STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF NEWBURGH,

Charging Party,

CASE NO. U-10589

-and-

LOCAL 589, INTERNATIONAL ASSOCIATION OF FIREFIGHTERS,

Respondent.

HITSMAN, HOFFMAN & O'REILLY (JOHN F. O'REILLY of counsel), for Charging Party

DeSOYE & REICH, ESQS. (THOMAS F. DeSOYE and FREDERICK K. REICH of counsel), for Respondent

BOARD DECISION AND ORDER

The City of Newburgh (City) excepts to an Administrative Law Judge's (ALJ) dismissal of its charge against Local 589, International Association of Firefighters (Association) which alleges that the Association violated §209-a.2(b) of the Public Employees' Fair Employment Act by agreeing to a provision in the parties' 1988-89 contract which it never intended to honor and later repudiated.

The provision in issue is Article IV, §A which provides that any unit employee on a civil service eligible list for promotion must accept the City's assignment to a temporary or acting higher level position or the employee, on refusal, must remove his or her name from that promotion list.

The ALJ held that the Association had no duty to disclose its doubts about the legality of Article IV, §A and that the

stipulated record otherwise did not establish either that the Association lacked an intention to enter into a binding contract or that it repudiated its agreement.

The City's exceptions are directed to each of the ALJ's conclusions of law. It argues that the Association's intention to dishonor the agreement is established by its failure during negotiations to disclose to the City its doubts regarding the legality of Article IV, §A, and its contemporaneous repudiation of that agreement, which is also pleaded as a separate basis for violation. The Association allegedly repudiated the agreement by causing unit employees' noncompliance and by sending certain letters to the local civil service commission soon after the contract was executed on August 23, 1988. The Association's attorney wrote to the local commission after the first employee had been instructed by the City to remove his name from the civil service eligible list. His letter bears the same date as the one sent to the local commission by that employee which questions the legality of the City's requirement. The first letter, dated September 1, 1988, refers to an opinion the Association's attorney had obtained from the New York State Civil Service Commission. The attorney's letter requests the local commission's reaction to the State Commission's opinion that an individual cannot be removed from an eligible list under the cited circumstances. The second letter, dated September 28, 1988, represents another affected employee's belief regarding the validity of Article IV, §A and concludes with the stated assumption that the employee's name would not be stricken from

the eligible list. A third letter, dated October 5, 1988, and written on behalf of three other unit employees, is to the same effect as the second.

In late October 1988, the local civil service commission informed the City's attorney that Article IV, §A was in conflict with the State Civil Service Law and the local commission's rules and it refused to remove the employees' names from the eligible list.

The Association argues in response to the City's exceptions that the ALJ's dismissal of the charge was warranted, if not compelled, on the stipulated record before him. In its cross-exceptions, it alleges that the ALJ erred by not addressing certain of its affirmative defenses, by refusing to consider the record on an appeal to the Appellate Division, Third Department in a related court case,[1/] and by declining to defer his determination pending a final judicial decision on the legality of Article IV, §A.

With respect to the Association's admitted failure to disclose its doubts regarding the legality of Article IV, §A, it is unclear to us whether the City alleged this failure as an

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[1/] The City commenced a declaratory judgment action after the local civil service commission refused to remove the names of the unit employees who had refused to accept acting or temporary assignments, naming the Association, the affected fire fighters and the local civil service commission as parties. Supreme Court, Orange County held Article IV, §A to be valid and enforceable, but, on appeal by the Association, the Appellate Division unanimously reversed, and declared the clause void as contrary to the imperative provisions of Civil Service Law §61(2). City of Newburgh v. Potter, ____ A.D.2d ____ (3d Dep't 1990). The City has filed a motion with the Appellate Division for permission to appeal to the New York Court of Appeals.

independent violation. It appears that the City uses the failure to disclose only to support its repudiation theory or its allegation that the Association never intended to be bound by the terms of Article IV, §A. To the extent that the City may be alleging that the failure to disclose its doubts is an independent act of impropriety, we affirm the ALJ's dismissal. Although a failure or refusal to disclose information which may reasonably have a material effect on the conduct of negotiations may violate the Act under some circumstances,[2/] the Association was under no duty to disclose its concerns regarding the legality of the City's proposal because the City's attorney and its other representatives were equally able to make their own assessment. Whatever information there was which caused the Association to have doubts regarding the legality of the City's proposal, it was not uniquely in the Association's exclusive possession.

We are also not persuaded by the merits of the City's repudiation theory on the law and the facts and affirm the ALJ's findings and conclusions in these respects. It is not a refusal to negotiate per se for a party to initiate or support a challenge to the legality of a negotiated agreement.[3/] Factually, the stipulated record does not show that the

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[2/] See New York City Transit Auth. and Manhattan & Bronx Surface Transit Operating Auth., 15 PERB ¶3129 (1982) (employer's failure to disclose contemplated layoffs).

[3/] See Salmon River Cent. School Dist., 13 PERB ¶4591 (1980). The Director there dismissed a charge which alleged that the employer initiated a court proceeding to stay arbitration after agreeing to resolve the issue under the contractual grievance procedure because it did not state a violation of the Act as a matter of law.

Association caused any unit employees to refuse to comply with the terms of Article IV, §A. Indeed, the employees who refused the acting or temporary assignments did what the contract minimally required when they requested the local civil service commission to remove their names from the civil service eligible list. In this respect, the record evidences a union responding to the actions of its unit employees, not one causing them to act. The ALJ read the attorney's letters to the local civil service commission as reflecting only the attorney's inquiry regarding the local commission's intentions to strike the employees' names from the eligible list. The timing and content of the letters previously summarized support the ALJ's interpretation.

There is more merit to the City's remaining allegation that the totality of the Association's conduct establishes a violation of its duty to negotiate in good faith resting upon an intention from inception to dishonor Article IV, §A.

We believe that a party fails to negotiate in good faith if, at the time an offer is made or accepted by that party, it has an undisclosed and absolute intent to initiate or support proceedings to nullify the agreement once reached, and, thus, no intent to comply with its agreement. On this record, however, the Association cannot be found to have had that intent when it agreed to Article IV, §A. Even when read most favorably to the City, the stipulated record facts reasonably show only that the Association had an intention when it bargained Article IV, §A to pursue its doubts regarding the validity of that clause by making

an inquiry to appropriate state and local officials at any unit employee's subsequent request. We do not consider a party's making of such an inquiry to be inconsistent with the statutory concept of good faith. The Association's subsequent statements and actions which were premised upon the intervening opinions from the state and local civil service commissions that the clause was invalid and unenforceable do not evidence the existence of the necessary intent at the date the agreement to Article IV, §A was bargained or struck.

Having affirmed the ALJ's decision for the reasons stated above, it is unnecessary for us to consider the Association's cross-exceptions.

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

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

FRANK BELARDO,

Charging Party,

CASE NO. U-11589

-and-

COVE NECK POLICE BENEVOLENT ASSOCIATION,

Respondent.

JASPAN, GINSBERG, EHRLICH, SCHLESINGER & HOFFMAN (JACOB S. FELDMAN of counsel), for Charging Party

LERNER, GORDON & HIRSCH, P.C. (LAWRENCE M. GORDON of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Frank Belardo (charging party) to a decision of an Administrative Law Judge (ALJ) which dismisses his charge against the Cove Neck Police Benevolent Association (PBA). The ALJ dismissed the charge before hearing on a finding that this Board was without jurisdiction[1/] because the charge encompassed only an internal membership dispute involving an election for union officers.

The charging party, a part-time police officer for the Village of Cove Neck, alleges that part-time officers are included in a unit with full-time officers represented by the

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[1/] See generally Civil Serv. Employees Ass'n, 17 PERB ¶3072 (1984).

PBA. The PBA's refusal to represent the part-time officers or to otherwise recognize their unit and union status is alleged to violate the part-time officers' rights under the Act. The PBA denies that it represents the part-time officers or that it has any statutory duties in that regard. It asserts that any representation it may have afforded the part-time officers in the past was in the nature of voluntary services only.

The charging party argues in his exceptions that the charge is within our jurisdiction because it concerns the statutory rights of the part-time police officers to representation by the PBA, not their right to hold PBA office. Moreover, the charging party argues that he should have been afforded a hearing to resolve disputed issues of material fact.

For the following reasons, we reverse the ALJ's decision and remand the case for further processing.

From our review of the charging party's pleading, we are persuaded that the ALJ read it too narrowly. Although an election for union office may have triggered the filing, and the charge may include the election dispute as one of its aspects, the charge, as filed, is more than a one-issue complaint.

The charge centers upon a March 20, 1990 letter from the PBA's attorney in which it is stated several times that the PBA represents only full-time police officers, not any part-time officers. The charging party alleges in his charge, however,

that the part-time officers are represented by the PBA, an allegation which the PBA denied in its answer along with every other allegation made by the charging party. The PBA's denial of its status as the bargaining agent for the part-time officers allegedly has interfered with the statutory rights of the charging party to join and participate in the PBA. The charging party clarified any ambiguity in his pleading in a memorandum submitted to the ALJ at her invitation after she informed him that the charge appeared to involve only a question of internal union affairs beyond our jurisdiction. A central point in that memorandum was that the PBA's exclusion of the part-time officers from the unit and union violated the fundamental purposes and policies of the Act and the rights of the part-time officers under §202 of the Act. The charging party argued specifically, for example, that the PBA's treatment of the part-time officers had deprived them of services provided by the PBA as bargaining agent vis-a-vis their employment relationship such as the statutory right to be represented by the PBA for purposes of collective bargaining and grievance administration.

As we view the charge, both as pleaded and as clarified, the charging party put in issue the PBA's status as the bargaining agent for the part-time police officers, whether they be in one unit with the full-time officers, as alleged by the charging party, or in a separate unit, as suggested by the ALJ on the

record before her. In either circumstance, the PBA's denial that it represents part-time officers raises issues which are divorced from matters of purely internal union affairs and which, therefore, lie within the scope of our jurisdiction.

Depending upon the facts ascertained on remand, the ALJ should decide whether the PBA unilaterally altered the composition of the bargaining unit, or abandoned a separate unit of part-time officers, and, if so, whether such conduct violates §209-a.2(a) of the Act. We express no opinion on the merits of the charging party's allegations in this respect, only that they are within our jurisdiction to decide. Of course, if it is determined on remand that the PBA is not the statutory bargaining agent for the part-time officers, the charge would be properly dismissed because in that circumstance it would involve only an alleged deprivation of the membership rights and privileges of union members which lie outside our jurisdiction.

The record before the ALJ did not definitively establish the unit status of the part-time officers and it is our determination to permit the charging party a hearing at which the facts associated with that issue can be fully investigated and developed, including the disputed authenticity of PBA by-laws which the ALJ relied upon in reaching her decision.

Based upon the foregoing, the charging party's exceptions are granted, the ALJ's decision is reversed, and the case is remanded to the ALJ for further processing consistent with this decision.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, NASSAU LOCAL 830,

Charging Party,

CASE NO. U-11550

-and-

COUNTY OF NASSAU,

Respondent.

NANCY E. HOFFMAN, ESQ. (MIGUEL ORTIZ of counsel), for Charging Party

BEE, DeANGELIS & EISMAN (PETER A. BEE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Nassau Local 830 (CSEA) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). The Assistant Director dismissed CSEA's charge against the County of Nassau (County) which alleges that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the work schedules of certain unit employees. The Assistant Director dismissed the charge because the parties' contract authorized the

schedule changes[1] and, therefore, CSEA waived any further right to negotiate those changes.

CSEA argues in its exceptions that the contract language,[2] which allows the County to both regulate and change work schedules, is not a waiver of its statutory right under Starpoint Central School District[3] (Starpoint) to negotiate the manner in which employees will be assigned to provide a selected level of service.

We stated in Starpoint that although staffing levels and the selection of the days and hours of an employer's operations are management prerogatives, the selection of the method or manner by which the prerogative is accomplished is mandatorily negotiable if there are alternative means to the chosen end. CSEA's exceptions suggest, incorrectly, that Starpoint created some meaningful distinction between bargaining over work schedules and

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[1] The changes involved two new shifts assigned to employees periodically on a rotating basis.

[2] The County argues in response to CSEA's exceptions that we have no jurisdiction over the charge under §205.5(d) of the Act. Jurisdiction is possessed because the parties did not have a contractual relationship at the date the work schedules were changed. The prior agreement had expired on December 31, 1989 and a successor was then being negotiated. The provisions of the expired contract were continued under §209-a.1(e) of the Act during the hiatus period and, therefore, they are material to the merits disposition of the charge.

[3] 23 PERB ¶3012 (1990). In Starpoint, the employer changed a unit employee's work schedule from Monday through Friday to Wednesday through Sunday. Although we recognized the employer's right to establish regular weekend coverage, we subjected the employer's assignment of the employee to the revised work schedule to a bargaining duty in the absence of any proof from the employer of a compelling need to make the change.

bargaining over the method, manner or means of implementation of an employer's staffing decisions. It concedes, for example, the County's right to regulate or change work schedules, but claims that there is an independent, residual duty to bargain how those schedules will be covered. However, for most purposes in general, and for this case in particular, the differently worded articulations of the bargaining obligation which stems from an employer's staffing decisions are synonymous. Our references in Starpoint to the mandatorily negotiable aspects of an employer's staffing decisions were intended simply to embrace the assignment of employees to work schedules. That duty to bargain work schedule assignments is as much subject to satisfaction and waiver as any other term and condition of employment.

In that latter respect, we are persuaded, as was the Assistant Director, that CSEA has given to the County in bargaining the specific right to both regulate and change the employees' work schedules under certain conditions which were admittedly satisfied. Consistent with our earlier interpretations of the same contract language,[4/] we hold that the contract evidences a plain and clear waiver[5/] of CSEA's right to negotiate the changes which were made in the existing work schedules. Therefore, the County's implementation of the

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[4/] See County of Nassau cases reported at 18 PERB ¶3034 (1985), 13 PERB ¶3053 (1980), 12 PERB ¶3105 (1979), and 12 PERB ¶3049 (1979).

[5/] See CSEA v. Newman, 88 A.D.2d 685, 15 PERB ¶7011 (3d Dep't 1982), appeal dismissed, 57 N.Y.2d 775, 15 PERB ¶7020 (1982).

work schedule changes in issue was proper because contractually based.

Based upon the foregoing, CSEA's exceptions are denied, the Assistant Director's decision is affirmed, and IT IS, THEREFORE, ORDERED that the charge be, and it hereby is, dismissed.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ONEONTA TEACHERS ASSOCIATION, NEA/NY, NEA,

Charging Party,

CASE NO. U-11473

-and-

ONEONTA CITY SCHOOL DISTRICT,

Respondent.

RICHARD CATERINO, for Charging Party

JOSEPH T. PONDOLFINO, JR., ESQ., for Respondent

BOARD DECISION AND ORDER

The Oneonta City School District (District) excepts to an Administrative Law Judge's (ALJ) decision that it violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally banned smoking in all of its buildings and refused to negotiate the ban on demand by the Oneonta Teachers Association, NEA/NY, NEA (Association).

Finding the material facts not in dispute, the ALJ held after a hearing that the District's smoking ban was mandatorily negotiable because it was more restrictive than the minimum requirements of New York's Clean Indoor Air Act (Clean Air Act).[1/]

[1/] N.Y. Pub. Health Law Art. 13-E (McKinney 1990).

The District grounds its exceptions on several procedural and substantive errors allegedly committed by the ALJ. The District argues that the ALJ should have granted either its motion to dismiss the charge for failure to state a cause of action or its motion to particularize the charge, and should have joined two other unions which represent District employees as parties to the charge. Substantively, the District alleges that the ALJ's findings are generally contrary to law and the record evidence.

The District's motion to dismiss the charge is based upon an alleged pleading defect. The District argues that the charge as pleaded is defective as a matter of law because:

1. it does not state specifically that the District's smoking ban is more restrictive than the requirements of the Clean Air Act;
2. it does not identify specifically each aspect of the smoking ban which is more restrictive than the requirements of the Clean Air Act; and
3. it does not plead that the District, in fact, adopted a smoking ban.

Our pleading requirements are satisfied by a concise recitation of facts which may constitute a violation of the Act.[2/] The first numbered contention in support of the District's motion to dismiss involves purely a conclusion of law

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[2/]Rules of Procedure §§204.1(b)(3) & 204.2(a).

which, while helpful, need not be pleaded. The second involves more of a mixed issue of fact and law than the first, but it similarly ultimately necessitates a conclusion of law which need not be pleaded. The third numbered contention in support of the District's motion alleges a failure to plead a fact necessary to the unilateral change aspect of the charge. In assessing whether a charge is sufficiently pleaded on a motion to dismiss, it is appropriate to consider both the allegations set forth on the charge form itself and those in the attachments to that charge. In reviewing all of the papers as filed, we find that the Association's pleadings are plainly sufficient. When the charge is read in the light most favorable to the Association, as it must be on the District's motion,[3/] the charge alleges a unilateral change in smoking practice pursuant to a resolution which, although temporarily tabled, had been announced and effectively adopted.

As an alternative to its motion to dismiss, the District moved before the ALJ for particularization of the charge. However, the District's motion for particularization was accompanied by its answer to the charge. A motion for the particularization of a charge is properly granted only to the

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[3/] See City of Yonkers, 23 PERB ¶3055 (1990).

extent necessary to enable the respondent to answer.[4/] By answering the charge, the District necessarily conceded that the Association's charge was not so vague and indefinite as to be reasonably incapable of being answered. Therefore, on this basis alone, the ALJ's failure or refusal to grant the District's motion for particularization was not error.

Moreover, we do not find that the absence of a more particularized pleading prejudiced the District at the hearing as it claims. The District argues in its exceptions that it would have presented certain evidence regarding smoking in the teachers' lounges had it known before the hearing that the teachers' lounges were likely to be in issue. In its answer, however, which was filed more than two months before the hearing, the District alleges on information and belief that the Association wanted "the right to smoke in the teachers lounge". It is clear to us, therefore, that the District knew that the teachers' lounges were likely to be in issue at the hearing and that it refrained from introducing whatever relevant evidence it may have had for reasons unrelated to the one alleged in its exceptions.

As to the joinder of any other unions which represent District employees, it does not appear from the record that the

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[4/] Rules of Procedure §204.3(b). Compare the motion for particularization of an answer which is properly granted to enable the movant to address the respondent's affirmative defenses in an expeditious manner at the hearing. Rules of Procedure §204.3(d).

ALJ was ever asked to join any other parties. The ALJ was not required to join other unions with or without request, because our Rules of Procedure and hearing practice do not require or authorize compulsory joinder in these circumstances. Moreover, these other unions were in no way necessary to the disposition of this charge. If interested, they could have moved to intervene to protect their interests.[5/] Finally, the ALJ's remedial order is directed only to the employees in the Association's negotiating unit. The District's smoking policy as it applies to other District employees is not affected in any way by the ALJ's order. The District's exception in this regard is, accordingly, denied.

The District's remaining exceptions are directed to the ALJ's conclusions of fact and law.

As to the former, the record clearly establishes that the District banned smoking in all of its buildings. The District specifically admitted that it banned smoking in all of its buildings both in its answer and on the record at the hearing. The record also establishes that the teachers' lounges were one of the designated smoking areas in use prior to the District's promulgation and implementation of the smoking ban. The District's exceptions in this respect are, accordingly, denied.

The District's remaining exception necessitates an interpretation of the Clean Air Act and an analysis of the

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[5/]Rules of Procedure §204.5.

interplay between the provisions of that statute and the Act.

The Clean Air Act prohibits smoking in certain specific indoor areas open to the public[6] and certain places of employment.[7] To the extent smoking is not prohibited, the Clean Air Act authorizes the establishment of designated smoking areas including public indoor areas within public schools.[8] The subdivision of the Clean Air Act pertaining to places of employment[9] specifically authorizes the designation of a smoking room for employees.[10] An employee lounge need only contain contiguous nonsmoking areas[11] sufficient to meet employee demand. Unlike smoking areas within work areas, which must be physically separated from the smoke-free work areas,[12] there is no similar requirement under the Clean Air Act for employee lounges. A nonsmoking employee is entitled to a smoke-free work area.[13] Employee lounges, however, are not

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[6]Clean Air Act §1399-o.1 includes auditoriums, elevators, gymnasiums, swimming pool areas and classrooms.

[7]Clean Air Act §1399-o.6(d) & (e) includes the areas listed in §1399-o.1 and rest rooms, hallways, medical facilities, rooms with photocopying or office equipment and company vehicles.

[8]Clean Air Act §1399-o.3.

[9]A place of employment is defined in §1399-n.7 of the Clean Air Act as an indoor area not generally accessible to the public in which employees perform services for their employer.

[10]Clean Air Act §1399-o.6(f).

[11]Clean Air Act §1399-o.6(c).

[12]Clean Air Act §1399-n.11.

[13]Clean Air Act §1399-o.6(a) & (h).

treated as work areas for purposes of the Clean Air Act. Therefore, contrary to the District's contention, it would not be required to ban smoking in a teachers' lounge even on demand by a nonsmoking employee.

Two other sections of the Clean Air Act are relevant to the disposition of this charge.

Section 1399-r.1 provides that "nothing in [the Clean Air Act] shall be construed to deny the owner...of a place covered by [the Clean Air Act] the right to designate the entire place, or any part thereof, as a nonsmoking area."

However, §1399-r.1 cannot be read alone. It must be read in conjunction with §1399-o.6(i), which provides that provisions in an employer's required[14/] smoking policy "that are more restrictive than the minimum requirements" of the applicable provisions of the Clean Air Act "shall be subject to the applicable law governing collective bargaining."

The record shows that smoking was permitted in the teachers' lounges for years until prohibited under the District's unilaterally imposed ban. Nothing in the Clean Air Act required the District to ban smoking in the teachers' lounges. Therefore, the ban as it applies to the teachers' lounges is more restrictive than the mandates imposed by the Clean Air Act. As §1399-o.6(i) makes clear, it was the Legislature's stated intention to preserve an employer's duty to bargain regarding

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[14/] Clean Air Act §1399-o.6.

those smoking policies which embrace mandatory subjects of negotiation under the Act except to the extent the employer's discretion to act was taken away by the requirements imposed by the Clean Air Act. Section 1399-r.1 merely ensures that nothing in the Clean Air Act itself can be used to prohibit a smoking ban. When the unilateral imposition of a total smoking ban is prohibited or restricted by other provisions of state law, §1399-r.1 of the Clean Air Act cannot be read to repeal those external sources of obligation. A ban on employee smoking in a teachers' lounge is presumptively a mandatory subject of negotiation which subjects an employer to a statutory duty to bargain under the Act.[15/] That duty is unaffected in relevant respect by any provision in the Clean Air Act. There being nothing in the record to counterbalance the negotiability determination, the District's unilateral promulgation and implementation of a smoking ban and its refusal to bargain the ban pursuant to the Association's demand violated §209-a.1(d) of the Act. In that latter respect, the District was not privileged initially to condition its obligation to meet with the Association on the Association's recitation of the particular

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[15/] See, e.g., County of Niagara (Mount View Health Facility), 21 PERB ¶3014 (1988); Rush-Henrietta Cent. School Dist., 21 PERB ¶3023 (1988), modified, 151 A.D.2d 1001, 22 PERB ¶7016 (4th Dep't 1989) (subsequent history omitted).

aspects of the smoking ban which the Association wanted to negotiate.[16] Neither was it thereafter privileged to refuse to negotiate all aspects of the promulgation and implementation of the smoking ban.

Based on the foregoing, the District's exceptions are denied and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the District:

1. Rescind the ban on smoking in teachers' lounges[17] as it applies to the employees in the Association's unit;
2. Negotiate in good faith with the Association regarding those aspects of the smoking ban which are more restrictive than the minimum requirements of the Clean Air Act.

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[16] We view the District's obligation in this circumstance to be similar to an employer's duty to negotiate the impact of a managerial prerogative. Just as an employer is not privileged to refuse to meet until the union particularizes its impact bargaining demands, so, too, the District was not privileged to condition its willingness to negotiate on the Association's specification of those aspects of the ban which it considered to be more restrictive than the minimum requirements of the Clean Air Act.

[17] This is a change in the order issued by the ALJ who rescinded the smoking ban to whatever unspecified extent it exceeded the minimum requirements of the Clean Air Act. We consider the modification to be appropriate to conform the remedial order to the record evidence supporting the violation.

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

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, 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 Oneonta Teachers Association, NEA/NY, NEA (Association) that the Oneonta City School District (District):

1. Will rescind the ban on smoking in teachers' lounges as it applies to the employees in the Association's unit;

2. Will negotiate in good faith with the Association regarding those aspects of the smoking ban which are more restrictive than the minimum requirements of the Clean Air Act.

.....

ONEONTA CITY SCHOOL DISTRICT

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

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

Petitioner,

CASE NO. CP-215

-and-

STATE OF NEW YORK (DEPARTMENT OF AUDIT AND CONTROL),

Employer,

-and-

PUBLIC EMPLOYEES FEDERATION,

Intervenor.

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

WALTER J. PELLEGRINI, ESQ. (LAUREN DESOLE of counsel), for Employer

RICHARD E. CASAGRANDE, ESQ. (NANCY L. BURRITT of counsel), for Intervenor

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) to a decision of the Director of Public Employment Practices and Representation (Director) which dismissed after a hearing a unit clarification petition filed by CSEA. CSEA's petition was occasioned by the State of New York's (Department of Audit and Control) (State) designation of Employee Retirement

System Examiner (ERSE) IV[1] as a position within the Professional, Scientific and Technical Services Unit (PS&T), which is represented by the Public Employees Federation (PEF). CSEA claims that the ERSE IV position is encompassed within the scope of its Administrative Services Unit (ASU).

The Director dismissed CSEA's petition on a finding that the inclusion of the ERSE IV position in the PS&T unit comported with the scope of the PS&T unit as defined by us in earlier decisions.[2]

In its exceptions, CSEA alleges that the Director incorrectly ascribed a burden of proof to it and drew erroneous conclusions from the record regarding the level of supervision actually exercised by the ERSE IVs. PEF urges in its response that we affirm the Director's dismissal.

For the reasons which follow, CSEA's exceptions are denied and the Director's dismissal of the unit clarification petition is affirmed.

A unit clarification petition seeks only a factual determination as to whether a job title is actually encompassed

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[1] The ERSE title series was created in late 1988 by the State Department of Civil Service after a title structure change and reclassification involving five titles. ERSE IV is one of several levels in the ERSE series. Twenty-one of the current ERSE IVs were in the ASU unit in their former job titles; six were in the PS&T unit.

[2] State of New York, 1 PERB ¶399.85 (1968), conf'd, 32 A.D.2d 131, 2 PERB ¶7007 (3d Dep't 1969), aff'd, 25 N.Y.2d 842, 2 PERB ¶7012 (1969); State of New York, 2 PERB ¶3044 (1969).

within the scope of the petitioner's unit. We have held a unit clarification petitioner to a burden of proof on its petition because that particular type of petition necessarily seeks only a determination of fact.[3/] A unit clarification petition differs from a unit placement petition. Although both are directed to newly created or substantially altered titles, only the unit placement petition puts the appropriateness of the unit under §207 of the Act in issue. Moreover, the unit placement petition proceeds from the finding or admission that the position in issue is not in the petitioner's unit, but should be most appropriately placed there. The uniting criteria set forth in §207 of the Act can be material to the disposition of the fact question which underlies the unit clarification petition, but only if and to the extent they evidence the actual scope of the bargaining unit.

CSEA argues that the ASU and PS&T units are defined in relevant respect by the level of supervisory authority exercised by the incumbents of the particular job title. Although it concedes that most third level supervisors are in the PS&T unit, it claims that lower level supervisors are in its ASU unit. It concludes that the ERSE IVs must be in the ASU unit because they do not, in fact, yet exercise third level supervisory authority.

We reject CSEA's argument for two reasons. First, we are not persuaded that the record proves that all first and second level supervisors are included in the ASU unit. Second, whether

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[3/] Civil Service Employees Ass'n, Inc., Local 1000, AFSCME, 21 PERB ¶3030, aff'g 21 PERB ¶4012 (1988).

the ERSE IVs exercise third level supervisory authority is not dispositive of this particular type of petition. In keeping with its burden of proof, it was incumbent upon CSEA to prove that only the designation of the ERSE IV as an ASU position would be consistent with the scope of the ASU and PS&T units as created and presently constituted. Having reviewed the record, we agree with the Director's conclusion that the State assigned the ERSE IV title to the PS&T unit after an examination of the differing supervisory responsibilities of several job titles within the ASU and the PS&T units. There being record evidence that the supervisory duties and responsibilities of the ERSE IVs, as defined in the job description for that position and as actually carried out, are like those of others in similarly graded titles within the PS&T unit, the Director's decision must be affirmed. By our affirmance, however, we express no opinion as to whether the ERSE IVs would be most appropriately included in the PS&T unit upon an application of the statutory uniting criteria because that question is not raised by the unit clarification petition. As the Director suggested, the appropriateness of the ERSE IVs' uniting may be raised by a representation petition filed under §201.3 of the Rules of Procedure or, perhaps, by a unit placement petition.[4/]

[4/]There may be a question at this date whether the ERSE IV is a new or substantially altered position as required by §201.2(b) of the Rules.

Based upon the foregoing, CSEA's exceptions are denied, the Director's decision is affirmed, and the petition is dismissed.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GENESEE COMMUNITY COLLEGE EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION, NEA/NY,

Petitioner,

CASE NO. C-3542

-and-

GENESEE COMMUNITY COLLEGE and COUNTY OF GENESEE,

Employer,

-and-

GENESEE COUNTY EMPLOYEE'S UNIT, LOCAL 819, CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

ROBERT D. CLEARFIELD, ESQ. (ROBERT W. KLINGENSMITH, JR. of counsel), for Petitioner

HARTER, SECREST & EMERY (BARRY R. WHITMAN and ERIC A. EVANS of counsel), for Employer

NANCY E. HOFFMAN, ESQ. (STEVEN CRAIN of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Genesee County Employee's Unit, Local 819, Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by the Director of Public Employment Practices and Representation (Director). The Director held that Genesee Community College

(College) was a legal entity separate from its sponsor, the County of Genesee (County), and that the College was the joint public employer within the meaning of the Public Employees' Fair Employment Act (Act) with the County of the nonpedagogical employees who work at the College. Adopting his earlier decision in Niagara Community College and County of Niagara (hereafter Niagara),[1/] which was not appealed to us, the Director determined that the joint employer relationship between the College and the County warranted the fragmentation of the nonpedagogical employees from the county-wide unit represented by CSEA pursuant to the petition filed by the Genesee Community College Educational Support Personnel Association, NEA/NY (Association).

CSEA excepts to the Director's conclusions that the College is a legal entity separate from the County and that the College is the joint employer of the noninstructional employees who work at the College. CSEA argues that the County is the sole employer.

The Association alleges in its response that CSEA's exceptions are untimely and argues, alternatively, that the Director's decision was in all respects correct.

We deal first with the Association's claim that CSEA's exceptions are untimely. Exceptions must be filed and served

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[1/] 23 PERB ¶4052 (1990).

within 15 working days of a party's receipt of the Director's decision,[2/] the date of receipt itself being excluded from the computation. CSEA received the Director's decision on December 31, 1990, and filed and served its exceptions by mail on January 23, 1991, the fifteenth working day thereafter. Its exceptions are, accordingly, timely.

Turning to the merits, we affirm the Director's material conclusions of fact and law. The issues raised by CSEA in its exceptions were presented to the Director and his decision, which incorporates his earlier decision in Niagara, sets forth a comprehensive analysis of the controlling provisions of statute and regulation. We adopt the Director's decision, and for the reasons set forth therein, and in our own decision in Dutchess Community College,[3/] we hold that a community college is an entity with a legal identity separate from its sponsor, that a community college is a public employer under §201.6(a) of the Act, and that a county-sponsored community college is a joint employer within the meaning of the Act with the sponsoring county

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[2/]Rules of Procedure §201.12(a).

[3/]17 PERB ¶3010 (1984) (subsequent history omitted). Although the public employer status of the community college was not in dispute in that case, we concluded as a necessary part of our analysis that a county sponsored community college is a public employer within the meaning of the Act.

of those employees hired by the community college because control over the terms of the employees' employment relationship is divided between and shared by the community college and the sponsoring county as a matter of law.

Only two points in CSEA's exceptions warrant any comment beyond that in the Director's decision and this Board's in Dutchess Community College.

Since 1984, the Education Law has permitted a community college to be regionally sponsored by two or more contiguous counties or school districts. Under this sponsoring arrangement, §6310.12 of the Education Law deems the community college regional board of trustees to be the public employer for purposes of the Act. There is no similar provision in the Education Law concerning the identity of the employer for a county-sponsored community college. CSEA argues that this omission evidences a legislative intention that a county-sponsored community college is not an employer for purposes of the Act, joint or otherwise. However, since 1975,[4/] §209.3(f) of the Act has specifically referenced a community college as one of the Act's several "public employers". This itself is sufficient to negate the inference regarding legislative intent which CSEA would have us draw from the subsequent enactment of Education Law §6310.12.

[4/] 1975 N.Y. Laws ch. 850.

The Legislature could not possibly have intended by identifying the community college as the public employer under one special type of sponsoring arrangement to have denied all other community colleges public employer status when its earlier enactment, which specifically identifies a community college as a public employer, was continued unchanged on and after enactment of Education Law §6310.12.

CSEA also relies upon Education Law §§6308 and 6309 which make the sponsoring county responsible for the defense and indemnification of community college employees and members of the college's board of trustees for certain civil and criminal acts arising out of or in the course of their employment. Unlike CSEA, we do not view these two sections of the Education Law to be necessarily a codification of common law doctrines of respondeat superior, master and servant or principal and agent. Enactment of these provisions of the Education Law reflects more logically nothing more than a recognition of the county's fiscal responsibilities as the community college's sponsoring entity. Without CSEA's assumptions, which we do not make, the defense and indemnification provisions in Education Law §§6308 and 6309 are meaningless to any analysis regarding the status of a community college as a public employer under the Act. Based upon the foregoing, CSEA's exceptions are denied, the Director's decision

is affirmed and the case is remanded to the Director for such further processing as is appropriate.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, 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,

CASE NO. U-11377

-and-

STATE OF NEW YORK (DIVISION OF MILITARY AND NAVAL AFFAIRS),

Respondent.

NANCY E. HOFFMAN, ESQ. (JEROME LEFKOWITZ of counsel), for Charging Party

WALTER J. PELLEGRINI, ESQ. (RICHARD J. DAUTNER and GARY JOHNSON of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by both the State of New York (Division of Military and Naval Affairs) (State) and the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to an Administrative Law Judge's (ALJ) decision. The ALJ held that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed its practice regarding the computation of paid military leave.

CSEA represents airport fire fighters who normally work six 24-hour shifts during a 14-day period. Before January 1, 1990, an airport fire fighter who was absent from scheduled duty for ordered military duty had to charge only 1 working day of

military leave for each continuous 24-hour period. Effective January 1, 1990, whenever a fire fighter is scheduled to work past midnight on a 24-hour shift, the fire fighter must charge 3 working days to military leave if absent. The revised method of computation results in a more rapid exhaustion of military leave credits than previously. The State's admitted unilateral change in computation method was based upon an opinion issued by the State Comptroller that a 24-hour shift consists of 3 working days for purposes of computing paid military leave under Military Law §242(5). Military Law §242(5) requires employers to pay their public officers and employees their salary or other compensation while in ordered military duty for a period "not exceeding a total of thirty days or twenty-two working days, whichever is greater, in any one calendar year...[or] in any one continuous period of such absence."

CSEA excepts only to the ALJ's failure to issue a make-whole order, which the State argues was appropriately omitted because the parties' stipulated record does not evidence that any employee was damaged by the State's change in the method of computing military leave.

The State alleges that the ALJ erred procedurally by not deferring jurisdiction in favor of a judicial proceeding and substantively by finding that the State's military leave practice was changed. In the latter respect, the State contends before us that there has not been any change in its military leave practice

because its practice has been to provide paid military leave to employees only as and to the extent required and authorized by Military Law §242(5). The State argues that when the State Comptroller interpreted Military Law §242(5) to require that a 24-hour shift be treated as 3 working days for purposes of computing paid military leave under Military Law §242(5), it was required and privileged to discontinue having employees charge only 1 working day of military leave for each continuous 24-hour period of absence, a practice which it alleges stemmed from a mistaken interpretation of the requirements of Military Law §242(5).

Turning first to the State's exceptions, we affirm the ALJ's decision to retain jurisdiction over this charge for the reasons stated in her decision. Moreover, given the State's position before us, our interpretation of Military Law §242(5) is unnecessary.[1/] The State's argument in defense does not require us to decide whether Military Law §242(5) forbids leave practices more generous than the minimums required by that statute because the State now concedes that Military Law §242(5) does not prohibit leaves in excess of 30 days. It is similarly unnecessary to decide whether the State Comptroller's

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[1/]We would affirm the ALJ's interpretation of Military Law §242(5) if necessary. We do not read either in the language of Military Law §242(5) or in its history any legislative intention to make salary payments in excess of those required by Military Law §242(5) illegal when those payments are made pursuant to the employer's bargaining obligations under the Act.

interpretation of Military Law §242(5) is correct. Therefore, no rationale has been offered to support the State's request for deferral.

On the merits, the stipulated record satisfied the burden of proof assigned CSEA on a unilateral change case under Schuylerville Central School District.[2/] It was the State's burden thereafter to prove that the change was otherwise permissible because its military leave practice was in some way limited or conditioned.

The State argues that the unit employees' military leave benefits are defined and limited by Military Law §242(5). This argument necessitates a finding that the State's military leave practice represented nothing more than the administration of the statutory benefits available under Military Law §242(5). We are not persuaded, however, that the stipulated record proves that Military Law §242(5) was the sole source of the leave benefits extended to unit employees. The record establishes in relevant part only that the State changed its method of computing charges to military leave in reliance upon a State Comptroller's opinion regarding the meaning of working days in the context of a 24-hour shift. That the State's change in practice was prompted by an interpretation of Military Law §242(5) does not prove, however, that the State's military leave practices were initially established and subsequently maintained strictly in accordance

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[2/] 14 PERB ¶3035, aff'g 14 PERB ¶4505 (1981).

with the terms of that statute. In the absence of proof that the State's practice was defined solely by the terms of Military Law §242(5), and the administrative or judicial interpretations thereof, the ALJ's finding that the State violated §209-a.1(d) of the Act must be affirmed.

Regarding the remedy ordered by the ALJ, we agree with CSEA that it should have included make-whole relief. Make-whole relief is ordered as a matter of policy, absent demonstrated good cause to the contrary, to address the possibility that employees may have been damaged by a respondent's unlawful acts. We do not insist upon record proof that unit employees have been damaged in fact. To the contrary, a party is not required to make any particular pleading of damages and we have discouraged litigation regarding damages during the course of the improper practice proceeding. Even if no employees were actually affected as of the date of the ALJ's order, they may have been in the time which has since elapsed. Whether and to what extent any unit employees have been damaged by the State's change in the computation of military leave will be readily ascertainable from time and attendance records or such subsequent proceedings as may be necessary.[3/] If no employees were damaged, the make-whole portion of the remedial order will have no application and the State is not prejudiced by its issuance. If the order did not issue, however, the State would profit from its improper practice

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[3/] See County of Broome, 22 PERB ¶3019 (1989).

if even one unit employee was disadvantaged by the State's action.[4/]

Based upon the foregoing, the State's exceptions are denied, CSEA's exception is granted, the ALJ's decision is affirmed except as modified as to remedy, and IT IS, THEREFORE, ORDERED that the State:

1. Rescind the September 25, 1989 memorandum regarding military leave;
2. Restore the practice regarding the computation of military leave and charges thereto as it existed immediately prior to the September 25, 1989 memorandum;
3. Recalculate military leave credits for all affected unit employees under the method which existed immediately prior to the September 25, 1989 memorandum and restore any military leave credits as recalculated which were charged by any unit employee beyond those required to be charged under the method which existed immediately prior to the September 25, 1989 memorandum. Restore any other leave credits charged by employees who were absent on ordered military duty with corresponding offset by charge to military leave credits as

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[4/] See City of Dunkirk, 23 PERB ¶3025 (1990), for a discussion of the general principles which underlie any of our remedial orders.

recalculated and credited under the method which existed immediately prior to the September 25, 1989 memorandum. Make whole any employees unable by circumstance to utilize such leave credits for any wages or benefits lost as a result of the application of the September 25, 1989 memorandum, with interest at the current maximum legal rate;

4. Sign and post notice in the form attached at all locations ordinarily used to post notices of information to unit employees.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, 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 Division of Military and Naval Affairs' unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the State of New York (Division of Military and Naval Affairs) will:

1. Rescind the September 25, 1989 memorandum regarding military leave;

2. Restore the practice regarding the computation of military leave and charges thereto as it existed immediately prior to the September 25, 1989 memorandum;

3. Recalculate military leave credits for all affected unit employees under the method which existed immediately prior to the September 25, 1989 memorandum and restore any military leave credits as recalculated which were charged by any unit employee beyond those required to be charged under the method which existed immediately prior to the September 25, 1989 memorandum. Restore any other leave credits charged by employees who were absent on ordered military duty with corresponding offset by charge to military leave credits as recalculated and credited under the method which existed immediately prior to the September 25, 1989 memorandum. Make whole any employees unable by circumstance to utilize such leave credits for any wages or benefits lost as a result of the application of the September 25, 1989 memorandum, with interest at the current maximum legal rate.

STATE OF NEW YORK (DIVISION
OF MILITARY AND NAVAL AFFAIRS)

.....

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

KINGS PARK CLASSROOM TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

CASE NO. U-11484

-and-

KINGS PARK CENTRAL SCHOOL DISTRICT,

Respondent.

STEPHEN M. BLUTH, for Charging Party

INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER & REICH (JOHN H. GROSS of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Kings Park Central School District (District) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). The Assistant Director held after a hearing on a charge filed by the Kings Park Classroom Teachers Association, NYSUT, AFT, AFL-CIO (Association) that the District violated §209-a.1(a) and (c)[1/] of the Public Employees' Fair Employment Act (Act) when it officially reprimanded a teacher, William Stein, for a statement he made in a letter he wrote to Thomas Cavanagh, President of the District's Board of Education.

[1/]The Assistant Director dismissed an alleged violation of §209-a.1(b) of the Act for a failure of proof. No exceptions have been filed to that aspect of his decision.

The Assistant Director held that the entirety of Stein's letter was protected. Although he found that the District's reprimand of Stein was not improperly motivated, the Assistant Director, citing our decisions in State of New York[2/] and Binghamton City School District,[3/] held unlawful any interference or discrimination directed against an employee's exercise of a statutorily protected right.

The District filed two exceptions to the Assistant Director's decision. First, the District argues that the Assistant Director misapplied the Supreme Court's decision in NLRB v. Great Dane Trailers, Inc.[4/] (Great Dane). In Great Dane, the Supreme Court interpreted the comparable interference and discrimination provisions of the National Labor Relations Act (NLRA). It held that motive is not an essential element of a violation of those provisions of the NLRA when the employer's conduct is "inherently destructive" of important employee rights. In contrast, when the employer's conduct has only a "comparatively slight" adverse effect on the exercise of protected rights, and the employer has come forward with evidence of legitimate and substantial business justifications for its action, no violation can be found without affirmative proof of improper motive. Alleging that we have adopted Great Dane, the

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[2/] 10 PERB ¶3108 (1977).

[3/] 22 PERB ¶3034 (1989).

[4/] 388 U.S. 26, 65 LRRM 2465 (1967).

District argues that the Assistant Director erred when he concluded that its reprimand of Stein was "inherently destructive" of his statutory rights. According to the District, its reprimand of Stein was justified and it had only a "comparatively slight" impact on his exercise of protected rights. Therefore, once the Assistant Director held that the District's reprimand was not improperly motivated, the charge should have been dismissed.

Under its second exception, the District argues that the statement for which Stein was reprimanded was not protected.

In its cross-exceptions, which merely respond to the District's exceptions, the Association argues that the Assistant Director's findings and conclusions were correct as a matter of law and fact.

The District's first exception raises interesting issues about whether we have adopted Great Dane[5/] and, if so, the proper application of Great Dane principles to the facts of this case. It is unnecessary, however, for us to discuss those several issues because the District's second exception necessitates a reversal of the Assistant Director's decision.

The District's second exception is directed to the Assistant Director's conclusion that Stein's letter was protected in its

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[5/] Compare Wappingers Central School Bd. of Educ., 10 PERB ¶3028 (1977) with Spencerport Cent. School Dist., 12 PERB ¶3074 (1979), in which Great Dane is cited with approval. Great Dane is also cited in other of our decisions and we have several times referred to "inherently destructive" conduct without citing to Great Dane.

entirety. Before setting forth the content of Stein's letter, we make a few observations which will help to place the letter in its proper perspective.

First, although the Association had made form letters available to teachers as part of its letter-writing campaign, Stein chose to author his own letter to Cavanagh. Second, Stein was not reprimanded for writing his letter to Cavanagh about the then ongoing negotiations, but only for a "lack of professionalism" in mentioning Cavanagh's son in his letter. The District acknowledged to Stein that he had the right to communicate with board of education members regarding negotiations and none of the other teachers who wrote letters to board members were subjected to any form of discipline or retaliation. Finally, whether and to what extent Stein's letter is protected can be judged only by its content, considered in the context of the circumstances prevailing at the time, uninfluenced by either the writer's articulated intent or the reader's reaction on receipt.

Against this background, the following is the text of Stein's letter to Cavanagh:

> As your son's teacher this year I find myself in the most difficult position of maintaining what is, unfortunately, an adversary position with you as the negotiating agent for the Kings Park community, while being cheerful and pleasant to my class in order to be an effective teacher. Surely you must realize effective teaching requires goodwill and cooperation on the part of students and teachers. The adversary position created by the Board of Education during these contract

> negotiations creates and spreads ill will and serves to destroy the positive, cheerful feelings necessary for a good education in the Kings Park Schools. The longer the Board continues in their hostile stand towards the teachers the more teachers will feel negative feelings towards the Board of Education, and inevitably towards the community itself. Surely it is obvious that the conditions being created are overwhelmingly negative in both the long and short run for education in Kings Park. Is this what you, and the other Board members are seeking to leave Kings Park as your legacy?

The Assistant Director relied in relevant part upon our decision in Binghamton City School District.[6/] Our holding in that case that intentionally false or maliciously injurious statements are not protected does not mean, however, that all other statements spoken or written during the exercise of a protected right are themselves necessarily protected. Statements made by an employee during the exercise of a protected right may be denied protection for reasons having nothing to do with the truth of the statements or the motive behind them. For example, our decision in Deer Park Union Free School District[7/] reflects our sensitivity to a union's use of students to aid the union in the accomplishment of its goals. We there suggested that certain conduct by employees which causes students to become entangled in a labor dispute may be deemed unprotected. Similarly, in State

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[6/] Supra note 3.

[7/] 11 PERB ¶3043 (1978) (teachers' participation in union sponsored success card program held unprotected).

of New York,[8/] we cautioned employees that the exercise of a protected right is not a license to engage in "impulsive behavior" or "overzealous conduct".

Turning to Stein's letter, we find, in disagreement with the Assistant Director, that it represents the type of "impulsive", "overzealous" enmeshing of students into a then pending labor dispute which is unprotected. Unlike the Assistant Director, we find that Stein's comments reflect more than his views that classroom instruction might be affected adversely by the parties' collective negotiations. As we read Stein's letter, it is subject to a reasonable interpretation that because Cavanagh's son is in Stein's class, he and other students may be made to suffer a lower level and quality of instruction than they would have received otherwise were it not for the adversary relationship between Stein and Cavanagh. Whether Stein's unprotected statement is labeled inappropriate, insubordinate, disloyal or threatening matters little because the requisite statutory analysis hinges on the close facts of the particular case when labels are of no use.

In concluding that the statement for which Stein was reprimanded was not protected, we stress the narrowness of our decision. We do not hold that a teacher is unprotected in articulating concerns about the effects of prolonged negotiations upon the quality of classroom education or the teacher's ability to teach. We hold only that, on the particular facts of this

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[8/] 11 PERB ¶3084 (1978).

case, the specific statement for which Stein was reprimanded (the reference to Cavanagh's son) was unprotected and, therefore, he was permissibly subjected to discipline.

Based upon the foregoing, the District's exceptions are granted in part, the Assistant Director's decision is reversed, and IT IS, THEREFORE, ORDERED that the charge be, and it hereby is, dismissed.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CLAUDIA S. COCKERILL,

Charging Party,

-and-

CASE NOS. U-9708 & U-10539

BRENTWOOD UNION FREE SCHOOL DISTRICT,

Respondent.

CLAUDIA S. COCKERILL, pro se

BERNARD T. CALLAN, ESQ., for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by Claudia S. Cockerill (charging party) to an Administrative Law Judge's (ALJ) decision which dismisses, after hearing, her two improper practice charges against the Brentwood Union Free School District (District). The charging party, a school psychologist, alleges that the District violated §209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) by basing her building and workload assignments on her exercise of statutorily protected rights.

The ALJ dismissed the subsection (b) allegation for failure of proof. He dismissed the subsection (a) and (c) allegations because the charging party failed to establish the necessary "but for" causation between the charging party's exercise of protected rights and her building and workload assignments.

The charging party's exceptions are directed only to that part of the ALJ's decision concerning the District's refusal to return her during the 1987-88 school year to her assignment at Sonderling High School. Welch, the District's Coordinator of Health, Psychological and Social Work Services since January 1987, removed the charging party from that assignment in late May 1987, before the charging party had engaged in any protected activity. The District urges us to affirm the ALJ's decision, arguing that the charging party's exceptions are factually inaccurate in part and otherwise without merit.

In several respects, the charging party's exceptions stem from a misunderstanding of the nature and limits of her rights under the Act. The charging party plainly considers the District's refusal to reassign her to Sonderling or some other high school to have been an arbitrary decision. She also believes that Welch employed pretextual reasons to block her return to Sonderling in cooperation with Mintz, Sonderling's principal, who allegedly disliked the charging party. Even if true, however, these allegations afford the charging party no ground for a violation of the Act and no basis for a reversal of the ALJ's decision. There is no improper interference or discrimination with the charging party's exercise of statutorily protected rights unless the record proves that she would have been returned to Sonderling or given an assignment at some other high school in the District had she not instituted various proceedings protesting Welch's original decision to remove her

from Sonderling. In that respect, and having reviewed the record, we find no basis upon which to disturb the ALJ's findings and conclusions which necessarily rest substantially on his assessment of the witnesses' credibility regarding the motives prompting the District's assignments of the charging party and the uncontroverted timing of events.

Based upon the foregoing, the charging party's exceptions are denied, the ALJ's decision is affirmed, and the charges are dismissed.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ADMINISTRATIVE SUPERVISORY ASSOCIATION,

Charging Party,

-and- CASE NO. U-11186

GERMANTOWN CENTRAL SCHOOL DISTRICT,

Respondent.

RONALD H. SINZHEIMER, ESQ. (PETER J. MOLINARO of counsel), for Charging Party

WHITEMAN, OSTERMAN & HANNA, ESQS. (GUNTER DULLY of counsel), for Respondent

BOARD DECISION AND ORDER

The Germantown Central School District (District) excepts to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) which finds it to have violated §209-a(1)(d) of the Public Employees' Fair Employment Act (Act) when it subcontracted unilaterally its school lunch program, supplemented by a new breakfast program. The Assistant Director based his decision upon a record consisting of a total of 23 stipulated exhibits.

In its exceptions, the District asserts that it was denied an evidentiary hearing and that the Assistant Director based his decision upon facts in dispute in violation of its due process and statutory rights. Among other things, it alleges that the

Assistant Director erroneously failed to accept as evidence factual allegations contained in its answer in deciding the merits of the charge.

The Assistant Director notified the parties that the charge, its amendment, and the District's answer would constitute part of "the record in this case". PERB's Rules of Procedure (Rules) do not make provision for the submission of a reply to an answer, so that factual allegations contained in an answer to a charge are neither admitted nor denied by a charging party. Moreover, the Assistant Director stated in his decision[1/] that "[f]actual assertions in the pleadings which have not been admitted or included in the stipulated record are not part of the record before me." While it is certainly true that a pleading does not constitute evidence, and that any factual allegation made in a pleading must be proved if not admitted or properly noticed, it appears that the District understood the factual allegations contained in its answer to have been deemed admitted by virtue of the inclusion of the answer as part of the record, without any apparent limitation upon its use for evidentiary purposes.

It further appears from the record in this case that some question existed concerning the scope and purpose of the submission of stipulated exhibits to the Assistant Director. According to the District's counsel, the District anticipated that the Assistant Director would decide the following three of

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[1/] Germantown CSD, 23 PERB ¶4605, at 4735 n. 2(1990).

its affirmative defenses: first, that the amendment to the charge was untimely filed and that the charge as originally filed failed to set forth any claim upon which any relief could be granted; second, that the District was statutorily precluded from subsidizing a cafeteria program while on an austerity budget and that negotiations concerning contracting out for a nonsubsidized program in lieu of an in-house subsidized program is not a mandatory subject of negotiations; third, that the failure of the Administrative Supervisory Association (Association) to allege or establish a demand to negotiate the District's decision to utilize Quality Food Management, Inc. (QFM) for its cafeteria program requires dismissal of the charge.

In his decision, the Assistant Director denied the first affirmative defense, finding that the amendment to the charge was itself filed within four months of the action complained of therein and was, therefore, timely. With respect to the second affirmative defense, the Assistant Director held that the fact that the District was precluded from subsidizing its cafeteria program while on an austerity budget did not require it to contract out the program, since the program could arguably have been continued in-house without subsidization. He accordingly dismissed the second affirmative defense. Finally, the Assistant Director denied the third affirmative defense, holding that the Association did not waive its right to negotiate, nor did the obligation rest with it, but instead with the District, to seek

negotiations on the subject of contracting for cafeteria services.

In dismissing the District's second and third affirmative defenses, the Assistant Director made factual determinations concerning the possibility of the District operating its cafeteria program on a nonsubsidized basis in accordance with its austerity budget, and made factual determinations concerning whether, by its conduct, the Association waived its right to negotiate. By this, the Assistant Director extended the decision beyond the more narrow legal issues which the District contends it intended to raise by its affirmative defenses. The District further argues that, if the Assistant Director was going to make such factual determinations in deciding the affirmative defenses and the merits of the underlying charge, the factual allegations contained in its answer should have been accepted as true and taken into consideration, arguing that had he done so, the charge would have been dismissed.

The Assistant Director also denied the District's defenses related to the negotiability of its decisions and found a failure to negotiate in good faith by virtue of the contracting out of food service work to QFM.

We find that there is sufficient ambiguity on this record concerning the parties' understanding of the purposes to which the pleadings would be devoted and the issues to be addressed to warrant the remand of this case for further proceedings to fully establish all of the relevant facts before issuance of a decision

on its merits.[2/] Accordingly, the Assistant Director's decision is reversed and remanded for further proceedings, including additional stipulations and a hearing if necessary.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2/ In view of our remand of this matter, we do not decide the remaining exceptions raised by the District because additional facts may be adduced which bear upon the merit of those exceptions and the outcome of the case before the Assistant Director.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FOOD AND COMMERCIAL WORKERS,
DISTRICT UNION LOCAL 1, AFL-CIO,

Petitioner,

CASE NO. C-3695

-and-

MOHAWK VALLEY NURSING HOME,

Employer.

BELSON & SZUFLITA (GENE M. SZUFLITA of counsel), for Petitioner

TOBIN & DEMPF (JOHN W. CLARK of counsel), for Employer

BOARD DECISION AND ORDER

By decision dated July 10, 1991,[1] we remanded this matter to the Director of Public Employment Practices and Representation (Director) with instructions that he open and count the ballot cast by Mark Sommer. As Sommer's vote could have been determinative of the election, we did not decide the challenge made by the Mohawk Valley Nursing Home (Employer) to the ballot cast by Kristin Markwardt. Sommer's vote makes Markwardt's ballot determinative of the election[2] and it is, therefore, necessary pursuant to our earlier decision for us to determine her eligibility to vote.

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[1] 24 PERB ¶3010 (1991).

[2] The vote as last tallied by the Director after Sommer's ballot was counted stands 42 in favor of representation, 41 against, with the one remaining challenge to Markwardt's ballot.

The stipulated unit in relevant respect includes regular part-time employees who work "more than 20 hours per week". The parties' arguments regarding Markwardt's eligibility are based strictly upon her time and attendance records. The Employer alleges that Markwardt is ineligible because she did not work the number of hours required by the parties' consent agreement. The United Food and Commercial Workers, District Union Local 1, AFL-CIO (Petitioner) argues to the contrary.

As requested by the assigned Administrative Law Judge, the Employer submitted time records from the payroll period ending May 19, 1990, the one immediately preceding the date the petition was filed, through August 11, 1990, the payroll period including the August 9 ballot count. In summary, these records show that in all but one week, when she had no hours worked, Markwardt worked a varying number of hours ranging from a low of 10.5 to a high of 34.25. Markwardt worked fewer than 20 hours in 7 of the 13 weeks during this period.

In the absence of any contrary intent by the parties, we believe that their agreement to the appropriate unit should reflect the ordinary meaning of the words used. The applicable definition of the word "per" means "with respect to every member of a specified group or series" or "for each".[3/] Because Markwardt did not work more than 20 hours each week within any arguably relevant time period and because we have no evidence

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[3/] Webster's Third New International Dictionary (1966 ed.)

before us of the parties' intent to construe their unit definition in any way other than in the ordinary sense of the word "per", we find that Markwardt was not in the unit for purposes of the election and that she is ineligible to vote.

For the reasons set forth above, we sustain the Employer's challenge to Markwardt's ballot on a finding that she is ineligible to vote. Her ballot is, accordingly, void.

As a majority of the valid votes cast favors representation by the Petitioner (42 - 41), the Petitioner is entitled to be certified.

IT IS HEREBY CERTIFIED that the United Food and Commercial Workers, District Union Local 1, AFL-CIO has been designated and selected by a majority of the employees of the 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 (more than 20 hours per week) Licensed Practical Nurses, Nurses Aides, Activities Assistants and Ward Clerks.

Excluded: All Registered Nurses, per diem casual or seasonal employees, confidential employees, guards, supervisors, medical record clerks, cooks, diet technicians, dietary aides, maintenance workers, housekeepers, laundry workers, feeder/transporters and all other nursing home employees.

FURTHER, IT IS ORDERED that the Employer shall negotiate collectively with the United Food and Commercial Workers, District Union Local 1, 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: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, NASSAU LOCAL 830,

Charging Party,

CASE NO. U-11754

-and-

COUNTY OF NASSAU,

Respondent.

NANCY E. HOFFMAN, ESQ. (STEVEN CRAIN of counsel), for Charging Party

BEE, DeANGELIS & EISMAN (PETER A. BEE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Nassau (County) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). The Assistant Director held that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it reduced the length of the maximum meal break permitted correction officers in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Nassau Local 830 (CSEA).

The stipulated record before the Assistant Director establishes that under Warden's Order No. 26-88 the correction officers have enjoyed a 40-minute maximum meal break since

December 1988, which was unilaterally shortened to a 30-minute maximum in May 1990. For many years before December 1988, the correction officers had a meal period with a maximum duration of 30 minutes.

The Assistant Director dismissed the County's defense that its action was permitted by certain provisions in the parties' existing contract, finding, in effect, that its rights to regulate work schedules and to determine the methods, means and personnel by which its operations are conducted did not encompass a right to increase the employees' hours of work. The Assistant Director also held that the 17 months during which the unit employees had a maximum 40-minute meal period was enough to constitute a past practice which could not be changed unilaterally. As a remedy, he ordered, inter alia, that the County rescind so much of the May 1990 order which set a meal period of 30 minutes and restore the meal relief practice as it existed under Warden's Order No. 26-88.

The County alleges in its exceptions that we lack subject matter jurisdiction over the charge because it alleges a breach of contract, that there is no established past practice favoring a 40-minute maximum meal period, and that the remedy is overly broad in its unqualified restoration of Warden's Order No. 26-88. CSEA argues in its response that the Assistant Director's decision is correct in all respects.

For the reasons which follow, we affirm the Assistant Director's finding of a violation of §209-a.1(d), but we modify the proposed remedy.

The charge lies plainly within our jurisdiction because the contractual provisions cited by the County are not a reasonably arguable source of right to CSEA with respect to the subject matter of the charge.[1/] The cited contractual provisions may be an arguable source of right to the County, but in that respect, we agree with the Assistant Director's disposition of this contractual waiver defense for the reasons stated in his decision.[2/]

We similarly affirm the Assistant Director's disposition of the alleged unilateral change in practice. As found by the Assistant Director, the County's most recent meal break practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances[3/] to create a reasonable expectation among the affected unit employees that the 40-minute maximum meal break would continue. We have no

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[1/] County of Nassau, 23 PERB ¶3051 (1990).

[2/] It appears from certain statements in the County's appeal papers that the County may have intended to include an exception to the Assistant Director's disposition of its claim of contractual privilege within its narrow exception to the jurisdictional issue. We, therefore, address both the jurisdictional issue and the waiver issue.

[3/] See City of Rochester, 21 PERB ¶3045 (1988), conf'd, 155 A.D.2d 1003, 22 PERB ¶7035 (4th Dep't 1989) (period of 13 months sufficient under circumstances to establish exclusivity over certain work).

hesitancy in affirming the Assistant Director's finding that there was an established past practice in the described circumstances and, therefore, we have no occasion to consider whether lesser circumstances may similarly establish a practice insulated from unilateral change.

The County's exception directed to the proposed remedy concerns only that part of the order which requires the County to restore Warden's Order No. 26-88, which effected the change to a 40-minute maximum meal break. The charge is limited to a change in the length of the meal period. Warden's Order No. 26-88, however, covers matters beyond the length of the meal break as does the May 1990 order which gave rise to the charge. The Assistant Director ordered the County's May 1990 order rescinded only insofar as it sets a meal relief period of 30 minutes. It is consistent with that portion of the remedial order and with the scope of the charge as filed and litigated to clarify the Assistant Director's order by amending it to require a restoration of Warden's Order No. 26-88 only insofar as it authorizes a 40-minute maximum meal break rather than a restoration of that order in its entirety.

For the reasons set forth above, we affirm the Assistant Director's finding that the County violated §209-a.1(d) of the Act, dismiss the exceptions directed to that finding, and grant the County's exception directed to the Assistant Director's remedial order.

THEREFORE, WE ORDER that the County rescind so much of Policy No. 21-90 which sets a maximum meal relief period of 30 minutes; that it restore that part of Warden's Order No. 26-88, dated December 12, 1988, and effective December 19, 1988, which authorizes a maximum meal relief period of 40 minutes; that it make the affected employees whole by paying them their contractual rate of pay for each 10 minutes of meal relief time lost by virtue of the implementation of Policy No. 21-90, with interest at the maximum legal rate; and that it sign and post the attached notice at all locations normally used to communicate information to correction officers.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, 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., Local 1000, AFSCME, AFL-CIO, Nassau Local 830, that the County of Nassau:

1. Will rescind so much of Policy No. 21-90 which sets a maximum meal relief period of 30 minutes;

2. Will restore that part of Warden's Order No. 26-88, dated December 12, 1988, and effective December 19, 1988, which authorizes a maximum meal relief period of 40 minutes;

3. Will make the affected employees whole by paying them their contractual rate of pay for each 10 minutes of meal relief time lost by virtue of the implementation of Policy No. 21-90, with interest at the maximum legal rate.

COUNTY OF NASSAU

.....

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 the

YONKERS NON-TEACHING UNIT, LOCAL 860, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO and LOCAL 860, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO and CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

CASE NO. D-0247

Respondents,

upon the Charge of Violation of §210.1 of the Civil Service Law

BOARD DECISION AND ORDER

On August 29, 1990, John M. Crotty, this agency's Counsel, filed a charge alleging that the Yonkers Non-Teaching Unit, Local 860, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO and Local 860, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO and Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO had violated Civil Service Law (CSL) §210.1 in that they caused, instigated, encouraged or condoned a strike against the Yonkers City School District on June 1 and June 4, 1990.

The charge further alleged that of the 1,060 employees in the negotiating unit, 1,060 employees participated in the strike.

The Respondents requested Counsel to indicate the penalty he would be willing to recommend to this Board as appropriate for the violation charged. Counsel proposed a penalty of the loss of Respondents' right to have dues and agency shop fee deduction privileges to the extent of twenty-five percent (25%) of the amount which would otherwise be deducted during a year.[1/]

Upon the understanding that Counsel would recommend and this Board would accept that penalty, the Respondents withdrew their answer to the charge. Counsel has so recommended. We determine that the recommended penalty is a reasonable one and will effectuate the policies of the Act.

WE ORDER that the dues and agency shop fee deduction rights of the Yonkers Non-Teaching Unit, Local 860, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO and Local 860, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO and Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO be suspended, commencing on the first practicable date, and continuing for such period of time during which twenty-five percent (25%) of their annual agency shop fees, if any, and dues would otherwise be deducted. Thereafter, no

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[1/]This penalty is based upon the conduct of Yonkers Non-Teaching Unit, Local 860, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO and is intended to be the equivalent of a three-month suspension of privileges of dues and agency shop fee deductions, if any, if such were withheld in twelve monthly installments.

dues or agency shop fees shall be deducted on their behalf by the Yonkers City School District until the Respondents affirm that they no longer assert the right to strike against any government as required by the provisions of CSL §210.3(g).

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ALBANY AIRPORT PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 3337, IAFF, AFL-CIO-CLC,

Petitioner,

-and-

CASE NO. C-3795

COUNTY OF ALBANY,

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 Albany Airport Professional Firefighters Association, Local 3337, IAFF, AFL-CIO-CLC 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: Albany County Airport aircraft rescue firefighters, including crew chiefs.

Excluded: Chief of the fire department and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Albany Airport Professional Firefighters Association, Local 3337, IAFF, AFL-CIO-CLC. 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: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Petitioner,

- and -

CASE NO. C-3805

TOWN OF DOVER,

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 Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Foreman, Mechanic, Heavy Equipment Operator, Driver and Laborer.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 317, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3825

TOWN OF NEW HAVEN,

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 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Motor Equipment Operators,

Excluded: All Clerical, Personnel, Office Personnel, Guards and Supervisors.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: August 14, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

#5A-8/14/91

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
50 WOLF ROAD
ALBANY, NEW YORK 12205-2670

August 14, 1991

Marvin E. Johnson
1221 Smith Village Road
Silver Springs, MD 20904

Dear Mr. Johnson:

I am pleased to inform you that the Board at its August meeting appointed you to its grievance arbitration panel. Consistent with our discussions and agreements at the July 16 meeting at the Rochester office of the Division, please copy me on your withdrawal of case 6-B-R-88-129033.

Very truly yours,

John M. Crotty
Deputy Chairman and Counsel

JMC:cw

cc: Forest Cummings, Jr.
Pauline Kinsella
Richard Curreri

MARVIN E. JOHNSON

ACCORMEND ASSOCIATES

CONFLICT RESOLUTION SERVICES
(716) 482-2857

49 ALVORD STREET
ROCHESTER, NY 14609

August 26, 1991

Forest Cummings, Jr.
Regional Director
N.Y. State Division of Human Rights
259 Monroe Avenue
Rochester, New York 14607

Re: Johnson v. PERB
Case No. 6-B-R-88-129033

Dear Mr. Cummings:

By letter dated August 14, 1991, John M. Crotty, Deputy Chairman and Counsel for the New York State PERB, informed me that the PERB appointed me to its grievance arbitration panel.

Persuant to my agreement with Mr. Crotty and Executive Director Rosemarie V. Rosen, representatives for the PERB, I hereby withdraw my complaint in the above referenced case.

Sincerely yours,

Marvin E. Johnson
Mediator/Arbitrator

cc: John M. Crotty