STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

THOMAS C. BARRY,

Charging Party,

-and- CASE NO. U-9923

UNITED UNIVERSITY PROFESSIONS,

Respondent.

THOMAS C. BARRY, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Thomas C. Barry to the dismissal, as deficient, of his improper practice charge against the United University Professions (UUP) by the Director of Public Employment Practices and Representation (Director). Barry alleges that UUP violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it promulgated its 1988-89 agency fee refund procedure which does not include, on its face, any statement that the procedure applies to persons hired by the State of New York (employer) after May 15, 1988, when the period ends for filing objections to the use of agency fee monies for purposes not permitted, over objection, by the Act. Barry makes no claim in his charge, or in his exceptions to the Director's decision, that he has any knowledge or belief that agency fee payers hired after May 15, 1988 will be precluded, in fact, from having resort to UUP's

agency fee refund procedure to any extent or in any manner. He also does not assert that he personally may or will be affected by a failure or refusal by UUP to permit resort to the procedure by persons hired after May 15, 1988, since he was, at the time of filing of this charge on January 21, 1988, an employee of the State of New York and an agency fee payer. In essence, Barry's charge alleges only that UUP's 1988-89 agency fee refund procedure contains no affirmative statement that persons hired after the April 15 to May 15, 1988 objection period will be permitted resort to the procedure, including the opportunity to file an objection to the use of agency fees for purposes not permitted, over objection, by the Act, and that it does not state how and to what extent the procedure will be extended to cover such persons.

The first issue to be decided by us, then, is whether Barry has standing to allege that UUP's written procedure does not state, on its face, that resort to the 1988-89 procedure may be had by persons hired after May 15, 1988. We find that he does not have such standing. Although Barry, like all other agency fee payers, is entitled to seek compliance by the employee organization representing the bargaining unit to which he belongs with the duty to establish and maintain a procedure which provides "for the refund to any employee demanding the return [of] any part of an agency shop fee deduction which represents the employee's pro rata share of expenditures by the

organization in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment",[1] his right extends only to the procedure insofar as it does or may potentially affect him. Barry accordingly has standing only to contend that the procedure promulgated by UUP and distributed to agency fee payers coerces him in the exercise of his right not to join an employee organization.[2] In UFT, Local 2 (Barnett), 15 PERB ¶3103 (1982), this Board considered the question of whether an agency fee payer who had in fact received health insurance benefits from the employee organization representing the bargaining unit to which he belonged had standing to allege that the employee organization's insurance plan brochure violated §209-a.2(a) of the Act because it described the insurance benefits as applying to "members only". We there held that the charging party had standing to claim that the inaccurate description contained in the brochure had a coercive effect on employees to join the employee organization as a condition of receiving benefits, in violation of the Taylor Law, stating, at p. 3159: "The mere inaccuracy of the description is coercive on its face in that it is sufficient to exert improper pressure upon all agency shop fee payers and, thus, any such unit employees had standing to bring the

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[1]Section 208.3(a) of the Act.

[2]See §§209-a.2(a) and 202 of the Act.

charge." The charging party was found to have standing because he was a member of the group (in that case, all agency shop fee payers) to whom the exclusion contained in the plan brochure applied. In the instant case, by contrast, Barry is not a member of the sub-group of agency fee payers to whom a mid-year application of the procedure would apply. That sub-group of agency fee payers to whom the mid-year procedure would apply is any and all agency fee payers hired after the expiration of the objection period for the 1988-89 procedure, that is, agency fee payers hired after May 15, 1988. Since Barry is not a member of this group of agency fee payers, he is without standing to claim that the procedure must state, on its face, its application to those persons.

For the reasons stated herein, we find that the charge fails to set forth a violation of §209-a.2(a) of the Act, and

IT IS HEREBY ORDERED that the charge be dismissed in its entirety.

DATED: May 19, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LILLIE WILLIAMS,

Charging Party,

-and- CASE NO. U-10041

COUNTY OF ALBANY (NURSING HOME),

Respondent.

LILLIE WILLIAMS, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Lillie Williams (charging party) to the dismissal, as deficient, of her charge against the County of Albany (Nursing Home) (County) by the Director of Public Employment Practices and Representation (Director). The charge alleges that the County violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it: (1) failed to pay extra compensation to charging party for extra services performed as an LPN at the Nursing Home; (2) deducted, over charging party's objection, contribution payments to the New York State and Local Employees' Retirement System which she, as a part-time employee, was not required to join; and (3) terminated charging party without good cause from her employment with the County.

The Director dismissed the charge, after giving the charging party an opportunity to amend it, upon the ground that, as framed, it failed to set forth any allegations which, if proven, would establish that the complained-of actions by the County constituted a deliberate attempt to interfere with, restrain or coerce the charging party in the exercise of her right to participate in, or refrain from participating in, employee organization activity.[1/] The Director found that, in the absence of any claim that the allegedly adverse actions taken against charging party were motivated by her employee organization activity, this Board is without jurisdiction to remedy the wrongs alleged.

We agree with the Director that the charge fails to set forth any facts constituting a violation of §209-a.1(a) of the Act, and that we are accordingly without jurisdiction over charging party's claims of wrongdoing by the County. In her exceptions, while asserting additional claims of wrongdoing by the County, charging party makes no allegation or argument that the County's actions relate in any way to her exercise of "the right to form, join and participate in, or to refrain from forming, joining or participating in, any employee organization of [her] own choosing" (§202 of the

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[1/]Sections 209-a.1(a) and 202 of the Act.

Act). In the absence of such claim, we lack jurisdiction over the matters raised by charging party.

For the foregoing reasons, the dismissal of the charge by the Director is affirmed, and

IT IS HEREBY ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: May 19, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GARDEN CITY POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and- CASE NO. U-9809

INCORPORATED VILLAGE OF GARDEN CITY,

Respondent.

AXELROD, CORNACHIO & FAMIGHETTI, ESQS. (MICHAEL C. AXELROD, ESQ.), for Charging Party

CULLEN & DYKMAN, ESQS. (THOMAS M. LAMBERTI, ESQ.; THOMAS B. WASSEL, ESQ.; and NICHOLAS C. FERRARA, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Incorporated Village of Garden City (Village) to an Administrative Law Judge (ALJ) decision which found that three demands submitted by the Village to interest arbitration constitute nonmandatory subjects of bargaining which the Garden City Police Benevolent Association (PBA) cannot be compelled to negotiate. The ALJ directed that the Village negotiate in good faith pursuant to §209-a.1(d) of the Public Employees' Fair

Employment Act (Act) by withdrawing the three at-issue demands from arbitration.[1/]

The at-issue proposals submitted by the Village provide in their entirety as follows:

> 4. 375(i) retirement plan for police officers hired after June 1, 1987.
>
> 5. Election of 375(i) career retirement plan after 20 years of service.
>
> 7. Eliminate contribution for health insurance on retirement.

The ALJ found that demand number 4 is nonmandatory because the effective date of an agreement to restrict the retirement options of persons hired after June 1, 1987 would, of necessity, have retroactive effect. The ALJ determined since the Village's demand would have the effect of retroactively diminishing a retirement benefit accorded to employees hired after June 1, 1987 but before the effective date of the parties' agreement, the demand would conflict with the protections of Article V §7 of the Constitution of the State of New York.[2/] Having so found, the

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[1/]The ALJ made findings that, as to certain other demands alleged by the PBA to constitute nonmandatory subjects of bargaining, and also violative of the Act, the charge should be dismissed. Since no exceptions have been filed by the PBA to the ALJ's findings with respect to the other Village demands raised in the improper practice charge, they are not addressed here.

[2/]Article V §7 of the New York State Constitution provides, in relevant part, as follows:

> ...membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.

ALJ determined, based upon numerous decisions issued by this Board which have held that an employee organization cannot be compelled to negotiate the waiver of constitutional, and in some instances, statutory, protections afforded to its unit members,[3/] that the Village's fourth proposal is nonmandatory.

In Matter of Oliver v. County of Broome, 113 A.D. 2d 139 (3d Dep't 1985), the Appellate Division, Third Department, considered the question of whether persons hired between July 1, 1976 when Article 15 of the Retirement and Social Security Law (Tier III) was declared effective by the New York State Legislature, and July 27, 1976, when the Legislature in fact enacted Article 15 of the Retirement and Social Security Law, were properly members of Tier II or of Tier III. The Court there held that the Legislature could not give the Tier III benefit plan retroactive effect, because to do so would violate Article V §7 of the Constitution of the State of New York, as a diminution and impairment of retirement benefits gained upon entry into the retirement system. This decision, in our view, adds further support to the ALJ's determination that the retroactive effect of Village demand number 4 runs afoul of the Constitution. Holding, as we have in the past, that a proposal which would compel negotiation of a waiver of constitutionally protected rights is

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[3/] City of Buffalo, 20 PERB ¶3048 (1987); City of Binghamton, 9 PERB ¶3026 (1976), aff'd, City of Binghamton v. Helsby, 9 PERB ¶7019 (Sup. Ct. Alb. Co. 1976). Compare Plainview-Old Bethpage CSD, 15 PERB ¶3061 (1982), aff'd sub nom. Plainview-Old Bethpage Congress of Teachers v. PERB, 16 PERB ¶7012 (Sup. Ct. Alb. Co. 1983).

nonmandatory, we affirm the ALJ decision that the Village violated §209-a.1(d) of the Act when it demanded interest arbitration concerning demand number 4. We so find notwithstanding the contention of the Village that we have held on other occasions that parties are free to negotiate less beneficial terms for future employees. See, e.g., Old Brookville Policemen's Benevolent Association, Inc., 16 PERB ¶3094 (1983). This is certainly so, and our holding here is not intended to imply a different result. However, at issue here is not the application of less beneficial terms and conditions of employment to persons who may be hired in the future, but a retroactive diminution of retirement benefits protected by law.

The ALJ found that Village demand number 5 was also nonmandatory, because it has the effect of compelling employees to switch, over objection, as a condition of continuing employment, from one retirement plan to another retirement plan upon their achievement of 20 years of service. This, too, the ALJ found, conflicts with the protections of Article V §7 of the Constitution of the State of New York. While we certainly agree with the assertion of the Village that retirement benefits are negotiable, we construe Article V §7 as not requiring[4/] negotiations which would result in an impairment or diminution of benefits already achieved by incumbent employees.

[4/]We need not and do not reach here the question of whether an employee organization has the power, if it wishes, to waive the provisions of Article V §7 of the New York State Constitution on behalf of its unit members.

Based upon the foregoing, we affirm the determination of the ALJ that Village demand number 5 is a nonmandatory subject of bargaining as to the PBA.

Finally, we have reviewed the exceptions presented by the Village to the determination of the ALJ that Village demand number 7, which would eliminate the Village's contribution for health insurance on the retirement of any current or future employee, is nonmandatory. The ALJ found that elimination of benefits beyond the expiration of the contract covering an employee on the date of his retirement renders the demand nonmandatory. We agree with the ALJ that the PBA is not required to negotiate concerning the health insurance premium payments made on behalf of retirees following the expiration of the contract term during which they retire. See Troy Uniformed Firefighters Ass'n, 10 PERB ¶3015 (1977). We further agree with the ALJ that the demand to eliminate employer contributions conflicts with §167(2) of the Civil Service Law, which specifies a minimum contribution by an employer toward the insurance premium costs for retired employees under state-wide health insurance plans. The ALJ found, and we agree, that the PBA cannot be required to negotiate a waiver of such a statutory right.[5/]

[5/] See case citations at footnote 2, supra.

For the foregoing reasons, the exceptions of the Village are hereby denied, and the decision of the ALJ, finding that the Village's submission to arbitration of demands numbered 4, 5 and 7 violated §209-a.1(d), is affirmed.

IT IS HEREBY ORDERED that the Village negotiate in good faith by withdrawing demands numbered 4, 5 and 7 from arbitration.

DATED: May 19, 1988
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

#3A-5/19/88

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SALARIED EMPLOYEES OF NORTH AMERICA,
UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3269

COUNTY OF ONONDAGA AND ONONDAGA COUNTY
SHERIFF DEPARTMENT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Salaried Employees of North America, United Steelworkers of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time deputy sheriffs/captains; patrol, jail and technical divisions.

Excluded: Captains assigned to Personnel Division (Murphy), all other sheriffs, undersheriffs, chief and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Salaried Employees of North America, United Steelworkers of America, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 19, 1988
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

11560

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MONTICELLO ADMINISTRATORS AND SUPERVISORS ASSOCIATION, STATE ADMINISTRATORS ASSOCIATION OF NEW YORK STATE,

Petitioner,

-and- CASE NO. C-3291

MONTICELLO CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Monticello Administrators and Supervisors Association, State Administrators Association of New York State has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as the representative of the employees in such unit who are members of the Monticello Administrators and Supervisors Association, State

Administrators Association of New York State for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Principals, Assistant Principals, Coordinators, Directors and Principal/Teachers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Monticello Administrators and Supervisors Association, State Administrators Association of New York State. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 19, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 200-B SERVICE EMPLOYEES INTERNATIONAL UNION,

Petitioner,

-and-

CASE NO. C-3331

CENTRAL SQUARE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

SCHOOL LUNCH EMPLOYEES AND DRIVERS,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Local 200-B Service Employees International Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective

negotiations and the settlement of grievances.

Unit: Included: All food service workers including cooks, dish room employees, waitresses, cashiers, line people and school lunch drivers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 200-B Service Employees International Union. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 19, 1988
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

11564

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200B, AFL-CIO,

Petitioner,

-and-

CASE NOS. C-3326 & C-3327

JORDAN ELBRIDGE CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,

IT IS HEREBY CERTIFIED that the Service Employees International Union, Local 200B, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All regularly employed full-time and part-time clerical staff including typists,clerks, account clerks, stenographers teacher aides, and custodial worker I.

Excluded: Secretary to the Superintendent, Secretary to the Administrative Assistant/Accounts Payable Clerk, Payroll Clerk, the Treasurers, casual temporary and substitute personnel, custodial worker II, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Service Employees International Union, Local 200B, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 19, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

11566

M E M O R A N D U M

May 19, 1988

TO: The Board

FROM: Martin L. Barr

RE: Proposed Rule Making

I hereby request the Board to include in its minutes authorization for proposed rule making, as summarized below. Final adoption must await publication and comments.

The proposed rule making falls into two large categories: substantive amendments and miscellaneous technical amendments.

Substantive amendments

1. MTA rules, previously approved for rule making by PERB.

2. Addition of a new subdivision (i) to §201.10 to provide for a timeliness objection to the processing of an application for m/c designation which is filed prematurely:

> (i) Objection. A party who objects to the processing of an application on the ground that it was filed earlier than the time provided for filing under this section may file an original and four copies of such objection, with proof of service upon all other parties, within 10 working days after receipt from the director of a copy of the application. The objection shall include a specific, detailed statement of why the application is untimely. Such objection to the processing of the application, if not duly raised, may be deemed waived.

3. In §204.11, change the event that triggers the commencement of the time period during which cross-exceptions are to be filed from service to receipt of exceptions:

> 204.11 Cross-exceptions. Within seven working days after [service] receipt of

exceptions, any party may file an original and four copies of a response thereto, or cross-exceptions and a brief in support thereof, together with proof of service of copies of these documents upon each party to the proceeding.

Technical amendments

1. All male-gender references have either been changed to gender-neutral references or have been expanded to include reference to the female gender.

2. §210.1(4) the names and addresses of any other persons, employee organizations or [public] employers whose interests are reasonably likely to be affected by the ruling; and

3. The following amendments are proposed in various sections in order to correct errors in the existing rules or to clarify the existing rules:

   - Change "hearing officer" to "administrative law judge".
   - Change "these rules" to "this Chapter".
   - Change "this" to "the".
   - Change "Title" to "Chapter".
   - Change "Act" to "act".
   - Change "Part" to "section".
   - Change "Chapter" to "Part".
   - Change "Civil Service Law" to "act".
   - Change "Appeal" to "Exceptions".
   - There are additional miscellaneous proposed changes which include, but are not limited to, the correction of grammar, spelling and punctuation errors.

SMN:jbs