STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROCKLAND COUNTY PATROLMEN'S BENEVOLENT ASSOCIATION, INC.,

Petitioner,

-and-

COUNTY OF ROCKLAND,

Employer,

-and- CASE NO. C-3067

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., ROCKLAND COUNTY LOCAL 844,

Intervenor,

-and-

ROCKLAND COUNTY SHERIFF'S DEPUTIES ASSOCIATION, INC.,

Intervenor.

ILAN S. SCHOENBERG, ESQ., COUNTY ATTORNEY (JOSEPH E. SUAREZ, ESQ., ASSISTANT COUNTY ATTORNEY, of Counsel), for Employer

RAYMOND KRUSE, ESQ., for Petitioner

DOIG, CORNELL & MANDEL, ESQS. (MYRON I. MANDEL, ESQ., of Counsel), for Intervenor

BOARD DECISION AND ORDER

The County of Rockland (County) and Civil Service Employees Association, Inc., Rockland County Local 844 (CSEA) jointly move this Board to review a determination made by the Director of Public Employment Practices and Representation

(Director) in the course of hearing the above entitled proceeding before an Administrative Law Judge (ALJ) designated by the Director. The Rockland County Patrolmen's Benevolent Association, Inc. (PBA) seeks to fragment from a county-wide unit represented by CSEA persons in the Bureau of Criminal Investigation. According to the County and CSEA, all parties to the proceeding entered into a stipulation during the course of the hearing conducted by the ALJ that the "employer" in this proceeding is the County and that no "joint public employer" exists. Following eight days of hearing, the PBA moved for rescission of the stipulation. The Director granted the motion and directed that the matter be set down for further proceedings on the question of the possible existence of a "joint public employer" (i.e. the County and the Rockland County Sheriff) of the employees sought to be represented by the PBA.[1/]

The County asks this Board to review the Director's determinations allowing rescission of the stipulation, reopening the hearing for further evidence and, in addition, permitting the intervention of the Rockland County Sheriff's Deputies Association, Inc., after it had declined to intervene at the outset of the proceedings.

[1/]No formal written decision was issued setting forth these rulings, which were made orally and subsequently confirmed by letter to the parties.

Although the County, in support of its assertion that this Board should undertake an interlocutory review of the rulings made by the Director, asserts prejudice and expense to the taxpayers of Rockland County, no facts are presented in support of its claim.

CSEA joins in the County's motion and moves the Board to decide whether §201.6(b) of the Act precludes the Director and/or his designee from considering, without an application from an employer, and in the face of an employer's opposition thereto, the issue of existence of a "joint public employer". That section states "(b) Upon the application of any government, the board may determine that the applicant shall be deemed to be a joint public employer..."

Section 201.9(c)(3) of our Rules of Procedure (Rules) provides:

> Review. Unless expressly authorized by the board, rulings by the director or by an administrative law judge shall not be appealed directly to the board, but shall be considered by the board when it considers such exceptions to the decision of the director as may be filed.

It is and has been the policy of the Board not to engage in piecemeal review of interlocutory rulings by the Director or his designee in representation proceedings in the absence of extraordinary circumstances in which severe prejudice would otherwise result. See State of New York (Division of Military and Naval Affairs), 18 PERB ¶3084 (1985); Village of

Geneseo, 17 PERB ¶3026 (1984).

In the absence of a showing of unusual circumstances and/or extreme prejudice, we decline to review at this time the interlocutory rulings made in this proceeding.

IT IS ACCORDINGLY REMANDED to the Director for further proceedings.

DATED: November 2, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-9808

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

MARJORIE E. KAROWE, ESQ. (PAUL D. CLAYTON, ESQ., of Counsel), for Charging Party

JOHN K. MUTH for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) from the dismissal of its charge against the New York State Thruway Authority (Authority), which alleges that the Authority violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, on July 20, 1987, it unilaterally promulgated a rule prohibiting the unit title of Motor Equipment Maintenance Supervisor I in the Albany Division from participating in public auctions of vehicles owned by the Authority.

In particular, the assigned Administrative Law Judge (ALJ) found that while the rule involves a term and condition of employment and was unilaterally implemented, imposition of

the rule is not a mandatory subject of negotiations because, on balance, the interest of the Authority in avoiding the appearance of impropriety in the conduct of its auctions outweighs the impact of the rule on terms and conditions of employment. In support of his finding, the ALJ took into consideration that the duties of the Motor Equipment Maintenance Supervisor I in the Albany Division include the responsibility of supervising the crew which prepares the vehicles to be sold at auction; preparing a condition report on the vehicles, which is used as a representation of the vehicles' condition at sale; attending the auction and supervising maintenance workers at the auction; and answering questions of the public concerning the condition of the vehicles on the day of the auction.

The sole issue before us in CSEA's exception to the ALJ decision, relying upon our decision of County of Montgomery, 18 PERB ¶3077 (1985), is whether the ALJ adequately considered whether the Authority's action was the least intrusive method of encroachment on the terms and conditions of employment of the affected employees. In that case, at 3167, we held as follows:

> In applying such a balancing test, it is unavoidable that the nature of each work rule under consideration must be fully examined to determine which interest predominates. Implicit in this test is the recognition that simply because a work rule relates to the employer's mission, it does not follow that the employer is necessarily free to act unilaterally in the manner in which it chooses to

> act. If it is faced with an objectively demonstrable need to act in furtherance of its mission, the employer may unilaterally impose work rules which are related to that need, but only to the extent that its action does not significantly or unnecessarily intrude on the protected interests of its employees. Thus, we must weigh the need for the particular action taken by the employer against the extent to which that action impacts upon the employees' working conditions.

CSEA concedes that the Motor Equipment Maintenance Supervisor I, having access to the maintenance history jackets of the vehicles while the bidding public does not, may have an unfair advantage over the public in determining the condition of vehicles to be sold at auction by the Authority and that such access may create an appearance of impropriety. It argues, however, that the general public should be given access to the maintenance history jackets, rather than utilizing the more drastic measure of denying these employees the opportunity to bid on the vehicles at auction.

CSEA's proposed alternative does not satisfy the Authority's legitimate concern in this situation. Even if attending the auction in other than their official capacity as Authority employees, their responsibility to both prepare the vehicles for auction and to make representations concerning the condition of the vehicles to members of the public interested in bidding on them, and their input into the maintenance history jackets, creates an appearance of conflict of interest which is not addressed by CSEA's

alternative of giving access to the jackets to all bidders. As CSEA does not assert and the record does not establish the availability of any other reasonable alternative which would avoid such an appearance of conflict of interest but intrude to a lesser degree on the employment interests of the employees, the exclusionary rule, here at issue, is found to be a nonmandatory subject of bargaining. Therefore, CSEA's exceptions must be denied.

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

DATED: November 2, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Charging Party,

-and- CASE NO. U-10201

NEW YORK STATE SUPREME COURT OFFICERS ASSOCIATION,

Respondent.

HOWARD R. RUBENSTEIN, ESQ. (LEONARD R. KERSHAW, ESQ. of Counsel), for Charging Party

DRETZIN, KAUFF, MCCLAIN and MCGUIRE, ESQS. (HARLAN J. SILVERSTEIN, ESQ. of Counsel), for Respondent

BOARD DECISION AND ORDER

The State of New York - Unified Court System (State) excepts to the dismissal by the Director of Public Employment Practices and Representation (Director) of its charge alleging a violation of §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by the New York State Supreme Court Officers Association (SCOA). The charge alleges that SCOA, the New York State Court Officers Association, Local 598, SEIU, AFL-CIO (COA), and the New York State Court Clerks Association (CCA) are, together, a joint bargaining representative, known as the Joint Council, for a unit of state employees, which may only act jointly in the exercise

of rights under the Act. In particular, the charge alleges that the SCOA, acting on its own behalf, and therefore improperly, has demanded arbitration under the terms of a collective bargaining agreement between the State and the Joint Council, over the objection of the COA. The Director dismissed the charge upon the ground that a "demand for arbitration merely constitutes the allegation of a contractual right" and that the "allegation of a contractual right, whether it is meritorous or not, does not violate the [Act]," quoting our decision in Amherst Education Association, 17 PERB ¶3038, at 3062 (1984), and citing Port Chester-Rye UFSD, 10 PERB ¶3079 (1977).

We find that the mere filing of a demand to arbitrate does not, in and of itself, set forth a violation of the Act. We further find that the Director properly dismissed the charge because the SCOA asserts a contractual right to arbitrate which is properly a matter for arbitral determination.[1/]

[1/] While we are cognizant of the State's concerns relating to the creation, existence, authority, and possible dissolution of the Joint Council, these matters are not properly before us in the context of the instant improper practice charge.

IT IS ACCORDINGLY ORDERED that the charge be, and it hereby is, dismissed.

DATED: November 2, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHAUTAUQUA COUNTY EMPLOYEES UNIT 6300, CHAUTAUQUA COUNTY LOCAL 807, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and- CASE NO. U-9188

COUNTY OF CHAUTAUQUA,

Respondent.

MARJORIE E. KAROWE, ESQ. (PAMELA NORRIX-TURNER, ESQ., of Counsel), for Charging Party

ROBERT M. LAUGHLIN, COUNTY ATTORNEY (MICHAEL J. SULLIVAN, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the County of Chautauqua (County) to an Administrative Law Judge (ALJ) decision which finds that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by effecting a unilateral transfer of unit work to a private corporation. The Chautauqua County Employees Unit 6300, Chautauqua County Local 807, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) alleged in its charge, and the ALJ found, that pursuant to the Federal Job Training Partnership Act (JTPA)[1/], the County

---

[1/] See 29 U.S.C.S. §§1501 et seq. (Supp. 1986).

established a local Private Industry Council (local PIC)[2/], a private, not-for-profit corporation. Notwithstanding the existence of the local PIC, the County operated job training programs under the JTPA, utilizing County employees and the County's employment office.

In October 1986, the local PIC, which had been inactive since its creation in 1981, was activated by its Board of Directors. At that time, a determination was made that the local PIC would itself operate the job training programs theretofore operated by the County. In furtherance of that determination, the County assigned contracts which it then had with several job training providers to the local PIC, after obtaining the consent of these providers to the assignment and assuring each that "the new PIC will continue to receive state and federal funding, and will remain engaged in the same type of activities."

Pursuant to the determination that the job training programs would be conducted by the local PIC, the persons represented by CSEA in the County's employment office were laid off, effective January 1, 1987.

The County argues that it simply "went out of the business" of operating job training programs, and that the local PIC made an independent determination to conduct the job training programs previously conducted by the County. However, the ALJ found, and we agree, that the stipulated record does not support the

---

[2/]There are also larger area PICs, one for each service delivery area, as more fully described infra.

County's contention.[3/]

Three factual points of the stipulation are particularly significant in our analysis of these circumstances.

First, the JTPA provides, in relevant part, as follows:

> §1513. Functions of Private Industry Council ...
> (b)(1). The Council, in accordance with an agreement or agreements with the appropriate chief elected official or officials [the County Executive herein], shall--...
>
> > (B) select as a grant recipient an entity to administer the job training plan (which may be separate entities), (i) the Council, (ii) a unit of general local government in its service delivery area, or an agency thereof, (iii) a nonprofit, private organization or corporation, or (iv) any other agreed upon entity or entities. ...
>
> (d) No job training plan prepared under §104 [29 USCS §1514] may be submitted to the Governor unless (1) the plan has been approved by the Council and by the appropriate chief elected official or officials specified in subsection (c), and (2) the plan is submitted jointly by the Council and such official or officials. 29 USCS §1513 (Emphases added).

Second, the local PIC was created as the result of, and following, the creation of a service delivery area PIC (SDA PIC) encompassing Chautauqua, Cattaraugus and Allegany Counties, under which each county agreed to participate in the SDA PIC and to create local PICs within their respective counties. The agreement of the three chief elected officials from the counties which created the SDA PIC makes the following assertion:

[3/]The County's exceptions include the assertion that the ALJ erred in failing to conduct a hearing in this matter. However, the County's agreement to stipulated facts and its failure to object to the closing of the record based upon the stipulations of the parties and documentary evidence, and its failure to assert the existence of any additional material facts which would have been established at a hearing, compel denial of the exception.

> It is understood that, the chief elected official of each county shall: (1) with commensurate authority, have responsibility for the operation and results of JTPA programs, and for any and all accolades, successes, awards, claims, disallowed costs, or litigation associated with such programs in his county.

Furthermore, it is of particular note that the County obtained the consent of, and assigned its contracts with job training providers to the local PIC so that the local PIC could stand in the place of the County in delivering job training programs to County residents by County employees. Finally, the County leased County office space to the local PIC to enable it to operate the formerly County granted program in the same County facilities.

The JTPA and SDA PIC agreement makes it clear that the County must be in agreement with the selection of a grant entity and provider of job training programs before any such selection can take place. It is further clear from the legislation and agreements reached pursuant thereto, that but for the County's agreement to the transfer of the work of conducting job training programs from the County to the local PIC, the transfer could not have taken place. The need for the County's agreement to such transfer affords it effective control over whether the County or the PIC would operate the job training programs at issue herein, and is appropriately construed as giving rise to a voluntary decision in which the County actively participated. This conclusion is further evidenced by the assignment of the County's contracts with job training providers to the local PIC in

furtherance of the transfer of operations from the County employment office to the PIC.

We have long held that the transfer of unit work to nonunit employees is a mandatory subject of negotiations, and that unilateral action in this regard violates §209-a.1(d) of the Act.[4/] Having found that the County had the authority to prevent the transfer, that the transfer could not have taken place without the County's consent, and that the County indeed actively facilitated the transfer of work previously handled by bargaining unit members by assigning contracts for which its employees had previously been responsible, the ALJ decision must be affirmed.

We accordingly find that the County's decision, without negotiation, to close its employment office and lay off the employees assigned to that office, violated §209-a.1(d) of the Act.

IT IS THEREFORE ORDERED[5/] that the County:

[4/] See Niagara Frontier Transportation Authority, 18 PERB ¶3083 (1985); City of Rochester, 21 PERB ¶3040 (1988).

[5/] We have reviewed that portion of the County's exceptions which asserts that the remedial relief ordered by the ALJ is inappropriate because, by its terms, it concedes that the County's "services were discontinued". We believe that the remedial relief, when read in the context of the ALJ decision, is more properly interpreted to mean that the employees' services were discontinued (that is, they were laid off), and reinstatement with back pay is accordingly appropriate relief under our jurisdictional grant of authority under §205.5(d) of the Act.

1. Offer reinstatement to their former positions under the prevailing terms and conditions of employment to those unit employees in the County's former employment office who were laid off on or about January 1, 1987, and make each employee whole for any wages or benefits lost as a result of such layoffs, with interest on any sum owing to any employee to be paid at the currently prevailing maximum legal rate;
2. Negotiate in good faith with CSEA with respect to the terms and conditions of employment of unit employees;
3. Sign and post notice in the form attached at all locations at which unit employees work in places ordinarily used to post notices of information to unit employees.

DATED: November 2, 1988
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the Unit represented by the Chautauqua County Employees Unit 6300, Chautauqua County Local 807, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the County of Chautauqua will:

1. Offer reinstatement to their former positions under the prevailing terms and conditions of employment to those unit employees in the County's former employment office who were laid off on or about January 1, 1987, and make each employee whole for any wages or benefits lost as a result of such layoffs, with interest on any sum owing to any employee to be paid at the currently prevailing maximum legal rate;

2. Negotiate in good faith with CSEA with respect to the terms and conditions of employment of unit employees.

County of Chautauqua

.....

Dated..... **By**.....
(Representative) (Title)

11798

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORGANIZATION OF STAFF ANALYSTS,

Charging Party,

-and- CASE NO. U-8999

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondent.

JOAN STERN KIOK, ESQ., for Charging Party

JEROME ROTHMAN, ESQ., for Respondent

BOARD DECISION AND ORDER

The Organization of Staff Analysts (OSA) has filed exceptions to this Board from the dismissal of its improper practice charge against the Board of Education of the City School District of the City of New York (District), which alleges that the District violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by refusing to promote or upgrade unit employees in the title of Staff Analyst to the position of Associate Staff Analyst (also a bargaining unit title). The assigned Administrative Law Judge (ALJ) dismissed the charge, after hearing, finding that the OSA failed to meet its burden of proving that the District was motivated by anti-union animus notwithstanding the evidence that, among 14 persons appointed from the

Associate Staff Analyst eligible list, all persons selected for promotion were managerial or confidential, and no employees promoted were within the bargaining unit represented by OSA. In so finding, the ALJ relied heavily upon credibility determinations favorable to Penny Mencher, the District's Director of Classification, who testified that she did not know, nor was it a relevant factor, whether persons selected for promotion were bargaining unit members or not. Mencher further testified that selections for promotion were based upon the request of supervisors and the establishment of need for the positions.

In its exceptions, OSA alleges that the ALJ failed, in making her credibility determinations concerning Mencher's testimony, to give proper weight to documentary evidence discovered and made part of the record subsequent to the last day of hearing in this matter, which, according to OSA, conflicts with Mencher's testimony.[1/] OSA asserts that this, coupled with the claimed failure of the ALJ to take proper administrative notice of and give appropriate weight to prior decisions of the Director of Public Employment Practices and Representation (Director) and this Board relating to earlier disputes between these same parties, warrants reversal of the ALJ decision.

[1/]The ALJ decision makes no specific reference to or analysis of the documentary evidence received post-hearing.

Some review of the history between the parties as it may be reflected in our decisions is appropriate. On November 26, 1980, the District filed an application seeking the designation of all 117 persons in its Staff Analyst series (Staff Analyst, Associate Staff Analyst and Administrative Staff Analyst) as managerial or confidential. Twelve days later the Communication Workers of America, AFL-CIO filed a certification petition seeking to represent the same employees, a proceeding in which OSA subsequently intervened. By decision dated January 22, 1985, the Director determined that an appropriate negotiating unit was established, comprised of Staff Analysts and Associate Staff Analysts, but excluded from the bargaining unit seven Associate Staff Analysts designated as managerial or confidential and three Staff Analysts designated as confidential (18 PERB ¶4004 (1985)). The Director's decision was affirmed by the Board at 18 PERB ¶3025 (1985).

During the pendency of these proceedings, OSA filed an improper practice charge alleging that the District had evaluated, reclassified and reassigned employees for the purpose of altering the outcome of the pending representation case and obtaining the removal from the potential bargaining unit of as many employees sought to be represented by OSA as possible. The assigned ALJ dismissed the charge as deficient. Board of Education of the City School District of

the City of New York, 18 PERB ¶4577 (May 24, 1985). The Board found, at 18 PERB ¶3068 (1985), that the ALJ erred in dismissing the OSA's charge for failure to state a prima facie case, holding (at 3148):

> The question of law is whether the District may evaluate, reclassify and reassign employees for [the] purposes of altering the outcome of a pending representation case. We answer this question in the negative. Such action by a public employer is violative of §209-a.1(a) of the Taylor Law.
>
> In finding a possible violation here, we emphasize the proposition that the purpose of the District is of the essence [footnote omitted]. Evaluation, reclassification and transfer are proper management tools if undertaken for legitimate operating purposes. They become improper if undertaken for the purpose of interfering with public employees' right of organization. Thus, we found the abolition of positions in order to thwart organizational efforts of employees to be improper in Village of Wayland, 9 PERB ¶3084 (1976), conf. sub. nom. Wayland v. PERB, 61 A.D.2d 674 (3rd Dept. 1978), 11 PERB ¶7004 (1978). [footnote omitted]

We further stated, (at 3149) that:

> The District's alleged effort to reclassify positions out of the staff analyst series in order to forestall its organization is violative of §209-a.1(a) in two respects. First, it is coercive of employees in the series. The staff analyst titles carry a prestige which may be of value to some of the employees subject to reclassification. Thus, the reclassification is coercive of them to withdraw support from OSA so that, free from the pendency of the representation petition, they might be allowed to remain in their present title. Second, it is an interference with the right of employees to organize.

We remanded that case to the Director for further proceedings not inconsistent with our decision and the charge was later settled between the parties. Ultimately, OSA was certified as the bargaining agent of Staff Analysts and Associate Staff Analysts not designated as managerial or confidential. 18 PERB ¶3000.23 (1985).

We now have before us the question of whether the promotion exclusively of nonbargaining unit members to the promotional title of Associate Staff Analyst is discriminatory, coercive of employees or interferes with their right to representation under §202 of the Act.

The evidence establishes that of the 14 persons appointed to the title of Associate Staff Analyst, a promotional position from the Staff Analyst position, none came from within the bargaining unit represented by OSA, although three of the persons on the eligible list, and bypassed, were bargaining unit members (Granat, Sabasowitz and Mackey) and two (Pielli and Varella), although not bargaining unit members, were not managerial or confidential employees at the time they were bypassed. In other words, only persons who had managerial or confidential status were given promotions to the title of Associate Staff Analyst, and no persons having managerial or confidential status were bypassed. Notwithstanding this statistical evidence, the District asserted, through Mencher, Director of

Classification, that the managerial or confidential status of employees was not a relevant consideration for promotion. OSA asserts that a memorandum prepared by Mencher in May 1985, approximately one year prior to the at-issue appointments, directly contradicts this testimony. In that memorandum, Mencher, in denying a request for allocation of a Staff Analyst position held by J. Beavan to Associate Staff Analyst, stated the following:

> The Division of Personnel has been instructed by the Office of Labor Relations that this title (Associate Staff Analyst) can only be established where there is a clear indication that the work performed will be managerial and/or confidential in nature as defined by the New York State Taylor Law. Mr. Beavan's present Staff Analyst position has already been designated non-managerial/non-confidential by PERB. Nothing in this new description would warrant an appeal of that determination.

This memorandum was forwarded to Edward Sermier, Chief Administrator of the Division of Special Education, and to the attention of Harold Coopchik, Director of Personnel of the Division of Special Education.

Approximately one year later, according to the documentary evidence submitted to the ALJ, Sermier submitted another request for appointment of an Associate Staff Analyst (this time S. Clark, a confidential employee) and provided the following justification for the appointment:

> This represents an appointment from the eligible list for Associate Staff Analyst. The incumbent will perform labor relations and personnel tasks for the Division of Special Education's Brooklyn West region. These tasks will be primarily of a confidential nature as defined by the New York State Taylor Law and the Binghamton decision. Filling this position will aid our efforts in meeting our mandates.

This justification, submitted contemporaneously with the appointment of exclusively nonbargaining unit employees to the Associate Staff Analyst titles from the eligible list indicates, contends the OSA, a continuation of the policy outlined in Mencher's May 15, 1985 memorandum. We agree.

We find that under the circumstances of this case the documentary evidence establishes that it was the District's policy not to appoint any person to an Associate Staff Analyst position, unless the person was already, and would after promotion be, outside the OSA-represented bargaining unit and in a managerial/confidential position. The actions of the District, in making its 14 appointments from the Associate Staff Analyst promotion eligible list from outside the bargaining unit and into Associate Staff Analyst positions deemed to be managerial or confidential establishes that the District acted in furtherance of this policy.

This policy of refusing to consider for promotion persons who hold unit positions is in violation of §§209-a.1(a) and (c) of the Act.

In Board of Education of the City School District of the City of New York and OSA, 18 PERB ¶3068 (1985), we found that the use of proper management tools such as evaluation, reclassification and transfer violates the Act if undertaken for the purpose of interfering with employees' rights of organization. We here find that the use of the proper management tool of selection of one of three candidates from an eligible list pursuant to Section 61 of the Civil Service Law may violate the Act if used for the purpose of discriminating against unit employees or interfering with and undermining their right to be represented by automatically excluding them from consideration for promotion based upon their bargaining unit status. While, under ordinary circumstances, we would not reverse a credibility determination made by an ALJ, here the documentary evidence so conflicts with the testimony as to render the testimony noncredible and we are compelled to reverse that determination.

We find that the OSA has met its burden of proving, by a preponderance of the evidence, that the District violated §§209-a.1(a) and (c) of the Act when it utilized, as a prerequisite for consideration of candidates for promotion to the position of Associate Staff Analyst, their managerial/ confidential status and their concomitant exclusion from the bargaining unit.

While we find that bargaining unit members were excluded from consideration for promotion because of their bargaining unit status, we do not find that the record supports a determination that the bargaining unit members would have been appointed to the promotional position of Associate Staff Analyst "but for" their unit status. We, therefore, find only that, to the extent that the selection process was tainted, a violation of §§209-a.1(a) and (c) of the Act occurred.[2/]

Under these circumstances, the appropriate remedy is a direction to the District to conduct a de novo review of the original eligible list candidates and evaluate the qualifications of bargaining unit members without regard to their unit status.

IT IS THEREFORE ORDERED that the decision of the ALJ be, and it hereby is, reversed, and it is further ORDERED that the District shall:

1. Rescind the appointments of persons appointed to the position of Associate Staff Analyst prior to October 20, 1986 and conduct a de novo review of the original candidates for that position and evaluate the qualifications of bargaining unit members without regard to their unit status;

[2/]See County of Suffolk, 20 PERB ¶3009 (1987); Toler and Monroe Community College, 2 PERB ¶3025 (1969).

2. Cease and desist from interfering with, restraining, coercing or discriminating against bargaining unit members, with respect to promotional opportunities, or in the exercise of rights protected by the Act;

3. Sign and post a notice in the form attached at all locations ordinarily used to communicate information to unit employees.

DATED: November 2, 1988
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the Unit represented by the Organization of Staff Analysts that the Board of Education of the City School District of the City of New York:

1. Will rescind the appointments of persons appointed to the position of Associate Staff Analyst prior to October 20, 1986 and conduct a de novo review of the original candidates for that position and evaluate the qualifications of bargaining unit members without regard to their unit status;

2. Will not interfere with, restrain, coerce or discriminate against bargaining unit members, with respect to promotional opportunities, or in the exercise of rights protected by the Act.

Board of Education of the City School District of the City of New York.....

Dated..... **By**.....
(Representative) (Title)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.