2A-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DUTCHESS COUNTY DEPUTY SHERIFFS POLICE BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3961

COUNTY OF DUTCHESS and DUTCHESS COUNTY SHERIFF,

Joint Employer,

-and-

NEW YORK STATE FEDERATION OF POLICE, INC.,

Intervenor.

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for Petitioner

ANTHONY DE ROSA, ESQ., for Joint Employer

THOMAS P. HALLEY, ESQ., for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Dutchess County Deputy Sheriffs Police Benevolent Association (PBA). The PBA, on May 15, 1992, filed a petition seeking to represent certain employees of the County of Dutchess and the Dutchess County Sheriff (Joint Employer) and to decertify the New York

State Federation of Police, Inc. (Federation).[1/] The Director of Public Employment Practices and Representation (Director) dismissed the petition on the merits.

The Federation opposes the petition filed by the PBA, claiming that the existing unit is most appropriate. The Joint Employer supports the PBA's uniting position, but offered no evidence in support of its position. The PBA argued to the Director that the Federation had, in settlement of an earlier representation petition, consented to the establishment of a separate unit for deputy sheriffs and was estopped from opposing its petition. The PBA also argued that its petition for a separate unit for the deputy sheriffs should be granted because the Federation had not provided them with adequate representation.

The Director held that the Federation was not estopped from taking a position regarding the composition of the most appropriate unit and that the PBA had not established its claim that the Federation had systematically and intentionally disregarded the deputy sheriffs' interests, which would warrant their fragmentation. Accordingly, he dismissed the petition.

[1/]The PBA seeks to fragment the existing unit and represent a unit which would consist of only the following titles: deputy sheriff, deputy sheriff sergeant, deputy sheriff lieutenant, deputy sheriff-civil, deputy sheriff sergeant-civil and deputy sheriff lieutenant-civil. The deputy sheriff-civil series, also known as civil deputies, are unrepresented titles; the deputy sheriff series, also known as road patrol deputies, are in the unit represented by the Federation.

The PBA excepts to the Director's determination on the facts and the law. For the reasons set forth below, we affirm the Director's decision, in part, but reverse his dismissal of the petition and remand the case to him for further processing.

The Federation has been the representative of the existing unit since 1984. The Federation and the Joint Employer were parties to collective bargaining agreements for January 1, 1986 to December 31, 1988, and from January 1, 1988 to December 31, 1992.[2/]

In 1990, a decertification petition for the existing unit was filed by the Civil Service Employees Association, Inc. (CSEA) mounting a challenge to the Federation. The Federation and the Joint Employer were then negotiating the 1988-1992 collective bargaining agreement, but those negotiations stopped after CSEA's petition was filed. Sometime after the petition was filed, a meeting was called by the Federation's attorney, Kenneth Franzblau, to discuss resolution of the representation question. Franzblau and John Henry, vice-president of the Federation, and two other Federation members, met with Adam Nowik, Jr., president of the PBA, and John Witenberg and Michael Sariganis, unit members. No one from CSEA was present. Nowik testified that an agreement resulted from that meeting, under which CSEA would withdraw the petition and "that the Federation in return would consent to dividing us into two separate units within the

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[2/]Negotiations for a successor to the 1988-1992 contract were suspended once the instant petition was filed.

Federation and returning the civilian employees, clericals, to the CSEA unit."[3/] The unit separation was to take effect at the end of the contract.

The PBA argued to the Director that the Federation's agreement to the establishment of two separate units estops it from opposing the instant petition. The Director rejected this argument, finding that even if the Federation had earlier given its agreement to two separate units, it was not precluded from asserting a different position in a representation proceeding before PERB because such an estoppel might limit PERB in the discharge of its statutory obligation to define the most appropriate unit.

We find on the facts of this case that the Federation is not estopped from raising a unit appropriateness argument. Withdrawal of the earlier petition was not conditioned upon execution or implementation of that agreement. Further, the agreement itself is unclear, both in its actual wording and in its intent. As the record does not clearly establish the

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[3/]Franzblau memorialized the agreement in a handwritten note that he copied and distributed at the meeting. It provided:

> Negotiations would continue from the mediator proposal/last offer. Upon signing of the contract all parties will consent to the establishment of separate bargaining units as petitioned for by the CSEA on July, 1990 w/NYS PERB. All parties will consent to the inclusion of civilian employees in the current county-wide unit represented by CSEA at the end of the negotiated contract. The two separate bargaining units will remain as members of the United Federation of Police, Inc.

Federation's unconditional agreement to fragment, no basis for an estoppel is present. Therefore, we affirm the Director's determination to allow the Federation to present its uniting position in this case.[4/]

Turning to the merits of the fragmentation petition, we have, in several previous cases,[5/] determined that deputy sheriffs are not appropriately fragmented from existing units which include other sheriff's department employees. For example, in County of Warren[6/] we stated:

> We have previously considered and rejected the claim that there is an inherent conflict of interest between the responsibilities of road patrol deputies and correction officers in a sheriff's department warranting fragmentation of an overall unit of sheriff's department employees. Rather, we have recognized that the common "law enforcement" responsibilities of deputy sheriffs and correction officers, by whatever title, warrant a single unit for both. (footnote omitted)

The PBA presented evidence of two incidents, which it asserts establish that the deputies received disparate or inadequate representation by the Federation. We affirm the Director's determination that the evidence presented by the PBA

[4/]We do not here decide whether we would find an estoppel if the facts were different. See State of New York (Div. of State Police), 15 PERB ¶3014 (1982).

[5/]See County of Erie and Erie County Sheriff, 25 PERB ¶3062 (1992); County of Erie and Erie County Sheriff, 22 PERB ¶3055 (1989); County of Albany and Albany County Sheriff, 19 PERB ¶3054 (1986); County of Albany and Albany County Sheriff, 15 PERB ¶3008 (1982); County of Schenectady and Sheriff of Schenectady County, 14 PERB ¶3013 (1981).

[6/]21 PERB ¶3037, at 3081 (1988).

was not sufficient to establish that the deputies had been so "systematically and intentionally disregarded"[7/] by the Federation as to warrant their fragmentation from the overall unit.

One incident involved Deputy Sheriff Sergeant Gary Corbett. He testified that in August 1990, the Joint Employer had changed its practice of allowing deputy sheriffs in the rank of sergeant or lieutenant to work "details" for overtime opportunities. He contacted Shelly Love-Ciraolo, a Federation employee, who sent him a completed grievance form to sign and submit. Corbett did so and sent Love-Ciraolo copies of his immediate supervisors' denials of the grievance. The grievance was denied by the Sheriff. Corbett forwarded the Sheriff's decision to Love-Ciraolo in September 1990, without making any request for any further action. This was Corbett's last contact with the Federation, although he testified that Love-Ciraolo had assured him at some point earlier that the Federation would support the grievance through the County Executive step and, if necessary, to arbitration.

Corbett also testified about a conversation he had with a Federation attorney during which the attorney told him that there was also an excellent case for an improper practice charge based on the events which gave rise to the grievance. Corbett thought

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[7/] County of Erie and Erie County Sheriff, 25 PERB ¶3062, at 3133 (1992), citing State of New York (Long Island Park and Historical Preservation Comm'n), 22 PERB ¶3043, at 3099 (1989).

that the attorney would file such a charge with PERB and, at the attorney's request, Corbett gave him the number Love-Ciraolo had assigned to the grievance by the Federation. At the attorney's suggestion, he also sent Love-Ciraolo the paper work he had accumulated in pursuing the grievance. He could not remember the identity of the attorney, the time or place of the conversation, or any other details of the conversation.

The second incident relied upon by the PBA in its effort to establish inadequate representation by the Federation of the deputy sheriffs involves a lawsuit alleging violations by the Joint Employer of the federal Fair Labor Standards Act (FLSA). The Federation commenced the lawsuit on behalf of ninety correction officers and twenty-five deputy sheriffs.[8/] The lawsuit involved three allegations: that employees were not paid for a required ten-minute lineup time; that correction officers were required to take a thirty-minute unpaid lunch break during each shift at the jail; and that all employees were required to undergo training at times outside their normal work hours and in excess of their forty-hour workweek, without overtime compensation.

The pendency of the lawsuit was used as a bargaining tool by the Federation during negotiations for the 1988-92 collective bargaining agreement. However, shortly after the commencement of

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[8/]Each employee was a named plaintiff.

the lawsuit, the Joint Employer began paying overtime to those employees undergoing training outside of their regular workday. In January 1991, the Joint Employer moved for summary judgment in the lawsuit on the grounds that correction officers had always been paid for their lunch breaks and that the Joint Employer was paying overtime for time spent in training in excess of forty hours per week. Thus, the only issue still in dispute was line-up pay. The Federation thereafter agreed with the Joint Employer to discontinue the lawsuit in exchange for the payment, prospectively, for line-up time for employees, as well as agreement on the successor contract, which included salary increases and other benefits for the whole unit. The Joint Employer conditioned agreement on the contract upon the withdrawal of the lawsuit. The Federation left all unit employees a release form at their work stations to be executed and returned to the Federation. Most of the employees signed the releases. After the Federation's attorney advised the court that most plaintiffs had signed the releases, the court directed the Federation to publish notification to those who had not signed that the lawsuit had been settled and that those who desired to pursue it further would have to submit to the court written

notification of their intention to continue the lawsuit individually.[9/]

The notice was posted, apparently by the Federation, with the names of the seven employees[10/] who had not signed releases, and the following statement:

> As of June 18, 1991 the following employees...have not signed off on this lawsuit. There is a possibility that as a result of these people not signing off, it could result in our negotiated contract with the County being voided. Should that occur it would cost the average employee...approximately $5,000 in backpay. **TALK TO THESE PEOPLE.**

Three of the named employees, all deputy sheriffs, wanted to continue the lawsuit to obtain line-up pay, retroactively, and consulted an attorney. That attorney attempted to contact the Federation's attorney for information about the lawsuit. There was no response from the Federation's attorney to the messages left for him. Additionally, Nowik contacted the Federation's chief delegate for help in getting copies of the court papers.

[9/]The notice stated:

> If you are a Plaintiff, and have not agreed to settle this action, written notice of your intention to proceed with the Litigation must be received in the office of Edward L. Ford, Esq., 175 Main Street, Suite 401, White Plains, New York 10601 on or before July 15, 1991.
>
> Further, two of the three issues involved in this suit have been resolved in favor of the Defendant, and the New York State Federation of Police, Inc. has decided not to pursue this litigation or to provide counsel. Those Plaintiffs choosing to continue this litigation will be responsible for all future litigation costs including attorneys' fees.

[10/]Six were deputy sheriffs and one was a correction officer.

He was told that if any employees wanted to continue the lawsuit, they would have to do so on their own.

The Director determined that the PBA had failed to establish a systematic and intentional disregard for the interests of the deputy sheriffs which would warrant the fragmentation of the existing, long-standing unit.[11/] He found that the two incidents presented by the PBA in the eight years of otherwise adequate representation by the Federation were insufficient to establish that the interests of the deputy sheriffs had been "disregarded or ignored out of hand".[12/] There is, for example, no record evidence to support such an assertion. Neither is there evidence that Corbett had clearly conveyed to the Federation that he wanted to pursue the grievance to the next step or to file an improper practice charge. We cannot find on this record that the Federation ignored Corbett's grievance because he was a deputy sheriff or failed to answer his inquiries as to its status, because he made no inquiries in those respects.[13/]

As to the second incident, the settlement of the FLSA lawsuit was to the benefit of the whole unit. Even the PBA concedes in its exceptions that "the Federation's policy decision

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[11/]County of Erie and Erie County Sheriff, 22 PERB ¶3055 (1989).

[12/]County of Erie and Erie County Sheriff, 25 PERB ¶3062, at 3133 (1992).

[13/]See Nassau Educ. Chapter of the Syosset Cent. Sch. Dist. Unit, CSEA, Inc., 11 PERB ¶3010 (1978).

to settle the FLSA case is not, by itself, proof of inadequate representation." It would have this Board conclude from that decision, however, that the Federation's decision was motivated by its desire to benefit the correction officers, at the expense of the deputy sheriffs. The record does not support such a conclusion. Indeed, the unit members themselves, including the majority of the deputy sheriffs, concurred in the decision to withdraw the lawsuit by signing the releases. The remaining employees were given clear instructions in the notice of discontinuance on how to proceed. That the Federation attorney may not have returned the phone calls of some of the plaintiffs or their attorney and that a Federation delegate was reluctant to offer assistance does not evidence a pattern of ignoring the interests of the deputy sheriffs in favor of the interests of the correction officers which would be necessary to support a decision to fragment a long-standing unit.

Were we to limit our analysis to inadequate representation, we would affirm the Director's dismissal of the petition. However, effective January 1, 1990, the New York Constitution, Article XIII, §13(a), was amended to delete the provision exempting a county from responsibility for the acts of a sheriff. As we noted in County of Nassau and Nassau County Sheriff:[14/]

[14/]25 PERB ¶3036, at 3075 (1992), citing Thoubboron v. New York State Dep't of Civil Service, 79 N.Y.2d 982 (1992).

> [T]he purpose of this constitutional amendment was to relieve sheriffs throughout the State of personal liability for their acts or omissions and for the acts or omissions of their appointees in discharging official duties relating to civil process.

We further noted that the court in Thoubboron had held that the effect of the amendment was to bring even those deputies who performed civil functions into the classified civil service. We have not yet had the opportunity to consider the effect, if any, of the constitutional amendment on the civil service classifications and, possibly, duties of deputy sheriffs. In addition, upon reconsideration of our fragmentation decisions regarding sheriff's department personnel, we believe that the "law enforcement" responsibilities and duties of deputy sheriffs and other sheriff's department employees may be sufficient to warrant the establishment of a separate unit of deputy sheriffs. The typical duties of deputy sheriffs, which may include patrolling in a police vehicle or on foot, investigating suspicious activities, making arrests, maintaining order in crowds and public gatherings and answering questions for the public, may fairly be considered to be police work. As we acknowledged in City of Amsterdam:[15/] "The policeman deals almost wholly with human relations.... The police service is concerned with the broad spectrum of human rights, public order, and the protection of life and property." We there fragmented an existing unit and created separate units of police and fire

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[15/]10 PERB ¶3031, at 3061 (1977).

fighters, based upon the distinct responsibilities of police officers, despite the "public safety" responsibilities of both groups. The law enforcement duties of deputy sheriffs may justify a separate bargaining unit for them based upon an arguable unique community of interest and/or actual or potential conflict of interest with other employees in the Sheriff's Department who may not have any similar duties.

Given our previously articulated standards, the focus of the Director's investigation in this case was, properly, whether the deputy sheriffs had been inadequately represented. As a result, there is little evidence in this record about the civil service classifications, distinct duties, responsibilities and working conditions of the deputy sheriffs and other employees of the Joint Employer. In order to determine the most appropriate unit, the matter must be remanded to the Director to take evidence relative to a community or conflict of interest among the deputy sheriffs and others in the Sheriff's Department. The Director should then issue a determination based on the evidence submitted pursuant to the remand. Upon receipt of the Director's findings, we will issue a final decision in this matter.

IT IS, THEREFORE, ORDERED that the PBA's exceptions relating to the Director's determination that there had been adequate representation of the deputy sheriffs are dismissed and that the

petition is remanded to the Director for further processing consistent with this decision.

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2B-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

THOMAS CUMMARO, et al.,

Charging Parties,

-and-

CASE NO. U-14398

WESTCHESTER COUNTY DEPARTMENT OF CORRECTION SUPERIOR OFFICERS' ASSOCIATION, INC.,

Respondent.

THOMAS P. HALLEY, ESQ., for Charging Parties

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Thomas Cummaro, and five other employees (charging parties) of the County of Westchester (County) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing their charge that the Westchester County Department of Correction Superior Officers' Association, Inc. (Association) had violated its duty of fair representation under §209-a.2(c) of the Public Employees' Fair Employment Act (Act).

The charge as filed by the charging parties alleges that the Association had commenced a lawsuit against the County to compel it to fill all supervisory vacancies and to have a decision made as to which of two eligible lists should be utilized by the County. It is alleged that one list is two and one half years old and has no minority candidates, and that the second list was certified in July 1992 and contains some minority officers. The charge appears to allege that the Association met and decided

that its position in the lawsuit would be that the earlier list should be used to fill the vacancies. The charging parties allege that the Association violated its by-laws by holding the meeting and vote, by failing to give the charging parties, upon request, a copy of the minutes of the meeting and by failing to support the charging parties.[1/] The charging parties were notified by the Assistant Director of Public Employment Practices and Representation (Assistant Director) that the charge was deficient because PERB did not have jurisdiction over internal union affairs, such as violations of an employee organization's constitution or by-laws.

The charging parties then filed a clarification which alleges that the Association denied them information of a type which it had previously provided to other union members. The Assistant Director then informed the charging parties that, while the Association would have an obligation to provide information about the lawsuit if it had previously provided similar information to other members of the unit, the charging parties had provided no facts to support that allegation. The charging parties thereafter filed a second clarification, reiterating the allegations in the original charge and first clarification, but providing no facts in support of those allegations.[2/]

[1/]The charging parties are apparently all on the July 1992 list, but not on the earlier list.

[2/]In the second amendment, the charging parties alleged that they had requested information regarding dates and places of meetings, minutes of meetings and information regarding lawsuits brought on behalf of unit members.

The Director then dismissed the charge, finding that PERB had no jurisdiction to regulate internal union affairs, that an employee organization does not violate the Act per se by its support of some union members to the detriment of others, and that the charging parties had no right established by the Act to the requested information, unless it had also been provided to others. Since no facts had been pled which would support a finding of discriminatory treatment, that allegation was also dismissed.

The charging parties' exceptions assert that it is a breach of the duty of fair representation for an employee organization to fail to provide information to minority members so that they can determine whether to file a grievance or improper practice charge on their own and that the Director's decision must be reversed.

For the reasons set forth below, we affirm the Director's decision in part, reverse in part, and remand it to him for further processing.

We have previously held that the deprivation of membership rights and privileges of union members are internal union affairs which lie outside our jurisdiction.[3/] We, therefore, find no violation of the Act in the alleged violation by the Association of members' rights under its by-laws.

Additionally, a union's decision to support a position which is detrimental to certain unit members and beneficial to others

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[3/]See Cove Neck Police Benevolent Ass'n, 24 PERB ¶3028, at 3057 (1991).

§209-a.2(c) of the Act.[4] Therefore, we affirm the Director's dismissal of that part of the charge.

We find, however, that the charging parties' allegation that the Association refused or failed to provide them with copies of the notice, the minutes of the in-issue union meeting, the lawsuit and the eligibility list(s) may set forth a violation of the Act, if proven and found directly relevant to their employment rights and obligations.

We have not had occasion to decide whether and to what extent a union owes a duty to unit employees to provide them, on request, with information which is relevant to their employment relationship.[5] However, the National Labor Relations Board and the courts have issued several decisions which, while not binding on this Board,[6] provide guidance. The U.S. Supreme Court, in Air Line Pilots Association International v. O'Neill,[7] (hereafter Pilots Association) reiterated that a union's

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[4]AFSCME, Council 66, Local 930, 25 PERB ¶3070 (1992); UFT, Local 2, AFT, AFL-CIO, 18 PERB ¶3048 (1985); South Huntington United Aides, 17 PERB ¶3012 (1984).

[5]In Public Employees Fed'n (Murgali), 14 PERB ¶3036 (1981), the Board affirmed the dismissal of a charge that a union had violated the Act by failing to provide information about a proposed contract to a nonmember, finding the information sought to be in the nature of a status report, which the union was not obligated to provide to nonmembers. That case differs factually from the one before us, but did hold that a union may not misinform unit members. However, to the extent that dicta in the footnotes may suggest that there is no duty under the Act to furnish information to unit members, upon request, about a proposed contract, we decline to adopt it.

[6]Ad Hoc Committee of Regents College Degrees and Examinations Professional Employees, 24 PERB ¶6501 (1991).

[7]___ U.S. ___, 136 LRRM 2721 (1991).

statutory role as exclusive bargaining representative gives it a power to act on behalf of others, which "involves the assumption toward them of a duty to exercise the power in their interest and behalf."[8/] The Court in Pilots Association analogized the duty of fair representation owed by a union to unit members to the duty owed by fiduciaries to their beneficiaries, trustees to trust beneficiaries, corporate officers and directors to shareholders or lawyers to clients. The Court has repeatedly identified three components of the duty: "to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct."[9/] We have held, and the courts have agreed, in numerous cases, that an identical standard is applicable in duty of fair representation cases brought under the Act.[10/] As under federal law, in New York, a union's duty stems from its status as the exclusive representative of designated units of employees.[11/]

[8/]Steele v. Louisville & Nashville Railway Co., 323 U.S. 192, 202, 15 LRRM 708, 712 (1944).

[9/]Vaca v. Sipes, 386 U.S. 171, 177, 64 LRRM 2369, 2371 (1967).

[10/]See, e.g., Civil Service Employees Ass'n, Inc. v. PERB, 132 A.D.2d 430, 20 PERB ¶7024 (3d Dep't 1987), aff'd, 73 N.Y.2d 796, 21 PERB ¶7017 (1988); Symanski v. East Ramapo Cent. Sch. Dist., 117 A.D.2d 18, 19 PERB ¶7516 (2d Dep't 1986); AFSCME, Council 66, Local 930, 25 PERB ¶3070 (1992); Professional Staff Congress, 23 PERB ¶3030 (1990); State of New York and New York State Public Employees Fed'n, 22 PERB ¶3049 (1989).

[11/]The Act was amended in 1989 to make all recognized or certified unions the exclusive bargaining agent for the unit they represent. 1989 N.Y. Laws ch. 91 (effective May 22, 1989).

In the private sector, it has become well-established that the duty of fair representation requires unions to provide the employees they represent with information regarding their terms and conditions of employment. In International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers,[12/] the NLRB, in confirming that the duty of fair representation includes the obligation to provide information to unit employees regarding, in that case, a union security clause, referred to the union's fiduciary relationship with its employees as defined by the Supreme Court and held:

> The basis for the "fiduciary" obligation analogy is the union's comprehensive authority as exclusive bargaining representative, the cornerstone of representation under the Act. Because this comprehensive authority "leads inevitably to employee dependence on the labor organization,"(footnote omitted) the Board and courts require exclusive representatives to notify employees they represent of matters affecting their employment.

The NLRB has extended this duty beyond informing unit members about union security clauses. In Law Enforcement and Security Officers, Local 40B,[13/] the NLRB held that a union's refusal to provide a unit employee with a copy of the collective bargaining agreement and its health and welfare plan, to enable him to ascertain his eligibility for certain benefits, was a breach of the duty, noting that:

> Employees must rely on their union to represent them fairly in all matters covered by the collective bargaining agreement, which controls the terms and conditions of their employment. However, when a union denies the employees it represents the opportunity to

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[12/]311 NLRB 105 (May 28, 1993).

[13/]109 LRRM 1162, 1164 (1982).

> examine its agreement with their employer, it severely limits the employees ability to determine whether they have been afforded the fair representation which is their due.

The NLRB has similarly found a violation when a union fails to inform employees of contract interpretations or changes clearly affecting their employment. In Teamsters, Local 896 (Anheuser-Busch),[14/] a violation was found when the union failed to provide an employee with requested information about the contract which she allegedly needed to pursue her own grievance to arbitration. The NLRB decided that the employee was entitled to the requested information, citing to Teamsters, Local 282 (Transit-Mix Concrete),[15/] which held that "a union's duty of fair representation imposes on it the duty not to purposely keep employees uninformed or misinformed concerning their grievances or matters affecting employment."

Although decisions of the NLRB are not binding on this agency,[16/] we have adopted the NLRB's rationale when we consider it to be persuasive and consistent with the purposes and policies of the Act.[17/] The rationale articulated by the Supreme Court and the NLRB in the cases cited above is fully applicable to duty of fair representation cases arising under the Act. We here hold, therefore, that an exclusive representative violates its duty of fair representation when it fails or refuses to provide

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[14/]280 NLRB 685, 124 LRRM 1063, 1986 WL 53961, at 18 (1986).

[15/]267 NLRB 1130, 114 LRRM 1148, 1150 (1983).

[16/]Act, §209-a.4.

[17/]See, e.g., Regents College, supra note 6.

unit employees with requested information directly relevant to their employment. However, the obligation to provide requested information is not absolute. Just as an employee organization is dependent upon a public employer for information necessary to process grievances or negotiate and administer a collective bargaining agreement, so too is the unit employee dependent upon the employee organization for information about his or her employment rights and obligations. It follows, therefore, that the standard used to determine whether information requested by an employee organization should be provided by the employer should apply in determining a unit employee's entitlement to information from a union. As we outlined in City School District of the City of Albany,[18/] the duty to grant the request will be based upon its reasonableness, which will be evaluated based upon

> the burden upon the [party] to provide the information, the availability of the information elsewhere, the necessity therefor, the relevancy thereof and finally, that the information supplied need not be in the form requested as long as it satisfies the demonstrated need.

The Director held that the Association had no obligation, as a matter of law, to provide any of the requested information. Therefore, no assessment was made about the reasonableness of the charging parties' request and whether it met the criteria established in City School District of the City of Albany, supra. It is necessary, therefore, to remand the charge to the Director

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[18/] 6 PERB ¶3012, at 3030 (1973).

for further consideration and processing consistent with this decision.

For the reasons set forth above, the Director's decision is affirmed as to his findings that PERB has no jurisdiction over internal union affairs and that an employee organization does not breach its duty of fair representation per se when it takes a position which benefits some unit members to the detriment of others, absent a showing of discrimination or improper motivation. The charging parties' exceptions are dismissed as to those findings. The exceptions are granted as to the Director's decision that, as a matter of law, an employee organization has no obligation to provide unit members with requested information regarding their employment relationship. The charge, in that respect only, is remanded to the Director for further processing consistent with this decision. SO ORDERED.

DATED: November 30, 1993
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

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

-and-

CASE NOS. U-11327 & U-11518

STATE OF NEW YORK (DEPARTMENT OF HEALTH and ROSWELL PARK MEMORIAL INSTITUTE),

Respondent.

PETER M. YURKEWICZ and EDWARD GIBLIN, for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (RICHARD J. DAUTNER of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the State of New York (Department of Health and Roswell Park Memorial Institute) (State) to a decision by an Administrative Law Judge (ALJ) on two charges filed by the New York State Public Employees Federation, AFL-CIO (PEF).

In U-11327, PEF alleges that the State violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it refused PEF's demand for certain medical patient complaint forms. Those complaints were the basis for a counseling memorandum issued to a unit employee who subsequently filed both a contract and noncontract grievance pursuant to the

parties' collective bargaining agreement.[1/] The ALJ held that the patient complaint forms were relevant to PEF's investigation and prosecution of the grievances and that they were not confidential. Accordingly, the ALJ held that the State violated its duty to negotiate under §209-a.1(d) of the Act. The ALJ also held that the refusal to provide the documents interfered with the employee's fundamental right to be represented in grievances, in per se violation of §209-a.1(a) of the Act.[2/]

In U-11518, PEF alleges that the State questioned the unit employee regarding her communications with her PEF grievance representative, Peter M. Yurkewicz. The nature of certain of Yurkewicz's comments during the processing of the grievances and a follow-up internal investigation led the State to believe that the unit employee may have released patient medical information to Yurkewicz. The State asked the employee, with Yurkewicz present and over his objection, whether she had released patient medical information to Yurkewicz, or knew who may have, whether she had the patients' permission to release information and whether she was aware of the definition of professional misconduct. The employee indicated to the State's representative

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[1/]The grievance alleges that the counseling memorandum constitutes a disciplinary reprimand and that it contains threats against the employee without just cause. Noncontract grievances are filed regarding disputes concerning terms and conditions of employment which are not covered by the parties' contract. Contract grievances may proceed to arbitration, but noncontract grievances cannot.

[2/]The ALJ dismissed the §209-a.1(c) allegation and no exceptions have been taken to that aspect of the ALJ's decision.

that she had a basic understanding of professional misconduct, but had not released any patient information, did not know who may have done so and had not secured the patients' permission to release any information. The questioning stopped at that point.

The ALJ held that the State violated §209-a.1(a) and (c) of the Act[3/] by questioning the employee. In reaching this conclusion, the ALJ held that the State's questioning was not privileged because the release of patient information in the grievance context is not professional misconduct and had not been treated as such by the State previously in its dealings with PEF. Assuming, however, that the release of patient medical information in these circumstances could be considered to be professional misconduct, the ALJ held that the State's questioning of the employee was still per se improper. In reaching this conclusion, the ALJ relied upon our decision in City of Newburgh,[4/] in which we held unlawful an employer's interrogation of a union representative regarding his conversations with and observations of an employee during a consultation involving potential disciplinary action.

In its exceptions to the ALJ's decision in U-11327, the State argues that the ALJ erred in finding the patient complaint forms to be relevant to the grievances and in holding that those

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[3/]The ALJ dismissed the §209-a.1(d) allegation in U-11518 and no exceptions have been taken to her decision in that respect.

[4/]11 PERB ¶3108 (1978), conf'd, 70 A.D.2d 362, 12 PERB ¶7020 (3d Dep't 1979).

forms are not confidential. In its exceptions to the ALJ's decision in U-11518, the State argues that its few questions to the employee were privileged, if not required, by various statutory and regulatory provisions which protect a patient's right to the confidentiality of medical records, a right which the State claims it may not waive under any circumstances.

PEF in its response argues that the ALJ's findings of fact and conclusions of law are correct and that her decision should be affirmed.

Having reviewed the record and considered the parties' arguments, including those made at oral argument, we reverse the ALJ's decision in U-11518, but affirm her decision in U-11327.

We begin with an analysis of U-11518 because it raises the issue of patient confidentiality, common to U-11327, more broadly.

The issue in U-11518 is the scope of an employer's right to question an employee regarding what it considers to be job-related misconduct. In this respect, we consider it irrelevant whether an employee's release of medical information is professional misconduct under law, regulation, work rule or policy and we make no findings in that regard. It is also unnecessary to decide whether and to what extent an employee may refuse to answer questions put to him or her by an employer. Nor do we decide whether an employee is entitled to the benefit of union representation during an employer's questioning. In this

case, the questions were asked of and answered by the employee with her union representative present.

The State in this case had reason to believe that the employee may have engaged in conduct stemming from her employment relationship which directly affected her employment as a health care professional. This afforded the State a sufficient basis for the questioning, even assuming that the Act requires some basis as a condition to an employer's questioning of an employee. Unlike the ALJ, we do not consider the State's questioning of the employee to have "invaded the confidential relationship between the grievant and her union representative." In this case, the release of the medical information is itself the act of alleged misconduct and the questions asked by the State were intended simply to permit it to ascertain whether there had been an unauthorized disclosure of patient information. The State could have asked the employee whether she had released patient information to anyone without violating the Act because nonconsensual acquisition and release of that information was not protected by the Act. The narrower inquiry, concerning a possible disclosure to Yurkewicz, was based upon the information then in the State's possession, was essentially coincidental, and, therefore, made in good faith. No questions were asked of the employee regarding any communications she may have had with Yurkewicz concerning her grievances nor any he may have had with her. There were no inquiries regarding any advice sought or given as occurred in City of Newburgh, supra. Moreover, in City

of Newburgh, the employee's communication with the union representative was not the act of misconduct which the employer was investigating. City of Newburgh is, therefore, inapposite because neither the nature of the interrogation nor its scope was similar to the circumstances of the questioning conducted by the State in this case.

The basic purpose of the privilege protecting the grievant-representative relationship is to ensure to those parties the mutual right to freely consult with one another regarding any actual or potential grievances. The State itself recognizes that there must be a privilege attaching to communications between an employee and a union representative to facilitate the grievance process. It seeks only a recognition of the countervailing policies which protect the confidentiality of a patient's medical records.[5/] The limited questions put to the employee by the State in this case did not threaten the employee's access to union representation nor did they jeopardize the purposes served by a grievant-representative privilege. By permitting the very preliminary type of questions asked in this case, we reach a reasonable accommodation between the patients' rights to the confidentiality of their medical records and an employee's rights under the Act.

Different issues would have been presented if the State had questioned the employee regarding her discussions with her

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[5/]10 NYCRR §§405.7(b)(13), 405.7(c)(13), 405.10(a)(5); 8 NYCRR §29.1(b)(8); CPLR 4504.

grievance representative or if it had disciplined her for releasing patient information. We have no occasion on the facts of this case, however, to decide the extent of the State's rights to make further inquiries of an employee suspected of some job-related misconduct or its rights to discipline in that regard.

Turning to U-11327, we affirm the ALJ's decision requiring the release of the patient complaint forms.

The documents requested by PEF were relevant to its investigation of the grievances and to its decisions as to whether and to what extent to process those grievances. The State's counseling memorandum was based directly upon those complaints and the grievances brought the merits and accuracy of those complaints into issue. Without the documents, PEF could not make a reasonably informed decision as to whether the patient complaints were accurately summarized by the State in its meeting with the employee, whether the grievances were meritorious or, even if so, whether other circumstances militated against their prosecution. Just as the State argues in conjunction with the questions it asked of the employee that it has a need to investigate instances of potential professional misconduct, PEF's need to investigate grievances on behalf of a unit employee is no less and that investigation cannot be conducted reasonably without the patient complaint forms.

The State's primary argument regarding the confidentiality of the patient complaint forms is that they must be deemed confidential to permit patients the fullest freedom to exercise

their rights to complain about hospital care and services without fear of reprisals.[6/]

The ALJ refused to equate a patient's right to complain about treatment or service without reprisal to a guarantee of confidentiality of the patient complaint forms and we agree. Central to our conclusion in this respect is that the patient complaint forms are not medical records and have not been considered or treated as such by the State. Therefore, whatever confidentiality may attach to patient medical records does not attach to the patient complaint forms. Moreover, the very term "patient complaint form" itself is a slight misnomer. The complaints in these cases were made by a relative of the patients, not the patients themselves. Indeed, the majority of the complaints at this medical facility are made by persons other than the patients. Having reviewed the several and varied sources of the asserted confidentiality of these documents, we find none which directly render them confidential and we cannot discern any legislative or administrative intent to render them such.[7/]

[6/]N.Y. 2Public Health Law §208-c(3)(c) (McKinney 1985); 10 NYCRR §§405.7(b)(22) & (23), 405.7(c)(17).

[7/]Having held that the patient complaint forms are not confidential, we need not and do not decide whether the State's disclosures of patient complaint forms in the past or its summarization of parts of the at-issue complaints in its meeting with the employee can waive a patient's right to confidentiality of medical information.

Our conclusion in this respect is buttressed by another section of the Public Health Law. Under §230.11(a) of that law, reports to the office responsible for investigating complaints of professional medical conduct are specifically "confidential" and inadmissible "in any administrative or judicial proceeding . . . ." The enactment of this provision persuades us that the Legislature bestows confidentiality upon complaints regarding medical care clearly and explicitly when that is its intent. Given the defense difficulties which would be presented to employees if they were denied any access to patient complaints[8/] which then become the basis for an employer's counseling or discipline, the confidentiality of those documents should not be assumed or implied, as the State would have us do.

The State argues alternatively that it should at least be permitted to redact from the patient complaint forms any data which would identify the complainant. We have no occasion, however, to consider this issue. The State unqualifiedly refused to disclose the patient complaint forms and never offered to disclose any type of redacted document in response to PEF's demand. Beyond noting that it may be extremely difficult to allow the redaction of all potentially identifying data and yet

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[8/]These types of problems led the Appellate Division to order disclosure of patient complaints despite the restrictions of Public Health Law §230.11(a) in circumstances in which the complainants had testified at the disciplinary hearing. The Court held that the statutory proscription against disclosure had to yield to the accused's constitutional rights. McBarnette v. Sobol, 190 A.D.2d 229 (3d Dep't 1993).

extend to an employee a document useful to the investigation, evaluation and pursuit of a grievance, we can offer no guidance helpful to the parties in making or denying requests for patient complaint forms. The scope of disclosure in any given case will be dependent upon at least the nature of the demand for the patient complaint forms and the State's response to that demand, factors which will vary from case to case. Had the State provided a redacted copy of the requested forms, for example, we likely would have been presented with issues somewhat different than the ones we have under the State's refusal of PEF's demand.

The ALJ also held that the State's refusal to provide PEF with the patient complaint forms per se violated §209-a.1(a) of the Act. The ALJ held in this respect that employees have a fundamental right to be represented in grievances and that the unprivileged withholding of relevant grievance information necessarily interferes with that right.

We have recognized that the right of public employees to be represented in grievances is one of the most important afforded them by the Act.[9/] We have also held that the deprivation of fundamental employee rights, however erroneous or innocent, per se violates §209-a.1(a).[10/] The denial of the patient complaint

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[9/]State of New York (Diaz), 18 PERB ¶3047 (1985), rev'd on other grounds, 132 A.D.2d 430, 20 PERB ¶7024 (3d Dep't 1987), aff'd, 73 N.Y.2d 796, 21 PERB ¶7017 (1988).

[10/]State of New York, 10 PERB ¶3108 (1977) (erroneous interpretation of the Act's contract bar rules causing an improper denial of representation access rights).

forms interfered with the employee's statutory right to be represented on the grievances. Therefore, we affirm the ALJ's decision in this respect on the basis set forth in her decision.

For the reasons and to the extent set forth above, the State's exceptions in U-11518 are granted and the ALJ's decision in that case is reversed. The ALJ's decision in U-11327 is affirmed and the State's exceptions in that case are denied.

IT IS, THEREFORE, ORDERED that the charge in U-11518 must be, and it hereby is, dismissed. In Case No. U-11327, the State is ordered to:

1. Deliver to PEF the patient complaint forms which were the basis of an October 5, 1989 employee counseling memorandum if either of the grievances filed with respect to that counseling memorandum is still pending.
2. Sign and post the attached notice in all locations normally used to post informational notices to unit employees employed at Roswell Park Memorial Institute.

DATED: November 30, 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 all employees in the unit represented by the New York State Public Employees Federation, AFL-CIO (PEF) at Roswell Park Memorial Institute that the State of New York will deliver to PEF the patient complaint forms which were the basis of an October 5, 1989 employee counseling memorandum if either of the grievances filed with respect to that counseling memorandum is still pending.

Dated . . . . . .

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

STATE OF NEW YORK
DEPARTMENT OF HEALTH
ROSWELL PARK MEMORIAL INSTITUTE
. . . . . .

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.

2D-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CONNETQUOT CLERICAL ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3891

CONNETQUOT CENTRAL SCHOOL DISTRICT,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC. LOCAL 1000, AFSCME/AFL-CIO, SUFFOLK LOCAL 870, CONNETQUOT UNIT,

Intervenor.

KAPLOWITZ AND GALINSON (DANIEL GALINSON of counsel), for Petitioner

GUERCIO AND GUERCIO (GREGORY J. GUERCIO of counsel), for Employer

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

BOARD DECISION AND ORDER

By decision dated April 30, 1993, the Director of Public Employment Practices and Representation (Director) dismissed a petition filed by the Connetquot Clerical Association (Association), which seeks to fragment clerical employees of the Connetquot Central School District (District) from an existing blue-collar and white-collar noninstructional unit presently represented by the Civil Service Employees Association, Inc.,

Local 1000, AFSCME/AFL-CIO, Suffolk Local 870, Connetquot Unit (CSEA).

In its exceptions to the Director's dismissal of the petition, the Association asserts that the Director erred when he found that the Association had not proven that CSEA provided inadequate and discriminatory representation to the clerical employees and that it had not shown a compelling need for the fragmentation of the clerical employees from the long-standing noninstructional unit. In particular, the Director determined that the evidence adduced over five days of hearing did not establish that CSEA had systematically and intentionally failed the clerical employees in contract negotiations, grievance administration or otherwise because of their job category or title. The Director also determined that there was not an inherent conflict of interest between the duties, working conditions, employment status, and other indicia of employment of the clerical employees and the other employees in the existing bargaining unit.

We have carefully reviewed the exceptions, response and supporting briefs submitted by the Association and CSEA, together with the extensive record developed by the Director, and find that, for the reasons set forth in the Director's decision, and based upon his proper application of the facts of this case to the clearly enunciated standards established by this Board for

the fragmentation of existing bargaining units,[1/] the Director's decision should be affirmed and the Association's exceptions dismissed. It is our finding that the record, which is summarized in detail in the Director's decision, fully supports his material factual determinations and his legal conclusions.

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

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[1/] County of Erie and Sheriff of Erie County, 25 PERB ¶3062 (1992); Board of Educ. of the City Sch. Dist. of the City of Buffalo, 24 PERB ¶3006 (1991); State of New York (Long Island Park, Recreation and Historical Preservation Comm'n), 22 PERB ¶3043 (1989).

2E-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 342, LONG ISLAND PUBLIC SERVICE EMPLOYEES, UNITED MARINE DIVISION, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Charging Party,

-and-

CASE NO. U-13083

TOWN OF HUNTINGTON,

Respondent.

EDWARD J. HENNESSEY, ESQ., for Charging Party

JOHN J. LEO, ESQ., for Respondent

BOARD DECISION AND ORDER

The Town of Huntington (Town) excepts to a decision by an Administrative Law Judge (ALJ) which, in relevant respect, finds that the Town violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) as alleged by Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO (Local 342).[1/] The ALJ held that the Town's Director of the Department of General Services, Glen LaMay, made statements and took actions at a meeting with a temporary employee, David Fusaro, who was at the relevant time in Local 342's blue-collar unit, which per se interfered with,

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[1/]The ALJ dismissed that part of the charge which alleges that the Town violated the Act by refusing to answer an employee's grievance. No exceptions have been filed to that aspect of the ALJ's decision.

restrained and coerced Fusaro in the exercise of his protected rights to file and pursue grievances and to seek grievance representation by Local 342.

The Town argues in its exceptions that the ALJ's decision should be reversed because LaMay's conduct and statements were not threatening or coercive and did not interfere with Fusaro's pursuit of the grievance. It also argues that the Town cannot be held accountable for LaMay's actions and that any violation is de minimis and premised upon a novel theory of law. In a point-by-point response to the Town's exceptions, Local 342 argues that the ALJ's decision is correct in all respects and should be affirmed.

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

The charge in this case is directed to LaMay's conduct and statements at a meeting with Fusaro called by LaMay on October 25, 1991. What was said and done there is not in dispute. Fusaro had filed a grievance on October 24, 1991, after being notified that he was terminated from his temporary laborer position effective October 26, 1991 due to "budget constraints". LaMay, believing that Fusaro had been misinformed about his rights by a Local 342 steward, called the meeting to give Fusaro some "counseling on procedures". The meeting was attended by only LaMay and Fusaro and was in LaMay's office. After some preliminary conversation about the termination, LaMay told Fusaro that he had no seniority, that the grievance had no merit and was

"not worth the paper it's written on". LaMay also told Fusaro: "You don't make friends this way. I don't know who told you to do this. You have no rights as a temporary worker." LaMay then tore up the grievance and threw it into a trash pail.

Certain of the Town's exceptions are related to the merits of Fusaro's grievance or to the Town's possible procedural or substantive defenses to it. Those issues are, however, immaterial to this charge or its disposition because only LaMay's statements and conduct are challenged. Although the Town questions Fusaro's state of mind after the meeting with LaMay, it is similarly immaterial whether Fusaro was, in fact, intimidated, embarrassed or otherwise affected by that meeting.[2/] The pertinent inquiry is whether LaMay's statements and conduct, objectively viewed, interfered with, restrained or coerced a reasonable employee's exercise of statutorily protected rights.

We also reject the Town's argument that it cannot be held responsible for LaMay's actions. Our decisions in this respect do not require evidence of specific authorization, ratification or condonation of conduct by a supervisor or manager in that capacity as the sine qua non for attribution of liability to the employer.[3/] Moreover, LaMay was clearly acting within the scope of his employment in meeting with Fusaro regarding his grievance

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[2/]Patricia Sutherland, Local 342's shop steward, testified that Fusaro told her in a meeting shortly after the meeting with LaMay that he was humiliated and embarrassed by LaMay and that he felt that the grievance system did not work.

[3/]City of Schenectady, 26 PERB ¶3038 (1993).

because LaMay is the step-one representative under the parties' grievance procedure.

Public employees have certain fundamental statutory rights. Among these are the rights to file and pursue contract grievances, to seek advice from their bargaining agent regarding employment matters and to secure the benefit of union representation on any grievance. The existence of these rights, our recognition of them, and the impropriety of an employer's interference with them does not involve any novel theory of law. Nor have we ever considered an interference with such basic employee rights to represent only a technical or de minimis violation, not deserving of either a finding of violation or appropriate remedial action. To the contrary, our decisions reflect a careful scrutiny of any action by an employer which would tend to compromise or chill the exercise of rights associated with an employee's filing and pursuit of a contract grievance.[4/]

In its remaining exceptions, the Town argues that LaMay's conduct and statements were not per se threatening, coercive or otherwise an interference with Fusaro's grievance or representation rights. We find LaMay's conduct and statements to be as alleged by Local 342 and found by the ALJ. The circumstances under which the meeting was called and conducted, LaMay's statements, particularly the one concerning Fusaro's

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[4/]See, e.g., State of New York (Dep't of Correctional Services), 26 PERB ¶3055 (1993); Town of Hempstead, 19 PERB ¶3022 (1986).

grievance not making him any friends, and his destruction of the grievance form itself would be intimidating and threatening to any reasonable employee, but all the more so to a temporary employee who had worked for the Town for only a few months before the meeting. Contrary to the Town's argument, LaMay's conduct and statements represent far more than simply his position on the merits of the grievance. LaMay by word and deed simultaneously conveyed to Fusaro his disrespect for the grievance process and the risks which might be posed to any employee who grieved or consulted with their union representative. As the ALJ correctly observed, LaMay's conduct and statements were premeditated and unprovoked.[5/] In LaMay's zeal to convey to an employee his view of the employee's rights, LaMay clearly crossed the line between permissible counseling or grievance adjustment and improper interference with an employee's rights under the Act.

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

IT IS, THEREFORE, ORDERED that the Town:

1. Cease and desist from indicating to Fusaro that he will be injured or impaired in any employment with the Town because of the filing or pursuit of his October 24, 1991 grievance.

[5/]Compare New Paltz Cent. Sch. Dist., 17 PERB ¶3108 (1986).

2. Sign and post the attached notice at all locations ordinarily used to post notices of information to unit employees represented by the Local 342 in the Blue-Collar Unit.

DATED: November 30, 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 the employees of the Town of Huntington in the Blue Collar Unit represented by Local 342, Long Island Public Service Employees, United Marine Division, International Longshoremen's Association, AFL-CIO, that the Town of Huntington will not indicate to David Fusaro that he will be injured or impaired in any employment with the Town because of the filing or pursuit of his October 24, 1991 grievance.

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

Town of Huntington
. . . . . .

...is 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-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHAUTAUQUA COUNTY SHERIFFS SUPERVISORS' ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4008

CHAUTAUQUA COUNTY and CHAUTAUQUA COUNTY SHERIFF,

Employer.

THOMAS J. KRAJCI, for Petitioner

MARK A. WINES, ESQ., for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the Chautauqua County Sheriffs Supervisors' Association (Association) and Chautauqua County and the Chautauqua County Sheriff (Employer) to a decision rendered by the Assistant Director of Public Employment Practices and Representation (Assistant Director) on behalf of the Director of Public Employment Practices and Representation (Director).

The Association seeks to represent six currently unrepresented employees employed in the following titles: Captain, Lieutenant and Jail Supervisor/Administrator. The Assistant Director dismissed the petition after a hearing. He concluded that five of the six employees were managerial as

defined in §201.7(a) of the Public Employees' Fair Employment Act (Act) and, therefore, ineligible for representation.[1/] He did not determine whether the remaining employee was managerial because, even if not, negotiating units of one employee are per se inappropriate.[2/]

The Association argues in its exceptions that the Assistant Director's decision is not supported by the record, which the Association claims clearly shows that the employees are only supervisors who are eligible for representation. The Employer argues that the Assistant Director's decision is correct on the facts in all material respects and on the law. It argues in cross-exceptions, however, that the Assistant Director should have found that the one employee as to whom there was no determination is also managerial.

Having reviewed the record and considered the parties' arguments, we reverse the Assistant Director's decision as to all but Captain Dale W. Van Vlack. We are persuaded that the other employees have not been shown on this record to be managerial.

The Assistant Director held that Captain Van Vlack, Jail Supervisor/Administrator Jeffrey N. Belson, and Lieutenants John W. Runkle and Andrew W. Lawrence are managerial because of their involvement in the preparation for and participation in

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[1/]Managerial employees, in relevant respect, are those who "formulate policy" or who "may reasonably be required . . . to assist directly in the preparation for and conduct of collective negotiations . . . ."

[2/]Auburn Indus. Dev. Auth., 15 PERB ¶3139 (1982).

negotiations on behalf of the Employer. He also found that these four and Lieutenant David E. Krieg are all involved, to varying degrees, in either drafting or advising the Sheriff regarding the issuance of General Orders, which establish departmental policy.[3/] Accordingly, he held that a managerial determination was warranted for each as policy makers.

The Association's exceptions to several of the Assistant Director's findings of fact are offered to support its contention that the employees' responsibility for "policy" is either nonexistent or very low-level and that their role in negotiations has been minimal and essentially "technical". We have reviewed these exceptions carefully as against the record as a whole and those specific parts cited by the Association. From that review, we conclude that, except as to Van Vlack, the Assistant Director's determination that the five employees are managerial is not supported by this record and is not in accordance with the criteria in §201.7(a) of the Act as interpreted.

Captain Van Vlack supervises the uniformed patrols. Lieutenants Runkle and Krieg also supervise the uniformed patrol officers in the Road Division, alternating the day and night shifts. Supervisor Belson is responsible for the operation of

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[3/]The decision at one point refers erroneously to Lieutenant Jerome G. Adams as being one of the department's policy makers. The intended reference was clearly to Krieg. The Assistant Director did not make any determination regarding Adams' status as a managerial employee and he is the subject of the Employer's cross-exceptions.

the Chautauqua County Jail. Lieutenant Lawrence supervises the criminal investigations division. Lieutenant Adams operates the Training Academy.

Although Runkle, Belson and Lawrence, to varying degrees, have all attended negotiating sessions, they have been, at most, resource persons. Their participation in discussions at the table or in caucuses has been minimal, if not nonexistent. Their discussion and review of the proposals submitted by the union which represents the rank-and-file employees in the Sheriff's Department is quite similar in type and degree to the duties we have found do not support a managerial designation.[4/] That they may, as Sheriff John R. Bentley testified, occasionally "talk over" his position on union proposals and thereby learn "things", is too generalized and conclusory a basis for a managerial determination based upon labor relations responsibilities.

This record also shows that these three employees and Krieg are only peripherally involved at a low level in the discussion and formulation of the policies governing the operation of the Sheriff's Department. This record as we view it shows these employees to be technicians and experts in their own areas of command responsibility who offer their input to the Sheriff as requested or expected. As important as their role is, they individually or collectively have not been shown on this record

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[4/] See, e.g., Copiague Union Free Sch. Dist., 8 PERB ¶3095 (1975).

IT IS, THEREFORE, ORDERED that the petition must be, and it hereby is, remanded to the Director for further processing consistent with this decision.

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

to "regularly participate in the decision-making process by which departmental objectives and policies are formulated and implemented".[5/]

As noted, the Assistant Director made no determination as to Adams. As he observed, however, the record as to Adams is, if anything, less persuasive of his managerial status than it is for the other employees. Having found that this record does not support the managerial status of any employee except Van Vlack, a fortiori, Adams has not been shown to be managerial.

We affirm, however, the Assistant Director's decision as to Van Vlack. He is third in command in the Sheriff's Department and has been placed in charge of the department in the absence of the Sheriff or Undersheriff. As we view the record, Van Vlack is much more regularly and deeply involved in discussions concerning negotiations and policy formulation across division lines than the other employees. His role in these areas and others fairly makes him a member of the Sheriff's command staff for whom a managerial determination is reasonable.

For the reasons set forth above, the Assistant Director's decision is reversed except as to his determination regarding Dale W. Van Vlack. The Association's remaining exceptions are granted and the Employer's cross-exceptions are dismissed.

[5/]City of Jamestown, 25 PERB ¶3015, at 3035 (1992).

2G-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNION-ENDICOTT MAINTENANCE WORKERS ASSOCIATION,

Charging Party,

-and-

CASE NO. U-13534

UNION-ENDICOTT CENTRAL SCHOOL DISTRICT,

Respondent.

PETER D. BLOOD, for Charging Party

COUGHLIN & GERHART (FRANK W. MILLER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Union-Endicott Maintenance Workers Association (Association) to a decision by the Director of Public Employment Practices and Representation (Director) on the Association's charge against the Union-Endicott Central School District (District). The Association alleges that the District transferred unit work in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when an elementary school principal opened the school on two Saturdays in 1992 to permit the junior varsity girls' drill team to practice. The charge is premised on a theory that unit custodians have exclusivity over the opening and closing of school buildings for such purposes.

After a hearing, the Director dismissed the charge on a finding that custodians do not have exclusivity over the work in issue. In reaching his decision, the Director also dismissed two

of the District's defenses[1/] and he did not reach any other of the District's several defenses.

In its exceptions, the Association argues that, the Director's statements notwithstanding, it did not repeatedly reshape or narrow its contention that there is a discernible boundary[2/] to the definition of the unit work within which its claim of exclusivity should be tested. Although conceding that its particular phrasings of the unit work may have varied, the Association argues that it has maintained consistently that only custodians opened and closed school buildings for weekend or holiday, school-sponsored, student activities involving athletic teams or extracurricular organizations which are normally scheduled at the middle school or high school. According to the Association, the Director's decision, which does not recognize this definition of the unit work, is not supported by the record.

In cross-exceptions, which the District represents need not be considered unless the Director's decision on the merits is reversed, the District argues that the Director erred by rejecting some of its defenses and not ruling on others. It

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[1/]One alleges that a notice of claim pursuant to Education Law §3813 is a condition precedent to the filing of an improper practice charge and the other alleges that the charge is untimely.

[2/]We first recognized the concept of a discernible boundary to the definition of unit work in Town of West Seneca, 19 PERB ¶3028 (1986). Recognition of a discernible boundary to unit work allows a union to maintain its exclusivity within that boundary even if there is no exclusivity over the job function beyond that boundary.

argues, however, that the Director's decision is manifestly correct on the record and should be affirmed.

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

We do not consider it material to the disposition of this charge whether or to what extent the Association's articulation of its discernible boundary theory changed during the processing of the charge or remained consistent throughout. The issue before the Director and before us is simply how the unit work should be defined for purposes of applying our principles governing the transfer of unit work.[3/]

The Association proposes that we define the unit work only by the circumstances in which nonunit individuals have not done that work because that narrow definition allows it to maintain the necessary exclusivity over the work. The unit work in any transfer case, however, is primarily defined by reference to the job duties performed by the unit employees.[4/] The duty of the custodians involved here is the opening and closing of school buildings generally. Their job is not the opening and closing of only certain buildings at certain times for certain activities or events. As detailed at some length in the Director's decision, to which no factual error is attributed, many nonunit individuals have opened and closed school buildings many times under many

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[3/]Niagara Frontier Transp. Auth., 18 PERB ¶3083 (1985).

[4/]Town of Brookhaven, 26 PERB ¶3066 (1993).

different circumstances. We have not recognized a discernible boundary when we have been unable to identify a reasonable relationship between the components of the discernible boundary and the duties of the unit employees.[5/] The several components of the discernible boundary proposed by the Association are unrelated to the required duties of the custodians' position in any relevant respect. Therefore, the Director was correct in rejecting the Association's discernible boundary claim.

For the reasons set forth above, the Association's exceptions are denied and the Director's decision is affirmed. In view of our affirmance of the Director's decision, we do not reach the District's cross-exceptions.

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

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[5/]See, e.g., City of Buffalo, 24 PERB ¶3043 (1991).

2H-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RICHARD W. GLASHEEN,

Charging Party,

-and-

CASE NO. U-14313

COUNTY OF SUFFOLK,

Respondent.

RICHARD W. GLASHEEN, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Richard W. Glasheen to the dismissal, without hearing, of his improper practice charge which alleges a violation of §209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) by the County of Suffolk (County).

Glasheen, the Director of Facilities and Associate Professor of Facilities at Suffolk Community College (College), alleges that the College held "hearings" with his subordinates to receive complaints about him. Glasheen claims that, although the allegations made at those hearings are unsubstantiated, he received a mediocre evaluation which adversely affects his promotional opportunities. He characterized these actions as "attacks" against him by the College and an interference with his "right of enjoyment of the protection" of the collective bargaining agreement between his employee organization and the County.

Glasheen was notified by the Assistant Director of Public Employment Practices and Representation (Assistant Director) that his charge was deficient because the facts alleged would not establish a violation of §209-a.1(a), (b) or (c) of the Act. Glasheen then filed two amendments to the charge in which he alleged that the County denied his request to meet and discuss the negative comments made at the hearings and that his evaluation contained negative comments which made reference to his earlier improper practice charges.[1/]

The Director of Public Employment Practices and Representation (Director) thereafter dismissed the charge for the reason set forth in the deficiency letters sent to Glasheen. The Director held that no facts had been alleged which would establish the improper motivation required to sustain a violation of §209-a.1(a), (b) or (c).

Glasheen excepts to the Director's decision because, he claims, it prevented him from making additional attempts to amend, clarify or correct the charge, it failed to consider his previous improper practice charges as a demonstration of the College's continuing animus toward him and it minimized the

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1/ County of Suffolk, 25 PERB ¶4650 (1992), aff'd, 26 PERB ¶3029 (1993); County of Suffolk and Suffolk Community College, 25 PERB ¶4513, aff'd, 25 PERB ¶3067 (1992); County of Suffolk and Suffolk Community College, 24 PERB ¶4565 (1991), aff'd, 25 PERB ¶3019 (1992). All these charges were dismissed on the ground that the facts alleged did not establish the allegations pled.

significance of the comments made at the hearings and in the evaluation.[2/]

We affirm the Director's decision to dismiss Glasheen's charge for the reasons set forth below.

As to Glasheen's second and third exceptions, we agree with the Director that the meetings held by the College and its evaluation of Glasheen are not, in and of themselves, violations of the Act and that Glasheen does not plead any facts evidencing any improper motive. Furthermore, contrary to his assertion otherwise, Glasheen's prior charges cannot establish a course of improper conduct by the College because they were dismissed for failure to plead a prima facie case.[3/]

As to Glasheen's first exception, §204.1(b) of our Rules of Procedure (Rules) requires a charging party to supply a clear and concise statement of the facts which support the alleged violations of the Act. The Director, pursuant to §204.2(a) of the Rules, must review an improper practice charge to determine if the facts pled would establish, if proven, a violation of the Act. If the Director should determine that the facts as alleged

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[2/] Glasheen also makes further allegations of animus against the College based on statements that are included for the first time in his exceptions. Facts which are not alleged in the improper practice charge and which are included for the first time in the exceptions may not be considered in support of the charge. Oswego City Sch. Dist., 25 PERB ¶3052 (1992).

[3/] Glasheen admits in his exceptions that there is no improper motivation by the County nor involvement by the County in any of the actions which form the basis of this charge.

do not make out an improper practice, he is empowered to dismiss the charge without further notice. By practice, however, the Director gives charging parties notification of the deficiencies in their pleadings and an opportunity to withdraw the charge or to correct those deficiencies. Glasheen was afforded this opportunity and, in response, submitted his first letter of clarification, supplying certain information which he believed would evidence some improper motivation. Glasheen apparently had additional facts which, for some reason, he chose not to submit with his first clarification. He was, however, given another opportunity to provide additional facts which were necessary to support the allegations made in his original charge and the first clarification. Glasheen then filed a second clarification, with more facts. Thereafter, in his exceptions, he alleges still more facts in support of the improper practice charge.

Glasheen had three opportunities to file a charge which conforms to our pleading requirements. He now asks for a fourth chance, and apparently any number of opportunities thereafter, if the fourth is insufficient, to correct the deficiencies in his charge. To accept Glasheen's theory of pleading would give a charging party limitless opportunities to file clarifications of charges, a result which is neither contemplated nor permitted by our Rules. The Director, in exercising his discretion pursuant to §204.1(d) of the Rules, was not required to accept further amendments or clarifications to the charge, having afforded Glasheen a reasonable opportunity to submit a charge which meets

the requirements of §204.1(d) of our Rules. Furthermore, notice of intent to dismiss the charge was not here required.

Based on the above, the Director's dismissal of the charge is affirmed and Glasheen's exceptions are dismissed.

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

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

21-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF ROCKLAND, **CASE NO. DR-042**

Upon a Petition for Declaratory Ruling

JACK SCHLOSS, DEPUTY COUNTY ATTORNEY, for Petitioner

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Rockland (County) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing, as untimely, the County's petition for a declaratory ruling. The petition objected to the arbitrability of a proposal submitted by the Criminal Investigators and Senior Criminal Investigators of the Office of the Rockland County District Attorney (Union) to compulsory interest arbitration under §209.4 of the Public Employees' Fair Employment Act (Act). The County sought a ruling that the Union's proposal for a twenty-five year retirement plan is a nonmandatory subject of negotiation.

The County was notified by the Director that the petition was untimely, but it declined to withdraw the petition. The Director thereafter issued a decision dismissing the petition as untimely. He, therefore, did not determine the negotiability of the Union's proposal. The County argues in its exceptions that the Director failed to determine whether a ruling would be in the public interest as required by §210.2 of PERB's Rules of Procedure (Rules) and that the processing of the Union's petition for interest arbitration was

not strictly in compliance with the Rules, which gave the County a good-faith belief that the time limits for filing its petition for a declaratory ruling would not be strictly enforced.

For the reasons set forth below, we affirm the decision of the Director.

The Rules, at §205.6(c), provide that a petition for a declaratory ruling objecting to the arbitrability of any matter included in a petition for compulsory interest arbitration "may not be filed after the date of the filing of the response filed in accordance with §205.5" of the Rules. Section 205.5(a) of the Rules provides that a response to a petition for compulsory interest arbitration "shall be filed within ten working days of receipt of the petition requesting arbitration." It is undisputed that the Union filed its petition for interest arbitration on October 31, 1991, and that the County received it in November 1991. The County's declaratory ruling petition was not filed until March 26, 1993,[1/] almost sixteen months after the Union's arbitration petition, and well beyond the ten working days permitted for the filing of a declaratory ruling petition. The County's petition is, therefore, patently untimely.[2/]

The County argues in its first exception that the Director never made a determination as to whether the issuance of a

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[1/]The County's response to the petition for compulsory interest arbitration was apparently also filed on that date.

[2/]See Elmira PBA, Inc., 25 PERB ¶3072 (1992).

declaratory ruling would be in the public interest as required by §210.2 of the Rules.[3/] The County misconstrues the requirements of §210.2 in this respect. While the Director must determine if he will issue a declaratory ruling on the merits of a petition, he cannot reach the merits of a petition for a declaratory ruling if the petition is not timely filed. Timeliness is an initial requirement for processing, which a petitioner must satisfy before any merits determination may be made. The requirements of §210.2 presume that the petition has satisfied the procedural requirements of the Rules, specifically §210.1 and §205.5. Since the instant petition did not satisfy the timeliness requirements of the Rules, the Director was not obligated to make a determination as to whether the policies of the Act would or would not be served by the issuance of a declaratory ruling.

The County's second exception asserts that the Union's petition for compulsory interest arbitration was not processed in strict accordance with the Rules and, therefore, its late filing of the petition for a declaratory ruling should be excused. The County relies upon a September 18, 1991 amendment to §209.4 of the Act which included, for the first time, criminal investigators employed in the office of a district attorney within the group of public

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[3/]Section 210.2(a) of the Rules provides, in pertinent part:

> The Director will determine whether the issuance of the declaratory ruling would be in the public interest as reflected by the policies underlying the act.

employees entitled to compulsory interest arbitration. The Union had declared an impasse in its negotiations with the County on July 2, 1991. A mediator was appointed by PERB's Director of Conciliation on July 9, 1991, and one mediation session was held on September 6, 1991, without resolution. After the above-referenced amendment became effective on September 18, 1991, the Union, on October 31, 1991, filed its petition for compulsory interest arbitration. The County is arguing that the Union should have filed an additional declaration of impasse after the effective date of the legislation which created a right to interest arbitration under the provisions of §209.4 of the Act. Since the Union's declaration of impasse was filed before it gained the right to compulsory interest arbitration under the Act, the County argues that the Union's petition for binding arbitration was not in strict compliance with the Rules and that the County's own failure to comply with the filing requirements of the Rules should be overlooked.

The Union had a right under the Act to declare impasse whether or not it was entitled to binding arbitration.[4/] That it declared impasse, as was its right to do, before it became entitled to compulsory interest arbitration, does not require it to begin the impasse procedure again after the effective date of the amendment to §209.4. The procedure for the declaration of an impasse is identical whether the parties are subject to fact-finding or binding arbitration. As noted above, the time limits for the filing of a

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[4/]Act, §209.3 and §209.4.

petition for declaratory ruling are clearly specified in the Rules. The County chose to disregard those time limits.[5/] The minor irregularity it perceives in the Union's filing of its petition for compulsory interest arbitration did not excuse the County's manifestly late filing and did not extend its time to file the petition for a declaratory ruling.[6/]

For the reasons set forth above, the Director's decision is affirmed and the County's exceptions are dismissed.

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

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[5/]Apparently, the County asked for and received an extension of time in which to file its response to the petition for compulsory interest arbitration to December 29, 1991. It did not file its response, however, until March 26, 1993, over the Union's objection.

[6/]Indeed, the Director of Conciliation rejected the same argument when raised by the County in January 1992. He noted: "The change in finality under the Taylor Law's impasse procedures does not affect, or in any way change, the significance or propriety of the Declaration of Impasse filed with this office...."

2J-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LIVINGSTON COUNTY LOCAL 826, LIVINGSTON COUNTY EMPLOYEE UNIT,

Charging Party,

-and-

CASE NOS. U-13224 & U-13435

COUNTY OF LIVINGSTON,

Respondent.

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

HARRIS, BEACH & WILCOX (CARL R. KRAUSE and ANDREA M. BASILE TERRILLION of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions and cross-exceptions filed, respectively, by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Livingston County Local 826, Livingston County Employee Unit (CSEA) and the County of Livingston (County) to a decision by an Administrative Law Judge (ALJ). Each of the charges alleges that the County transferred exclusive unit work in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it replaced full-time unit employees with part-time, nonunit employees. The charges involve employees in the following titles: Home Energy

Assistance Program (HEAP) Examiner, Probation Officer and Senior Clerk at the County's skilled nursing facility.

The ALJ dismissed the charges except as to the Probation Officer. The ALJ held that CSEA had exclusivity over the unit work of a Probation Officer as that work was defined by that specific job title. The ALJ held, however, that CSEA had no exclusivity over the work of a Senior Clerk because the County regularly had assigned the full range of a Senior Clerk's duties to nonunit, part-time personnel in several County departments. The ALJ also dismissed the charge as it applies to the HEAP Examiner. According to the ALJ, CSEA's exclusivity in relevant respect was limited to the work of a full-time, "hybrid" position characterized by the ALJ as "HEAP Examiner/Clerical". Occupants of this full-time position did HEAP work seasonally, from January to April, and varied clerical duties from May to December. The ALJ held that CSEA did not have exclusivity over the work of the seasonal HEAP Examiner employed annually from only January to April because nonunit personnel had served in that seasonal capacity in the past.

CSEA excepts to the ALJ's decision regarding the HEAP Examiner. The County excepts to the ALJ's decision regarding the Probation Officer. No exceptions have been taken to the ALJ's decision regarding the Senior Clerk.

CSEA argues in its exceptions that the ALJ erred in not finding that the use of seasonal HEAP Examiners is an improper unilateral transfer of exclusive unit work because the duties of

the HEAP Examiner have been exclusive to its unit since 1988 when the County stopped using seasonal employees in that title. CSEA attaches no significance to the full-time HEAP Examiners' regular performance of clerical duties during part of the year. The HEAP-specific duties, according to CSEA, were exclusive to its unit and only those duties, not the clerical duties, are the subject of its charge.

The County argues in its cross-exceptions that the ALJ was correct in holding that the work of HEAP Examiners is not exclusive unit work. It argues, however, that the ALJ erred in finding a violation of the Act with respect to the Probation Officer because that hiring is consistent with its long-standing use of part-time and seasonal employees in many of the same job titles as are staffed by full-time employees. The County also argues that CSEA waived any further right to bargain regarding the use of part-time employees by specific agreement and conduct during negotiations for a successor to the parties' 1989-91 contract.

Having reviewed the record and considered the parties' arguments, we reverse the ALJ's decision as to the Probation Officer and affirm, on different grounds, her dismissal of the allegations regarding the HEAP Examiner. Our decision is premised upon a waiver by agreement, a theory applicable equally to the two titles in dispute. Therefore, we have no occasion to consider CSEA's exceptions or other of the County's cross-exceptions.

Article II §1 of the parties' agreement provides as follows:

> The Employer retains the sole right to manage its business and services and to direct the working force, including the right to decide the number and location of its business and service operations, the business and service operations to be conducted and rendered, and the methods, processes and means used in operating its business and services; and the control of the buildings, real estate, materials, parts, tools, machinery and all equipment which may be used in the operation of its business or in supplying its services; to determine whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by this Agreement; to maintain order and deficiency in all its departments and operations. (emphasis added)

The ALJ held that this provision was not specific enough to evidence a waiver of bargaining rights, which must be clear and unmistakable.[1/] In reaching her decision, the ALJ relied upon County of Broome[2/] and City of Poughkeepsie,[3/] two cases in which we held that management rights clauses did not constitute a waiver. Our finding of a waiver in this case, however, is entirely consistent with those decisions.

The management rights clause in County of Broome is not similar to the contract provision in this case. First, the clause under review in County of Broome did not contain any language which gave the employer any right to use nonunit

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[1/]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).

[2/]22 PERB ¶3019 (1989).

[3/]15 PERB ¶3045 (1982), conf'd, 95 A.D.2d 101, 16 PERB ¶7021 (3d Dep't 1983), appeal dismissed, 60 N.Y.2d 859, 16 PERB ¶7027 (1983).

personnel in the delivery of its services. Second, the employer's rights in County of Broome were qualified by a proviso which stated they could only be exercised "subject to the limitations provided in the Law . . . ." In this case, the County's management rights, in relevant respect, are specific and the exercise of those rights is not restricted.

Language restricting the employer's management rights was also present in City of Poughkeepsie. The management rights clause in City of Poughkeepsie was identical to that here in relevant respect with the important distinction that a separate section of the same clause subjected the employer's exercise of any contractual management right to "such regulations governing the exercise of said rights as . . . provided in Article 14 of the Civil Service Law . . . ." The Board in that case found that the management rights clause was not a waiver of the union's bargaining rights because there was unrebutted testimony from the union that the City's right to subcontract was specifically intended to be limited by its duty to negotiate under the Act and because the City's own conduct evidenced that it understood and agreed that the clause had the meaning which had been ascribed to it by the union in its testimony.

None of the factors which persuaded the Board in City of Poughkeepsie is present here. The specific grant of management right is unqualified and unrestricted and there is no evidence of negotiating history or conduct to suggest that the clause means something other than what it plainly states. To the contrary,

the County's practice of utilizing nonunit employees in many positions which have parallel full-time unit titles supports the conclusion that in this case, unlike City of Poughkeepsie, the parties mutually understood and agreed that the County had the right to use part-time or seasonal employees in the delivery of its services. Whether such part-time or seasonal employees would be appropriately added to CSEA's unit is not before us.

A union and an employer may satisfy by agreement their mutual duty to bargain a given subject, and thereby waive any further bargaining rights regarding the exercise of that contract right, without expressly stating in their contract that it was reached pursuant to the Act and was intended to fulfill the entirety of their statutory bargaining duty on that particular subject. Such a level of specificity has never been required as a condition to a finding of waiver by agreement either by this Board or in any other forum of which we are aware. We have, to the contrary, found a waiver by agreement in contract clauses which are broad when we have been persuaded that the language is a clear grant of right to the employer with respect to the subject matter of the improper practice charge.[4/] The particular management rights clause in issue here, which gives the County the right "to determine whether and to what extent the work required in operating its business and supplying its services shall be performed by employees covered by [the]

[4/]Town of Greece, 26 PERB ¶3032 (1993); Sachem Cent. Sch. Dist., 21 PERB ¶3021 (1988).

Agreement" is at least as specific as other agreements which have been held to constitute a waiver of further bargaining rights.[5/]

In reaching this conclusion, we reiterate that a waiver of bargaining rights is not to be implied and is not to be extended to circumstances not clearly encompassed by the parties' agreement. Where that waiver, however, is premised upon the parties' mutual agreement to afford an employer an unqualified right to take a certain action, we would distort the bargaining process and drain the agreement of its plain meaning by finding that the exercise of that right violated the employer's duty to bargain.

In this case, the hiring of a part-time HEAP Examiner and a part-time Probation Officer was consistent in nature and scope with the County's past utilization of part-time and seasonal employees. In that regard, we do not consider it dispositive that the County has not previously hired a part-time Probation Officer or has not used a seasonal HEAP Examiner since 1988. Although relevant to a consideration of CSEA's exclusivity, the nonutilization of nonunit personnel in certain positions is not relevant to the County's exercise of contract right. The County's management right, as granted and as exercised, crosses departmental lines and particular positions. The absence for some time of a perceived need for a part-time Probation Officer or a seasonal HEAP Examiner does not extinguish the County's

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[5/]See, e.g., County of Nassau, 26 PERB ¶3052 (1993).

rights under the contract to utilize part-time employees consistent with its needs as determined at any given time.

For the reasons set forth above, the County's exceptions regarding waiver by agreement are granted and the ALJ's decision in that respect is reversed. We do not reach CSEA's exceptions or the County's remaining cross-exceptions.

IT IS, THEREFORE, ORDERED that the charges must be, and they hereby are, dismissed.

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2K-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FIREFIGHTING TEACHERS AND EMERGENCY SERVICE INSTRUCTORS ASSOCIATION,

Petitioner,

- and -

CASE NO. C-4096

VOCATIONAL EDUCATION AND EXTENSION BOARD OF THE COUNTY OF SUFFOLK,

Employer.

SCHLACTER & MAURO (REYNOLD MAURO, of counsel), for Petitioner

RAINS & POGREBIN (RICHARD ZUCKERMAN of counsel), for Employer

BOARD DECISION AND ORDER

On April 30, 1993, the United Firefighting Teachers and Emergency Service Instructors Association (petitioner) filed a petition seeking to represent a unit of employees of the Vocational Education and Extension Board of the County of Suffolk. Thereafter, the parties executed a consent agreement in which they stipulated that the following is the appropriate negotiating unit:

Included: Fire academy instructors.

Excluded: All other employees.

Pursuant to that agreement, a secret-ballot election was held to determine the wishes of the employees on October 15, 1993, at which twenty-two votes were cast against representation by the petitioner, and thirteen in favor of representation by the petitioner; there were no challenged ballots.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, **IT IS ORDERED**, that the petition should be, and hereby is dismissed.

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3A-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NIAGARA FRONTIER TRANSPORTATION AUTHORITY SUPERIOR OFFICERS ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4150

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,

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 Niagara Frontier Transportation Authority Superior Officers Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Lieutenants - Fire Division.

Excluded: All other Employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Niagara Frontier Transportation Authority Superior Officers Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3B-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HYDE PARK EDUCATIONAL SUPPORT ASSOCIATION, NEA/NY,

Petitioner,

-and-

CASE NO. C-4148

HYDE PARK CENTRAL SCHOOL DISTRICT,

Employer,

-and-

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

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

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

Unit: Included: Bus drivers, custodians, groundsmen, cleaners, maintenance men, mechanics, cafeteria workers, school bus dispatchers, couriers and painters of the District and any other classification or category that may be established that falls within the intent in the certified unit.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3C-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 264, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

CASE NO. C-4145

NIAGARA FRONTIER TRANSPORTATION AUTHORITY,

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 Teamsters Local 264, International Brotherhood of Teamsters 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 those employed in the following titles: Airfield Foreman, Maintenance Facilities Supervisor, Maintenance Foreman, Fuel Farm Supervisor, Assistant Fuel Farm Supervisor,

Motor Equipment Maintenance Foreman, Assistant Motor Equipment Maintenance Supervisor, Electrical Superintendent, and Assistant to Airport Manager.

Excluded: Airport Manager, Properties Superintendent, Airfield Superintendent, Assistant Airport Manager and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 264, International Brotherhood of Teamsters. 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: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3D-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUBSTITUTES UNITED IN BROOME, NYSUT AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4137

CHENANGO VALLEY 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 Substitutes United in Broome, NYSUT, AFT, 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 per diem substitute teachers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Substitutes United in Broome, NYSUT, AFT, 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: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3E-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHOHARIE COUNTY DEPUTY SHERIFF'S ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4110

SCHOHARIE COUNTY AND SCHOHARIE COUNTY SHERIFF,

Employer,

-and-

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

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Schoharie County Deputy Sheriff's Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective

negotiations and the settlement of grievances.

Unit: Included: All Sheriff's Department employees.

Excluded: All persons in the unclassified service, in the exempt class of the classified service of Civil Service, the Sheriff, Under Sheriff, Lieutenants (including Chief Deputy), and Confidential Secretary.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Schoharie County Deputy Sheriff's Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3F-11/30/93

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SARATOGA COUNTY DEPUTY SHERIFF'S BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4101

SARATOGA COUNTY AND SARATOGA COUNTY SHERIFF,

Employer,

-and-

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

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Saratoga County Deputy Sheriff's Benevolent Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of

collective negotiations and the settlement of grievances.

Unit: Included: All employees of the Sheriff's Department.

Excluded: Elected officials, Undersheriff, Chief Deputy, Chief Deputy/Corrections , Confidential Secretary to the Sheriff and part-time and temporary employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Saratoga County Deputy Sheriff's Benevolent Association. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 30, 1993
Albany, New York

Pauline R. Kinsella

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg

Walter L. Eisenberg, Member

Eric J. Schmertz

Eric J. Schmertz, Member

GRIEVANCE AND INTEREST ARBITRATION PANELS

A candidate for appointment to the grievance arbitration panel must demonstrate satisfactory experience as a labor arbitrator. Applications for appointment to the panel must include the applicant's vita, five recent arbitration awards written by the applicant, and a listing of all awards rendered in the past two years, such listing to include the names of the parties, the nature of the issue(s) involved, and the appointing authority. Exceptions to the arbitration award requirements may be made for persons who have five or more years of relevant and appropriate professional employment with a federal, state or municipal agency charged with the administration of a labor relations statute and who, by education, training, experience or other objective criteria, can demonstrate such outstanding competence and stature in the field of labor relations as to assure the Board of their ability to serve effectively as a labor arbitrator, and such that their appointment to the panel would be of substantial value to the agency, its clientele and public. Candidates must be residents of, or maintain bona fide business offices within, the State of New York, or a location immediately contiguous thereto. Consistent with staffing needs and caseload demands, the Director of Conciliation should recommend to the Board such persons as are determined to have met the necessary standards and criteria.

A candidate for appointment to the interest arbitration panel must demonstrate substantial experience both as a labor mediator and labor arbitrator, and must be a member of PERB's mediation, fact-finding and grievance arbitration panels. Consistent with staffing needs and caseload demands, the Director of Conciliation should recommend to the Board such persons as are determined to have met the necessary standards and criteria.

A member of the grievance or interest arbitration panel may be removed by the Board for good reason as determined by the Board, including, without limitation, a failure, refusal or inability to comply with or maintain any of the standards, criteria or policies governing appointment to or service on a panel, such as service as an advocate in matters of labor relations or labor standards, or extended periods in which a member is not selected or assigned to a dispute despite availability.

MEDIATION AND FACT-FINDING PANELS

A candidate for appointment to the mediation and fact-finding panels must demonstrate by education, training and experience, or other objective criteria, an ability to serve effectively as a labor mediator or fact finder. Candidates must be residents of, or maintain bona fide business offices within, the State of New York, or a location immediately contiguous thereto. Consistent with staffing needs and caseload demands, the Director of Conciliation should recommend to the Board such persons as are determined to have met the necessary standards and criteria.

A member of the mediation or fact-finding panel may be removed by the Board in the same manner and upon the same terms as members of the grievance and interest arbitration panels.