STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, SUNY AT BINGHAMTON LOCAL 648,

Charging Party,

-and-

CASE NO. U-13622

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK AT BINGHAMTON),

Respondent.

NANCY HOFFMAN, GENERAL COUNSEL (MIGUEL ORTIZ of counsel), for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (JULIE SANTIAGO of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, SUNY at Binghamton Local 648 (CSEA) to a decision by an Administrative Law Judge (ALJ). CSEA's charge against the State of New York (State University of New York at Binghamton) (State) alleges that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it required three unit employees to obtain a Non-Commercial Driver's License Class C (Non-CDL C). The ALJ held that the three employees, one a laborer, one a stores clerk II (senior stores clerk), and one an

electrician, could be required in the course of their job duties to operate a vehicle with a gross vehicle weight rating (GVWR) between 18,001 and 26,000 pounds. Operators of vehicles with that GVWR require a Non-CDL C license under the State's Vehicle and Traffic Law. As such, acquisition of the Non-CDL C license was held by the ALJ to be part of the essential aspects of the employees' basic employment functions or related incidental tasks and, therefore, the State's issuance of that licensing directive was a nonmandatory subject of negotiation under our decision in Waverly Central School District (Waverly).[1/]

CSEA argues in its exceptions that the ALJ erred in relying upon Waverly because the employees in issue had never in the course of their employment driven a vehicle with a GVWR requiring a Non-CDL C license. Therefore, according to CSEA, the operation of those vehicles could not be part of their jobs. Moreover, CSEA argues that the predominant effect of the licensing requirement is on wages, not job assignments, because of the additional costs of acquiring that type of license.

The State argues in response that the ALJ was correct in holding that the licensing requirement was not mandatorily negotiable.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ in part and reverse in part.

[1/]10 PERB ¶3103 (1977).

The negotiability of the licensing directive necessitates a determination preliminarily as to whether the operation of vehicles requiring a Non-CDL C license is part of the essential aspects of any of the employees' basic employment functions or related incidental tasks.

The ALJ held that the operation of vehicles with a GVWR requiring a Non-CDL C license was integrally connected with all three employees' job assignments and that their job descriptions encompassed the operation of this class of motor vehicle. We agree that the operation of vehicles requiring a Non-CDL C license is a task incidentally related to the performance of the duties required of the laborer and the senior stores clerk. That is sufficient under Waverly to render the issuance of the licensing directive as to those two positions a nonmandatory subject of negotiations.

Neither incumbent of the laborer and the senior stores clerk positions had driven the type of vehicles requiring, since February 19, 1991, a Non-CDL C license before the date the State directed them to obtain that license. That is a relevant factor in the analysis, but it is not dispositive when the job descriptions for these two positions require at least the occasional operation of this class of motor vehicle. The position description for a laborer[2/] specifically states that

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[2/]The laborer's job description states that "in the pick up and delivery of items . . . [the laborer] may in the event of need be required to drive the vehicle."

the incumbent may occasionally be required to operate self-propelled equipment. Listed as a qualification for the laborer position is a "driver's license appropriate for the type of vehicle to be operated". The delivery and pick up of various articles is within the very broad scope of a laborer's duties as described in the job description and the operation of the delivery van is reasonably required as an incidental part of those duties. Lawful operation of that van necessitates a Non-CDL C license.

The job description of the senior stores clerk incorporates the duties of a stores clerk, which include, as with the laborer, the occasional operation of a motor vehicle to pick up and deliver supplies.[3/] Although less general than the laborer's position, the job description for the senior stores clerk similarly encompasses the driving of the delivery van on occasion.

CSEA argues alternatively in support of the mandatory negotiability of the licensing directive that the Non-CDL C license costs the employees more than the licenses they have for their personal vehicles. This added cost, argues CSEA, makes the predominant effect of the State's directive on wages. In making this argument, CSEA relies on our cases in Sackets Harbor Central

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[3/]As stated on the job description, a stores clerk may "occasionally operate a motor vehicle to pick up and deliver supplies."

School District (Sackets Harbor)[4] and South Jefferson Central School District (South Jefferson).[5] In those cases, we held that employers had unilaterally changed terms and conditions of employment by assigning teachers extracurricular duties which lengthened the employees' workday even though those extracurricular duties were inherently part of the teachers' occupation. Those cases, however, are not relevant here. Having found that the operation of vehicles requiring a Non-CDL C license is already part of the laborer's and senior stores clerk's positions, there is no change in the conditions of employment of those two employees. Moreover, in South Jefferson and Sackets Harbor, it was the employers which imposed the increase in hours on the employees in their employer capacity. In this case, the State did not impose any job related requirements on any unit employees in its employer capacity. The licensing requirements under the Vehicle and Traffic Law are directed to the public at large in the State's capacity as sovereign and as an aspect of its control over the regulation of motor vehicles generally. Any costs incurred by the employees in conjunction with securing the necessary license can be addressed in the context of any impact bargaining as may be demanded. Whatever impact bargaining obligations there may be, however, do

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[4]13 PERB ¶3058 (1980).

[5]13 PERB ¶3066 (1980).

not deprive the State of its separate right to issue the licensing directive.[6/]

We reach a different conclusion than did the ALJ, however, with respect to the electrician. Unlike the laborer's and the senior stores clerk's, the electrician's job description does not support a conclusion that the operation of a motor vehicle requiring a Non-CDL C license is reasonably a part of the electrician's job. Operation of a motor vehicle is not listed among the duties or qualifications for the electrician's position. The State required the electrician to obtain the Non-CDL C license because it believed that he might have to operate a vehicle requiring such a license in the course of his duties, specifically a boom truck with an attached bucket. Although the electrician may be required to go into and up in the bucket in the course of installing, maintaining or repairing elevated electrical devices such as lights or traffic signals, nothing in the record evidences that the electrician is responsible for driving the necessary equipment to the site. Indeed, there is no evidence in the record to show that the electrician had to drive any vehicle in the course of his duties. As to the electrician, therefore, the licensing directive is unrelated to the duties required of that position and, therefore, was subject to a prior bargaining obligation which the State admittedly did not honor.

[6/]Town of Oyster Bay, 12 PERB ¶3086, aff'g 12 PERB ¶4510 (1979).

For the reasons set forth above, the ALJ's decision as it applies to the laborer and senior stores clerk is affirmed and CSEA's exceptions in those respects are dismissed, as is the charge to that extent. The ALJ's decision as it applies to the electrician is reversed and CSEA's exceptions in that respect are granted.

IT IS, THEREFORE, ORDERED that:

1. The State rescind any requirement that the incumbent of the electrician position in issue hold a Non-CDL C license and pay the current incumbent of that position, Paul Hudzina, the amount expended by him to obtain that license with interest at the currently prevailing maximum legal rate.
2. Sign and post notice in the form attached in all locations at which notices of information to unit employees are ordinarily posted.

DATED: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, SUNY at Binghamton Local 648 that the State of New York (State University of New York at Binghamton) will rescind any requirement that Paul Hudzina, an electrician, hold a Non-Commercial Driver's License Class C and will pay Paul Hudzina the amount expended by him to obtain that license with interest at the currently prevailing maximum legal rate.

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

State of New York (State University of New York at Binghamton)

. . . . . .

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.

2B- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-14218

KINGS PARK CENTRAL SCHOOL DISTRICT,

Respondent.

STEPHEN M. BLUTH, for Charging Party

INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER, REICH & SCRICCA (ANNA M. SCRICCA of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Kings Park Central School District (District) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Kings Park Classroom Teachers' Association, NYSUT, AFT, AFL-CIO (Association). The Association alleges in its charge that the District violated §209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) when it formally reprimanded teacher and Association vice-president Roger Kinsey for a comment he made in a column he submitted to the Association's paper, The Voice of 1812.

The ALJ held that Kinsey's comments were protected under the Act such that the District's reprimand of him for making them violated §209-a.1(a) and (c). The ALJ dismissed the charge in all other respects and no exceptions have been taken to those aspects of her decision.

The District argues in its exceptions that Kinsey was not engaged in statutorily protected activity when he made his comment regarding honor students at the District's William T. Rogers Middle School and that the ALJ should have dismissed the charge because there is no proof that the District was improperly motivated in issuing him the reprimand.

The Association argues that the ALJ was correct in her findings of fact and her conclusions of law and should, therefore, be affirmed.

Having reviewed the record and considered the parties' arguments, we reverse the ALJ's decision on the ground that Kinsey's comment was not protected under the Act. Accordingly, we do not consider any of the District's other arguments.

The Voice of 1812 is distributed to teachers throughout the District via school mailboxes, but it is also accessible to and read by parents, administrators and community members. This case involves a column Kinsey wrote entitled Voice of 1812, Not!, which was published and distributed after the Association's December newsletter was released because he missed the paper's filing deadline. The portion of the column for which Kinsey was reprimanded reads as follows:

> All things considered, this has not been a banner year to be a Kings Park teacher. However, it has produced some of the best humor I have ever heard, much of it unprintable even by my standards. Perhaps the quintessential comment is a bumper sticker recently seen which read, "My child beat up an Honor Student at the _____ Middle School." Sounds like a best seller to me.

The bumper sticker referenced in Kinsey's comment is a parody of a District program under which it distributes bumper stickers to the parents of honor students in the William T. Rogers Middle School which read: "My child is an honor student at Wm. T. Rogers Middle School."

The principal of a District elementary school, who objected to Kinsey's reference to the bumper stickers, gave a copy of Kinsey's column to Mary DeRose, Superintendent of Schools, informing her that he had also received a complaint from a teacher who found the column objectionable. DeRose met with Kinsey and an Association representative and reprimanded him orally for ridiculing honor students and involving them in labor matters. The reprimand was later reduced to writing and placed in Kinsey's file with a directive that he refrain from this type of inappropriate behavior under threat of disciplinary action for noncompliance.

The ALJ held that Kinsey had a protected right under the Act to write a column for the Association newsletter. As a broadly stated proposition, this is certainly correct. The ALJ also correctly recognized, however, that a generally protected right of an employee who serves as a union officer to write, publish or

distribute opinions in any given medium is not absolutely protected by the Act regardless of circumstance or the content of the remarks. The ALJ, however, held that the content of Kinsey's nonthreatening statements did not deprive him of the Act's protection because he did not enmesh students in a labor dispute. An enmeshing of students was the circumstance which deprived an employee of protection against a reprimand in an earlier decision involving this District.[1/]

The fact that Kinsey's comments were not threatening and did not enmesh students in a labor dispute, however, does not necessarily make them protected under the Act. In the paragraph for which he was reprimanded, Kinsey makes it plain that he considers a bumper sticker proclaiming that one student had beaten another who is an honor student to be humorous and opines that many others would share that sentiment. As the ALJ observed, that comment was wholly unconnected to any labor dispute or to any other aspect of the employer-employee relationship. Kinsey's remarks in relevant respect do not relate to any employee interests or working conditions and do not give any indication of an attempt to secure any benefit for teachers as employees. Fairly read, Kinsey's remarks constitute a public disparagement, however satirical or humorous he viewed it, of a District program, written without connection to the employer-employee relationship. Such comments are not protected by the

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[1/]Kings Park Cent. Sch. Dist., 24 PERB ¶3026 (1991).

Act.[2/] Because Kinsey was not engaged in activity protected by the Act in making and publishing the remarks in issue, the District's oral and written reprimands do not violate §209-a.1(a) or (c) of the Act.[3/]

For the reasons set forth above, the District's exceptions with respect to the protected nature of Kinsey's comments are granted and the ALJ's decision is reversed insofar as she held the District in violation of §209-a.1(a) and (c) of the Act.

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

DATED: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter ~~L.~~ Eisenberg, Member

Eric J. Schmertz, Member

[2/]NLRB v. Electrical Workers IBEW (Local 1229)(Jefferson Standard Broadcasting Co.), 346 U.S. 464, 33 LRRM 2183 (1953), cited with approval in Deer Park Union Free Sch. Dist., 11 PERB ¶3043 (1978).

[3/]Whether Kinsey had any other sources of right to make these remarks and whether the District violated any of those rights in its reprimand or threatened disciplinary action are issues which are not properly before us.

20- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL BROTHERHOOD OF CORRECTIONAL OFFICERS, LOCAL R2-110,

Charging Party,

-and-

CASE NO. U-13872

COUNTY OF ROCKLAND AND ROCKLAND COUNTY SHERIFF,

Respondents.

EDWARD P. HOURIHAN, JR., ESQ., for Charging Party

ILAN SCHOENBERGER, ESQ. (JOSEPH E. SUAREZ of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Rockland and Rockland County Sheriff (County) to a decision by an Administrative Law Judge (ALJ). The International Brotherhood of Correctional Officers, Local R2-110 (Local) is the bargaining agent for the County's correction officers, having replaced the employees' prior union representative, which had filed the charge. After a hearing, the ALJ held that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the starting and ending times of three existing shifts, unilaterally imposed a fourth shift and failed to negotiate the impact of those changes as demanded.

The County argues in its exceptions that its contract defenses necessitated the dismissal of the charge or at least warranted deferral of the charge to arbitration, that it negotiated the impact of the shift changes in good faith, and that the collective bargaining agreement waived any further bargaining rights the Local had regarding shift scheduling. The County also argues that it was forced to rest after the Local had concluded its direct case because the ALJ had made rulings against it before and during the hearing. The Local did not file a response to the County's exceptions.

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

Most of the County's defenses to its admitted changes in the shifts are grounded upon the collective bargaining agreement. The County relies upon that contract, under alternative theories, as a jurisdictional limitation, a basis for either a jurisdictional or a merits deferral, or a waiver of the Local's bargaining rights.

The County's defenses based on a lack of jurisdiction must be dismissed. There being no grievance filed, a deferral of the jurisdictional issue to arbitration is inappropriate.[1/] In such circumstances, our authority to proceed with the unilateral change aspects of the charge is an issue to be decided by us in the first instance. The record does not support the County's contention that the Local's president relied upon any provision

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[1/]Erie County Water Auth., 25 PERB ¶3017 (1992).

of the contract as a source of right to the Local which prevented the County from making the shift changes in issue. The County relies in this respect on provisions in the contract covering meals and pay dates. The shifts are referenced in those provisions, but only to illustrate or clarify the employees' rights regarding the meals to be furnished them or the time paychecks will be distributed. We, therefore, affirm the ALJ's finding that the references to the preexisting shifts in the contract are merely incidental to the contractual meal allowances and pay dates and do not grant the Local any contractual rights to the maintenance of any shift schedule.

The only contract provision even arguably relevant to the disposition of this charge is the County's management rights clause, which is the source of a waiver defense to the unilateral change aspects of the charge. A respondent's assertion of a contract right in defense of an improper practice charge within our jurisdiction is not a claim we have deferred on the merits to arbitration.[2/] We would note, moreover, the practical difficulties presented by such a request because there is ordinarily no right under a collective bargaining agreement for an employer to file a contract grievance or to otherwise secure an interpretation of the contract apart from a grievance

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[2/]State of New York (State Univ. of New York at Albany), 11 PERB ¶3026 (1978), aff'g 10 PERB ¶4578 (1977) (subsequent history omitted).

initiated by an employee or the employee's bargaining agent. In any event, no such employer right is prescribed here.

We affirm the ALJ's dismissal of the County's defense that the management rights clause clearly manifests a waiver by the Local of the right to bargain the at-issue shift changes for the reasons stated by the ALJ. We similarly affirm her findings and conclusions regarding the County's failure to negotiate the impact of the shift changes.

Finally, we find no support for the County's allegation that the ALJ's rulings forced it to rest. From our reading of the record, the County elected to move to dismiss the Local's charge and then rested because it believed that the Local had not established any aspect of the charge on its direct case.

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

IT IS, THEREFORE, ORDERED that the County:

1. Rescind the shift changes put into effect on October 3, 1992 and reinstitute the three shifts in existence prior thereto.
2. Reimburse unit employees for any lost wages or benefits suffered as a result of the implementation of the October 3, 1992 work schedules, including any overtime lost by virtue of the schedule changes, plus interest at the maximum legal rate.

3. Sign and post notice in the form attached at all locations customarily used to post written communications to unit employees.

DATED: April 25, 1994
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 County of Rockland and the Rockland County Sheriff in the unit represented by the International Brotherhood of Correctional Officers, Local R2-110, that the County of Rockland and Rockland County Sheriff:

1. Will rescind the shift changes put into effect on October 3, 1992 and reinstitute the three shifts in existence prior thereto.

2. Will reimburse unit employees for any lost wages or benefits suffered as a result of the implementation of the October 3, 1992 work schedules, including any overtime lost by virtue of the schedule changes, plus interest at the maximum legal rate.

Dated . . . . . .

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

County of Rockland and Rockland County Sheriff

. . . . . .

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- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

-and-

CASE NO. U-13598

STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL SERVICES),

Respondent.

JAMES KEMENASH, for Charging Party

WALTER PELLEGRINI, GENERAL COUNSEL (RICHARD W. MCDOWELL of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Public Employees Federation, AFL-CIO (PEF) to a decision by an Administrative Law Judge (ALJ) dismissing its charge that the State of New York (Department of Correctional Services) (State) had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally discontinuing free analysis of laboratory tests for unit employees at the Downstate Correctional Facility (Facility) and requiring payment of lab costs from those employees who had received the free analyses in the past. The ALJ reserved decision on the State's motion to dismiss the charge at the close of PEF's direct case and ordered the State to put in

its evidence. The ALJ in her decision granted the motion to dismiss, finding that PEF had neither established a practice at the Facility of free lab test analyses for employees represented by PEF nor the State's knowledge that such a practice existed. Alternatively, she found that the State's sole witness had credibly testified that there was no practice as alleged and the State was not aware that employees had received any free analyses until a January 1992 audit. The State notified all unit employees that they were not to seek a free lab test analysis and, to the extent that they had received such a benefit in the past, they were to reimburse the State for its costs.

PEF excepts to the ALJ's decision, arguing that the record establishes the past practice of free lab test analysis and that the State was aware of the practice. The State supports the ALJ's findings and decision.

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

The employees represented by PEF work in the Facility's health care unit. Lab tests conducted in that unit, whether on inmates or Facility employees, were at the times relevant to this charge sent to National Health Laboratories (NHL) for analysis. Tests on employees ordered by the Facility, such as a lead level test on corrections officers working as range instructors, a test on kitchen workers, and a test on clerical employees, all of whom are not in PEF's bargaining unit, and a measles test of several

employees, some of whom were in PEF's unit, were not charged to employees. Apparently, in anticipation of retirement, a management employee at one time also had some tests conducted without charge. There were also a number of occasions when employees, including some in the PEF unit, received tests for a variety of nonemployment related conditions, ranging from strep throat to pregnancy. Bills for all tests conducted by the health care unit which were sent to NHL for analysis, whether for employees or inmates, were sent to the Facility's business office and were paid. It is difficult, if not impossible, to ascertain from some bills whether the individual is an employee or an inmate, with the exception of pregnancy tests because there are no female inmates at the Facility.

In January 1992, the Facility first became aware that there were non-job-related tests being analyzed when billing for pregnancy tests showed up in an audit of NHL being conducted by the State Comptroller. The Facility, upon investigation, found that fifteen of the thirty-nine employees in the health care unit had received personal lab tests that had been paid for by the Facility. When NHL was questioned about these bills, it advised the Facility that the bills were in error because it conducted employee tests for free as a "professional courtesy". The Facility instructed NHL to stop analyzing any employee's personal tests for free and to give it a list of any other employees who

had had free tests performed by NHL.[1/] The Facility then received two additional names from NHL.

The Facility thereafter advised all employees that they were no longer to receive such tests, and to the extent they had received them in the past, they had to reimburse the Facility for the cost of the test and analysis. PEF demanded recision of and negotiations on this directive. This charge was filed when that demand was refused.

PEF's charge centers on an alleged discontinuation of a mandatorily negotiable past practice. The ALJ noted correctly that for a practice to be established, for the purposes of the Act, it must be unequivocal, exist for some reasonable period of time and raise an expectation among unit employees that it will be continued.[2/] Here, only during one measles outbreak did employees in PEF's unit receive a Facility-sanctioned test, at no cost to the employee. The other examples given by PEF involve nonunit employees who likewise received employer-ordered tests. Of the remaining individual tests which were billed to the Facility and which were not ordered by the Facility, only fifteen employees over ten years received an analysis of their lab tests

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1/ The Facility advised NHL that such a practice was improper because employees were not allowed to have non-job-related tests conducted at the Facility and even if they were, the New York State Public Officers Law prohibited State employees from accepting such a benefit from NHL.

2/ See County of Nassau, 24 PERB ¶4523, aff'd, 24 PERB ¶3029 (1991).

at no charge to the employee. Of those fifteen employees, all that is known from the record is that they were assigned to the health care unit. Arguably, therefore, some of them were in PEF's unit. The ALJ determined that these few instances over the decade or more involved, did not evidence a past practice of Facility-provided free lab test analysis for nonemployment related conditions which was subject to a bargaining duty prior to alteration. The ALJ also found that there was no proof of knowledge by any agent of the State that some employees were receiving this benefit. There was no credible evidence offered to establish that any members of the Facility's management knew about the personal lab tests being analyzed by NHL.[3/] The number of bills submitted each month and the method of listing patients and test types are such that it cannot be found that the Facility had constructive notice of the testing. The State's actions upon discovering the situation supports this finding. The State quickly moved to disabuse unit employees of any notion that this was a benefit to which they were entitled, either by contract or by practice.

3/ That one management/confidential employee had some tests conducted prior to retirement does not establish knowledge on the part of the State, or even the Facility, of the alleged practice. The testimony of one of PEF's witnesses that she had advised management, during the measles testing, that tests could be conducted for free for employees by NHL does not establish knowledge by any member of management that employees could receive personal lab test analysis for free.

Accordingly, PEF's exceptions are dismissed and the ALJ's decision is affirmed.

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

DATED: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2E- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WILLIAM T. BRUNS,

Charging Party,

-and-

CASE NO. U-12252

STATE OF NEW YORK (DIVISION OF PAROLE), and SECURITY AND LAW ENFORCEMENT EMPLOYEES, COUNCIL 82, AFSCME, AFL-CIO,

Respondents.

KATHLEEN BRUNS, for Charging Party

WALTER J. PELLEGRINI (LAUREN DESOLE of counsel), for Respondent State of New York

JOSEPH P. MCGOVERN, ESQ., for Respondent Security and Law Enforcement Employees, Council 82, AFSCME, AFL-CIO

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by William T. Bruns (Bruns) to a decision by an Administrative Law Judge (ALJ) dismissing his charge, as amended, that the State of New York (Division of Parole) (State) and Security and Law Enforcement Employees, Council 82, AFSCME, AFL-CIO (Council 82) had violated, respectively, §209-a.1(a) and (c) and §209-a.2(c) of the Public Employees' Fair Employment Act (Act).

At the close of Bruns' direct case, the ALJ, upon the State's and Council 82's motions, dismissed Bruns' charge. Bruns excepts to the ALJ's pre-hearing rulings, her denial of his

motion that she recuse herself,[1/] certain of her rulings at the hearing and her finding that he had not made out a prima facie case.

Bruns filed a voluminous improper practice charge on January 29, 1991, in which he made several allegations of improper conduct by both the State and Council 82. Bruns was twice advised by the Assistant Director of Public Employment Practices and Representation (Assistant Director) that his charge was deficient. In response, on February 19, 1991, Bruns filed a clarification of the charge which contained several allegations, including the claim that he had filed a grievance with Council 82 on December 26, 1990, and had not yet been advised of its actions regarding that grievance. The charge, with this clarification, was assigned to the ALJ for further processing.

Because of the number and complexity of allegations and the sheer volume of paper which accompanied the charge, the clarification, and Bruns' statements at the pre-hearing conference, the ALJ directed Bruns to file an offer of proof setting forth his allegations against both the State and Council 82 in a clear and concise statement with supporting facts.[2/] Bruns responded with a document in excess of 100

[1/]Bruns earlier appealed these rulings to us. We declined to rule on the merits of his appeal at that time, finding that it was interlocutory in nature. State of New York (Div. of Parole) and Security and Law Enforcement Employees, Council 82, AFSCME, AFL-CIO, 25 PERB ¶3007 (1992).

[2/]The ALJ also provided Bruns with copies of several relevant PERB decisions to enable him to limit his charge to cognizable allegations.

pages, inclusive of supporting documents, setting forth sixty-eight separate allegations of wrongdoing, primarily by Council 82. By letter dated September 23, 1991, the ALJ ruled that all but one of the allegations were untimely and/or conclusory (i.e., unsupported by specific factual allegations as required by §204.1(b)(3) of our Rules of Procedure). The ALJ scheduled a hearing on the following allegation, which referenced the handling of the December 26, 1990 grievance Bruns had included in his February 19, 1991 clarification of his charge:

> Christopher Gardner [Council 82's General Counsel] failed to process this grievance for Mr. Bruns and failed to notify Mr. Bruns he had not and would not, thereby rendering the grievance untimely. Council 82 breached its duty of fair representation by failing to process this grievance in a timely manner and by failing to communicate the same to Mr. Bruns.[3/]

The State and Council 82 denied the material allegations of the charge as clarified and amended by the offer of proof. The hearing lasted four days, all of which was devoted to Bruns' direct case. Bruns was represented by his wife and testified for

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[3/]The ALJ also ruled that another paragraph of the offer was ancillary to the allegations against Gardner. It alleged that Walter Cavanaugh, who at that time was a Field Staff Coordinator for Council 82, had returned the referenced grievance to Bruns with instructions to file the grievance at step 1 of the grievance procedure because Council 82 could not take any action until a step 1 decision had been rendered or the time for the State to issue such a decision had elapsed. While finding that Cavanaugh's actions did not separately constitute an improper practice, the ALJ ruled that she would accept evidence about this allegation because it showed what happened to the grievance after it was sent to Gardner.

part of the first day of hearing.[4/] Gardner was on the stand for most of the remainder of the hearing, having been called by Mrs. Bruns. Cavanaugh, also called by Mrs. Bruns, testified briefly on the third day of hearing.[5/] Both Council 82 and the

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[4/]During the first day of hearing, it became apparent that Mrs. Bruns, who is not an attorney, was testifying during her examination of each witness. The ALJ swore Mrs. Bruns in as a witness and asked if everything she had testified to and would testify to was the truth. Upon Mrs. Bruns' affirmation, the ALJ made clear that Mrs. Bruns was simultaneously questioning witnesses and testifying. On the final day of hearing, Mrs. Bruns advised the ALJ that she was the next witness. The ALJ, who had assured Mrs. Bruns earlier in the proceeding that she would be given an opportunity to testify in the narrative, ruled that, as she had received enough testimony from Mrs. Bruns during the course of the hearing and as it was unlikely that she would add anything new to the record, Mrs. Bruns was precluded from further testifying and closed the hearing. Shortly thereafter, the ALJ reconsidered her ruling and advised Mrs. Bruns in writing that she would reopen the record to hear her testimony following receipt from her of an offer of proof as to the nature of her testimony and its relationship to the charge. No offer of proof was submitted by Mrs. Bruns, who advised the ALJ that she was now reluctant to testify. The ALJ then confirmed that the record was closed and set a briefing schedule.

[5/]Bruns requested the issuance of three subpoenas ad testificandum for the appearance of Cavanaugh, Joseph Puma, Executive Director of Council 82, and Martin Kelly, Director of Parole Administration for the State. The ALJ issued the subpoenas to Bruns for service. The State and Council 82 thereafter made motions to rescind the subpoenas. The ALJ reserved on the motions and the parties then instituted proceedings to quash the subpoenas in Supreme Court, Albany County. Cavanaugh was voluntarily produced by Council 82 for the third day of hearing. The ALJ requested Bruns to make an offer on the record of the relevancy of the testimony sought from Puma and Kelly to the issue being litigated. Finding that the offer made by Mrs. Bruns established that their testimony would not be relevant to the issue before her, the ALJ rescinded the subpoenas for Puma and Kelly. Thereafter, by decision dated November 19, 1992, Justice Conway confirmed Cavanaugh's subpoena and quashed the subpoenas for Puma and Kelly.

State were present[6/] and represented by counsel, who made motions to dismiss at the close of Bruns' case. The ALJ reserved judgement on the motions, closed the record and accepted briefs from Bruns and Council 82.[7/]

Based upon the following findings of fact and conclusions of law, we affirm the ALJ's decision.

Bruns is a Warrant and Transfer Officer[8/] employed by the State's Division of Parole (Parole) in the Western region of New York. He is the only Council 82 unit employee, and member, at his facility. In March 1989, Bruns filed a grievance relating to overtime.[9/] Thereafter, he filed a grievance complaining of the State's proposed use of Federal Marshals to perform unit work. From 1989 to the time of the hearing, Bruns was involved in numerous grievances and other actions,[10/] all of which were processed by

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[6/]The State, with the ALJ's permission, was present only for the last two days of hearing, as the only timely charge against the State was dependent upon proof that Council 82 had violated §209-a.2(c) of the Act by failing to process a grievance alleging that the State had violated the collective bargaining agreement.

[7/]The State declined to submit a brief.

[8/]He transports parole violators and prisoners from location to location both within New York and to and from the other states and New York.

[9/]Bruns alleged in his grievance that he had submitted claims for overtime worked from July 7, 1988 through October 26, 1988 on November 2, 1988. As of January 19, 1989, when he made inquiry as to the status of his claim, he had received no information from Parole as to when he could expect payment.

[10/]A number of these relate to his ongoing dispute with Parole over the payment on his overtime claims as detailed in his March 2, 1989 grievance. The overtime statements and travel vouchers of Bruns and other Warrant and Transfer Officers came under some scrutiny by the Office of the State Comptroller's Management Audit staff and the Inspector General.

Council 82. Some of his grievances were taken to arbitration and some were settled by the State and Council 82 prior to, or at, arbitration. Indeed, by letter dated November 27, 1990, Bruns was advised by Brian O'Donnell, Esq., Council 82's retained counsel, that the bulk of his remaining overtime claims from 1989 would be paid in his December 19, 1990 paycheck.[11/] O'Donnell noted that Kelly still had problems with some of the justifications for overtime offered by Bruns but at least Bruns would be getting a partial payment and that the issues in dispute would be narrowed for arbitration, which was scheduled for September 11, 1991. O'Donnell further informed Bruns by a letter dated December 14, 1990, that Bruns would be receiving a check for $5,055.00 on December 19, 1990, which would represent the undisputed amount of overtime which had still not been paid. Bruns did receive a check from the State on December 19, 1990 in payment for his overtime claims[12/] and the check was for approximately $2700 less than what Bruns had claimed, based on the State's deduction for unauthorized time worked, for which Bruns had earlier been compensated.[13/]

[11/]This letter was part of Bruns' pleadings and is attached to an ALJ exhibit.

[12/]He had previously received other checks in partial payments of this, and other, overtime claims and travel vouchers.

[13/]We take administrative notice that Bruns filed an improper practice charge on March 23, 1992 (Case No. U-13349) alleging that the State and Council 82 had improperly settled this overtime grievance and all related claims at an arbitration held on February 19, 1992. That stipulation of settlement provides that Bruns receive $4,878.28 as final payment for all compensable hours worked by him in 1988 and specifically references the monies paid and later disallowed by Parole on December 19, 1990. Case No. U-13349 is being held pending the decision in this case.

Bruns and his wife appeared in Albany for an arbitration on December 20, 1990 on another of his grievances. He learned upon his arrival that the arbitration, which had been scheduled since February 1990, had been adjourned. He called Gardner for an explanation and Gardner agreed to meet with him at Council 82's Albany office. During their meeting, Gardner told him that the arbitration had been adjourned without date in the hopes of resolving the matter because Gardner was not optimistic about prevailing on the merits. He told Bruns that Robert Falzone, the Field Representative responsible for Bruns' geographic location, should have advised Bruns of the adjournment.[14/] Bruns then detailed some of the difficulties he perceived in his dealings with Council 82, including his dissatisfaction with the manner in which the overtime grievance was progressing. He testified that Gardner then told him to file his grievances directly with him or bring any questions he had to Gardner and he would handle them. Gardner's testimony differs on this point. He claims that he "suggested to [Bruns] that if he was unable to reach Mr. Falzone and there was an issue he wanted some advice on, he should call me and I'd be happy to discuss that with him. I have never suggested to any Council 82 union member that they should file a grievance directly to me."

[14/]Gardner called Falzone at that time and asked him why he had failed to tell Bruns about the adjournment. Gardner told Bruns that Falzone had said he was afraid of Bruns and that was why he had not apprised him of the adjournment.

On December 26, 1990, Bruns sent a packet of documents to Gardner. It included a cover letter to Gardner,[15] a letter detailing Bruns' concerns about his "zoning" grievance and requesting that Gardner write a letter to Parole about the issue, a grievance form computer-generated by Mrs. Bruns and a two-page narrative of the details of the grievance. The grievance complains about a check dated December 19, 1990. It is the same check that O'Donnell had earlier explained to Bruns was in partial settlement of his overtime claims, the balance of which would be resolved in an arbitration already scheduled.[16] The grievance form, in the space for "date submitted", read "12/27/90". Gardner reviewed the packet upon his return from

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[15]The letter read as follows:

> Dear Chris:
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> Please find enclosed two (2) communications. The first is an article 8 grievance based on the state's (sic) recent action involving my overtime submissions for the year 1988. The second is a letter requesting you to write to the Division of Parole and/or the GOER advising them the "zoning" policy they implemented on August 8, 1990 is unsatisfactory to the union and the temporary arrangement is to end.

[16]The attachment to the grievance form states, in part:

> On December 19, 1990 the Finance Office, Audit and Control, Dept. of Budget and/or Division of Parole Director Martin F. Kelly, did violate Article 8 of the Security Services Unit Agreement by singling me out to enforce their interpretation of the FLSA concerning the payment of overtime. Their selective enforcement covers not only the time I have previously grieved and the time after the dates complained of in that grievance, but now time for which I have previously been paid has been deducted from that which the State has owed me since July 1988.

vacation in early January 1991 and acknowledged his receipt in a letter to Bruns dated January 14, 1991.[17/] Gardner testified that after he wrote to the Bruns, he had his secretary file the packet away in the office, for reference when, and if, the grievance went to arbitration. He believed that Mr. and Mrs. Bruns had sent him the grievance form as a courtesy copy because it indicated that it had been submitted on December 27, 1990 and it was not signed. Gardner further testified that he does not become involved with a grievance until the arbitration stage and that the contractual grievance procedure and Council 82's practice contemplate that the grievant will file the grievance at the first step, unless it is a grievance with regional or statewide implications, in which case a representative of Council 82 may file.

[17/]In the letter, Gardner noted:

> I am responding to your recent correspondence regarding grievances which you have filed concerning zoning of overtime assignments and the retroactive deduction of overtime payments.
>
> Your grievance regarding the retroactive deduction of overtime payments raises some important issues and may well have to be arbitrated. However, prior to that action being taken, the grievance must proceed through step 3 of the grievance procedure.
>
> In regard to your grievance concerning the zoning of overtime assignments, I am less clear regarding exactly what is at issue, and I suggest that you review this issue with Bob Falzone as the matter proceeds through the grievance procedure. Bob has a much greater familiarity with the history and background of that issue, as well as its full ramification.

The Bruns were advised by their private attorney, Vincent Moyer, by letter dated January 28, 1991, that he had spoken with Gardner. He went on to note:

> Mr. Gardner informed me that he had received the grievance that you filed for the disallowance and deduction made by the Division of Parole for two thousand six hundred ninety two dollars and twenty nine cents ($2,692.29). He indicated that this grievance would have to proceed through the steps that are set forth in the collective bargaining agreement. He indicated that he had already sent you a letter concerning this matter and would be corresponding with you in the future concerning his progress on this particular grievance.

Bruns alleged in the February 19, 1991 clarification of his improper practice charge that his grievance was filed on December 26, 1990 and Council 82 had taken no further action at that point. Gardner testified that after he received a copy of the instant charge and its clarification in mid-March, he and Bruns had a telephone conversation during which he became aware that Bruns thought Gardner had filed the grievance and he made Bruns aware that he had not because he thought Bruns had filed the grievance.[18/]

[18/]Gardner originally testified that he recalled having several phone conversations with Bruns and/or his wife on a variety of issues. Bruns subpoenaed Council 82's telephone records for the period of December 1990 through March 1991. These records reveal that there were no phone calls made to the Bruns from Council 82's Albany offices during that time frame. Gardner then conceded that he had made a mistake in his earlier testimony. He referred to his December 20 meeting with the Bruns, his January 1991 telephone conversation with their attorney and his March 1991 telephone conversation with Bruns as the specific instances when he spoke directly to Bruns or his representatives. He testified that he might have had some other conversations with the Bruns at times not covered by the subpoenaed telephone records.

Cavanaugh testified that by letter dated March 22, 1991, he had returned two grievances to Bruns because they had not been filed at step 1, but he could not remember which grievances they were. He further testified that he had not discussed the merits of either grievance with Gardner. Bruns testified that he believed that the two grievances that were returned to him were the one he sent to Gardner on December 26 and an additional grievance he had "filed" on March 14, 1991.[19/] The Bruns were not able to produce at the hearing either the original or a copy of the grievance form they had sent to Gardner as part of their packet.[20/] Both Gardner and his counsel stated at the hearing that they had never been in possession of the original of the December 26 grievance.

[19/]This grievance also dealt with the use of Federal Marshals for the service of papers and the transport of parole violators lodged out of state.

[20/]The grievance form in evidence is one produced by Council 82 pursuant to a subpoena duces tecum issued by PERB. Gardner testified that the form in evidence is a copy of the only one found in his files and it is an accurate facsimile of the grievance he received from the Bruns. Mrs. Bruns indicated on the record that the grievance form had been produced by her on her computer, but that she believed that the one in evidence was not the one she had filed with Council 82 because it had "funny lines" on it. Although her requests that the ALJ, and also PERB's Chair, compel Council 82 to produce the original grievance form were denied, she concurred that the form in evidence was identical to the one she had filed, except that the form she had sent to Gardner had Mr. Bruns' "fresh" signature on it. The ALJ found that in all relevant respects the form proffered was sufficient for the hearing and declined to order the production of the "original" by Council 82, which, in fact, Council 82 claimed it didn't have.

Before we turn to the substantive exceptions in this case, the exceptions which relate to the processing of the charge should be addressed.[21/] We must acknowledge that the charge, clarification and offer of proof submitted by Bruns are lengthy, conclusory and contain numerous attachments. Indeed, Bruns filed ninety separate exceptions to the ALJ's decision. Most of the exceptions are directed to the ALJ's attempts to ascertain the nature of the violations being alleged by Bruns and the proof he had in support of those allegations. Recognizing that neither Bruns nor his representative, Mrs. Bruns, are attorneys, the ALJ gave repeated, detailed instructions to them, both in correspondence and on the record, on PERB procedures and the requirements of proof as set forth in PERB decisions. Her attempts to narrow for litigation the numerous allegations to those which are timely and set forth a prima facie case were largely frustrated by the Bruns' continued refusal to heed her directions. After careful review of the record, we find that, in those instances where the ALJ exercised discretion, there was no abuse of discretion. We also find that the ALJ committed no reversible error in any of her pre-hearing or post-hearing rulings, or any of her rulings at the hearing.

[21/]They include, but are not limited to, the ALJ's direction that an offer of proof be filed, the denial of the motion to recuse herself, the recision of certain of the subpoenas, the denial of the Bruns' motion for particularization of the respondents' answers and the denial of Bruns' motion for compulsory joinder.

Likewise, we affirm the ALJ's decision that all but one of the allegations set forth in Bruns' offer of proof, which was properly treated by the ALJ as an amendment to the charge, are untimely or are conclusory in nature, setting forth no facts upon which a finding of a violation by either Council 82 or the State could be based.[22/] Indeed, the Director of Public Employment Practices and Representation or the ALJ could have dismissed the charge without having made the several efforts at clarification and simplification they did because Bruns' charge did not concisely state the grounds for the improper practice charge as required by our Rules.

The one allegation that was litigated, that Gardner had failed to file the overtime pay disallowance grievance for Bruns, failed to notify him that he was not processing the grievance and, by doing so, rendered the grievance untimely, was dismissed on the merits by the ALJ, who found that Bruns had failed to establish by a preponderance of the evidence that Gardner's actions were "deliberately invidious, arbitrary or

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[22/]The allegation that Cavanaugh improperly returned two grievances to Bruns in March 1991 was treated by the ALJ as "ancillary" to the charge, that is, she took some evidence about this allegation to complete the chronology of events surrounding the December 26, 1990 grievance. Despite Bruns' allegations of impropriety related to Council 82's instruction to him to file his grievances himself at Step 1, the charge did not set forth a separate prima facie case in this respect. An employee organization does not violate the Act by requiring unit members to comply with the grievance procedure and file grievances on their own at the first step. Just as an employee organization has no duty under the Act to process every grievance presented to it, it likewise has no statutory duty to process grievances at the first step of the procedure when unit members have an equal right to file on their own.

founded in bad faith."[23] We affirm the ALJ's decision, though on other grounds.

A review of the record in this case, including Bruns' pleadings, persuades us that the grievance that Bruns sent to Gardner for filing was prepared in response to the receipt by Bruns of the check for overtime which was covered by the grievance he filed in March 1989. That grievance, and the amount of overtime payment due Bruns, were resolved by stipulation of settlement entered into by Council 82 and the State in February 1992. That settlement is the subject of another improper practice charge filed by Bruns. As the allegation in this charge is basically that Bruns has been inadequately represented by Council 82 with respect to his overtime claims, his charge must be dismissed. Bruns is correct in his allegation that Gardner did not file a grievance document dated December 26, 1990. That fact, however, is immaterial because Council 82 did, in fact, represent him with respect to this claim. It had been representing him for two years and continued to represent him even after this charge was filed. His filing on December 26 with Gardner was redundant. By his own pleadings, Bruns shows that O'Donnell had already advised him of the deductions the State would make on his overtime claim and of Council 82's intention to proceed to arbitration to obtain the balance owed him. That Bruns was impatient with the

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[23] Civil Service Employees Ass'n v. PERB and Diaz, 132 A.D.2d 430, 20 PERB ¶7024, at 7039 (3d Dep't 1987), aff'd on other grounds, 73 N.Y.2d 796, 21 PERB ¶7017 (1988).

grievance process and was seeking to put forward an additional theory in support of his overtime claim does not negate the fact that the very action he wanted Gardner to take had already been undertaken by Council 82. The Act does not require a bargaining agent to file every claim presented to it by a bargaining unit member; it certainly does not compel the filing of repetitive grievances. Therefore, as Bruns' concerns regarding overtime were already being adequately addressed by Council 82, we find no violation in Gardner's failure to file the December 26, 1990 grievance.

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

DATED: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2F- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION,

Charging Party,

-and-

CASE NO. U-14130

STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL SERVICES),

Respondent,

-and-

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

Intervenor.

EDWARD J. GIBLIN, for Charging Party

WALTER J. PELLEGRINI, General Counsel (JULIE SANTIAGO of counsel), for Respondent

NANCY E. HOFFMAN, General Counsel (JEROME LEFKOWITZ of counsel), for Intervenor

BOARD DECISION AND ORDER

This case is before us on exceptions filed by the Public Employees Federation (PEF) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). PEF filed a charge against the State of New York (Department of Correctional Services) (State) which alleges that the State transferred PEF unit work to employees who are represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act). CSEA intervened in the proceeding and has filed cross-exceptions to

the Assistant Director's decision, as has the State. Specifically, PEF alleges in its charge that the work which had been performed at Collins Correctional Facility (Collins) by Kay Baase, an Inmate Records Coordinator II (IRC), was assigned to one or more of the CSEA unit employees she had supervised after she was transferred to a different facility as part of a State-wide reorganization plan.

PEF called only Baase at the hearing. After she testified on direct, on cross-examination and on a limited redirect, PEF rested. The State and CSEA then moved to dismiss the charge on the ground that PEF had not proven that the duties in issue had been performed exclusively by Baase. After a discussion with the parties, the Assistant Director informed them that he would either treat the motion to dismiss to include a failure to prove a transfer of unit work or he would consider a dismissal on that latter basis on his own motion. After receipt of briefs, the Assistant Director denied the motion to dismiss for lack of proof of exclusivity,[1/] but he dismissed the charge because PEF had not proven a transfer of work outside of its unit. According to the Assistant Director, all that had been presented on the transfer issue was a stated assumption on Baase's part that the principal clerk in CSEA's unit took over her duties after she was transferred. The Assistant Director also denied PEF's motion made at the hearing to recall Baase and another witness to

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[1/]The Assistant Director ruled that there was sufficient proof that many of Baase's discrete duties and the overall responsibility for the functioning of the inmate records office were hers alone.

present evidence on the transfer issue. The Assistant Director denied PEF's request in this regard because it was made after PEF had rested and only after the possible inadequacy of its proof on the transfer issue had been called to all of the parties' attention and discussed. The Assistant Director believed that PEF had a full opportunity to present its case and to reopen the record at that point would be unfair to the State and CSEA. The Assistant Director did, however, afford the parties the opportunity to brief the sufficiency of the evidence introduced by PEF.

PEF argues in its exceptions that the Assistant Director erred in dismissing the charge for lack of proof on the transfer of work issue and in denying its request to recall Baase and to call one additional witness, both of whom were then present at the hearing.

CSEA and the State both argue that the Assistant Director was correct in dismissing the charge for the reasons he did. They argue additionally in their cross-exceptions that the Assistant Director also should have dismissed the charge for failure of proof of exclusivity. PEF supports the Assistant Director's ruling in this respect.

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

Whether pursuant to a motion of the parties or the presiding officer sua sponte, a charging party is entitled to a review of the evidence in the light most favorable to it, an assumption of the truth of its evidence and the benefit of all reasonable

inferences therefrom.[2/] We agree with the Assistant Director's determination that no inferences may be drawn from Baase's stated assumption that her work was transferred outside PEF's unit because it is admittedly based wholly on an assumption.[3/] The few facts in the record, even if they are assumed to be true and are read most favorably to PEF, cannot support a reasonable inference of a transfer of PEF unit work. The nature of the work performed by employees in the inmate records office, Baase's replacement by a CSEA unit employee when she was on vacation or otherwise off from work, and Baase's belief that another IRC was not appointed to succeed her at Collins do not support a permissible inference that any work of the IRC over which PEF arguably had exclusivity still exists and is being done by employees outside of PEF's unit.

This leaves for consideration whether PEF should have been afforded an opportunity to recall Baase and question the one other employee it had wanted to call as a witness. In this regard, we conclude that the Assistant Director was correct in identifying and treating this request as a motion to reopen the record. Indeed, PEF itself characterizes its request that way. A motion to reopen is ordinarily appropriate for the introduction of newly discovered evidence. PEF's request is not premised on this ground. To the contrary, it was content to rest until the

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[2/]Bd. of Educ. of the City Sch. Dist. of the City of Buffalo, 24 PERB ¶3033 (1991); County of Nassau (Police Dep't), 17 PERB ¶3013 (1984).

[3/]See Rupert v. Brooklyn Heights R.R. Co., 154 N.Y. 90 (1897).

Assistant Director pointed out to the parties that he had reservations about the adequacy of the proof regarding the transfer issue and invited the parties to brief that issue. To permit PEF to reopen under these circumstances would be plainly prejudicial to the State and CSEA and would not promote the orderly and careful investigation and presentation of proof. We see the issue in this respect to be most closely related to those circumstances in which a party has miscalculated the elements of a violation or the nature of its rights and responsibilities. We have not relieved a party from the consequences of those decisions in the past and see no reason to do so here.[4/]

PEF argues, however, that the Assistant Director should have permitted it to reopen the record after it had rested because §204.7(d) of our Rules of Procedure makes it "the duty of the Administrative Law Judge to inquire fully into all matters at issue to obtain a full and complete record." Whatever else this rule may mean in other contexts, in the context of a motion to dismiss, it does not have the meaning ascribed to it by PEF. PEF would transform this rule from one arguably imposing duties upon an Administrative Law Judge as an aid to the Board to one which is a source of right to the litigants in an improper practice proceeding. Under PEF's interpretation, §204.7(d) affords a party an entitlement to reopen a record at any point in the proceedings to introduce additional evidence, whether to

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[4/]See, e.g., Erie County Water Auth., 27 PERB ¶3010 (1994); City of Yonkers, 10 PERB ¶3020 (1977).

supplement a record or, as in this case, to respond to an observed deficiency in that party's case. Section 204.7(d) is not intended to afford any party an automatic "escape hatch" which would hold them harmless from any decisions which they may have made in the investigation, filing or litigation of an improper practice charge. As noted by the Assistant Director, the record was clear and sufficient to enable him to decide the issues which had been raised. We do not read the Assistant Director's statements as an invitation to reopen a record for a party which had ample opportunity to present its case and had rested. It was only an invitation to file a brief on the transfer issue. Section 204.7(d) of the Rules in this context required nothing more of the Assistant Director nor did it grant PEF any additional rights.

Having affirmed the Assistant Director's dismissal, we do not reach the cross-exceptions.

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

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

DATED: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2G- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DEPOSIT TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO, LOCAL 2602,

Charging Party,

-and-

CASE NO. U-14122

DEPOSIT CENTRAL SCHOOL DISTRICT,

Respondent.

BRIAN L. LAUD, for Charging Party

HOGAN & SARZYNSKI (JOHN P. LYNCH of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Deposit Central School District (District) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Deposit Teachers Association, NYSUT, AFT, AFL-CIO, Local 2602 (Association). The Association alleges in its charge that the District failed to negotiate in good faith in its negotiations with the Association regarding a distance learning program in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act).

After a hearing, the ALJ held that the District's conduct, taken as a whole during the parties' four negotiating sessions, evidenced a failure to negotiate in good faith.

The District argues in its exceptions that the ALJ's findings are not supported by the record and that her conclusion

that the District acted in bad faith disregards §204.3 of the Act, which defines the parties' bargaining obligation.[1/] The District also argues that we lack jurisdiction over the charge because the Association did not file a notice of claim pursuant to Education Law §3813.

The Association argues that the ALJ was plainly correct in reaching her findings and conclusion that the District did not negotiate in good faith and that her decision should be affirmed, particularly because she discredited the District's witness where his testimony differed in any material respect from the Association's witnesses.

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

The District's jurisdictional defense premised upon Education Law §3813 is dismissed. The court decision upon which it relies is presently on appeal to the Appellate Division, Third

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[1/]Section 204.3 of the Act provides as follows:

> For the purpose of this article, to negotiate collectively is the performance of the mutual obligation of the public employer and a recognized or certified employee organization 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, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

Department, and, for that reason, we shall not follow the Supreme Court's decision at this time.[2/]

On the merits, we consider the ALJ's decision to accurately reflect our long-standing case law[3/] involving the parties' reciprocal bargaining obligations. Like §8(d) of the National Labor Relations Act, upon which §204.3 of the Act is based, parties are not required in meeting their duty to bargain in good faith to make any specific concession, nor are they required to reach any particular agreement. That is to say, the absence of any given concession or any given agreement cannot be bad faith per se. It is well established, however, that a party's failure to make any concessions or to reach any agreements are factors which may be properly considered in assessing a party's good faith. A party negotiates in good faith only by actively participating in deliberations so as to indicate a present intent to find a basis for agreement. The Act does not require parties to agree, but it does require that they negotiate with an open mind and with a sincere desire to reach an agreement if possible. As has been otherwise stated, "an employer is obliged to make some reasonable effort in some direction to compose his

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[2/]Union-Endicott Cent. Sch. Dist. v. PERB, 26 PERB ¶7011 (Sup. Ct. Alb. Co. 1993) (appeal pending).

[3/]See, e.g., Town of Southampton, 2 PERB ¶3011 (1968).

differences with the union" if the statutory bargaining obligation is to have any significance at all.[4/]

The ALJ's decision shows a proper application of this standard. The ALJ stated the bases for her conclusions and we adopt them. Without engaging in unnecessary repetition, we find from the totality of record circumstances that the District did not approach these negotiations with a sincere desire to reach an agreement with the Association on the subject in issue.

In reaching our decision, we reject the District's suggestion that its stated willingness to negotiate conclusively establishes its good faith. A party's stated intent is only as persuasive as its subsequent conduct corresponds to that intent. We similarly disagree with the District's contention that the Association's alleged bad faith justifies the District's conduct or exculpates it from the consequences of its own actions. If it considered the Association to be in violation of its duty to bargain, the Act's improper practice provisions afforded it full recourse.

For the reasons set forth here and in the ALJ's decision, the ALJ's decision is affirmed and the District's exceptions are dismissed.

[4/]Reed & Prince Mfg. Co., 96 NLRB 850, 28 LRRM 1608 (1951), enforced, 205 F.2d 131, 32 LRRM 2225 (1st Cir.), cert. denied, 346 U.S. 887, 33 LRRM 2133 (1953).

IT IS, THEREFORE, ORDERED that the District:

1. Negotiate in good faith with the Association regarding a distance learning program.
2. Sign and post notice in the form attached in all locations at which notices of information to unit employees are ordinarily posted.

DATED: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees of the Deposit Central School District in the unit represented by the Deposit Teachers Association, NYSUT, AFT, AFL-CIO, Local 2602, that the District will negotiate in good faith with the Association regarding a distance learning program.

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

DEPOSIT CENTRAL SCHOOL DISTRICT

. . . . . .

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.

2H- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200B,

Charging Party,

-and-

CASE NO. U-14603

UTICA CITY SCHOOL DISTRICT,

Respondent.

THOMAS G. LEONE, ESQ., for Charging Party

DONALD R. GERACE, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Utica City School District (District) to a decision by an Administrative Law Judge (ALJ) on a charge filed against the District by Service Employees International Union, Local 200B (SEIU). SEIU alleges in its charge that the District's board of education failed to vote on whether or not to ratify a tentative agreement which had been reached by SEIU's and the District's bargaining representatives.

On a stipulated record, the ALJ held in relevant part[1/] that the District's failure for more than seven months to take a

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[1/]The ALJ dismissed one other allegation which SEIU raised for the first time in its memorandum to the ALJ. No exceptions have been taken to this aspect of the ALJ's decision.

vote on ratification of the contract violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act).

In its exceptions, the District argues that the ALJ erred in limiting her review to the parties' stipulation of facts. It asserts that it understood that its response to the charge would be considered in addition to the stipulation and that a hearing would be held despite the stipulation. The District also argues that the ALJ found certain facts other than those in the parties' stipulation and that the remedial order is inappropriate.

SEIU argues in response that the ALJ's decision and order is correct, that the District's exceptions are without merit, and that the ALJ's decision and order should be affirmed.

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

The District's exceptions were filed by the District's attorney. The District was represented throughout the processing of the charge, however, by its Director of Personnel, James D. Tyler. The parties' stipulation is in writing and signed by SEIU's representative and Tyler. Nothing in the case evidences that the District considered the stipulation to be incomplete or that it was to be supplemented through a hearing. Quite the contrary, Tyler informed the ALJ by letter that the District found "no need" to file a brief because it "submitted" to both the statement of facts as set forth in the charge and in the parties' stipulation. If the District believed at that time that a hearing would be held despite the stipulation, it logically

would have at least made an inquiry about a hearing when a briefing schedule was being fixed by the ALJ. Its failure to demand a hearing or to even inquire in that regard is irreconcilable with the claim it now makes on appeal that it always understood a hearing would be held. It appears that the District merely changed representatives on receipt of a decision finding it in violation of the Act and that its current representative disagrees, perhaps in hindsight, with the judgements made by the former representative.

We would affirm the ALJ's decision, moreover, even if we were to consider the District's explanations for not acting on ratification of the contract. The District claims that its board of education could not consider the contract at any of the several meetings it held between November 1992 and July 1993 because it was fully occupied dealing with other issues. The District, however, has an obligation under the Act to negotiate in good faith with SEIU, which includes a duty to vote on ratification with reasonable expedition.[2/] The value judgements placed on the relative importance of the many issues which may occupy any board of education's time are not determinative of the parties' bargaining rights and obligations. The District may not relegate ratification of SEIU's collective bargaining agreement to last place on the District's list of priorities simply because it considers debate and resolution of other issues to be more

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[2/]City of Dunkirk, 25 PERB ¶3029 (1992).

important. The short answer to the District's argument in this respect is that the board of education was duty bound under the Act to vote on ratification and that it had more than a reasonable amount of time in which to do that.

The District also argues that the ALJ erred in finding facts not in the record, specifically that the contract was subject to ratification and that Tyler had entered into a tentative contract. Both facts, however, are stated in the parties' stipulation and the ALJ accurately reported them in the decision.

Finally, the District argues that the ALJ should only have ordered the District to vote on ratification, not to execute the contract. The ALJ's order, however, is correct. Employer ratification of a contract is a privilege obtained by and belonging to the chief executive. It exists when properly reserved as a condition to the chief executive's otherwise absolute duty to execute on demand a writing embodying the agreements reached during negotiations. The chief executive alone, not the legislative body, has the right and duty to bargain and is responsible for any failure by the legislative body to vote on ratification within a reasonable period of time.[3/] Failure to act on ratification, as required by the Act, waives ratification as a condition to the chief executive officer's duty to execute, which then becomes fixed and absolute

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[3/] Id.

pursuant to §204.3 of the Act.[4/] For the reasons set forth above, the District's exceptions are dismissed and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the District:

1. Execute, upon demand by SEIU, the collective bargaining agreement reached by the parties in October 1992, effective July 1, 1992 through June 30, 1994.
2. Sign and post notice in the form attached at all locations ordinarily used to post notices of information to SEIU unit employees.

DATED: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[4/] Id.

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees in the unit represented by the Service Employees International Union, Local 200B (SEIU) that the Utica City School District will execute, upon demand by SEIU, the collective bargaining agreement reached by the parties in October 1992, effective July 1, 1992 through June 30, 1994.

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

Utica City School District

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered any other material.

3A- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MAINE-ENDWELL CLERICAL ASSOCIATION, NEA/NY,

Petitioner,

-and-

CASE NO. C-4195

MAINE-ENDWELL 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 Maine-Endwell Clerical Association, NEA/NY 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: Professional registered nurse, building secretary, accounts payable clerk, payroll clerk, coordinator secretary, guidance secretary, special services secretary, media center aide, transportation clerk, mail clerk/typist, office assistant, attendance clerk, switchboard operator/receptionist and monitor.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Maine-Endwell Clerical Association, NEA/NY. 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: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3B- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and- **CASE NO. C-4091**

ONONDAGA COUNTY WATER 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 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 described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Senior Engineer; Water Systems Chemist I; Assistant Water Maintenance Supervisor; Water Distribution Manager; Principal Plant Operator Type A; Water Meter Repair Supervisor; Account Clerk I; Peripheral Equipment Operator; Water Systems Construction Engineer; Account Clerk II; Water Maintenance Supervisor; Utility Billing Supervisor; Water Plant Manager Type A; Assistant Water Meter Repair Supervisor.

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: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

30- 4/25/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF WASHINGTONVILLE POLICE BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4119

VILLAGE OF WASHINGTONVILLE,

Employer,

-and-

NEW YORK STATE FEDERATION OF POLICE, INC.,

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 Village of Washingtonville Police Benevolent Association has been designated and selected by a majority of the employees of the above-named public employer, found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time police officers, including detectives and sergeants.

Excluded: Chief of Police.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Village of Washingtonville Police 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: April 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member