STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Petition of

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

Petitioner CASE NO. I-0038

To review the implementation of local government provisions and procedures pursuant to §212 of the Civil Service Law and PERB Rule §203.8.

NANCY E. HOFFMAN, ESQ., (JEROME LEFKOWITZ, ESQ., of Counsel), for Petitioner

THOMAS A. BRENNAN, JR., ESQ., for Westchester County Public Employment Relations Board

LEWIS, GREENWALD, KENNEDY, LEWIS, CLIFTON & SCHWARTZ, ESQS. (DANIEL E. CLIFTON, ESQ., of Counsel), for Westchester County Employees Union/Association of Municipal Employees

BOARD DECISION AND ORDER

On December 13, 1989, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) filed a petition with this Board to review the implementation of the rules and procedures of the Westchester County Public Employment Relations Board (local board) pursuant to §203.8 of this Board's Rules of Procedure. The petition as amended and clarified alleges that several of the determinations made by the local board in its processing of two representation

petitions, which were then pending before it,[1/] were not substantially equivalent to the provisions and procedures in Article 14 of the Civil Service Law and PERB's Rules of Procedure. Specifically, CSEA's petition challenges the local board's following determinations or actions:

1. Its decision that CSEA was the bargaining agent for a large unit of employees of the County of Westchester (County). CSEA alleges that this "essential" question was not investigated adequately.
2. CSEA's appearance on the election ballot. CSEA alleges that it was denied its unconditional right to appear on the ballot under its name of choice.
3. A statement made by the local board in one of its decisions criticizing CSEA and another union for their failure to inform the local board of an admission they made to this Board regarding their legal relationship. CSEA alleges that the statement was injudicious.

[1/] CSEA has since been certified by the local board following a December 19, 1989 election and a January 25, 1990 run-off election.

4. The sufficiency of a showing of interest supporting a petition filed by a competing union. CSEA alleges that the local board deliberately refused to consider CSEA's argument that the showing of interest should be disregarded because the petitioner had misled the unit employees during the solicitation regarding its organizational structure and composition.

5. The alleged deference paid by the local board to the American Arbitration Association (AAA) regarding the release of voter lists. CSEA alleges that the local board was unduly influenced by the AAA's policy in denying CSEA a copy of the voter list after the first election and again after the run-off election.

One of the representation petitions before the local board was filed by the Westchester County Employees Union/Association of Municipal Employees (WCEU/AME), which has intervened in this proceeding. WCEU/AME sought certification as the bargaining agent for the unit of County employees and the decertification of the "Westchester County

CSEA Inc.". The other petition was filed by the Westchester County Civil Service Employees Association, Inc. (WCCSEA). By decision dated October 20, 1989,[2/] the local board ordered an election pursuant to WCEU/AME's petition, but it dismissed WCCSEA's petition on the ground that it sought only a disaffiliation election which was beyond its power to direct.

While the representation petitions were pending before the local board, related improper practice charges filed by CSEA against WCCSEA were pending before this Board. There was an issue in both sets of proceedings as to whether CSEA or WCCSEA was the bargaining agent for the unit of County employees. CSEA claimed that it was the recognized representative of the unit and that WCCSEA was merely its agent for the transaction of business with the County. WCCSEA claimed that it was the recognized bargaining agent and that it was only affiliated with CSEA. Affirming the decision of our Administrative Law Judge,[3/] we determined that the County recognized CSEA as the bargaining agent for its employees in 1977 and that CSEA had not since lost or

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[2/]The local board's October 20 decision is reported at 22 PERB ¶8002 (1989). A second decision dated November 3, 1989 dealing with certain election details is reported at 22 PERB ¶8003 (1989).

[3/]22 PERB ¶4593 (1989).

abandoned that status.[4] The local board also found CSEA to be the recognized bargaining agent for the County's employees. It noted, however, that that entity was the same as the "Westchester County Unit of the Westchester County Local 860, Civil Service Employees Association, Inc., Local 1000, American Federation of State, County and Municipal Employees Union, AFL-CIO",[5] a notation apparently meant to convey the local board's lingering uncertainty as to the name of the recognized bargaining agent.

CSEA and the local board have filed memoranda of law against the preceding background on an investigative record which includes the petition for review as filed, WCEU/AME's intervention papers, a transcript of proceedings before the local board on July 12, 1989, the local board's files with respect to the representation petitions, the local board's decisions, certain affidavits and correspondence filed with this Board.

CSEA's petition questions the fairness and regularity of the local board's actions and decisions in conjunction with the two representation petitions. We begin our discussion by offering a general frame of reference for this type of review petition.

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[4]/23 PERB ¶3008 (1990) (appeal pending).

[5]/22 PERB ¶8002, at 8008 (1989).

The conduct of the local board and the procedures it used in reaching each of the several cited determinations involved an exercise of discretion and some measure of judgment. Although our decisions make it clear that a local board can so abuse its discretion as to warrant a finding that it has not implemented its procedures in a manner substantially equivalent to our own,[6] we have not ordinarily interfered with a local board's decisions in recognition of the Act's purpose to accommodate a diversity of experience in local procedures. Our review is guided by consideration as to whether a determination or procedure is repugnant to the Act or its proper administration.[7] Thus, we have said that we will not interfere with a local board's exercise of discretion unless its determination effectively deprives persons or organizations of their statutory rights[8] or, expressed alternatively, unless some "essential element intended by the Act" is thereby "destroyed".[9]

Two cases in which we set aside a local board's determination demonstrate the narrow scope of our review. In

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[6] See, e.g., Board of Higher Education of the City of New York, 2 PERB ¶3026 (1969).

[7] Nassau Chapter, CSEA, 6 PERB ¶3057 (1973).

[8] AFSCME, Council 66, 4 PERB ¶3063 (1971).

[9] Westchester CSEA, Inc., 7 PERB ¶3067, at 3110-11 (1974).

Teamsters Local Union 693[10] and In re George Lessler,[11] we determined that local boards had denied the petitioners a fair investigation of their petitions. In each of those cases, the local board's conduct of the representation proceeding fell so far below ordinary standards of fairness and procedural due process that its neutrality was brought into question.

Except as discussed below, the allegations CSEA raises are not of the type which would cause us to set aside a local board's determination, much less order its disestablishment as requested by CSEA. We see no evidence that any party was denied an opportunity to present any position or supporting arguments or to respond to any other parties' contentions regarding any material issue before the local board. To varying degrees, CSEA's allegations necessitate that we either substitute our judgment for that of the local board or that we reexamine and reevaluate the weight of the evidence on which the local board's determinations rest. We have held repeatedly, however, that our review does not encompass such matters.[12] A local board need not conduct its proceedings

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[10]/19 PERB ¶3068 (1986).

[11]/13 PERB ¶3023 (1980).

[12]/See, e.g., In re Rita Wallace, 22 PERB ¶3031 (1989); Committee of Interns and Residents, 12 PERB ¶3012 (1979).

in the same manner as we and unless some statutory or regulatory imperative has been disregarded by a local board, its determinations are not to be disturbed even if we might have proceeded differently or reached a different conclusion on the same facts.

CSEA's allegations which ascribe an improper motivation to two of the local board's determinations require further discussion. CSEA alleges that the local board's determinations regarding placement on the election ballot were motivated by a desire to ensure WCCSEA's participation in an election despite the dismissal of its petition. Similarly, CSEA alleges that the local board deliberately ignored its argument that WCEU/AME had misled unit employees in soliciting its showing of interest to avoid having to dismiss WCEU/AME's petition and to ensure that there would be an election pursuant thereto.

CSEA's allegations of improper motivation are supported by nothing more than the fact that the cited actions were taken, which is insufficient to establish the requisite scienter. Moreover, we find these allegations of impropriety to be drawn against a partially inaccurate or incomplete version of the local board's proceedings. Therefore, we find that CSEA has not set forth a sufficient basis for its claim in this respect and it is rejected.

Although the petition is appropriately dismissed for the reasons stated to this point, no different result is produced if we focus our discussion more specifically upon CSEA's enumerated allegations upon which we comment briefly in the order CSEA presents them to us. The local board decided the identity of the bargaining agent in the context of deciding its jurisdiction to process a disaffiliation petition. The identity of the bargaining agent was not "essential" to that jurisdictional question. The local board's directions regarding appearances on the ballot reflect its good faith balance of the rights, agreements and articulated preferences of the participating unions and the potential voters against a background of confusion, hostility and conflicting accusations regarding the identity and the name of the then recognized bargaining agent. We view as privileged the local board's statement in the text of its formal written decision which criticizes CSEA and WCCSEA for their lack of candor in failing to reveal to the local board admissions of fact made during proceedings before us on CSEA's improper practice charges. CSEA's arguments regarding WCEU/AME's alleged misrepresentations in the solicitation of its showing of interest were necessarily rejected when the local board decided that the showing of interest was sufficient and that WCEU/AME was an employee organization. The local board's

decisions to deny CSEA copies of the voter lists[13/] were solely that board's. Whether in reaching its decisions the local board considered AAA's previously articulated policy disfavoring a release of voter lists is immaterial.

We find that the local board has implemented its rules and procedures in a manner substantially equivalent to the provisions and procedures set forth in the Act and the Rules of Procedure of this Board.

NOW, THEREFORE, WE ORDER that the petition be, and it hereby is, dismissed.

DATED: September 18, 1990
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

13/CSEA was allowed to inspect a list of persons who had voted in the original election before the run-off election.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RONALD GRASSEL,

Charging Party,

-and-

CASE NO. U-10380

UNITED FEDERATION OF TEACHERS and BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

RONALD GRASSEL, pro se

SHEILA GARVEY, ESQ., for Respondent Board of Education of the City School District of the City of New York

BOARD DECISION AND ORDER

Ronald Grassel excepts to the dismissal, prior to hearing, of his improper practice charge which alleges that the United Federation of Teachers (UFT) and the Board of Education of the City School District of the City of New York (District) violated §§209-a.2(a) and 209-a.1(c), respectively, of the Public Employees' Fair Employment Act (Act).

UFT CHARGE

Grassel's charge against the UFT alleges first that it failed to fairly represent him by arbitrarily and without explanation refusing to pursue on his behalf a grievance which alleged a breach of the collective bargaining agreement between the UFT and the District in connection with the

issuance by the District of a letter reprimanding him and denying his request for use of personal business leave credit for a day of absence. Grassel alleges that because the District partially granted his grievance, thus establishing its merit,[1/] the UFT's failure to pursue his grievance establishes a breach of the duty of fair representation. Second, Grassel alleges that the UFT violated the Act when it failed to respond to his request for further consideration or appeal of its decision not to pursue his grievance.

The assigned Administrative Law Judge (ALJ) dismissed Grassel's charge against the UFT upon the ground that it failed to allege facts which, if proven, would establish a prima facie case of breach of the duty of fair representation.[2/]

It is unclear from the charge whether Grassel alleges that the UFT had a statutory duty to represent him at the steps of the grievance procedure which he conducted on his own behalf and which led to the partial granting of his grievance, or whether he alleges that, following the partial grant of his grievance, the UFT had a statutory duty to

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[1/]Grassel received a grievance step decision directing the removal of certain language from the letter issued to him, but affirming the denial of his request for personal business leave for the day in question, May 10, 1988.

[2/]Grassel had been put on notice that the charge was deficient in this regard and given an opportunity to correct same.

further pursue it to gain additional relief. In either event, however, an employee organization's failure or refusal, without more, to pursue a grievance, even if that grievance has been found or is later found to have at least some merit, does not rise to the level of arbitrary, discriminatory, or bad faith conduct necessary to establish a breach of the duty of fair representation. Indeed, Grassel alleges no discriminatory or bad faith conduct on the part of UFT, but in essence alleges only that the failure to provide representation to him is per se capricious, because his grievance was determined by the District to have some merit.[3/]

If Grassel had alleged that he requested and was denied a reason for the refusal or that the UFT failed to even consider the grievance or rejected the grievance without any reason at all, Grassel's claim of arbitrary refusal to represent him might well have merit. On the other hand, if the UFT reviewed the grievance and made a rational determination concerning its merit, dismissal of the charge

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[3/]Grassel alleges, for the first time, in his exceptions before us, that some 40 other requests for personal business leave without advance notice were granted by the District, in further support of his claim that the grievance had merit and should accordingly have been pursued by the UFT, as well as his claim, discussed infra, that the District subjected him to disparate treatment because of his protected activities. Because this allegation was not presented to the ALJ, and no explanation is offered for the failure to do so, we do not consider it here.

would be warranted. However, where no record evidence exists that Grassel requested and was denied any explanation or reason for the refusal to pursue his grievance, we may not assume merely from the allegation of a refusal to pursue the grievance that there was an arbitrary refusal to explain its position. Grassel's failure to allege any facts within his knowledge in support of the claim of arbitrary refusal, after being given the opportunity to do so, does not shift the burden to the ALJ to investigate and search out a cognizable charge. That burden continues to rest with the charging party, and it has not been met here. This aspect of the charge is accordingly dismissed.

A different conclusion is appropriate with respect to the aspect of Grassel's charge which alleges that no response was given to his written request for further consideration of his grievance or appeal of its decision within the UFT hierarchy. A request for information or appeal of an employee organization's decision, if not merely redundant and/or onerous, is deserving of a response, and the absence of one at least establishes a charge to the extent of requiring the presentation by the employee organization of an explanation for its failure to respond. We find that further consideration of the charge that the UFT breached its duty of fair representation when it failed to respond to his request for further consideration of the grievance is appropriate.

Accordingly, this aspect of the charge is remanded for further proceedings, including submission of an answer by the UFT pursuant to the Board's Rules of Procedure.

DISTRICT CHARGE

As to the District, Grassel alleges that its failure and refusal to grant him a personal business leave day was motivated by animus arising from his pursuit of another grievance, and that his grievance hearing scheduled for May 10, 1988 was adjourned in interference with his right to participate in employee organizational activity. As to the latter allegation, the ALJ dismissed the charge as untimely, since it was filed more than four months following the adjournment of the grievance hearing. We confirm that determination for the reasons set forth in the ALJ decision.

With respect to the former allegations, while Grassel alleges animus in the denial of the personal leave day and the denial of his grievance seeking the personal leave day, he makes no allegations and was able to offer no proof in support of the animus claimed, except to state that the District/UFT collective bargaining agreement merely requires reasonable advance notice for utilization of personal business leave, rather than the 48-hour advance notice asserted by the District. The allegations that the personal business leave day should have been granted and that the subsequent grievance should have been granted, are

insufficient to support a claim of antiunion animus. We therefore affirm the ALJ's dismissal of the charge against the District, following submission of its answer, and following the grant of the opportunity by the ALJ to Grassel to submit additional evidence in support of his claim.

In his exceptions before us, Grassel makes an allegation that might possibly be construed to mean that there may have been 40 instances in which the District granted personal business leave without 48 hours' advance notice.[4/] However, he fails to present the factual source of this information or why, if factually supported, it was not presented to the assigned ALJ after he was requested to provide such additional information. Certainly, if this additional

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[4/]In his exceptions, Grassel asserts the following:

> I have asked the Board of Education for documentation that would show that Mr. Linder routinely grants absent (sic) and I did requested (sic) evidence that would show that Mr. Linder has granted up to 40? (forty?) teachers (sic) absence on a single day without request of any documentation or penalty.

Grassel alleges in other papers presented to the ALJ that he requested such documents under the Freedom of Information Law on or about August 29, 1988. However, the FOIL request presented by Grassel appears to make no reference to a request for information concerning the treatment of other teachers' requests for personal business leave without advance notice. In view of Grassel's apparent failure to request such information, and the lapse of time between his purported request and the closing of the file by the ALJ approximately one year later, it does not appear that Grassel exercised due diligence in the effort to obtain information in support of the charge and to present it on a timely basis.

information had been presented to the ALJ, it would have constituted evidence of disparate treatment of Grassel, which would be supportive of his claim that he was improperly denied personal business leave because of his employee organizational activity. However, because this information was not presented to the ALJ in the charge or in subsequent submissions, the ALJ had no alternative than to make a determination based upon the charge's sufficiency on its face. Similarly, we limit our review of the ALJ decision to consideration of the record as it existed before her, and, under the circumstances of this case (in which no showing of extraordinary circumstances warranting our consideration of evidence not previously presented is made), we will not consider Grassel's new allegation.

Based upon the foregoing, the ALJ's dismissal of the charge against the District is affirmed, and it is hereby dismissed.[5/]

[5/] In his exceptions, Grassel also asserts that the ALJ improperly accepted the answer of the District at the pre-hearing conference, some five working days after the time for filing the answer expired. While Grassel's point is certainly well taken that the District had a duty to properly request an extension of time within which to file its answer, §204.3(e) of PERB's Rules of Procedure affords discretion to the ALJ to accept a late answer, particularly if, as here, no prejudice is shown. In any event, dismissal of the charge herein is based upon the failure of the charging party to allege a prima facie case, as to which the District's answer has no effect. This exception is accordingly denied.

IT IS THEREFORE ORDERED that the charge against the District be, and it hereby is, dismissed, and that the charge against the UFT be, and it hereby is, dismissed, except insofar as it alleges that the UFT failed to respond to Grassel's request for reconsideration or appeal of the decision not to pursue his grievance, in which regard it is hereby remanded for further proceedings not inconsistent herewith.

DATED: September 18, 1990
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CLARKSTOWN TEACHERS ASSOCIATION, NYSUT,

Charging Party,

CASE NO. U-11332

-and-

CLARKSTOWN CENTRAL SCHOOL DISTRICT,

Respondent.

JEFFREY R. CASSIDY, for Charging Party

LEXOW, BERBIT & JASON (IRA M. EMANUEL, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

The Clarkstown Teachers Association, NYSUT (Association) excepts to an Administrative Law Judge's (ALJ) decision to defer its improper practice charge against the Clarkstown Central School District (District) to arbitration pursuant to our decision in Herkimer County BOCES.[1/] The Association's charge alleges that the District's unilateral promulgation of a multi-faceted attendance policy violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act). The ALJ deferred the jurisdictional determination which would otherwise have been necessary as a result of the Association's having filed a contract grievance alleging that

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1/ 20 PERB ¶3050 (1987).

the District's action violated Article XXII.6 of its current contract[2] which provides as follows:

> Before the Board adopts a change in policy or regulations that adversely affects wages, hours, or conditions of employment, it will notify the Association in writing that it is considering such change. If it is a mandatory subject of bargaining, the Board and the Association may then negotiate such change, if a contract violation would be involved.

The Association argues that deferral is inappropriate only because the arbitrator will have to make negotiability decisions regarding several parts of the District's attendance policy, some of which PERB has allegedly not addressed previously. According to the Association, negotiability determinations should be made as a matter of policy by PERB, at least in the first instance. In support of its argument, the Association relies upon our decision in CSD of the City of Corning,[3] in which the ALJ declined to defer consideration of the merits of a union's improper practice charge.

The Association's reliance on Corning is misplaced for several reasons. First, the ALJ's determination of the

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[2]Section 205.5(d) of the Act provides that PERB "shall not exercise jurisdiction over an alleged violation of such an agreement [between an employer and a union] that would not otherwise constitute an improper employer or employee organization practice."

[3]16 PERB ¶3056, aff'g 16 PERB ¶4533 (1983).

deferral issue was not before us and was not decided by us because it was not raised on the employer's exceptions in that case. Moreover, Corning, even at the ALJ level, was a merits deferral case. At issue there was the union's claim to the preservation of a noncontractual status quo regarding a health insurance carrier and administrator. No grievance was pending and no similar contract interpretation issue was presented in that case.

Deferrals under Herkimer County BOCES involve not the merits of the dispute but the jurisdictional issue necessarily raised by the pendency of a grievance alleging that the unilateral change in issue under the improper practice charge violates or is otherwise covered by the parties' existing contract. We adopted the approach in Herkimer County BOCES as an alternative to the unconditional dismissals which previously had issued in similar factual circumstances. Were we to decline to defer this charge, not only would the Association be exposed to the consequences of unconditional dismissal of its charge, which we sought to avoid by adopting Herkimer County BOCES, but both parties would be denied the benefit of their mutual bargain to have an arbitrator make whatever negotiability determinations are

necessary in the grievance context.[4/] The contractual issues which we defer both jurisdictionally and on the merits often parallel statutory issues or otherwise necessitate statutory reference or interpretation. We see no reason to exempt negotiability determinations generally from the reach of Herkimer County BOCES when our power to review the award as rendered ensures that all of the fundamental policies of the Act are honored.

IT IS THEREFORE ORDERED that the charge be, and it hereby is, dismissed in accordance with the ALJ's decision.

DATED: September 18, 1990
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

[4/]We recently have honored a contractual agreement against policy challenges similar to those raised by the Association. In Board of Education of the City School District of the City of Buffalo, 22 PERB ¶3047 (1989), we upheld a choice-of-forum contract provision waiving improper practice relief against the union's claim that its clause was void as against public and statutory policies.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF SUFFOLK

Case No. S-0006

for a determination pursuant to Section 212 of the Civil Service Law.

BOARD DECISION AND ORDER

Pursuant to §212 of the Civil Service Law (CSL), the County of Suffolk (County) has submitted an application by which it seeks a determination that its Local Law No. 4-1978, as amended on June 26, 1990 by Local Law No. 24-1990, is substantially equivalent to the provisions and procedures set forth in CSL Article 14 with respect to the State. The amendment brings the County's local law into conformity with Chapter 237 of the Laws of 1989, which extended the CSL §209.4(d) interest arbitration provisions to July 1, 1991.

Having reviewed the application, and having determined that the subject local law, as amended, is substantially equivalent to the provisions and procedures set forth in CSL Article 14 with respect to the State,

IT IS ORDERED that the application of the County of Suffolk be, and it hereby is, approved.

DATED: September 18, 1990
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

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; NEW YORK FINGER LAKES REGION POLICE OFFICERS LOCAL 195, COUNCIL 82, AFSCME, AFL-CIO; and INTERNATIONAL ASSOCIATION OF FIREFIGHTERS, LOCAL 1446,

Charging Parties,

CASE NOS. U-10232, U-10251 & U-10295

-and-

CITY OF AUBURN,

Respondent.

NANCY E. HOFFMAN, ESQ. (MIGUEL ORTIZ, ESQ., of Counsel), for the Charging Party in Case No. U-10232

CHRISTOPHER H. GARDNER, ESQ., for the Charging Party in Case No. U-10251

BAKER, CLARK & SATTER, ESQS. (MIMI C. SATTER, ESQ., of Counsel), for the Charging Party in Case No. U-10295

EARLE E. THURSTON, ESQ., for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the City of Auburn (City) to an Administrative Law Judge (ALJ) decision which held that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally required unit employees represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), unit employees represented by the New York Finger Lakes Region Police Officers Local 195, Council 82, AFSCME,

AFL-CIO (Local 195), and unit employees represented by the International Association of Firefighters, Local 1446 (IAFF) to file annual financial disclosure statements.

The City's exceptions allege that Article 18 of the General Municipal Law (GML), as amended by Chapter 813 of the Laws of 1987 (and as further amended by Chapter 108 of the Laws of 1988) evidences a strong public policy in the State of New York in favor of avoiding conflicts of interest and favoring reasonable financial disclosure by public officers and employees, and that this public policy outweighs the public policy, set forth in the Act, favoring negotiations concerning terms and conditions of employment. The City thus argues that these competing public policies should be resolved in favor of financial disclosure and that its imposition should not be a mandatory subject of negotiations.

In finding that financial disclosure constitutes a term and condition of employment, and that unilateral implementation of a financial disclosure requirement violated the City's duty to negotiate pursuant to §209-a.1(d) of the Act, the ALJ determined, among other things, that Article 18 of the GML makes discretionary the implementation of financial disclosure statements, because the City has a population of less than fifty thousand persons[1/] and accordingly

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[1/] Section 810, GML defines the term "political subdivision", for purposes of §§811, 812 and 813 of Article 18, GML as "a county, city, town or village having a population of fifty thousand or more and shall include a city with a population of one million or more."

concluded that, in the absence of a statutory mandate to require financial disclosure, a duty to negotiate exists. In so finding, the ALJ relied upon a decision issued by this Board in Board of Education of the City School District of the City of New York, 19 PERB ¶3015 (1986), which, on the date of issuance of the ALJ decision in the instant matter, had been affirmed sub nom. Board of Education of the City School District of the City of New York v. PERB, 21 PERB ¶7001 (Sup. Ct. Alb. Co. 1988), and as to which an appeal was then pending in the Appellate Division, Third Department. That case involved enactment of a legislative resolution pursuant to statutory authorization under §2590-g(14), Education Law which authorized financial disclosure by bargaining unit employees, which this Board held to constitute a unilateral change in terms and conditions of employment.

Following issuance of the ALJ decision in the instant case, the Appellate Division, Third Department, reversed the Supreme Court and PERB, and held the New York City Board of Education's enactment of financial disclosure requirements to be a prohibited subject of negotiations. Board of Education of the City School District of the City of New York v. PERB, 147 A.D.2d 70, 3d Dept., 22 PERB ¶7014 (1989). Thereafter, pursuant to a motion granted for leave to appeal, the Court of Appeals reviewed the Appellate Division decision and reversed, in a decision dated May 1, 1990, affirming PERB's determination (75 N.Y.2d 660, 23 PERB ¶7012). During the

pendency of judicial review of the New York City Board of Education decision, we held our review of the ALJ decision in the instant case in abeyance, upon consent of the parties. Upon issuance by the Court of Appeals of a final decision in the New York City Board of Education case, the parties herein were afforded the opportunity to make supplemental submissions in support of their respective positions in light of the Court's ruling. The parties having made their submissions, we now review the ALJ decision.

Our analysis of this case rests upon a determination whether the factual distinctions between this case and the New York City Board of Education case are sufficient to require a different outcome based upon the application of a balancing test to weigh the public policies of (1) the public employer's duty to be vigilant in avoiding corruption; (2) public employees' rights of privacy; and (3) principles of collective negotiations in public employment as embodied in the Act. In so doing, we note at the outset that the City's exceptions do not assert that the City was without discretion pursuant to Article 18, GML with respect to the enactment of financial disclosure requirements of its employees. Indeed, the ordinance enacted by the City Council includes the following language:

> Be it ordained by the City Council of the City of Auburn, New York: THAT pursuant to §812(2) and §812(3) of the General Municipal Law, the City of Auburn hereby opts and determines that it shall not be subject to the disclosure requirements under said sections of the General Municipal Law, in that the City of Auburn is a municipality with a

> population of less than fifty thousand individuals. (Emphasis added.)[2/]

It thus appears that because the City has a population of less than 50,000 and has in any event elected not to subject itself to the financial disclosure requirements contained in §813, GML, its enactment of financial disclosure requirements for its employees is purely discretionary. In this respect, to the extent that the holding of the Court of Appeals in New York City Board of Education relies upon a

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2/ §§812.2 and 812.3, GML provide as follows:

> 2. The governing body of a county, city, town or village having a population of less than fifty thousand may by local law or ordinance elect to be subject to the provisions of this section. In such event, any such city, county, town or village shall be deemed to be a political subdivision under this section.
>
> 3. Any political subdivision or other county, city, town or village to which all of the provisions of this section are made applicable, whether as a result of the provisions contained in subdivision two of section eight hundred eleven of this Article or as a result of an election to be subject to the provisions of this section as permitted by subdivision two of this section, may elect to remove itself from the ambit of all (but not some) provisions of this section (other than this subdivision) by adopting a local law, ordinance or resolution specifically referring to the authority conferred by this subdivision. . . .

It appears that §812.3, GML applies to a governmental entity which has elected (if not mandated) to subject itself to financial disclosure requirements, and which subsequently determines to remove itself from the requirements. Under these circumstances, conditions apply to the removal, but not if no election to participate has already been made.

finding that the employer in that case was not statutorily mandated to adopt the financial disclosure requirement which it adopted, but was merely accorded the discretion to do so, that holding applies here.

Indeed, the argument that the City is mandated by statute to enact the at-issue financial disclosure requirements is less persuasive here than was the case in New York City Board of Education. There, the employer was specifically authorized, although not mandated, to enact financial disclosure requirements, while in the instant case, employers like the City, having a population of less than 50,000 persons, are not subject in any way to financial disclosure requirements, unless they so elect, which the City has declined to do.

It cannot be said that Article 18, GML evidences a public policy favoring financial disclosure for employers like the City. Issues of public interest or public concern do not rise to the level of public policy for they are not, "based on statute, constitution or even clear common law principles - sources in which a public policy prohibition against a collective bargaining agreement might be found." (75 N.Y.2d 660 at 669).

The Court, in New York City Board of Education, went on to say:

> Issues of public concern, while unquestionably important, are not to be confused with the strong, unmistakable public policy that would - and then only rarely - require invalidation of a collective bargaining agreement. Here, what the Board [of Education] asks is not even that we invalidate a collective bargaining agreement violative of public policy, but prospectively that we declare that the entire area of disclosure requirements is off-limits for negotiation - and on the basis of no body of law whatsoever. This, we decline to do. (75 N.Y.2d 660 at 669).

Having concluded that the City was neither required by statute nor by public policy to adopt the at-issue financial disclosure requirements, it remains to be decided by us whether because the scope of financial disclosure required is relatively narrow, and significantly more narrow than the requirements at issue in the New York City Board of Education case, the public interest in the avoidance of public corruption outweighs the statutorily established public policy favoring collective bargaining.

The Court of Appeals, in New York City Board of Education, indicated, in a footnote, the possibility that some limited disclosure might be within the sole

discretion of the employer.[3/]

In view of this cautionary note by the Court of Appeals, it is appropriate that we consider the fact that the financial disclosure requirements adopted by the City in the instant case are clearly more narrow in scope than the financial disclosure requirements contained in §812(5), GML. On the other hand, the City ordinance and financial disclosure requirements apply to a broader class of employees than the class of persons to whom the financial disclosure

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[3/]Footnote 3 of the Court's decision, at 75 N.Y.2d 660 at 670, provides in its entirety as follows:

> Our decision in this respect is limited to the claims presented to us by the parties. As noted in the administrative decisions, the disclosure requirements imposed by the Board go well beyond the types of financial disclosure specifically enumerated in the statute. The unions do not argue that the Board exceeded its statutory authority; by the same token, the Board does not argue that disclosure requirements more closely tailored to those enumerated in the statute might in some respects be permissive bargaining subjects only. Thus, we have no occasion to consider whether there might be certain limited powers reserved to the sole discretion of the Board under Education Law §2590-g(14), as were found by the Administrative Law Judge to exist under Education Law §2590-g(13).

requirements of §812, GML apply[4] or the class of covered employees in New York City Board of Education.

Notwithstanding the fact that the financial disclosure required by the City is narrower in scope than the financial disclosure contemplated by §812, GML, it may nevertheless constitute a new term and/or condition of employment, to which disciplinary action applies, and to which, it appears, new disciplinary procedures, other than those set forth in the parties' collective bargaining agreements, will apply[5] as will certain compulsory acknowledgments not previously required.

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[4] §810(3), GML defines the term "local officer or employee" as meaning "the heads (other than local elected officials) of any agency, department, division, council, board, commission, or bureau of a political subdivision and their deputies and assistants, and the officers and employees of such agencies, departments, divisions, boards, bureaus, commissions or councils who hold policy-making positions . . . ", while the City ordinance applies to both this class of persons and all other officers or employees as defined by §800(5), GML.

[5] §6 of the City's ordinance provides that:

> Any person who willfully files a false statement of annual disclosure shall be subject to penalty, discipline, suspension or removal after a hearing upon fifteen days notice by the Board of Ethics, or pursuant to disciplinary proceedings as are required for those persons eligible under the collective bargaining agreement between the City of Auburn and its bargaining units.
>
> No. 7. The Board of Ethics of the City of Auburn is hereby empowered to establish rules and procedures for hearings in regards (to) the requirements of this ordinance.

Based upon the foregoing, it is our determination that the financial disclosure requirements and disciplinary procedures contained in the City ordinance constitute terms and conditions of employment as to which no prohibition against negotiation, statutory or otherwise, exists. We accordingly affirm the decision of the ALJ in its entirety, and find that the City violated §209-a.1(d) by its enactment and implementation of the financial disclosure requirement.[6/]

IT IS THEREFORE ORDERED that the City:

1. Immediately cease enforcement or implementation of the financial disclosure requirements as adopted on June 8, 1988 as to any City employees in the units represented by CSEA, Local 195 and IAFF;

2. Immediately remove and destroy all reports or other documents submitted by unit employees pursuant to the financial disclosure requirements adopted on June 8, 1988;

3. Negotiate in good faith with CSEA, Local 195 and IAFF with respect to the terms and conditions of employment of unit employees;

[6/]The City has not excepted to the ALJ's determination that the City separately violated §209-a.1(d) of the Act by its refusal to bargain the financial disclosure requirement pursuant to a demand made by the IAFF. That finding is accordingly not before us and is deemed final.

4. Sign and post notices in the forms attached in all locations at which any affected unit employees work in places ordinarily used to post notices of information to such unit employees.

DATED: September 18, 1990
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 Civil Service Employees Association, Inc. (CSEA) that the City of Auburn will:

1. Immediately cease enforcement or implementation of financial disclosure requirements as adopted on June 8, 1988 as to any City employees in the unit represented by CSEA;

2. Immediately remove and destroy all reports or other documents submitted by unit employees pursuant to the financial disclosure requirements adopted on June 8, 1988; and

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

CITY OF AUBURN

.....

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.

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 New York Finger Lakes Region Police Officers Local 195, Council 82 (Local 195), that the City of Auburn will:

1. Immediately cease enforcement or implementation of financial disclosure requirements as adopted on June 8, 1988 as to any City employees in the unit represented by Local 195;

2. Immediately remove and destroy all reports or other documents submitted by unit employees pursuant to the financial disclosure requirements adopted on June 8, 1988; and

3. Negotiate in good faith with Local 195 with respect to the terms and conditions of employment of unit employees.

CITY OF AUBURN

.....

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.

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 International Association of Firefighters, Local 1446 (IAFF), that the City of Auburn will:

1. Immediately cease enforcement or implementation of financial disclosure requirements as adopted on June 8, 1988 as to any City employees in the unit represented by IAFF;

2. Immediately remove and destroy all reports or other documents submitted by unit employees pursuant to the financial disclosure requirements adopted on June 8, 1988; and

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

CITY OF AUBURN

.....

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.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WYOMING COUNTY SHERIFF'S EMPLOYEES ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3697

COUNTY OF WYOMING and SHERIFF OF OF WYOMING COUNTY,

Joint Employer,

-and-

WYOMING COUNTY SHERIFF'S DEPT., LOCAL 861, CSEA, LOCAL #1000, AFSCME, AFL-CIO,

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 Wyoming County Sheriff's Employees Association 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: Sergeant, Tech-Sergeant, Investigator, Deputy Sheriff, Dispatcher, Correction Officer, and Sheriffs Civil Clerk,

Excluded: Sheriff, Under-Sheriff and Administrative Assistant.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Wyoming County Sheriff's Employees Association. 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: September 18, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 693, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner,

-and-

CASE NO. C-3705

TOWN OF BERKSHIRE,

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 Teamsters Local 693, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America 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: HEO, MEO and laborers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 693, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 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: September 18, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3708

COUNTY OF STEUBEN,

Employer,

-and-

STEUBEN COUNTY SHERIFFS ASSOCIATION,

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 Steuben County Sheriffs Association 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: Civil Clerk Assistant, Civil Clerk, Correction Officer, Court Security Officer, Corrections Officer, Shift Supervisor, Deputy Sheriff, Registered Nurse, Criminal Investigator.

Excluded: All other County employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Steuben County Sheriffs Association. 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: September 18, 1990
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,

Petitioner,

-and-

CASE NO. C-3713

VILLAGE OF CORINTH,

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 Civil Service Employees Association, Inc., Local 1000, AFSCME, 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 and regular part time employees in the following titles: Motor Equipment Operator, Laborer, Foreman, Clerk.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, 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: September 18, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Petitioner,

-and- CASE NO. C-3716

VILLAGE OF MONROE,

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 United Federation of Police Officers, Inc. 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: Police dispatchers,

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Police Officers, Inc.. 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: September 18, 1990
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Petitioner,

-and-

CASE NO. C-3717

TOWN OF TICONDEROGA,

Employer,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200-D,

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 United Federation of Police Officers, Inc. 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: Full-time and part-time Sergeants, Constables and Patrolmen.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Police Officers, Inc. 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: September 18, 1990
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member