

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**SYRACUSE FIRE FIGHTERS ASSOCIATION,
LOCAL 280, IAFF, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-3839

CITY OF SYRACUSE,

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 Syracuse Fire Fighters Association, Local 280, IAFF, 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: Fire Deputy Chiefs,

Excluded: Chief of Fire and First Deputy Chief of Fire.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Syracuse Fire Fighters Association, Local 280, IAFF, 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: December 3, 1991
Albany, New York

Pauline R. Kinsella
Pauline R. Kinsella, Chairperson

Walter L. Eisenberg
Walter L. Eisenberg, Member

Eric J. Schmertz
Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AFSCME NEW YORK COUNCIL 66, LOCAL 930,
(BLUE COLLAR EMPLOYEES' UNION),

Charging Party,

- and -

Case Nos. U-9855 &
U-10927

ERIE COUNTY WATER AUTHORITY,

Respondent.

JOEL POCH, ESQ., for Charging Party

ROBERT J. LANE., ESQ., and RICHARD D. KRIEGER, ESQ.,
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by AFSCME New York Council 66, Local 930 (Blue Collar Employees' Union) (AFSCME) and the Erie County Water Authority (Authority) to a decision by an Administrative Law Judge (ALJ).

AFSCME's first charge (U-9855) alleges that the Authority violated §209-a.1(a), (b), (c) and (d) of the Public Employees' Fair Employment Act (Act) by the following acts:

1. Instituting Civil Service Law (CSL) §75 charges against Frank Max, AFSCME unit president, and Randy Burgwardt, AFSCME safety officer, in retaliation for a statement by Max on October 19, 1987 that AFSCME intended to file an improper practice charge against the Authority;

2. Directly dealing with unit employees regarding the CSL §75 charges which had been filed against them by the Authority;

3. Coercing unit employees into dropping their opposition to the CSL §75 charges and interfering with their right to a hearing;

4. Surveillance Max at work;

5. Threatening Max for his protected activities;

6. Refusing AFSCME's demand for statements by two employees waiving their right to a hearing on the CSL §75 charges filed against them by the Authority;

7. Refusing to reemploy Max and Burgwardt after the CSL §75 proceedings had ended because of their protected activities;

8. Limiting access to Authority property by Max and Burgwardt, who were seeking to conduct union business;

9. Threatening Chris Mulhern, an AFSCME steward; and

10. Making unilateral changes in investigatory interview procedures.

Under its second charge (U-10927), AFSCME alleges that the Authority violated §209-a.1(a) and (c) of the Act by determining to discharge Max and Burgwardt.

In a lengthy and detailed decision rendered after several days of hearing, the ALJ dismissed all of AFSCME's allegations except those numbered 6, 9, and parts of 10.

The ALJ dismissed allegations numbered 1 and 7 and the entirety of the second charge on a finding that AFSCME had not

established that the Authority brought CSL §75 charges against Max and Burgwardt and then discharged them because of their protected union activity.

She dismissed the second numbered allegation on a finding that two employees (John Yonkosky and Dominic Fioretti) had constructively dismissed AFSCME as their representative on the CSL §75 charges and had approached the Authority on their own, without threat or promise by the Authority, to try to settle the CSL charges. She dismissed the "direct dealing" charge as it applied to Burgwardt on a finding that it was Burgwardt who approached the Authority's agent to discuss the CSL §75 charge, that AFSCME did not have exclusive control over Burgwardt's CSL §75 proceeding and that the Authority's agent had been led to believe that Burgwardt wanted to speak about the CSL §75 charges with the Authority directly.

The third and fourth numbered allegations were dismissed by the ALJ for lack of proof.

The fifth numbered allegation was dismissed by the ALJ because any statement made about hurting Max financially was not made in relation to an exercise by him of his statutorily protected rights.

The ALJ held that the Authority violated §209-a.1(d) of the Act as stated in the sixth numbered allegation when it refused to give AFSCME copies of Yonkosky's and Fioretti's waiver statements. The ALJ found that the demand was properly made, that AFSCME needed the documents to verify that it no longer had

to represent the two employees on the CSL §75 charges, that the CSL §75 procedures arose under and were part of AFSCME's contract with the Authority and that the two employees were unlikely to provide the waiver statements to AFSCME based upon their conduct with both the Authority and AFSCME.

The ALJ dismissed the eighth numbered allegation on a finding that Max and Burgwardt were not barred from the Authority's premises for any improper reason and that they otherwise had no statutory right to access during their suspension from work because union business was and could have been conducted notwithstanding their absence.

The ALJ found a violation of §209-a.1(a) of the Act under the ninth numbered allegation. She concluded that Mulhern had been told by an agent of the Authority that the Authority was watching him and that they were out to get him because he was a union steward and an ally of Max.

With respect to the last numbered allegation, the ALJ held that the Authority violated §209-a.1(d) of the Act by failing to notify the employees or AFSCME of the nature of the Authority's investigation and by failing to permit employees to consult privately with AFSCME representatives prior to their interrogation. She dismissed, however, allegations regarding the use of stenographers and AFSCME's participation during the investigatory interview because there was insufficient proof of a change in practice.

AFSCME alleges in its exceptions that the ALJ erred when she dismissed the several specifications of the charges as noted. AFSCME argues that the record reflects a pattern of improperly motivated actions by the Authority against known union activists which greatly interfered with their exercise of protected rights. The Authority argues conversely that the record is inadequate to sustain the violations the ALJ found against it, although the Authority believes that the record otherwise supports the balance of her decision. The Authority also excepts to the notice the ALJ ordered posted as overly broad regarding the demand for the employees' waiver statements and as otherwise inappropriate because no violation of the Act should have been found in any respect.

Having reviewed the record and the parties' exceptions, we affirm the ALJ's decision upon the grounds stated therein. We find the ALJ's findings of fact and conclusions of law, many of which stem from specific credibility findings which we have no reason to question or disturb, to be internally consistent, well supported and correct in all material respects. To whatever extent certain of her findings differ from those made by a hearing officer under the CSL §75 charges filed against Max and Burgwardt, those differences stem from inherent distinctions in the two types of proceedings and the dissimilar factual records which have been developed as a result.

For the reasons set forth above, the ALJ's decision and order is affirmed as modified^{1/} and AFSCME's and the Authority's exceptions are dismissed.

In accordance with the ALJ's decision as affirmed, IT IS, THEREFORE, ORDERED that:

1. The Authority shall notify unit employees or AFSCME of the nature of any investigatory interview before questioning any unit employee and will permit the unit employee to consult privately with an AFSCME representative before questioning the employee;
2. The Authority shall provide AFSCME upon demand with information necessary for AFSCME to fulfill its duty under the Act to represent bargaining unit employees;
3. The Authority shall not surveille, threaten or punish Chris Mulhern or any other unit employee because the employee is an AFSCME official.

^{1/}We have deleted on our own motion that part of the ALJ's order which requires the Authority to negotiate in good faith regarding changes in investigatory procedures in keeping with our belief that such orders are unnecessary and inappropriate in unilateral change cases. See Middle Country Cent. School Dist., 23 PERB ¶3045 (1990); City of Buffalo, 23 PERB ¶3050 (1990).

4. The Authority shall sign and post notice in the form attached in all locations ordinarily used to post notices of information to unit employees.

DATED: December 3, 1991
Albany, New York

Pauline R. Kinsella
Pauline R. Kinsella, Chairperson

Walter L. Eisenberg
Walter L. Eisenberg, Member

Eric J. Schmertz
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 the employees of the Erie County Water Authority (Authority) in the unit represented by AFSCME New York Council 66, Local 930 (Blue Collar Employees' Unit) (AFSCME) that:

1. The Authority shall notify unit employees or AFSCME of the nature of any investigatory interview before questioning any unit employee and will permit the unit employee to consult privately with an AFSCME representative before questioning the employee;
2. The Authority shall provide AFSCME upon demand with information necessary for AFSCME to fulfill its duty under the Act to represent bargaining unit employees;
3. The Authority shall not surveille, threaten or punish Chris Mulhern or any other unit employee because the employee is an AFSCME official.

.....ERIE COUNTY WATER AUTHORITY.....

Dated.....

By.....
(Representative) (Title)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CLARKSTOWN TEACHERS ASSOCIATION,
NEW YORK STATE UNITED TEACHERS,

Charging Party,

- and -

Case No. U-11333

CLARKSTOWN CENTRAL SCHOOL DISTRICT,

Respondent.

JEFFREY R. CASSIDY, for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Clarkstown Central School District (District) to a decision by an Administrative Law Judge (ALJ). The ALJ held that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) as alleged by the Clarkstown Teachers Association, New York State United Teachers (Association), when it unilaterally implemented a smoking policy which prohibits smoking in all District buildings. The ALJ found that unit employees had previously been permitted to smoke, inter alia, in teacher lounges and employee cafeterias and that the smoking ban was implemented without prior negotiations with the Association. He

also held that the smoking ban was mandatorily negotiable^{1/} and that the District's duty to bargain under the Act was not superseded by any provisions of local law or the local Commissioner of Health's threatened enforcement thereof. The ALJ also refused to consider a contractual waiver defense because it was not raised in the District's answer.

In its exceptions, the District argues that it did negotiate the smoking policy with the Association prior to its implementation, that it had a compelling need to adopt the smoking ban when it did and that the ALJ erred by not considering the merits of its waiver defense. The Association argues in response that the ALJ's decision is correct in all respects and should be affirmed.

For the following reasons, we affirm the ALJ's decision.

The District's first two arguments misconstrue its duty to bargain in the context of an implementation of a unilateral change in a mandatory subject of bargaining. An employer does not satisfy its duty to bargain, even assuming it otherwise bargains in good faith, by simply meeting with the representatives of its employees to discuss a proposed change in a mandatory subject of negotiations. We have in prior cases identified the specific conditions which must be satisfied before an employer may be permitted to act unilaterally regarding a

^{1/}We held aspects of a smoking ban to be mandatorily negotiable most recently in Oneonta City School Dist., 24 PERB ¶3025 (1991), and Newark Valley Cent. School Dist., 24 PERB ¶3037 (1991) (appeal pending).

mandatory subject of negotiations. A unilateral change in a mandatory subject of negotiations may be permitted if there exists a compelling operational need to change the status quo at the time the change is made provided the employer has first bargained the change to impasse and the employer indicates its willingness to bargain the change thereafter.^{2/} In this case, the District admittedly did not bargain to impasse on a smoking ban. Moreover, although it may have had some need to adopt a smoking policy by a date certain, we find no requirement of any kind under State or local law for that policy to embrace an absolute smoking ban throughout all of the District's buildings. Having satisfied neither of the first two conditions to the privileged implementation of a unilateral change, the District's stated willingness to negotiate the smoking policy after the implementation of the ban is immaterial.

As to the waiver defense, the District first argues that it is encompassed in its second affirmative defense which alleges that PERB has no subject matter jurisdiction over the charge. We disagree. Waiver by contract and lack of jurisdiction are fundamentally different concepts. Lack of jurisdiction is not an affirmative defense and it need not be raised in an answer because jurisdiction relates to our power to hear and decide a case. Waiver, however, affects only the disposition on the

^{2/}Wappingers Central School Dist., 5 PERB ¶3074 (1972); Addison Cent. School Dist., 16 PERB ¶3099 (1983); County of Chautauqua, 22 PERB ¶3016 (1989).

merits of the particular improper practice charge or an issue arising thereunder. Waiver is an affirmative defense which must be raised in the answer if the defense is to be properly considered.^{3/}

The District argues, however, that it could not have raised a contractual waiver defense in its answer because the contract language upon which it relies was not interpreted by an arbitrator until after the hearing before the ALJ. We are not persuaded by this argument. A party is not prevented from raising a waiver defense grounded upon contract language simply because that language has not previously been interpreted by either an arbitrator or a court. We have stated many times in our decisions that we are empowered and required to interpret contracts to whatever extent necessary to decide a waiver issue.^{4/} Therefore, we hold that the District was not excused from an obligation to raise waiver as an affirmative defense in its answer and that the ALJ properly refused to consider that defense.

For the reasons set forth above, the District's exceptions are denied and the ALJ's decision and order is affirmed.

^{3/}See, e.g., New York City Transit Auth. v. PERB, 147 A.D.2d 574, 22 PERB ¶7001 (2d Dep't 1989), motion to amend granted, 156 A.D.2d 689, 23 PERB ¶7002 (2d Dep't 1989).

^{4/}See, for example, then Member Crowley's dissent in Town of Orangetown, 8 PERB ¶3042 (1975), which the full Board subsequently adopted in St. Lawrence County, 10 PERB ¶3058 (1977).

THEREFORE, IT IS ORDERED that the District rescind its smoking policy insofar as it applies to employees in the Association's unit to the extent that the smoking policy is more restrictive than the minimum requirements of the State's Clean Indoor Air Act^{5/} and that the District sign and post notice in the form attached in all locations ordinarily used to post notices of information to unit employees.

DATED: December 3, 1991
Albany, New York

Pauline R. Kinsella
Pauline R. Kinsella, Chairperson

Walter L. Eisenberg
Walter L. Eisenberg, Member

Eric J. Schmertz
Eric J. Schmertz, Member

5/ N.Y. Pub. Health Law, Art. 13-E (McKinney 1990).

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 of the Clarkstown Central School District (District) in the bargaining unit represented by the Clarkstown Teachers Association, New York State United Teachers (Association), that the District will rescind its smoking policy insofar as it applies to employees in the Association's unit to the extent that the smoking policy is more restrictive than the minimum requirements of the State's Clean Indoor Air Act.

CLARKSTOWN CENTRAL 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

NEW YORK STATE COURT CLERKS ASSOCIATION,

Charging Party,

- and -

Case No. U-11420

STATE OF NEW YORK (UNIFIED COURT SYSTEM),

Respondent.

SHEA & GOULD (EVE I. KLEIN of counsel), for Charging Party
HOWARD A. RUBENSTEIN, ESQ. (LEONARD R. KERSHAW of counsel),
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York - Unified Court System (Court System) to a decision by an Administrative Law Judge (ALJ). The ALJ held after hearing that the Court System violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it conditioned the promotion of two officers of the New York State Court Clerks Association (Association) on the officers' relinquishment of their full-time employee organization leave (EOL).

Martin Meaney and Robert Olivari are vice-presidents of the Association who have been on full-time EOL for several years. Each was promoted in 1989 from Senior Court Clerk to the title of Associate Court Clerk. Meaney's and Olivari's appointment letters stated that they were required to serve a probationary period of between 12 and 52 weeks pursuant to the rules of the Chief Judge. By happenstance, Howard A. Rubenstein, the Court

System's Director of Employee Relations, learned after Meaney's and Olivari's promotion that they remained on full-time EOL and were not serving in their promotional positions. He then met with Jonathan Lippman, the Court System's Deputy Chief Administrator for Management Support, Michael Colodner, the Court System's Counsel, and Amy Vance, Executive Assistant to the Deputy Chief Administrative Judge for the New York City Courts, to discuss the application of the Chief Judge's probationary rules to Meaney and Olivari. At this meeting, it was decided, on Rubenstein's recommendation, that Meaney and Olivari must comply with the Chief Judge's rules, and the Chief Clerks of the courts to which Meaney and Olivari were assigned were so instructed.

Meaney and Olivari were then ordered by their Chief Clerks to report to their assigned courts for service of a probationary period. Meaney complied, but Olivari refused and he then reverted to his former position and EOL status.

The Court System has filed lengthy exceptions to the ALJ's decision and a supporting brief. The Association has filed an equally detailed response and brief in opposition to the Court System's exceptions. In general summary, the Court System argues that the ALJ's findings of impropriety are not supported by the record, that she incorrectly shifted the burden of proof from the Association to the Court System and that the remedial order in several parts exceeded PERB's statutory authority. The Association argues that the ALJ's decision is fully supported by the record and that the remedy ordered is plainly within PERB's powers.

We hold that the ALJ's decision must be reversed and the charge dismissed because we find that the facts the ALJ relied upon in her decision do not support her conclusions and inferences.

The ALJ found that neither Meaney nor Olivari would have been required to serve any probationary period at all on their promotion had it not been for their active involvement in the Association. She specifically found that neither Lippman nor Matthew Crosson, Chief Administrator of the Courts, nor any Court System official, other than Rubenstein, had anti-union animus and that only Rubenstein was responsible for the decision to require a period of probationary service of Meaney and Olivari. It is against these findings, which we accept, that the ALJ's decision must be reviewed.

The ALJ's decision makes numerous references to the variability in the length of the probationary terms actually served by employees and differences in the probationary evaluation methodology and identifies an "irregular" implementation of the probationary rules of the Chief Judge. However, we have studied the record in this regard and conclude that, with only a very few exceptions, which were unknown to Rubenstein, all employees have been required to serve some probationary period and have in some manner been evaluated. Service of a probationary period for purposes of evaluation is the norm, not the exception, and we are not persuaded that required adherence to that norm evidences a violation of the Act.

The ALJ also relied upon the fact that two other union officials, one in the Association, the other in a different union, who were then on full-time EOL, did not serve a probationary period when they were promoted several years ago. Given the ALJ's findings that Rubenstein was solely responsible for the decision to require Meaney and Olivari to undergo a probationary period, the other union officers' circumstance is material only if Rubenstein knew about it. That other managers or supervisors within the Court System may have known about the two other union officers' promotion without service of a probationary period is accordingly immaterial. Rubenstein testified that he was unaware of this circumstance. The ALJ did not discredit Rubenstein's testimony in this respect and our own review of the record affords us no basis on which to do so. Therefore, the ALJ's decision that Meaney and Olivari would not have served any probationary period but for their activities on behalf of the Association is not supported by the fact that two other union officers did not serve a probationary period on their promotion several years earlier.

For similar reasons, we do not find support for a violation in the fact that Meany and Olivari were not immediately required to serve a probationary period by their Chief Clerks. Rubenstein did not learn that Meaney and Olivari were continuing on full-time EOL without serving a probationary period until after they had been promoted and he acted to recommend service of a

probationary period consistent with the Chief Judge's rules soon thereafter.

In further support of her conclusion that the application of the probationary rules to Meaney and Olivari was improper, the ALJ cited evidence that employees on other types of leave of absence are not required to serve an immediate probationary period. Employees who are promoted while on a leave of absence to serve in a higher level position for the Court System or employees who are on child care or maternity leave may not be required to return to work immediately to serve a probationary period following a promotion. We do not consider these circumstances, however, to be similar or comparable to those involving EOL. The other leave periods are finite and the employees do not serve in or receive the compensation of the promotional positions during the period of the leave. In contrast, Meaney's and Olivari's EOL is indefinite. Application of the probationary rules to them would be postponed until they no longer held office in the Association, a time frame completely beyond the direction or control of the Court System. During that time, they would be paid the salary of their promotional position and their former positions would be unavailable to other employees for permanent appointments for an indefinite period. Given these differences, we do not believe that the ALJ's decision is properly supported by the fact that employees on certain other types of leaves of absence at the time of their

promotion are not called back immediately to serve a probationary period.

The ALJ's decision also relies upon a finding that articulated workload concerns were a pretext. Although the Court System alleges in its exceptions that it never raised workload as a reason for requiring Meaney or Olivari to serve a probationary period, we find that we need not reach that specific claim. To whatever extent workload was raised as a reason for requiring Meaney or Olivari to serve a probationary period, it was raised by persons other than Rubenstein whom the ALJ did not find to be improperly motivated and whom the ALJ found were not responsible for requiring Meaney's and Olivari's service of a probationary period. There is nothing in the record as we read it to support a conclusion that Rubenstein, who, the ALJ found, was responsible for the decision, made it out of a concern for the Court System's workload. To the contrary, Rubenstein's testimony makes clear that his decision to recommend that Meaney and Olivari serve a probationary period was based on his felt need for compliance with the Chief Judge's rules, not the operational needs of the Court. Rubenstein summarized the entirety of his testimony on the relationship between workload and his decision to recommend compliance with the probationary rules by his statement during the hearing that staffing need was "not the issue that I was concerned with." Therefore, we do not find that workload was properly a factor in the ALJ's decision.

For the same reasons, we also find it irrelevant, to whatever extent accurate, that Meaney's job duties on promotion are the same or similar to those performed by him before his promotion. Rubenstein's recommendation that Meaney and Olivari be required to serve a period of probation was not based upon the job duties of their positions.

Finally, it appears that the ALJ in part based her decision that Olivari and Meaney would not have served any probationary period at all but for their union activities on a finding that they were given a longer probationary period than they might have been given otherwise. Initially, it is unclear to us how the first proposition is established by proof of the second. Leaving that issue aside, however, the record does not establish that Rubenstein fixed the length of either Meaney's or Olivari's probationary period. Rather, the record shows only that Rubenstein recommended service of a probationary period consistent with the Chief Judge's rules. The record does not show that Rubenstein recommended any particular period of probation for either Meaney or Olivari.^{1/} To the contrary, Rubenstein testified that "[t]he length of the probationary

^{1/}On January 1, 1990, new performance evaluation procedures went into effect. Michael Burke, the Chief Clerk for Meaney's assigned court, denied Meaney's request for early termination of his probationary period because of the pendency of those new rules. Neither the ALJ nor we consider Burke's action to support the Association's claim that Meaney was required to serve a probationary period because of his union activities.

period is a discretionary issue which is not within [his] control, purview or consideration."

In conclusion, we are not persuaded by the reasons stated by the ALJ or from our own review of the record that Meaney's or Olivari's activities in or on behalf of the Association caused the Court System to impose a period of probationary service upon them as a condition to their promotion.

For the reasons set forth above, the ALJ's decision and order is reversed.

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

DATED: December 3, 1991
Albany, New York

Pauline R. Kinsella
Pauline R. Kinsella, Chairperson

Walter L. Eisenberg
Walter L. Eisenberg, Member

Eric J. Schmertz
Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DAVID R. LOPEZ, et al.,

Charging Parties,

CASE NO. U-12060

- and -

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondent.

DAVID R. LOPEZ, for Charging Parties

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

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision by the Director of Public Employment Practices and Representation (Director) on an improper practice charge filed by David R. Lopez on behalf of himself and several other excise tax investigators employed by the State of New York in the Petroleum, Alcohol & Tobacco Bureau of the Department of Taxation and Finance. The Director dismissed as deficient the charging parties' improper practice charge against the Civil Service Employees Association, Inc. (CSEA) which alleges that CSEA breached its duty of fair representation in violation of §209-a.2(a) and (b) of the Public Employees' Fair Employment Act (Act). The charging parties allege that CSEA violated the Act by continuing their placement in a negotiating unit represented by CSEA which consists of

employees with whom the charging parties allegedly have no community of interest.

The Director dismissed the §209-a.2(b) allegation because individual employees have no standing to allege the refusal to bargain covered by that subsection of the Act. The Director dismissed the remaining allegation of the charge on the grounds that it was untimely filed because the unit placement was agreed to years ago, that an agreement to the composition of a negotiating unit cannot itself violate the Act, that a bargaining agent is neither required nor empowered to unilaterally alter the composition of an existing unit at the request of employees and that the charge did not otherwise evidence any breach of CSEA's duty of fair representation.

Having read the charging parties' exceptions and CSEA's response, we affirm the Director's decision for the reasons stated by him. To those reasons, we would add that the improper practice charge is grounded entirely upon allegations which raise only a question concerning the appropriateness of the existing unit. The statutorily defined improper practices do not cover such questions, which can only be resolved under the representation procedures made available to employees by the Act and our Rules of Procedure. In that regard, we do not make any determination regarding the appropriate unit placement of the excise tax investigators.

For the reasons set forth above, the charging parties' exceptions are denied, and the Director's decision is affirmed.

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

DATED: December 3, 1991
Albany, New York

Pauline R. Kinsella
Pauline R. Kinsella, Chairperson

Walter L. Eisenberg
Walter L. Eisenberg, Member

Eric J. Schmertz
Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GUILDERLAND CENTRAL SCHOOL DISTRICT
UNIT OF THE NATIONAL EDUCATION
ASSOCIATION OF NEW YORK,

Petitioner,

-and-

CASE NO. C-3793

GUILDERLAND CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Guilderland Central School District Unit of the National Education Association of New York has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All transportation, maintenance, custodial and cafeteria employees, including 4-hour per day substitute bus drivers.

Excluded: Maintenance/Transportation Supervisor, Assistant Transportation Supervisor and 2-hour per day substitute bus drivers.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Guilderland Central School District Unit of the National Education Association of New York. 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: December 3, 1991
Albany, New York

Pauline R. Kinsella
Pauline R. Kinsella, Chairperson

Walter L. Eisenberg
Walter L. Eisenberg, Member

Eric J. Schmertz
Eric J. Schmertz, Member