STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 817, FRANKLIN COUNTY,

Charging Party,

-and- CASE NO. U-9897

BOARD OF COOPERATIVE EDUCATIONAL SERVICES
OF FRANKLIN, ESSEX AND HAMILTON COUNTIES,

Respondent.

ROBERT H. BALLAN, ESQ., for Charging Party

ARTHUR F. GRISHAM, ESQ., for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Civil Service Employees Association, Inc., Local 817, Franklin County (CSEA) to an Administrative Law Judge (ALJ) dismissal after hearing of its charge that the Board of Cooperative Educational Services of Franklin, Essex and Hamilton Counties (BOCES) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when, on November 19, 1987, it discharged Thomas Gillot, the President of CSEA's Local 817, in retaliation for his engagement in protected activities.

The circumstances giving rise to this charge may be briefly summarized as follows. Gillot, an employee having

approximately three and one-half years of service in the capacities of school monitor and teaching assistant, was assigned to "time out" rooms at various schools of the BOCES where emotionally handicapped students are sent if their classroom behavior becomes disruptive. Prior to an incident on October 8, 1987, which precipitated Gillot's discharge, he had received only positive evaluations and comments concerning his work performance.

Less than one year after his employment by the BOCES, Gillot became President of CSEA's Local 817 and served in that capacity until his discharge on November 19, 1987. While President, Gillot represented the CSEA membership in connection with labor-management concerns, including smoking, asbestos testing and contract negotiations. The record does not contain any evidence that the relationship between CSEA and the BOCES was unusually strained or hostile during Gillot's tenure, nor was any claim made by CSEA prior to Gillot's discharge of anti-union animus or discriminatory treatment of union representatives, including Gillot, despite the fact that he was transferred to three different school locations during his employment.[1/]

[1/] Following Gillot's termination, and in the course of the proceedings before us, CSEA asserted that the transfers of Gillot reflect anti-union animus. However, this allegation was not made as an improper practice charge or otherwise at the time any of the transfers took place, and it is not part of the charge now before us.

On October 8, 1987, an incident occurred in the "time out" room to which Gillot was assigned, whereby Gillot used physical force to compel a student to move to a wastepaper basket and spit out a cracker and paper. In doing so, as Gillot stated in writing, he "had the student by the shoulder and [had his] thumb wrapped on the side of [the student's] neck and led the student to the basket to spit out a cracker and paper." The student and other students who witnessed the incident claimed that Gillot "choked" the student.

Following the incident, three persons (Dufort, the School Principal, Raymo, the teacher in charge, and Leavitt, Principal of Special Programs), none of whom were witnesses to the incident, conducted an investigation. Dufort interviewed students, including the student involved in the incident, as did Raymo. Leavitt interviewed Raymo, Dufort, the students, and Gillot. In the course of this investigation, Raymo prepared a statement, dated October 13, 1987, describing several additional incidents concerning Gillot's alleged deficient conduct while serving as a teaching assistant with her students. These incidents had apparently not been previously mentioned by her to anyone. These three persons recommended to Goodrow, Assistant Superintendent of Schools, that Gillot be terminated, a recommendation which he and Leavitt communicated to DeSantis, Superintendent of Schools. On the basis of this

recommendation, DeSantis notified Gillot, by letter dated October 26, 1987, that his termination was to be recommended, and he was subsequently discharged.[2/]

CSEA asserts that Leavitt and Goodrow were improperly motivated in their recommendation to terminate Gillot because of his engagement in protected activities as the local president. As to Leavitt, CSEA asserts that she told a union officer, approximately 18 months prior to the at-issue events, that: "I have one thing to say to you. No one should become an officer in the union until they have their tenure with BOCES." It is further asserted that Leavitt told the same employee that she should have brought a suggestion that school monitors be paid at the same rate as teaching assistants to her, rather than to the "union". CSEA also asserts that Leavitt made certain statements to Goodrow and DeSantis in support of the recommendation to terminate Gillot which were false. The primary support for this claim is that Leavitt informed her supervisors that she had consulted an expert in "BMAC" (Behavioral Management for the Aggressive Client), who had informed her that the procedures utilized by Gillot in restraining the student involved in the October 8 incident was in violation of such procedures, when in fact

---

[2/]Gillot had not completed his probationary term prior to his discharge and was accordingly terminated without any hearing procedures.

Leavitt did not engage in such consultation, was not familiar with BMAC procedures herself, and had no basis for asserting that Gillot's handling of the student violated such procedures.

In this regard, CSEA argues that Leavitt's recommendation to terminate Gillot was based upon information she knew to be untrue, that Goodrow and DeSantis, who approved her recommendation, had reason to believe the statements were untrue, based, so CSEA asserts, upon Leavitt's reputation for "untruthfulness",[3/] and that the approval of Leavitt's recommendation by Goodrow and DeSantis must accordingly have been improperly motivated, based, as it allegedly was, upon information which they should have presumed to be untrue. This argument lacks merit. In the first instance, no evidence or offer of proof was made to the ALJ that either Goodrow or DeSantis had any knowledge of Leavitt's purported reputation. Secondly, regardless of Leavitt's reputation, no evidence was offered to support a claim that, under the circumstances of this case, Goodrow or DeSantis knew or should have known that the statements made

---

[3/]CSEA sought to introduce testimony concerning Leavitt's alleged reputation for untruthfulness, which was rejected by the ALJ. We find that this rejection was within the proper exercise of the ALJ's discretion, particularly where, as here, the offer of proof made no claim of knowledge of such reputation by the persons responsible for Gillot's termination, nor does Leavitt's credibility affect the outcome here.

by Leavitt were untrue. Indeed, Leavitt's recommendation was supported by two other persons, neither of whom is asserted to be untruthful or improperly motivated. Finally, even if it may be said that Leavitt's basis for recommending Gillot's termination was faulty or untrue, the record fails to support a determination that such untruthfulness was motivated by anti-union animus on Leavitt's part.

The issue of the propriety of Gillot's behavior is not before us. What is at issue is whether CSEA has established, by a preponderance of the evidence, that Gillot would not have been terminated but for his protected activity. We agree with the finding of the ALJ that CSEA has failed to establish, by a preponderance of the evidence, that Gillot's union activity was the real reason for his termination, in light of the absence of any evidence of anti-union animus on the part of DeSantis and Goodrow, and the serious ambiguity of the evidence offered by CSEA in support of the claim that Leavitt was improperly motivated. Indeed, Raymo's accusations of inappropriate treatment of students by Gillot on occasions prior to October 8, although not disclosed prior thereto, together with the apparent crediting by Dufort and Raymo of the students' version of the October 8 incident, under circumstances in which no improper motivation is imputed, adequately support the conclusion that CSEA failed to meet its burden of proving that Gillot's termination

constituted retaliation for protected activities which would not have occurred but for those activities. Based upon the foregoing, CSEA's exceptions are denied, and the dismissal of the charge by the ALJ is affirmed.

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

DATED: July 11, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF DOBBS FERRY,

Charging Party,

-and- CASE NO. U-10198

DOBBS FERRY POLICE ASSOCIATION, INC.,

Respondent.

RAINS & POGREBIN, P.C. (ERNEST R. STOLZER, ESQ., of Counsel), for Charging Party

KRUSE & MC NAMARA, ESQS. (RAYMOND G. KRUSE, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

The Dobbs Ferry Police Association, Inc. (Association) excepts to an Administrative Law Judge (ALJ) decision which finds it in violation of §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by submitting three nonmandatory subjects of negotiation to compulsory interest arbitration pursuant to §209.4 of the Act. The three at-issue demands are contained in the parties' expired collective bargaining agreement. The Village of Dobbs Ferry (Village) seeks their deletion from a successor agreement while the Association seeks their continuation.

At the outset, while we note that the Association "takes exception to the finding that a demand to continue the language of [Article VII, Section 2, Article XV, Section 1, and Article XXI, Section 1] into a new contract constituted a violation of

§209-a.2(b) . . . ", it does not specifically contend that the subject matters contained in those Articles are not nonmandatory subjects of negotiation. Assuming, however, that the Association's exceptions are intended to address this issue, we find, for the reasons set forth in the ALJ decision, that each of the three Articles constitutes a nonmandatory subject of bargaining.

We further find that, notwithstanding the Association's assertion to the contrary, a demand to carry over language from an expired agreement is a demand subject to §209-a.2(b) of the Act in the same fashion as a demand to add new language would be. As the ALJ found, insistence upon continuation at interest arbitration of nonmandatory subjects is as subject to a charge as a proposed nonmandatory change would be.

The exceptions filed by the Association focus not upon whether the demands are mandatory or nonmandatory in nature, but upon the ALJ's finding that the Association submitted them to interest arbitration. The Association argues that these demands were not contained in its petition for interest arbitration and that in fact the Village submitted them to interest arbitration by demanding, in its response to the petition, deletion of the articles from the parties' expired agreement. This response was submitted simultaneously with the filing of the instant charge, which asserts that, notwithstanding the absence of specific language in the petition for interest arbitration seeking

continuation of these articles by the Association, the Association nevertheless seeks their inclusion in an interest arbitration award.

The ALJ, pursuant to discussion with the parties, proposed the following as a partial statement of facts:

> The Association asserts that while its petition is silent on continuation of those portions of the parties' expired agreement it does not seek to change, it seeks to have the arbitration award include those portions. While it expects and intends that the award will expressly state that those portions of the expired agreement will be continued, it asserts that if not express, inclusion in the award will be implied, apart from any continuation of the provisions possible under §209-a.1(e) of the Act. The Village agrees that it expects the award to include not only a decision on the changes sought by the parties in the petition and response, but also all portions of the expired agreement uncontested by the instant charge. Both parties agree that the above have been their assumptions and intent from the onset of negotiations.
>
> The Association asserts, however, that since it is not seeking at arbitration affirmative change in the at-issue provisions of the expired agreement, it has not carried said provisions to arbitration improperly within the meaning of the Act.

Following issuance of this proposed statement of facts to the parties, the ALJ directed them to submit any objections, modifications or additions to the proposed statement of facts on or before October 10, 1988. Within that time frame, the Association submitted a "memorandum" which made no reference to the ALJ's proposed statement of facts, and did not controvert any

of the statements set forth in the ALJ's letter. Indeed, the "memorandum" consisted of argument in support of the Association's position only. The Association argues before us, however, that the memorandum submitted by it is entitled to evidentiary weight and constitutes a controversion of the ALJ's proposed statement of facts. We have carefully scrutinized the memorandum submitted by the Association to the ALJ, and are not persuaded by the Association's position as stated to us in its exceptions. The statement of facts proposed by the ALJ was not controverted. It was therefore properly deemed by the ALJ to constitute a stipulation of facts and properly formed the basis for the ALJ's decision.

In view of the fact found by the ALJ that the Association "seeks to have the arbitration award include [the at-issue Articles] of the parties' expired agreement", the ALJ properly determined that the Association insisted, as contended by the Village, on the submission of the at-issue demands to interest arbitration. Thus, the Village's response to the petition, together with its filing of the instant charge, constitutes a response to the Association's position and, indeed, is in keeping with the understanding of both parties that those Articles of their expired agreement not modified or deleted will be carried forward by virtue of the arbitration award and/or the parties' ground rules.

Based upon the foregoing, the ALJ decision is affirmed and

IT IS HEREBY ORDERED that the Association negotiate in good faith by withdrawing said proposals from arbitration.

DATED: July 11, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DONALD O. SUMMERS,

Charging Party,

-and- CASE NO. U-10598

BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, INC., LOCAL 282,

Respondent.

DONALD O. SUMMERS, pro se

BOARD DECISION AND ORDER

Donald O. Summers excepts to the dismissal, as deficient, of his improper practice charge against the Buffalo Professional Firefighters Association, Inc., Local 282 (Local 282), which alleges that Local 282 violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it failed to refund agency shop fees deducted from his wages in 1987, and when it denied his application for membership in Local 282.

The Director of Public Employment Practices and Representation (Director) dismissed the aspect of Summers' charge alleging improper failure to refund agency shop fees upon the ground of untimeliness.[1/] The charge was filed on December 30, 1988, one year after the expiration of the calendar year for which Summers asserts a refund was due. The

---

1/PERB's Rules of Procedure §204.1(a)(1) requires that charges be filed within four months of the alleged improper practice.

Director's decision characterizes Summers' charge as alleging the lack of an appropriate agency shop fee refund procedure for 1987, and finds that the charge, filed in December 1988, was filed more than four months from the time that Summers knew or should have known that Local 282 had failed to establish a procedure for 1987 in accordance with §208.3(b) of the Act.[2/]

Summers' charge alleges, in part, however, as follows:

1. In the first week of January 1988 I demanded a refund of my agency shop fees to which I was entitled for the year 1987.

2. I have made repeated requests verbally to the union president who repeatedly informed me the union is working on a formula for amount of refund due.

3. In prior years I have received my refund promptly in the amount of 100 percent because the union has no formula to date.

4. My last request for my refund which was made in December was referred to Vice President William Smith. (See enclosed letter.)

The exhibit attached to Summers' charge is dated December 9, 1988 and is addressed to Mr. Summers. It provides as follows:

[2/]Section 208.3(b) of the Act requires an employee organization to establish and maintain an appropriate agency shop fee refund procedure enabling agency fee payers the opportunity and procedure to object to the use of agency fees "in aid of activities or causes of a political or ideological nature only incidentally related to terms and conditions of employment."

Re: Agency Shop Dues Rebate

Dear Mr. Summers:

> We apologize for the delay in getting this letter to you. As per our telephone conversation of today, I am sending this letter to inform you that we are having a Committee meeting on Agency Shop Dues Rebate next week (12/12-12/15) and we will be sitting down with our lawyers at that time.
>
> We will inform you in writing, of our decision from that meeting.

From the foregoing, Summers' charge may be summarized in the following manner. Prior to 1987, Summers alleges, Local 282 had a practice of refunding the entire amount of agency shop fees deducted during the year following the conclusion of the year. Following the conclusion of 1987, Summers, during January 1988, requested a refund of his agency fees previously paid. Thereafter, he "repeatedly" requested payment of the fee, and was informed that a fee refund procedure was being developed. No allegation is made that Local 282 has ever denied Summers' request for payment of the fee. In any event, Summers' last request for payment of the fee was answered by letter dated December 9, 1988, issued by a representative of Local 282, stating that a response would be provided shortly after a committee meeting to be held during mid-December. Apparently having received no further communication from Local 282, Summers filed the instant charge approximately two weeks later.

It is our determination that Summers' charge, as outlined above, alleges a denial of an agency fee refund for 1987, and is timely.[3/]

To the extent, however, that the charge, as amended, seeks a determination that Local 282 violated the Act by failing to establish an agency fee refund procedure for 1987 which meets the requirements of §208.3 of the Act as interpreted by this Board and the Courts, we are in accord with the Director's determination that the charge is untimely, since, as pointed out by the Director, Summers knew from the beginning of 1987 that no such agency fee refund procedure was in place. Having failed to file a charge within four months of having learned that no §208.3 procedure had been established for 1987, the charge, to the extent that it makes this allegation, was properly dismissed as untimely.

We now turn to the issue of Summers' claim that he was improperly denied membership in Local 282. The Director dismissed this aspect of the charge on the ground that it alleges only a denial of membership upon the ground of "monetary considerations". Summers was placed on written

---

[3/]In this regard we construe the alleged practice of Local 282 of making an end of year refund payment of the entire agency fee collected to be its "procedure," and the failure to issue payment pursuant to its procedure to constitute the violation of the Act alleged.

notice of the Director's opinion that the charge, as framed, was deficient because it failed to make allegations which, if proven, would establish a violation of the Act, and he was given an opportunity to amend or clarify the charge. Summers' clarification or amendment in this regard alleges as follows:

> The Union has denied me the right to join and participate in their organization. (Section 202 The Taylor Law)

Based upon these allegations, the Director determined that the charge was deficient, and dismissed it accordingly.

In his exceptions to the dismissal of this aspect of his charge, Summers asserts, for the first time, not that "monetary considerations" prompted Local 282's denial of membership to him, but that membership was denied "based on statements [Summers] has made in regard to racism in the Buffalo Fire Department in the past." This allegation is not, however, properly before us at this time, because we are limited in this case to review of the record upon which the Director based his determination.

Based upon the foregoing, IT IS HEREBY ORDERED that this charge, insofar as it alleges a failure to refund agency fees paid by Summers in 1987, is remanded to the Director for further proceedings consistent herewith, and, IT IS FURTHER

ORDERED that the charge be, and it hereby is, dismissed in all other respects.

DATED: July 11, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHAIRMEN'S ASSOCIATION OF SEWANHAKA DISTRICT,

Charging Party,

-and-

CASE NO. U-10688

SEWANHAKA CENTRAL HIGH SCHOOL DISTRICT,

Respondent.

SOLLEDER & SOLLEDER, ESQS. (GEORGE J. SOLLEDER, JR., ESQ., of Counsel), for Charging Party

DOUGLAS E. LIBBY, ESQ., for Respondent

BOARD DECISION AND ORDER

The Chairmen's Association of Sewanhaka District (Association) excepts to the dismissal by the Director of Public Employment Practices and Representation (Director) of its improper practice charge, as deficient, against the Sewanhaka Central High School District (District). The charge alleges that the District violated §§209-1.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when its Board of Education repudiated the parties' 1986-1990 collective bargaining agreement by refusing to conduct a third-stage grievance hearing in connection with a grievance challenging a performance evaluation filed by a unit member.

The charge alleges, in essence, that the District repudiated its agreement with the Association, in violation

of the Act, by its refusal to conduct a hearing mandated by the grievance procedure negotiated by the parties.

The Association asserts that, notwithstanding the fact that the charge alleges a single occasion of refusal to conduct a hearing pursuant to the parties' grievance procedure, the District's action amounts to a repudiation of the agreement violative of the Act in keeping with the decision of this Board in Addison CSD, 17 PERB ¶3076 (1984). In that case, the ALJ made a finding, affirmed by this Board, that "The District arbitrarily abandoned any semblance of compliance with [the parties' grievance] procedures". (17 PERB ¶4566, at 4629 [1984]). Indeed, at footnote 2, the ALJ took administrative notice of arbitration awards which found the District to have "flagrantly violated the contract", and found its action to be "part of a disturbing pattern of ignoring clear contractual directives . . . which showed a contempt by the District for the grievance process" and "were part of a deliberate pattern to ignore the District's contractual responsibilities." These findings, relied upon in part by the ALJ, together with findings of other violations of the Act, led the ALJ to conclude, at 4630, that

> The District's reckless, undefended and indefensible actions, wholly ignoring a quintessential aspect of the collective bargaining agreement and negating its existence constitutes a deliberate interference and restraint upon employee rights guaranteed by §202 of the Act, particularly when considered together

> with its other violations described below. History, too, supports this conclusion, the PERB having made note 'of the atmosphere of hostility and distrust in which the parties have conducted their labor relations.' Addison CSD, 13 PERB ¶3060, p. 3102 (1980).

We agree with the Director's determination that the allegations contained in the instant charge fall far short of the type of conduct previously found by this Board to have constituted a repudiation of a collective bargaining agreement necessary to set forth a cognizable claim of violation of the Act. The instant charge seeks nothing more than enforcement of the terms of the collective bargaining agreement, under circumstances in which a disagreement between the parties exists as to whether the grievance for which a hearing is sought is in fact covered by the collective bargaining agreement. Section 205.5(d) of the Act provides that "The board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice." We agree with the Director's determination that the violation of the agreement alleged herein would not otherwise constitute an improper employer practice, because it fails to allege facts sufficient to support a claim of repudiation of the collective bargaining agreement between the parties and

therefore fails to establish willful interference with protected employee organization rights.

The decision of the Director is affirmed, and IT IS HEREBY ORDERED that the charge be, and it hereby is, dismissed in its entirety.

DATED: July 11, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AGNES M. QUARTARONE, et al,

Petitioners,

-and- CASE NO. C-3506

TOWN OF RAMAPO HOUSING AUTHORITY,

Employer,

-and-

TOWN OF RAMAPO HOUSING AUTHORITY UNIT OF THE ROCKLAND COUNTY LOCAL 844 OF THE CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Intervenor.

AGNES M. QUARTARONE, for Petitioners

MARIAN E. CAWLEY, for Employer

GLENN H. BLACKMAN, for Intervenor

BOARD ORDER

On June 7, 1989, the Director of Public Employment Practices and Representation issued a decision in the above matter finding that the petition filed by Agnes M. Quartarone, et al, to decertify the Town of Ramapo Housing Authority Unit of the Rockland County Local 844 of the Civil Service Employees Association, Inc. as negotiating representative for certain employees of the Town of Ramapo Housing Authority (employer) should be granted for lack of opposition.[1/] No exceptions have been filed to the decision.

1/ 22 PERB ¶4028 (1989).

IT IS THEREFORE ORDERED that the Town of Ramapo Housing Authority Unit of the Rockland County Local 844 of the Civil Service Employees Association, Inc., be, and it hereby is, decertified as the negotiating representative of the following unit of employees of the employer:

Included: All employees of the employer including the following titles: Assistant Maintenance Mechanic: Maintenance Mechanic: Maintenance Helper: Account Clerk-Typist: Senior Account Clerk-Typist, Senior Clerk-Typist.

Excluded: Secretary to Authority/Executive Director.

DATED: July 11, 1989
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member