2A- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-3695

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 August 14, 1991,[1/] we determined that the United Food and Commercial Workers, District Union Local 1, AFL-CIO (Petitioner) had been selected by a majority of employees of the Mohawk Valley Nursing Home (Employer) to be the exclusive representative of the following 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.

[1/] 24 PERB ¶3018 (1991).

Accordingly, we certified the Petitioner and ordered the Employer to negotiate with it. Our decision and order was based upon an election in which forty-two votes were cast in favor of representation by the Petitioner and forty-one votes were cast against representation. That tally of ballots reflected a vote cast by an employee, which we had voided by decision dated July 10, 1991.[2/]

The Employer appealed from our certification of the Petitioner on the ground that we had incorrectly voided the employee's ballot. By decision dated December 24, 1992, the Appellate Division, Third Department, held the employee eligible to vote.[3/] Pursuant to the Court's decision, the Director of Public Employment Practices and Representation opened the employee's ballot. The ballot was cast against representation.

The final tally of ballots reflects forty-two votes cast in favor of representation by the Petitioner and forty-two votes cast against representation, with no outstanding challenged ballots. Petitioner, therefore, has not demonstrated majority support within the unit previously described.

[2/]24 PERB ¶3010 (1991). The employee's ballot was voided because she was not employed on the date the ballots in the mail ballot election were counted.

[3/]Mohawk Valley Nursing Home, Inc. v. PERB, ___ A.D.2d ___, 25 PERB ¶7017 (3d Dep't 1992). The Court held the employee eligible to vote because she had mailed her ballot when she was employed.

IT IS, THEREFORE, ORDERED that Petitioner's certification be, and it hereby is, revoked and that the bargaining order be, and it hereby is, rescinded.

DATED: February 24, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2B- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JEFFERSON COUNTY COMMUNITY COLLEGE EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3840

COUNTY OF JEFFERSON and JEFFERSON COUNTY COMMUNITY COLLEGE,

Employer,

-and-

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

Intervenor.

ROBERT D. CLEARFIELD, GENERAL COUNSEL (HAROLD G. BEYER, JR. of counsel), for Petitioner

GEORGE E. MEAD, III, ESQ., for Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Jefferson (County) and the Jefferson County Community College (College) and the Jefferson Local, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by the Director of Public Employment Practices and Representation (Director) on a petition filed by the Jefferson County Community College Educational Support Personnel Association (Association). On the basis of stipulated facts and

offers of proof, the Director found the County and the College to be the joint employer of the noninstructional staff at the College. Accordingly, on the basis of prior decisions,[1/] he fragmented those employees from an existing county-wide unit[2/] which is represented by CSEA. He ordered an election among the College's noninstructional staff in which CSEA and the Association were allowed to participate, on condition, inter alia, that they submit a minimum 30% showing of interest, which each has done.

The County and the College argue in their exceptions that the College is not a separate legal entity which would qualify it as a public employer, joint or otherwise. It argues that our prior decisions in Genesee and Dutchess, and the Director's decision in Niagara, are either wrong in their legal conclusions or are distinguishable on their facts.

CSEA agrees with the County's and the College's exceptions and, in addition, argues that the Director erred in ordering an election, in permitting the Association to participate in an election, assuming one was appropriately ordered, and in subjecting it to a showing of interest requirement.

[1/]Genesee Community College and County of Genesee (hereafter Genesee), 24 PERB ¶3017 (1991); Dutchess Community College (hereafter Dutchess), 17 PERB ¶3010 (1984); Niagara County Community College and County of Niagara (hereafter Niagara), 23 PERB ¶4052 (1990).

[2/]There already is a separate unit of faculty at the College.

The Association argues in response that the Director's decision is correct on the law and the facts and should be affirmed.

Having reviewed the record and considered the parties' arguments, including those made at oral argument, we affirm the Director's decision.

The County's and the College's main arguments were considered in Genesee and Niagara and, to a lesser extent, in Dutchess. We reaffirm those decisions, find them applicable to the facts of this case, and again conclude that a county-sponsored community college is a separate legal entity and a joint employer with the sponsoring county of the employees who work for the community college because control over the terms and conditions of employment of those employees is shared. We also find that the nature of that joint employer relationship is itself sufficient to warrant the fragmentation of a community college's noninstructional personnel.[3/]

The central thesis of the County's and the College's arguments to the contrary is that the College is nothing more than an expert agent of the County for the delivery of a particular service, no different than any other County department. Those arguments, however, are inconsistent with the

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[3/]Our recent decision in County of Nassau, 25 PERB ¶3036 (1992), in which we found an appointed sheriff not to be a joint employer with a county, is not relevant to this case because our conclusion there was dictated by the historically peculiar traits of the employment relationship within a sheriff's department.

status and powers of the College, exercised through its board of trustees, as conferred upon it by regulations[4/] promulgated by the trustees of the State University of New York pursuant to Article 126 of the Education Law. Those regulations recognize the boards of trustees of community colleges to be "legal official bodies corporate."[5/] Those same regulations vest in a community college president and a community college board of trustees broad powers and duties relating to budgets, salary schedules and salaries, personnel appointments, promotions, retention, retrenchment and administration of collective bargaining agreements.[6/]

The County and the College would have us disregard these regulations because they are allegedly inconsistent with provisions of the Education Law. Having examined Article 126 of the Education Law, which covers the establishment, administration and operation of all community colleges, we do not find the regulations to be inconsistent with controlling provisions of the Education Law. To the contrary, the Education Law makes all community college sponsoring arrangements specifically subject to regulations prescribed by the State University of New York trustees.[7/] We find that the regulations properly preserve the

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[4/]N.Y.Comp. Codes R. & Regs. tit. 8(B), parts 600-607.

[5/]N.Y.Comp. Codes R. & Regs. tit. 8(B), §604.2.

[6/]N.Y.Comp. Codes R. & Regs. tit. 8(B), §604.3(b).

[7/]Educ. Law §6302.1 (McKinney 1985).

County's statutory role regarding the establishment, budgeting, financing and auditing of the College. Subject to the general supervision of the State University of New York trustees, the discharge of other duties necessary or appropriate for the effective supervision of a community college are vested in the college's board of trustees and its president.[8/] Moreover, as we observed in Genesee, community colleges are specifically referenced in the Act as public employers having impasse procedures distinct from those applicable to the employees of the county sponsor.[9/] These several provisions readily distinguish a community college from a department head of a county-controlled agency.

That the community college sponsor appoints the majority of the community college's board of trustees[10/] is not dispositive of the identity of the public employer. A sponsor's power to appoint members of a community college board of trustees is not necessarily the power to control the administration of the board of trustees itself. Once appointed, the trustees govern the college as trustees of the governing board, not agents of the sponsor. Other than the power of appointment, the record is

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[8/]Educ. Law §6306 (McKinney 1985 and Supp. 1993).

[9/]Compare Act, §209.3(f) and 209.3(e).

[10/]Educ. Law §6306 (McKinney Supp. 1993).

barren of any indication that the County controls the decision-making of the college's board of trustees.[11/]

It is similarly irrelevant that the County may not have been exercising the full range of its statutory and regulatory powers or performing the full range of its duties under law or rule, even as to collective bargaining or contract administration. It is the power to assert the prerogatives of its status which makes the College a joint employer, not that it has thus far acquiesced in the County's control. In that regard, we view the College simply to have made the County its agent for the performance of certain of its functions.

The County and the College also argue that the College cannot be a public employer because it does not exercise governmental powers, such as the power to tax, to enact general legislation, to take by eminent domain or to exercise police powers. Those, however, are merely indicia of public employer status, taken from North County Library System, decided in 1968.[12/] Cases decided since North County Library System clearly show that it is enough to bestow public employer status upon a county-sponsored community college that it is established and operated pursuant to state law and that its functions and operations are subject to modification by the State Legislature

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[11/]See generally Queens Borough Public Library v. PERB, 64 N.Y.2d 1099, 18 PERB ¶7007 (1985), aff'g 104 A.D.2d 993, 17 PERB ¶7020 (2d Dep't 1984).

[12/]1 PERB ¶399.48 (1968).

and by regulation of the State University of New York Trustees.[13/]

The County's and the College's remaining arguments, including those centering on the admitted status of a regional community college as a public employer,[14/] are covered by the discussions in Genesee, Dutchess and Niagara, which are applicable here and with results that continue to be controlling.

Having affirmed the Director's decision to fragment the noninstructional employees who work at the College on the basis of the joint employer relationship,[15/] we come to CSEA's exceptions. As noted, the Director ordered an election and allowed the Association to move to intervene for placement on the ballot pursuant to §201.9(h)(1) of our Rules of Procedure. In ordering that election, the Director required CSEA to submit a showing of interest.

[13/]University of the State of New York v. Newman, ___ A.D.2d ___, 25 PERB ¶7005 (3d Dep't 1992); State of New York (Insurance Dep't Liquidation Bureau) v. PERB, 20 PERB ¶7021 (Sup. Ct. Albany Co. 1987), aff'd, 146 A.D.2d 961, 22 PERB ¶7008 (3d Dep't 1989). Like the entities in those cases, community colleges are ultimately politically accountable to various governments.

[14/]Educ. Law §6310.12 (McKinney 1985). We believe this statutory provision, extending public employer status to a regionally-sponsored community college, to have been intended to assure application of the public employer status already extended to community colleges established and operating under other sponsoring arrangements. There is no basis to conclude that the Legislature intended some community colleges to be covered employers but not others.

[15/]The basis for fragmentation makes it unnecessary to consider the Employer's argument that the existing unit would not otherwise be appropriately fragmented.

CSEA argues that under Evangelisto v. Newman,[16] it, as the former representative of the College's noninstructionals, continues as a matter of right as the bargaining agent for the noninstructional unit at the College because the Association's petition was for decertification only.

The issue in Evangelisto, however, was whether employees, following fragmentation from a bargaining unit, were entitled under §209-a.1(e) of the Act to a continuation of the terms of the contract which had been applicable to them before their fragmentation. There was no representation question present in Evangelisto as there is here. Therefore, we do not find Evangelisto to control or influence a disposition of the representation question which is raised by the petition in this case and hold that the Director correctly decided that CSEA did not, as a matter of right, continue as the bargaining agent for the fragmented employees.

CSEA argues alternatively that if an election is appropriate to decide the representation question, then at least the Association should not be allowed to participate in that election because its petition was for decertification only. For this, CSEA relies upon our decision in Mineola Union Free School District.[17] In that case, we denied an alter-ego union permission to intervene in a representation proceeding because

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[16]19 PERB ¶7021 (Albany Co. Sup. Ct. 1986).

[17]20 PERB ¶3001 (1987).

the pending petition was for simple decertification of a bargaining agent within an existing unit. The Director distinguished Mineola[18/] because this case involves the creation of a new bargaining unit. The creation of a new bargaining unit involves circumstances materially different from those in Mineola. Here, having formed a new unit, and having decided that an election was appropriate to determine the representative for that unit, the Director properly permitted the Association to intervene for placement on the ballot in that upcoming election. The privilege afforded the Association in that respect is no different from that which would have been afforded to any union. The Association's request for placement on the ballot was consistent with our Rules, not a circumvention of them as was the circumstance in Mineola. Therefore, we hold that the Director properly distinguished Mineola.

CSEA argues lastly that it should have been exempted from a requirement to submit a showing of interest as a condition to its participation in an election among the College's noninstructional staff because it previously represented them in a county-wide unit. CSEA's status as bargaining agent for the County employees, however, affords it no special privileges as to other units. CSEA might not have enjoyed any support among the

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[18/]The Director, however, on the basis of Mineola, denied the Association's request to convert the petition, which was being processed only as a petition for decertification, to one for certification as the exclusive representative for the noninstructional employees at the College.

noninstructional staff at the College at any time and still have been their representative so long as they remained within the unit of County employees. It is, in part, for this reason that only those organizations which are the recognized or certified representative of the employees in the unit found to be appropriate are exempt under our Rules from the requirement to submit a showing of interest.[19/] Once the noninstructional staff were fragmented from the existing unit, there was no bargaining agent for that new unit, and it was appropriate under our existing Rules and decisions for CSEA to be required to submit the same 30% showing of interest from among the employees in the new unit as would be required of any other union seeking to participate in an election.

For the reasons set forth above, we deny CSEA's and the County's exceptions, affirm the Director's decision, and remand the case to the Director for the conduct of an election as ordered.

DATED: February 24, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[19/]Rules of Procedure, §201.9(h)(1).

2C- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, GREENE COUNTY LOCAL 820, CAIRO-DURHAM CENTRAL SCHOOL DISTRICT UNIT,

Charging Party,

-and-

CASE NO. U-12449

CAIRO-DURHAM CENTRAL SCHOOL DISTRICT,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (MAUREEN SEIDEL, of counsel), for Charging Party

RUBERTI, GIRVIN & FERLAZZO (JAMES E. GIRVIN 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, Greene County Local 820, Cairo-Durham Central School District Unit (CSEA) to a decision by an Administrative Law Judge (ALJ). CSEA's charge alleges that the Cairo-Durham Central School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it subcontracted its cafeteria operation.

We had earlier remanded[1/] this case to the ALJ for consideration of the negotiating history of Article XXII of the

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[1/] 25 PERB ¶3052, remanding 25 PERB ¶4521 (1992).

parties' contract,[2/] which the District alleges gives it the right to subcontract the cafeteria operation. Following that remand, the ALJ traced the relevant negotiating history and he concluded, after crediting the District's witnesses, that the parties had agreed to permit the District to run its cafeteria operation under a private subcontract. Accordingly, he dismissed the charge. This appeal is from that determination.

CSEA argues in its exceptions that we should reconsider our earlier decision and disregard any testimony about the negotiating history or intent of Article XXII. CSEA also argues that the ALJ erred in finding that the parties agreed to permit the subcontracting of the cafeteria operation.

The District argues in response that our remand of the ALJ's earlier decision was correct. On the merits, the District argues that the ALJ's decision is correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision.

[2/]Article XXII of the parties' contract provides:

> Salary increases given to the cafeteria workers are dependent upon the cafeteria operating at a profit without any increase in the cost of lunches to the students attributable to salaries. In the event that the cafeteria fails to operate at a profit during any calendar month of the school year, the Board of Education reserves the right to close the cafeteria and lay off the employees or to lay off any number of employees so as to maintain the cafeteria at a self-sustaining basis.

CSEA's arguments regarding application of the parol evidence rule are not materially different from those presented for our consideration on review of the ALJ's first decision. We find no greater reason to accept them on this second appeal. Therefore, the ALJ's consideration of negotiating history was both required and permitted under our prior decision and order, which we reaffirm.

In dismissing the charge, the ALJ found that there was an agreement permitting the District to subcontract the cafeteria operation. In finding that agreement, the ALJ concluded that the actions which were taken and the statements which were made in conjunction with the negotiation of Article XXII established the exchange of mutual promises necessary to the formation of an agreement[3/] to subcontract. The ALJ's decision in this respect rests substantially upon credibility resolutions which are consistent with the record. Having acted within the scope of the rights afforded it by the contract, the District obviously cannot have acted unilaterally in subcontracting the cafeteria operation. It follows necessarily that CSEA's unilateral change allegations must be dismissed.

For the reasons set forth above, CSEA's exceptions are denied and the ALJ's decision on remand is affirmed.

[3/]Act §201.12.

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

DATED: February 24, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2D- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 694, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12669

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (ROBERT T. DeCATALDO of counsel), for Charging Party

NORMA MEACHAM, ESQ. (ANDREA R. LURIE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Local 694, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed CSEA's charge against the State of New York - Unified Court System (State-UCS) which alleges that the State-UCS violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it issued a memorandum to court reporters assigned to the Court of Claims, announcing that it would no longer provide them with certain supplies or maintain or repair certain of their equipment. In dismissing the charge, the ALJ held that the State-UCS was entitled to rely upon

the clear terms of a 1984-87 Page Rate Agreement[1/] under which it "shall not provide any equipment or supplies except stenographic machine packets". Therefore, notwithstanding a more generous,[2/] inconsistent practice, which was followed by the State-UCS during the term of the Page Rate Agreement, and for approximately one year after its expiration on June 30, 1987, the ALJ concluded that the State-UCS was privileged to revert unilaterally to the terms of the Page Rate Agreement. The ALJ then dismissed the charge because the June 1991 memorandum is consistent with the terms of the Page Rate Agreement.

CSEA excepts only to the ALJ's conclusion of law, contending that the expiration of the Page Rate Agreement denied the State-UCS any right of reversion to its terms. As such, CSEA maintains that the State-UCS was required to continue its more generous past practice regarding court reporters' supplies and equipment.

The State-UCS argues in response that the ALJ's decision is correct as a matter of law, logic and labor relations policy and should be affirmed.

Having reviewed the record and the parties' arguments, we affirm the ALJ's decision.

[1/]The Page Rate Agreement is a contract separate from the parties' main collective bargaining agreement. The parties are still in negotiations for a successor to the Page Rate Agreement.

[2/]Until June 28, 1991, unit employees received from the State-UCS all supplies necessary for the production of transcripts furnished to it.

In Maine-Endwell Central School District[3/] (hereafter Maine-Endwell), we held that an employer was privileged to revert to the terms of its collective bargaining agreement notwithstanding an inconsistent past practice. Our theory was that having reached an agreement on a subject matter, that agreement, not any practice with respect thereto, fixed and controlled the terms and conditions of employment. In effect, despite the reversion from practice to the contract terms, the status quo was nonetheless maintained.

Although accepting the premise of Maine-Endwell, CSEA argues that it should not apply after the contract expires. According to CSEA, after contract expiration, but not before, it has a right with respect to any particular subject to elect continuation of either the term of the contract or the employer's more generous practice. We do not agree, however, that the Act effects this one-sided result. We do not believe Maine-Endwell to have been wrongly decided nor do we find it inapplicable in circumstances in which the contract has expired. In that latter respect, we cannot discern any persuasive relationship between a contract's expiration and the theory upon which Maine-Endwell rests.

In addition to the reasons advanced by the ALJ, we believe a dismissal of CSEA's charge is warranted when consideration is given to an employer's obligations under §209-a.1(e) of the Act.

[3/]15 PERB ¶3025 (1982), aff'g 14 PERB ¶4625 (1981).

Section 209-a.1(e) of the Act requires an employer to continue all terms of an expired agreement with certain exceptions not here applicable. The Page Rate Agreement in this case is plainly an agreement within the meaning of §209-a.1(e). Thus, the State-UCS was obligated to continue its terms. CSEA, however, would make unlawful under §209-a.1(d) of the Act that which it could require under §209-a.1(e) by a proper and timely charge. We consider this a paradoxical and illogical result which should be avoided in our interpretation of an employer's statutory status quo obligation. It is avoided easily by recognizing that it is the parties' specific agreements, whether within or without their stated duration, which express the status quo and define the terms and conditions of employment which must be continued for purposes of both §209-a.1(d) and (e) of the Act. By this, an employer remains duty bound, absent applicable defense, to continue all terms of an expired agreement, but it does not otherwise violate the Act by doing so. Similarly, a union continues its entitlement to the benefits of its last negotiated agreement on a particular subject, but not to practices inconsistent with that agreement.

In summary, we hold that Maine-Endwell applies both during and after contract expiration.[4/] Therefore, the State-UCS did

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[4/]Our holding makes it unnecessary to determine whether the Page Rate Agreement is still in effect, notwithstanding its stated expiration, under Ass'n of Surrogate's and Supreme Court Reporters v. State of New York, 79 N.Y.2d 39, 25 PERB ¶7502 (1992).

not violate the Act as alleged when it insisted upon compliance with the terms of its Page Rate Agreement despite a contrary practice. For the reasons set forth above, CSEA's exceptions are denied and the ALJ's decision is affirmed.

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

DATED: February 24, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2E- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WAPPINGERS FEDERATION OF WORKERS, NYSUT/AFT,

Charging Party,

-and-

CASE NO. U-12914

WAPPINGERS CENTRAL SCHOOL DISTRICT,

Respondent.

WALTER T. FULTS, for Charging Party

RAYMOND G. KRUSE, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Wappingers Central School District (District) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) on a charge filed against the District by the Wappingers Federation of Workers, NYSUT/AFT (Federation). As relevant to these exceptions, the Assistant Director held that the District had refused the Federation's demand to negotiate the impact of a unilaterally imposed directive requiring unit employees to fill out certain time sheets at the end of the workday in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act).[1/]

[1/]The charge also complained about the unilateral imposition of the requirement and a refusal to bargain on demand the decision to require the time sheets. The Assistant Director dismissed the former allegation for lack of jurisdiction because the requirement arguably violated the parties' collective bargaining agreement. He dismissed the latter allegation because there is no duty to bargain regarding a work rule requirement already addressed by the parties' contract. No exceptions have been filed to these aspects of the Assistant Director's decision.

The District argues on appeal that the impact bargaining allegation should have been dismissed pursuant to its motion to dismiss for lack of jurisdiction or for failure to set forth a prima facie case, which it made after the Federation had rested on direct. It also argues that it satisfied its duty to negotiate the impact of its directive by meeting with the Federation's grievance chairperson, Peter Borzi, and by subsequently changing the time sheets. The Federation has not responded to the District's exceptions.

Having reviewed the record and considered the District's arguments, we affirm the Assistant Director's decision.

The District's motion to dismiss is not reasonably read to embrace the impact bargaining allegation. The motion, as we view it, is limited to the unilateral change and decisional bargaining allegations, both of which the Assistant Director dismissed. Even were we to read the motion to dismiss more broadly, dismissal of the impact bargaining allegation pursuant to that motion would not be correct. The District's alleged refusal to bargain the impact of the time sheets did not raise any arguable violation of the parties' contract which would have necessitated a jurisdictional dismissal pursuant to §205.5(d) of the Act. Additionally, there was evidence sufficient to withstand a motion to dismiss submitted on the Federation's direct case because the record shows the Federation's demand to bargain impact and the District's arguable noncompliance.

The impact bargaining demand was made by Joseph LaCicero, the Federation's president, to John Marmillo, the District's Assistant Superintendent for Personnel. Marmillo told LaCicero that George Foster, the District's Director of Facilities and Operations, who had issued the directive in issue, would meet with him. Foster never did. Instead, unbeknownst to LaCicero, Foster met with Borzi to discuss "problems" caused by the time sheets. Even assuming, as the District argues, that Foster was empowered to negotiate on behalf of the District, we have nothing to establish that Borzi was the Federation's agent for impact bargaining or that he was otherwise empowered to bargain on behalf of the Federation. As noted, LaCicero did not even know of the meeting between Foster and Borzi. Foster's meeting with Borzi might be loosely characterized as a meeting to adjust grievances, for which purpose Borzi might have been empowered by virtue of his position as grievance chairperson. A grievance discussion, however, is not synonymous with impact bargaining and it does not satisfy a particularized demand to bargain regarding a subject area. Minimally, the District owed LaCicero, or other authorized agent of the Federation, notice that the grievance meeting with Borzi was intended as its response to LaCicero's demand for impact bargaining. That notice would have permitted the Federation to either withdraw its bargaining demand as appropriate or to delineate its impact proposals. In summary, and as the Assistant Director concluded, the record does not show

that any impact negotiations were ever had or intended by the District regarding the time sheets.

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

IT IS, THEREFORE, ORDERED that the District negotiate the impact of its mandated use of "daily time sheets" and sign and post notice in the form attached at all locations normally used to post written communications to unit employees.

DATED: February 24, 1993
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 employees of the Wappingers Central School District (District) in the unit represented by the Wappingers Federation of Workers, NYSUT/AFT (Federation) that the District will negotiate the impact of its mandated use of "Daily Time Sheets".

WAPPINGERS CENTRAL SCHOOL DISTRICT

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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.

2F- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUFFOLK EDUCATIONAL LOCAL 870, CIVIL SERVICE EMPLOYEES ASSOCIATION, AFSCME, LOCAL 1000, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12938

BOARD OF COOPERATIVE EDUCATIONAL SERVICES, THIRD SUPERVISORY DISTRICT, SUFFOLK COUNTY,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ and STEVEN A. CRAIN of counsel), for Charging Party

INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER, REICH & SCRICCA (JOHN H. GROSS and NEIL M. BLOCK of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Suffolk Educational Local 870, Civil Service Employees Association, AFSCME, Local 1000, AFL-CIO (CSEA) and cross-exceptions filed by the Board of Cooperative Educational Services, Third Supervisory District, Suffolk County (BOCES) to a decision by an Administrative Law Judge (ALJ). CSEA alleges in its charge that BOCES violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it refused to pay a salary increment to

certain teacher aides contrary to an established past practice and the terms of an expired collective bargaining agreement.[1/]

After hearing, the ALJ dismissed the §209-a.1(d) allegation for lack of jurisdiction pursuant to §205.5(d) of the Act. In that respect, he concluded that Association of Surrogates and Supreme Court Reporters v. State of New York[2/] (hereafter Surrogates II) kept the parties' contract in effect beyond its stated expiration date. Having determined that the contract was still in effect, the ALJ held that we were divested of jurisdiction over the §209-a.1(d) allegation which is grounded upon a failure to continue a mandatory subject of negotiation covered by the contract. He held, however, that CSEA had stated a cause of action within our jurisdiction under §209-a.1(e) of the Act. In that respect, the ALJ held that Surrogates II was not intended to divest us of jurisdiction over alleged violations of §209-a.1(e) because that result would frustrate the very purpose of that subsection of the Act. The ALJ dismissed the §209-a.1(e) allegation, however, on a finding that CSEA does not represent the employees whom it alleges are owed a salary

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[1/]The contract term allegedly violated is Article XX, Salary which provides, in relevant part, as follows: "There will be a uniform anniversary date of July 1 for all placement and advancement purposes."

[2/]79 N.Y.2d 39, 25 PERB ¶7502 (1992). In that case, the Court of Appeals held that State Finance Law §200(2-b), which effected a five-day lag payroll upon nonjudicial employees of the Unified Court System, was unconstitutional because it impaired the union's collective bargaining agreement in violation of the contract clause of the Federal Constitution (U.S. Const., Art. 1, §10, Cl. 1).

increment. The ALJ used this same finding of fact as an alternative basis for dismissal of the §209-a.1(d) allegation.

CSEA argues in its exceptions that the ALJ erred in finding that it did not represent the employees in issue. It argues also that the ALJ's jurisdictional dismissal of the §209-a.1(d) allegation is wrong because it reflects an incorrect interpretation of Surrogates II. BOCES argues in its exceptions that the ALJ also should have dismissed the §209-a.1(e) allegation because Surrogates II precludes there being the "expired agreement" necessary to state a cause of action under that subsection of the Act.[3/] It otherwise supports the ALJ's findings and his dismissal of the charge.

Having reviewed the parties' arguments, including those at oral argument,[4/] we affirm the ALJ's dismissal of the charge. In doing so, we do not reach what the ALJ characterized as jurisdictional determinations regarding the §209-a.1(d) and (e) allegations. The ALJ's finding that CSEA does not represent summer employees, akin to a determination on standing, is as much a threshold question as is the effect of Surrogates II upon improper practice charges filed under §209-a.1(d) and (e) of the Act. By affirming on the ALJ's finding of fact on this threshold

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[3/]Section 209-a.1(e) of the Act makes it an improper practice for a public employer "to refuse to continue all the terms of an expired agreement until a new agreement is negotiated. . . ."

[4/]We granted oral argument to hear the parties' positions on the ALJ's controlling finding of fact, as well as their views on the effect of Surrogates II upon our improper practice jurisdiction.

issue, questions associated with Surrogates II become only incidental to our determination in this case. Given the importance of the questions which are raised by Surrogates II and the possibility of judicial appeal from any order based thereon, we believe that the issues raised by Surrogates II are best decided in a case in which an analysis of the Court of Appeals' decision is necessary to our disposition of the improper practice charge.

We affirm, however, the ALJ's finding that the employees in issue are not in CSEA's unit. CSEA represents a unit of full-time teacher aides who work either ten or eleven months for the BOCES. The BOCES also employs persons to staff its one-month summer school program. Some of those it hires for the summer are teacher aides who work during the regular school year. The record shows that CSEA has never bargained for or otherwise represented any of the summer school employees. CSEA argues nonetheless that the contract terms which apply to the full-time unit employees inure to their benefit if they are hired for the summer. We do not accept this "spillover" theory of representation.

The parties' contract and practice establish that summer employees, as a class, are presently unrepresented. CSEA has no statutory rights in relevant respect regarding unrepresented employees. We do not consider ten-month and eleven-month teacher aides, who happen to work during the summer in that capacity, or any other, to be in CSEA's unit. The summer hirings by the BOCES

are an act in no way attributable or tied to any individual's employment during the regular school year. Looking at the issue somewhat differently, we do not consider summer work to be unit work of the present bargaining unit. CSEA's unit work in this case is defined by the contract duration of its full-time employees' employment. Therefore, the BOCES' failure to extend a salary increment to any of the summer school teacher aides could not violate any statutory duty owed to CSEA under §209-a.1(d) or (e) of the Act.

For the reasons set forth above, CSEA's exceptions to the ALJ's finding of fact are denied, CSEA's and the BOCES' exceptions in other respects are dismissed, and the ALJ's decision dismissing the charge is affirmed.

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

DATED: February 24, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2G- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

THE COUNTY OF TOMPKINS **CASE NO. S-0011**

for a determination pursuant to CSL §212

BOARD DECISION AND ORDER

On April 21, 1992, the Tompkins County Board of Representatives adopted Resolution No. 141 which repealed an earlier resolution establishing the Tompkins County Public Employment Relations Board. Pursuant to the resolution, all local provisions and procedures pertaining to the Tompkins County PERB were terminated. A notice of termination was published by the Clerk of the Board of Representatives of Tompkins County and copies of the notice were posted for five days and included in a local newspaper advertisement.

We find that the County of Tompkins has fully complied with §203.6 of our Rules of Procedure to terminate a local PERB and we, therefore, determine that our February 21, 1968 order approving the establishment of a local public employment relations board, should be rescinded.

NOW, THEREFORE, WE ORDER that the order of this Board, dated February 21, 1968, approving the resolution establishing the Tompkins County Public Employment Relations Board be, and the same hereby is, rescinded.

DATED: February 24, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2H- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ASSOCIATION OF MUNICIPAL EMPLOYEES,

Charging Party,

-and-

CASE NO. U-10600

COUNTY OF SUFFOLK and SUFFOLK COUNTY POLICE DEPARTMENT,

Respondents.

ROBERT M. ZISKIN, ESQ., for Charging Party

ROBERT J. CIMINO, ESQ. (ANN SMITH COATES of counsel), for Respondents

BOARD DECISION AND ORDER

The Association of Municipal Employees (AME) excepts to an Administrative Law Judge's (ALJ) dismissal of its improper practice charge which alleges that the County of Suffolk and the Suffolk County Police Department (County) violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it refused to hire Winifred Kuhn as a Detention Attendant (attendant) because she engaged in activities protected by the Act.[1/]. The ALJ concluded, after a hearing, that regardless of whether AME had established a prima facie case of interference and discrimination, the County proved that it declined to hire Kuhn because of poor recommendations from two of her former

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[1/]The charge as filed covered three other employees, but it was withdrawn as to them after they were offered employment with the County. The attendant title is in the unit represented by AME.

employers and unfavorable information about her received from her neighbors. Finding that Kuhn's protected activities did not cause her to be denied employment as an attendant, the ALJ dismissed the charge.

AME has filed many objections to the ALJ's decision which focus on the ALJ's credibility findings and the ALJ's analysis of the record evidence. The County has not filed a response. Having reviewed the record and considered AME's arguments, we deny the exceptions and affirm the ALJ's decision.

Kuhn previously worked for the County as a per diem Precinct Matron (matron). As a matron, Kuhn's work schedule was dependent on the County's need and she was on-call twenty-four hours a day, to report whenever the County had taken a female into custody. When called in, she would inventory the prisoner's personal property, conduct a search, lodge and transport the prisoner and secure medical attention as needed. In October 1988,[2/] the County discontinued its practice of calling in matrons in favor of the new, full-time attendant title. In May 1989, Kuhn's application for employment as an attendant was rejected. She was notified by letter that the County found her "unsuited" for the attendant position because "two (2) of three (3) recent employers would not rehire you, while the neighborhood also yielded unfavorable information. It is for these reasons that a decision was made not to offer you the position you seek."

[2/]Having sustained an injury, Kuhn last worked as a matron on October 20, 1988.

As noted by the ALJ, there is evidence that the County was aware of Kuhn's limited protected activities and of comments by some County representatives which might show some animus toward those activities.[3/] However, even if a prima facie violation of the Act was established on this evidence, the County has shown that it had a legitimate reason for its refusal to hire Kuhn and that it acted based upon that legitimate reason. There is no evidence that comments by County officials about the matrons' union involvement in general, or Kuhn's activities in particular, had any impact on the decision not to hire Kuhn as an attendant. Indeed, the County officials who made the comments were not the ones who conducted the employment investigation or who made the decision not to hire her as an attendant. The ALJ's conclusion, supported by her credibility resolutions, that Kuhn's negative recommendations were the reason she was not hired is consistent with the record. Although most of AME's exceptions dispute the ALJ's conclusion in this respect, we find no basis in the record to disturb it.

Many of AME's exceptions ask us to evaluate the truth and the fairness of the evaluations by Kuhn's former employers. The ALJ correctly found, however, that such a determination would not be relevant in this case. The issue here is not whether the

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[3/]Kuhn and the other matrons had several job-related complaints which they were discussing with County representatives. They were advised by the County not to go to the press or to a union with their complaints, preferring that they be resolved internally.

reports of her prior work history are fair or accurate in fact or from Kuhn's perspective, nor whether the County's investigatory techniques were "inept". The issue is whether Kuhn's protected activities caused her to be denied employment as an attendant. There is no evidence to support a conclusion that the County acted upon the evaluations from Kuhn's other employers and neighbors knowing them to be false. Nor is there any evidence that the County would have independently verified the accuracy of those reports had it not been for Kuhn's protected activities. On this record, therefore, we find that Kuhn's protected activities did not cause the County to reject her application for employment as an attendant.

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

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

DATED: February 24, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3A- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-4011

EAST ROCHESTER UNION FREE SCHOOL DISTRICT,

Employer,

-and-

EAST ROCHESTER NON-TEACHING UNION, NEA/NY,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., AFSCME, Local 1000, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time and regularly scheduled part-time employees employed by the employer in the following job titles: Cleaner, Custodian, Clerk-Typist, Grounds Equipment Operator, Food Service Helper, Maintenance Mechanic I, Laborer, and Cook-Manager.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., AFSCME, Local 1000, 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: February 24, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3B- 2/24/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION, LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS, DISTRICT COUNCIL 424,

Petitioner,

-and-

CASE NO. C-4034

NORTH SHORE 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 United Public Service Employees Union, Local 424, A Division of United Industry Workers, District Council 424, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time, part-time cooks, assistant cooks and food service workers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union, Local 424, A Division of United Industry Workers, District Council 424. 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: February 24, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

MEMORANDUM

February 17, 1993

TO: Board

FROM: John M. Crotty

RE: Rule Change

Among other information, an improper practice charge must include the following under §204.1(b)(4):

> if the charge alleges a violation of section 209-a.1(d) or section 209-a.2(b) of the act, whether the charging party has notified the board in writing of the existence of an impasse pursuant to section 205.2 of this Chapter;

The reference to §205.2 is incorrect. Section 205.1 of the Rules covers notification of impasses. Therefore, §204.1(b)(4) should be amended to substitute "205.1" for "205.2".