2A- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-13431

STATE OF NEW YORK-UNIFIED COURT SYSTEM,

Respondent.

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

NORMA MEACHAM, ESQ., DIRECTOR OF HUMAN RESOURCES (LEONARD R. KERSHAW and SUSAN G. WHITELEY of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the State of New York-Unified Court System (UCS) and the Civil Service Employees Association, Inc., AFSCME, Local 1000, AFL-CIO (CSEA) to a decision by an Administrative Law Judge (ALJ). CSEA alleges in its charge that UCS violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the rates for and the conditions under which compensation is paid by UCS to court reporters for transcripts supplied to judges in the several courts in which CSEA's court reporters work and when UCS stopped requiring the production of two transcripts for criminal appeals. After several days of hearing, the ALJ held that UCS violated §209-a.1(d) of the Act in the following respects:

(1) ending its practice in the Third Judicial District of paying $2.375 per page for daily transcripts and $2.075 per page for expedited transcripts when ordered by a judge;

(2) ending its practice in the Ninth Judicial District of paying $2.75 per page for daily transcripts and $2.00 per page for expedited transcripts when ordered by a judge;

(3) ending its practice in Nassau County, Tenth Judicial District, of paying $2.00 per page for daily and expedited transcripts when ordered by a judge.[1/]

The ALJ dismissed the charge in all other respects. CSEA has filed cross-exceptions only to the ALJ's dismissal of the charge insofar as it pertains to the Fifth and Seventh Judicial Districts and Suffolk County in the Tenth Judicial District.

UCS argues in its exceptions that it is permitted to discontinue the premium payments for daily and expedited transcripts pursuant to a 1983 Page Rate Agreement (PRA) which, it claims, fixes a per page rate of $1.375 for all transcripts under all circumstances. In a decision issued this date on a substantially similar charge (U-13410) filed against UCS by another union which represents other UCS court reporters, we

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[1/]Expedited transcripts in the Third, Ninth and Tenth Judicial Districts were those produced and delivered within three days of order.

rejected UCS's defense in this respect. Affirming the ALJ, we there held that the PRA establishes only a base rate for regular transcripts and has no application to daily or expedited copy. Therefore, the PRA does not serve as a defense to UCS' unilateral abolition of premium payments for daily or expedited copy. We incorporate by reference our decision in U-13410, and for the reasons set forth more fully therein, affirm the findings of violation of §209-a.1(d) made by the ALJ in this case.

CSEA's cross-exceptions involve issues which were not presented in U-13410. As relevant to those cross-exceptions, the ALJ dismissed the charge as it pertains to the Fifth and Seventh Judicial Districts on the ground that CSEA had not shown a change in practice regarding premium payments. Although the ALJ found that a premium payment for such copy was made, the payment rates were not fixed. In the Fifth Judicial District, the rate for daily copy ranged from $1.75 to $5.00 per page and from $1.60 to $2.75 for expedited copy. In the Seventh Judicial District, the rate for expedited copy ranged from $2.25 to $2.75 per page.[2/] The ALJ held that there could not be a violation of §209-a.1(d) of the Act unless there was one specific rate of premium payment.

We reverse the ALJ's decision insofar as he dismissed such of the §209-a.1(d) allegations pertaining to the Fifth and Seventh Judicial Districts as are the subject of CSEA's cross-

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[2/]There was no experience for judge-ordered daily copy in the Seventh Judicial District and the ALJ dismissed the charge on that basis. CSEA has not taken any exception to that dismissal.

exceptions. The record establishes that a premium payment was made for daily and expedited copy in the Fifth Judicial District and for expedited copy in the Seventh Judicial District. Those premium payments have been discontinued by UCS and the rate of $1.375 per page now being paid by UCS is less than the low end of the range of the premium payments. The violation of the Act lies in the discontinuation of the premium payments previously made. The specific amount of the premium payment to be paid to a given court reporter submitting a particular copy under a given set of circumstances may affect the remedy, but it is not material to an assessment of violation.

The ALJ also dismissed the charge as it pertains to court reporters in Suffolk County in the Tenth Judicial District. Crediting the testimony of a witness for UCS, Victor Rossomano, Senior Administrative Assistant, the ALJ held that there had not been a change in practice in Suffolk County related to expedited copy because the authorized rate of payment for expedited copy in Suffolk County since 1986 had been $1.375, the rate currently being paid by UCS.

CSEA argues that the ALJ should not have credited Rossomano's testimony regarding expedited copy in Suffolk County because it was not supported by any documentary evidence. Testimonial evidence, however, need not be supported by documentary evidence to be persuasive and credible. Moreover, the documentary evidence supporting the testimony of CSEA's

witness that UCS had paid a premium for expedited copy in Suffolk County is equivocal and insubstantial. As an ALJ's resolution of credibility is entitled to great weight, and as the record does not establish a practice of paying a premium for expedited copy, the ALJ's dismissal of the allegations pertaining to expedited copy in Suffolk County must be affirmed.

For the reasons set forth above, the ALJ's decision is affirmed, except as to the dismissal of the §209-a.1(d) allegations pertaining to daily and expedited copy in the Fifth Judicial District and expedited copy in the Seventh Judicial District, as to which the ALJ's decision is reversed. UCS' exceptions, and such of CSEA's cross-exceptions as pertain to Suffolk County, Tenth Judicial District, are dismissed.

IT IS, THEREFORE, ORDERED that UCS:

1. Reinstate its practice of paying $2.375 per page for daily transcripts and $2.075 per page for expedited transcripts ordered by a judge in the Third Judicial District.

2. Make unit employees in the Third Judicial District who produced and delivered daily transcripts and were not paid $2.375 per page in accordance with practice whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

3. Make unit employees in the Third Judicial District who produced and delivered expedited transcripts within three working days and were not paid $2.075 per page in accordance with

practice whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

4. Reinstate its practice of paying between $1.75 and $5.00 per page for daily copy and between $1.60 to $2.75 per page for expedited copy ordered by a judge in the Fifth Judicial District.

5. Make unit employees in the Fifth Judicial District who produced and delivered either daily copy or expedited copy ordered by a judge and were not paid in accordance with practice between $1.75 and $5.00 per page for daily copy and between $1.60 and $2.75 per page for expedited copy whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

6. Reinstate its practice of paying between $2.25 and $2.75 per page for expedited copy ordered by a judge in the Seventh Judicial District.

7. Make unit employees in the Seventh Judicial District who produced and delivered expedited copy ordered by a judge and were not paid in accordance with practice between $2.25 and $2.75 per page whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

8. Reinstate its practice of paying $2.75 per page for daily transcripts and $2.00 per page for expedited transcripts ordered by a judge in the Ninth Judicial District.

9. Make unit employees in the Ninth Judicial District who produced and delivered daily transcripts and were not paid $2.75

per page in accordance with practice whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

10. Make unit employees in the Ninth Judicial District who produced and delivered expedited transcripts within three working days and were not paid $2.00 per page in accordance with practice whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

11. Reinstate its practice of paying $2.00 per page for daily and expedited transcripts ordered by a judge in the Tenth Judicial District, Nassau County.

12. Make unit employees in the Tenth Judicial District, Nassau County who produced and delivered daily transcripts and were not paid $2.00 per page when ordered by a judge whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

13. Make any unit employees in the Tenth Judicial District, Nassau County who produced and delivered expedited transcripts within three working days and were not paid $2.00 per page when ordered by a judge whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

14. Sign and post the attached notice at all locations customarily used to post notices of information to CSEA unit employees.

DATED: January 25, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Walter H. 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 State of New York-Unified Court System (UCS) represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, that UCS will:

1. Reinstate its practice of paying $2.375 per page for daily transcripts and $2.075 per page for expedited transcripts ordered by a judge in the Third Judicial District.

2. Make unit employees in the Third Judicial District who produced and delivered daily transcripts and were not paid $2.375 per page in accordance with practice whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

3. Make unit employees in the Third Judicial District who produced and delivered expedited transcripts within three working days and were not paid $2.075 per page in accordance with practice whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

4. Reinstate its practice of paying between $1.75 and $5.00 per page for daily copy and between $1.60 to $2.75 per page for expedited copy ordered by a judge in the Fifth Judicial District.

5. Make unit employees in the Fifth Judicial District who produced and delivered either daily copy or expedited copy ordered by a judge and were not paid in accordance with practice between $1.75 and $5.00 per page for daily copy and between $1.60 and $2.75 per page for expedited copy whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

6. Reinstate its practice of paying between $2.25 and $2.75 per page for expedited copy ordered by a judge in the Seventh Judicial District.

7. Make unit employees in the Seventh Judicial District who produced and delivered expedited copy ordered by a judge and were not paid in accordance with practice between $2.25 and $2.75 per page whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

2B- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHARLES ACEVEDO,

Charging Party,

-and- **CASE NO. U-12386**

CATSKILL REGIONAL OFF-TRACK BETTING CORPORATION,

Respondent.

HOLLIS GRIFFIN, ESQ., for Charging Party

MARK D. STERN, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Catskill Regional Off-Track Betting Corporation (OTB) to a decision of an Administrative Law Judge (ALJ) that it had violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it discharged Charles Acevedo on December 26, 1990, because he had tried to organize his fellow employees[1/] for the purpose of collective negotiations. OTB, denying that Acevedo's discharge violated the Act, raised as a defense that Acevedo had been terminated not for his exercise of protected rights but for making derogatory remarks about Arthur Weinfeld, OTB's vice-

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[1/]Acevedo had been a branch supervisor at the OTB's Sloatsburg parlor.

president and director of operations, at a Christmas party OTB sponsored on December 16, 1990.[2/]

After several days of hearing during 1991, the ALJ issued a decision in 1992 sustaining Acevedo's charge.[3/] In reaching his decision, the ALJ took administrative notice of and relied upon several earlier cases in which OTB had been found to have violated the Act by engaging in retaliatory and intimidating conduct during organizing campaigns.[4/] The ALJ also found that the penalty was excessively harsh when compared with the degree of the offense committed by Acevedo, especially considering other, more serious incidents, in which the OTB had imposed such a penalty upon other employees.[5/] Although the ALJ noted that Acevedo had offered evidence that he had received disparate treatment on other occasions, he did not make any finding on that

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[2/]Acevedo, while speaking to Steven Pasquale, the OTB Field Auditor, and Sherry Brenner, OTB's new Personnel Manager, stated to Brenner when Weinfeld walked by: "That guy over there [pointing to Weinfeld] that guy is a dick. That guy is a dick. He fired my best friend. He's a dick".

[3/]25 PERB ¶4619 (1992).

[4/]15 PERB ¶3023 (1982), aff'g 14 PERB ¶4054 (1981); 15 PERB ¶3022 (1982); 14 PERB ¶4518 (1981); 14 PERB ¶4011 (1981); and 13 PERB ¶4028 (1980).

[5/]Over the last decade, Weinfeld has terminated fifteen employees for offenses which he characterized as repeated, excessive cash shortfalls, coupled with breach of corporate procedures, cover-up attempts, and numerous warnings to the recalcitrant employees.

evidence. Upon exceptions filed by OTB, we remanded the matter to the ALJ, finding that

> If the entire evidence presented by Acevedo had consisted of [OTB's previous improper practices and the harshness of the penalty imposed on Acevedo], we would be constrained to reverse the ALJ and dismiss this charge.[6/]

We noted in our decision remanding the case to the ALJ that without evidence of anti-union animus closer in time and more directly related to Acevedo, we could not find that a continuing course of conduct by OTB with respect to organizing activity had been established.[7/] As Acevedo had offered further evidence of disparate treatment proximate in time to his December 1990 termination, that foul language was common in the workplace and had not been the subject of disciplinary action before, that he was under the influence of alcohol at the Christmas party, that he had tendered an apology to Weinfeld, and that anti-union remarks had previously been made to him, we instructed the ALJ to make findings of fact with respect to these assertions and to render a new determination based on those findings.

Acevedo alleged disparate treatment in several instances. As to some, the ALJ found that the evidence did not support a finding that Acevedo had received disparate treatment. Acevedo alleged that he was not invited to attend a series of breakfast

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[6/]26 PERB ¶3024, at 3039 (1993).

[7/]It is conceded by OTB that Acevedo had been engaged in organizational efforts in the fall of 1989 and that OTB, and particularly, Weinfeld, were aware of his activities.

meetings scheduled by Weinfeld with supervisory staff, but the ALJ found that Acevedo was not the only supervisor who had not been invited. Acevedo also claimed that the failure of OTB to train him on a Customer Automated Teller (CAT) was evidence of disparate treatment, but the ALJ found that only supervisors of the largest branch offices of OTB were so trained. Therefore, Acevedo, as a supervisor at a small office, was not treated any differently from other, similarly situated supervisors. Finally, Acevedo asserted that he was subject to an inordinate number of audits during 1990. The ALJ found that although the number of audits of Acevedo's branch had been increased in that year, so had the number in many of the other OTB branches.

The ALJ found evidence of improper motivation, however, with respect to a series of counseling memos Acevedo received from Weinfeld. In November 1989, shortly after Acevedo became involved in the organizing campaign[8/] and shortly after Weinfeld became aware of his involvement, Ira Saper, then personnel manager for OTB, warned Acevedo, "unofficially", that "a shockwave is coming out of Sloatsburg. I can't come and see you no more." Acevedo then received three counseling memoranda in

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[8/]In the fall of 1989, Acevedo began campaigning for Local 300-S, Production, Service and Sales District Council, H.E.R.E., AFL-CIO, which requested recognition as the exclusive representative of all branch supervisors employed by OTB in March 1990. A representation petition was thereafter filed with PERB. A secret ballot election was held on June 12, 1990. Of 54 eligible employees, 48 cast ballots; 20 in favor of representation, 24 against representation and 4 ballots were challenged. The union was, therefore, not certified as the bargaining agent. See Catskill Regional Off-Track Betting Corp., 23 PERB ¶3034 (1990).

short order. These were the first counseling memos Acevedo had received in fourteen years of satisfactory service with OTB. The first, dated November 21, cautioned Acevedo that he would be subject to disciplinary action if he violated security procedures and allowed an unauthorized person into the branch office's secure area;[9/] the second, dated November 22, threatened Acevedo with disciplinary action or termination if he failed to follow certain verification procedures;[10/] and the third, coming on November 23, warned Acevedo to stop disrupting other branch offices with phone calls and visits during business hours.[11/] Acevedo did not dispute the facts that gave rise to the memos, which were placed in his personnel file; he claims, however, that they were unjustified.

[9/]Weinfeld testified that he had been informed that a person had been invited into the secure area of the Sloatsburg branch by Acevedo. Without any confirmation from Acevedo, or any further verification of the allegation, Weinfeld issued the counseling memo.

[10/]Pasquale had reported to Weinfeld in September that he had observed Acevedo only counting the cash at the end of each day and not at the beginning, as was also required. When questioned by Weinfeld, Acevedo admitted that he had only been counting the cash once but would count it twice thereafter. There is no record evidence that Acevedo did not thereafter comply. In March 1990, Weinfeld sent a memo to all branch supervisors reminding them to correct errors in the following of verification procedures, in order "to enhance your next evaluation." No mention was made of any possible disciplinary action.

[11/]Acevedo had been contacting fellow employees about the union during these visits and phone calls, as Weinfeld had earlier refused his request to provide him with the names and home addresses of OTB employees so that he could contact them by mail.

In March 1990, Weinfeld issued a fourth counseling memo to Acevedo regarding his contact of an OTB board member, prohibiting him from such contact in the future. Weinfeld believed that the contact was part of Acevedo's attempts to bring a union into OTB. Acevedo claimed that his contact had nothing to do with organizing; he was only trying to ascertain the date of the next board meeting and if it was open to the public. After a number of writings passed between them, Weinfeld finally, on April 4, 1990, issued a memo to Acevedo, warning him that any future contact with board members would be severely punished. This memo followed a March 20 request that OTB recognize the union as the bargaining representative of two units of employees.

Also in April 1990, Weinfeld, during a visit to the Sloatsburg branch office, warned Acevedo, after hearing from him that there had been a favorable turnout at an organizational meeting conducted earlier by Acevedo: "I wouldn't be doing this if I were you. I don't want to wind up going up to Albany, trucking up to Albany." Shortly thereafter, Pasquale audited the Sloatsburg office and, during his visit, opined to Acevedo that there wasn't much support for the union and that it would probably not get as many votes in this election as in the previous one.

In the Spring of 1990, most supervisory employees received a bonus from OTB for their work in 1989. Although Acevedo had previously received a bonus in every year in which one was given,

he did not receive one in 1990.[12/] While Weinfeld testified that the small size of the Sloatsburg office and Acevedo's reluctance to work on Sundays were factors considered in the determination not to give him a bonus, the ALJ found that in prior years, neither had precluded Acevedo from receiving a bonus.[13/] Although Acevedo received a salary increase in 1989 that was the largest he had ever received, it was still lower than that received by any of the other supervisors.

The record further reflects, and the ALJ so found, that at least as between Weinfeld and Acevedo, the use of vulgar and coarse language was commonplace and had not been cause for any disciplinary action before. Weinfeld attempted to distinguish the incident at the Christmas party from Acevedo's previous use of foul language because it was directed at him personally, in his capacity as an executive staff member of OTB, and because the comment was made loudly and was overheard by a number of co-workers. According to Weinfeld, Acevedo's comment had the effect of undermining his authority and it affected his ability to perform his professional responsibilities. The record, however, does not reflect that anyone other than Pasquale and Brenner heard Acevedo's remarks to Weinfeld. Indeed, Jay Gettinger,

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[12/]Of the approximately seven supervisors in Rockland County who did not receive bonuses, three were new employees and the others, with the exception of Acevedo, did not receive favorable evaluations.

[13/]Indeed, Acevedo, unlike all the other branch supervisors, had been working on Saturdays during 1989, as he was directed to do by Weinfeld.

OTB's General Services Administrator, was standing nearby but did not hear the remarks.[14/]

The ALJ further found that Acevedo, when called upon on December 17 to explain his remarks to Brenner and Weinfeld, expressed no recollection of the incident. When told by them that others had heard the remarks, Acevedo said:

> If it happened that way and that's what I said, I must have had too much to drink. If it happened that way, I'm sorry.[15/]

The exceptions filed by OTB challenge the ALJ's decision on remand in four areas: disparate treatment of Acevedo, use of profanities, Acevedo's inebriated condition and apology,[16/] and remarks evidencing anti-union animus.

As to the incidents of disparate treatment, we affirm the ALJ's findings. The counseling memos received by Acevedo in November 1989 and March 1990 followed action by the union in its

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[14/]Pasquale prepared an unsolicited memo for Weinfeld the next day setting forth the details of the incident with Acevedo at the Christmas party. Gettinger also prepared a memo for Weinfeld, stating that as he accompanied Acevedo away from Weinfeld, Pasquale and Brenner, Acevedo stated to him that he had just seen "that prick Weinfeld".

[15/]Weinfeld, Brenner, and Pasquale met with David Groth, President of OTB, prior to the meeting with Acevedo. A range of possible disciplinary actions was discussed, with Groth instructing the others that Acevedo be accorded "fair" treatment. Groth apparently had no further involvement in the matter and was surprised to learn at the hearing that Acevedo had attributed his remarks to the influence of alcohol and had apologized to Weinfeld.

[16/]While OTB contests the extent of Acevedo's intoxication and the sincerity of his apology, nothing in the record warrants a disturbance of the ALJ's decision in these respects.

organizing campaign, a campaign that OTB knew Acevedo was intimately involved with and supported. They also dealt with subjects which either had not been raised to Acevedo before (the March memo), which had not been investigated (the November 21 memo), or were harsher than memos sent to other employees (the November 22 memo). The November 23 memo dealing with Acevedo's contact of other employees during business hours was issued although there are no work rules or guidelines prohibiting such conduct and such contact only took place because Weinfeld had refused Acevedo's request for the employees' home addresses for organizing purposes.

The ALJ found that the issuance of the counseling memos within such a short time after organizational activity, coupled with Saper's remark in November and Weinfeld's and Pasquale's April statements to Acevedo, raised the inference that the anti-union animus which Weinfeld was found to harbor in previous improper practice charges was still present and was the motivating factor in the issuance of the memos to Acevedo. Likewise, he found the denial to Acevedo of a bonus for 1989 for the first time in his career was based upon anti-union animus.

The record supports the ALJ's finding that profanities used by Acevedo in Weinfeld's presence had never before been the subject of discipline. The record further supports the ALJ's finding that only Weinfeld, Pasquale and Brenner heard Acevedo's remark at the Christmas party. We find no basis to disturb the ALJ's decision that the remark made by Acevedo, while crude and

inappropriate, was not the type of serious offense to warrant termination, especially in light of the particular circumstances surrounding the incident.

Finally, the ALJ found that certain remarks attributed to Weinfeld and Pasquale did not, by themselves, evidence anti-union animus. On this point, we reverse the ALJ. Weinfeld's remark was nothing less than a threat to Acevedo that his organizational activity was opposed by Weinfeld, that it would "inconvenience" Weinfeld and that it would be wise for Acevedo to discontinue such activity. While Pasquale's statement is not as overtly threatening as Weinfeld's, it too gets the message across to Acevedo that the corporation was aware of his activity, aware of the degree of union support and was scrutinizing the process and the active participants closely. These statements, even taken alone, but certainly coupled with the retaliatory actions taken against Acevedo, evidence anti-union animus on the part of Weinfeld and others in OTB's management structure. Taken together, the threatening statements, the disparate treatment with respect to the 1989 bonus and the counseling memos, and the excessive nature of the penalty imposed for Acevedo's ill-advised remarks establish that anti-union animus was the motivating factor in Acevedo's termination in December 1990.[17/]

[17/] Deer Park Union Free Sch. Dist., 167 A.D.2d 398, 23 PERB ¶7021 (3d Dep't 1990), conf'g 22 PERB ¶3014 (1989).

We find, therefore, that OTB violated §209-a.1(a) and (c) of the Act when it terminated Acevedo in retaliation for his exercise of rights protected by the Act.

IT IS, THEREFORE, ORDERED that OTB immediately offer unconditional reinstatement to Acevedo to his former position as branch supervisor at its Sloatsburg branch office, with full back pay and benefits, plus interest at the currently prevailing maximum legal rate, from the date of his termination until the date of his re-employment or his refusal of the unconditional offer of reinstatement, and that OTB sign and post the attached notice at all locations customarily used to communicate with employees of OTB.

DATED: January 25, 1995
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 employed by the Catskill Regional Off-Track Betting Corporation (OTB) that OTB will immediately offer unconditional reinstatement to Charles Acevedo to his former position as branch supervisor at its Sloatsburg branch office, with full back pay and benefits, plus interest at the currently prevailing maximum legal rate, from the date of his termination until the date of his re-employment or his refusal of the unconditional offer of reinstatement.

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

CATSKILL REGIONAL OFF-TRACK BETTING CORPORATION

. . . . . .

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.

20- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMALGAMATED TRANSIT UNION, LOCAL 282,

Charging Party,

-and- **CASE NO. U-15766**

REGIONAL TRANSPORTATION AUTHORITY/REGIONAL TRANSIT SERVICE, INC.,

Respondent.

BLITMAN & KING (JULES L. SMITH and HARRY B. BRONSON of counsel), for Charging Party

HARRIS BEACH & WILCOX (PETER J. SPINELLI and JEFFREY D. WILLIAMS of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision by the Director of Public Employment Practices and Representation (Director) filed by the Amalgamated Transit Union, Local 282 (ATU). As amended, ATU's July 1, 1994 charge against the Regional Transportation Authority/Regional Transit Service, Inc. (RTS) alleges that RTS violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act). The charge arises out of RTS' hiring and assignment of part-time employees pursuant to an April 18, 1994 voluntary interest arbitration award. Under the award, as clarified by the arbitrator, RTS is permitted to assign the part-time employees it hires notwithstanding the general seniority and job-bidding provisions in the parties' labor agreement. Finding that the arbitration award was converted by

the parties into a collective bargaining agreement, the Director dismissed the §209-a.1(d) allegation pursuant to §205.5(d) of the Act, which denies us jurisdiction over violations of contract. He dismissed the §209-a.1(e) allegation on the ground that a collective bargaining agreement was in effect when the charge was filed and, therefore, there was no cause of action under §209-a.1(e) of the Act.

ATU excepts only to the Director's dismissal of the §209-a.1(e) allegation. ATU argues that the arbitrator's award and clarification did not effect a collective bargaining agreement. Therefore, the seniority and job-bidding provisions of its last collective bargaining agreement, which expired October 31, 1990, must be continued as a matter of statutory right under §209-a.1(e) of the Act.

Having considered the parties' arguments, we affirm the Director's decision dismissing the §209-a.1(e) allegation.

To resolve a long-standing impasse in their negotiations for a successor to a contract which had expired on October 31, 1990, the parties agreed in March 1993 to submit their dispute to "binding contractual determination". For all relevant purposes, the parties' agreement was to binding interest arbitration. The parties specifically provided in their submission to arbitration that:

> The award of the Determinator, taken together with any and all provisions of the expired collective bargaining agreement which were not subject to or affected by the award, shall constitute a binding and enforceable labor agreement ... effective November 1, 1990 through October 31, 1994.

Even if we assume that RTS' deployment of the part-time employees violated the seniority and job-bidding rights of the full-time employees, ATU does not have a cause of action under §209-a.1(e) of the Act. A cause of action under §209-a.1(e) of the Act is dependent upon an "expired" agreement and the parties have agreed upon a successor to the 1990 contract, thereby extinguishing any cause of action under §209-a.1(e). In reaching this conclusion, it is immaterial that an arbitration award is not an agreement within the meaning of the Act. Under the parties' submission agreement, the arbitration award and those terms of the expired 1990 contract which were not submitted to the arbitrator were to constitute a successor labor agreement covering November 1, 1990 through October 31, 1994. The seniority and job-bidding provisions of the 1990 contract were not submitted for arbitration and, therefore, those terms became, by agreement, part of the 1990-94 contract, which was in effect when this charge was filed. The seniority and job-bidding provisions allegedly violated by RTS exist, therefore, not by statutory continuation of the expired 1990 agreement, but by the parties' successor 1990-94 agreement, in effect at all times relevant here. If, as ATU alleges, RTS' deployment of part-time employees violates the seniority and job-bidding provisions of that 1990-94 agreement, ATU has recourse in such other forums as are appropriate for breach of contract allegations. No cause of action exists, however, under §209-a.1(e) of the Act to require the continuation of the terms of the 1990 contract because a

successor collective bargaining agreement was in effect on the date ATU's charge was filed. ATU's §209-a.1(e) allegation is, therefore, deficient as a matter of law and the Director properly dismissed that allegation.

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

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

DATED: January 25, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2D- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO and its affiliated LOCAL 1070,

Charging Party,

-and-

CASE NO. U-13410

STATE OF NEW YORK-UNIFIED COURT SYSTEM,

Respondent.

ROBERT PEREZ-WILSON, ESQ. (JOEL GILLER of counsel), for Charging Party

NORMA MEACHAM, DIRECTOR OF HUMAN RESOURCES (LEONARD R. KERSHAW and SUSAN G. WHITELEY of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York - Unified Court System (UCS) to a decision by an Administrative Law Judge (ALJ) on a charge filed by District Council 37, AFSCME, AFL-CIO and its affiliated Local 1070 (DC 37). DC 37 alleges that UCS violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when, in late December 1991, it unilaterally changed its existing practices and the terms of an expired 1983 agreement regarding the rate of and conditions under which it pays court reporters for transcripts

(copy) supplied to judges in the several courts in New York City in which DC 37's court reporters work.[1/]

After several days of hearing, the ALJ held that UCS violated §209-a.1(d) of the Act in the following respects:

1. ending its practice when only the court orders the transcript of paying double ($2.75) the base rate ($1.375) per page for the production and delivery of "daily" copy;

2. requiring "rush" or "expedited" transcripts in New York City Family Court and New York City Criminal Court to be supplied within three rather than five working days to qualify for any payment by UCS;

3. ending its practice when only the court orders the transcript of paying double the base rate to New York City Family Court reporters for the production and delivery of "rush copy", i.e. that produced and delivered within five working days of recording;

4. ending its practice of paying $1.65 per page to New York City Criminal Court reporters for the production and delivery of transcripts within five working days of order by a Judicial Hearing Officer.

The ALJ also held that UCS violated §209-a.1(e) of the Act when it stopped paying court reporters a per page rate of $1.375 for transcripts other than daily, expedited or rush which are prepared and delivered to the judge before the close of the judicial proceeding.

[1/]DC 37 represents approximately 225 court reporters who work in Family Court, Criminal Court, Surrogate's Court and Civil Court within New York City. There are similar charges filed against UCS by unions representing court reporters in other units within and without New York City. The ALJ decided these cases separately because there are some differences in facts and issues. To avoid confusion, we have not consolidated the cases for decision.

UCS argues in its detailed exceptions and supporting brief that it is obligated by law and authorized by agreement with DC 37 to pay for transcripts only when they are produced and delivered within three working days of recording, and then only at a rate of $1.375 per page. It denies that it violated the Act by abolishing premium payments for transcripts produced and delivered within three working days from recording or by stopping any payment for transcripts produced and delivered outside of that time frame. According to UCS, its abolition of premium payments was permitted under an expired 1983 Page Rate Agreement (PRA), which it claims clearly fixes the rate for any transcripts for which it must pay at $1.375 per page. It argues that the abolition of premium payments in late 1991 merely brought its practice into conformity with the PRA as implemented by the Rules of the Chief Administrator of the Courts.[2/] It further argues that the ALJ erred in admitting testimony regarding the history or intent of the PRA, but that, if admissible, the testimony the ALJ relied upon in construing the PRA is not credible. Regarding the stoppage of any payments for transcripts which are prepared and delivered after three working days from recording, it is UCS' position that such transcripts constitute "regular" copy, which must be furnished to judges free of charge under Judiciary Law

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[2/]An employer's reversion to the terms of an existing or expired agreement despite practices to the contrary does not violate the Act. State of New York-Unified Court System, 26 PERB ¶3013 (1993); Maine-Endwell Cent. Sch. Dist., 15 PERB ¶3025 (1982), aff'g 14 PERB ¶4625 (1981).

§299 as interpreted by the Court of Appeals in Alweis v. Evans (hereafter Alweis),[3] discussed infra. DC 37, in a similarly detailed response, argues that the ALJ's decision is correct in all relevant respects.[4]

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

No exceptions have been taken to the ALJ's findings of material fact, only to the conclusions which can be properly drawn from them. Accordingly, we adopt the ALJ's findings of fact and incorporate them by reference. In brief background, UCS has for decades before and years after the 1983 PRA (an agreement reached with a coalition of unions, including DC 37), made premium payments to DC 37's court reporters for daily, expedited and rush transcripts.[5] The State ended the premium payments for DC 37 unit reporters in December 1991 and now pays only $1.375 per page for daily, expedited or rush copy, as it defines those terms, on the basis that the PRA base rate applies to all transcripts. It also paid until December 1991, $1.375 pursuant

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[3]69 N.Y.2d 199 (1987).

[4]The ALJ dismissed certain allegations in DC 37's charge and it has not taken any exceptions to the ALJ's decision in those respects.

[5]The definitions of those terms, the times within which those transcripts were to be prepared and delivered, and the amounts paid by UCS for those transcripts varied among the several negotiating units of court reporters and among judicial districts. It was in recognition of these differences that the ALJ issued separate decisions in the cases which are now on appeal to us.

to the PRA for "regular" transcripts produced at a judge's request before the close of the judicial proceeding. It discontinued those payments for what it deems to be "regular" copy after December 19, 1991, since that date paying only the $1.375 base rate for any copy produced and delivered within three working days from recording.

UCS' exceptions are directed only to the ALJ's rejection of its defenses and we confine our discussion accordingly. UCS' primary defense rests on the expired 1983 PRA. In that respect, UCS argues that the interpretation of the PRA must be restricted to the written language of that agreement and that language establishes a flat rate of $1.375 per page for all transcripts. In relevant part, the PRA provides: "Payment for transcripts shall be made based on a per page rate which shall be defined in and established by the Rules of the Chief Administrative Judge." The rate was initially established at $.75 per page in July 1984, with periodic increases to $1.375 per page as of July 1986, where it remains.

UCS' PRA defense is grounded upon the parol evidence rule. We find that that evidentiary and substantive rule, which prohibits the receipt of evidence of prior or contemporaneous agreements to contradict or vary the terms of a fully integrated agreement, is inapplicable here.

Parol evidence is unquestionably admissible to explain an ambiguity in a writing so as to ascertain the parties' intent. Conceding this, UCS argues that the ambiguity in the PRA was

created by the testimony of DC 37's main witness such that the parol evidence rule is applicable. We conclude, however, that the ambiguity which creates an exception to the parol evidence rule is inherent in the PRA.

The controlling question with respect to this aspect of UCS' defense is whether the PRA applies to all transcripts under all circumstances of production and delivery and it is in that respect that the PRA is ambiguous. The words "transcripts" and "based on" are not defined or described by the parties' agreement. We cannot know from the agreement whether "transcripts" and "based on" were to have a common, general meaning or a special, restricted meaning within the reporting trade. The ambiguity is further compounded by a usage of those terms within a judicial system where there has been a wide variety of transcripts, prepared and delivered for decades under different circumstances and paid for at different rates. The words of the PRA require clarification in the context of the history of negotiation of the PRA and the long-standing transcript practice if the intent of the parties in using them in the PRA is to be ascertained. The testimony accepted by the ALJ, therefore, was not offered by DC 37 or used by the ALJ to contradict or vary the terms of the PRA, but as an aid to the clarification of the ambiguity in the agreement. The parol evidence rule does not bar testimony offered and used for that purpose. Having admitted parol evidence for this reason, it is immaterial whether it was otherwise admissible.

In construing the PRA, the ALJ relied upon the testimony of Lester Kane, a senior court reporter and the chief spokesman for the coalition of unions which negotiated the PRA with UCS. UCS argues that Kane's testimony, if admissible, is not credible. Having reviewed the record, however, we find no reason to question Kane's uncontradicted testimony. UCS had a full opportunity to rebut Kane's testimony, but it made no attempt to do so during the hearing. Moreover, Kane's testimony that the PRA only establishes a base rate for regular transcripts is wholly consistent with UCS' premium payment practice for years after the negotiation of the PRA, the existence of premium payments under the former statutorily based system of transcript compensation, which the PRA merely replaced, with UCS' proposals to modify the 1983 PRA in negotiations for a successor, the circumstances in which the PRA was negotiated, and UCS' continuation of premium payments for transcripts produced and delivered by nonunit per diem court reporters. These actions are entirely inconsistent with UCS' current claim that the 1983 PRA was intended to eliminate the premium payments for transcripts which UCS had made for years. Without evidence to the contrary, we cannot conclude that the parties intended to abolish premium rates paid to unit personnel for a wide variety of transcripts without any specific mention of that intent. It is the more reasonable interpretation of the PRA, and the one Kane confirmed, that the parties took only a first step in the PRA to standardize page requirements and to establish a contractual base rate for

regular copy and left other transcript issues for resolution in subsequent negotiations.

In reaching this interpretation of the PRA, we give full effect to the zipper clause in that agreement. The PRA represents the parties' full agreement on the subjects it covers. The subject covered in relevant respect is a base rate for regular copy and the zipper clause extinguishes any duty to bargain on that issue. The zipper clause need not be and is not reasonably read, however, to establish that the PRA was intended to apply to all transcripts under all circumstances of production and delivery or to authorize the elimination of premium payments for daily, expedited or rush copy.

Having concluded that parol evidence was admissible to aid in the interpretation of the PRA, we need not decide whether without that testimony the wording of the PRA is susceptible to the construction offered by UCS or the one urged by DC 37.

The second major aspect of this charge concerns UCS' refusal on and after December 1991 to pay the PRA base rate of $1.375 for all transcripts which are produced and delivered outside the time frame UCS has used since December 1991 to define daily, expedited or rush copy.[6/] As of December 1991, UCS deems all transcripts produced and delivered more than three working days from the recording to be regular copy which must be produced and delivered

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[6/]UCS's operating definition of "regular" copy was first those transcripts produced and delivered after three business days from recording, then three calendar days and it has most recently returned to a three working-day definition.

free of charge under Judiciary Law §299 as interpreted in Alweis. For several reasons, however, Alweis does not require or permit UCS to refuse payments for any transcripts other than those produced and delivered after the close of the judicial proceeding. UCS' arguments to the contrary extend well beyond the very limited holding in Alweis.

The plaintiffs in Alweis were a small group of senior court reporters in the Fifth Judicial District who commenced an action for a declaratory judgment that Judiciary Law §299 was unconstitutional and that it had been repealed by implication by Judiciary Law §302. Judiciary Law §299 requires that transcripts ordered by judges for their own use be furnished by the court reporter free of charge. Judiciary Law §302, however, provides that a court reporter is entitled to fees for a transcript required, inter alia, by a judge. The plaintiffs in Alweis also sought damages and an injunction against UCS' directives to judges and justices in the Fifth Judicial District specifying that transcripts were to be ordered without charge to the State pursuant to Judiciary Law §299.

In Alweis, the Court of Appeals held that Judiciary Law §§299 and 302 are not inconsistent and that the latter section had not impliedly repealed the former. The Court read Judiciary Law §299 to apply to regular transcripts and Judiciary Law §302 to apply to daily and expedited copy. Regular copy had to be provided to a judge on request without separate charge by the

reporter. Compensation at public expense was required under Judiciary Law §302 for daily and expedited copy.

Whatever implications Alweis has for this case stem from the apparent prohibition in Judiciary Law §299 against payment for regular transcripts ordered by a judge for his or her own use. The problem Alweis presents for this case is that the Court did not define regular, daily or expedited copy. There was, indeed, no issue in Alweis regarding payment for daily or expedited copy because the plaintiffs had been informed by UCS agents that payment would still be made to them for daily or expedited transcripts notwithstanding the directives. As to daily or expedited copy, the Court merely observed that such copy required "extraordinary" service or demand.[7/] It described regular transcripts generally as those "which can be supplied under ordinary circumstances after the conclusion of the proceedings."[8/] Moreover, the Court in Alweis had no occasion to and did not consider when, in particular, compensation was owed under Judiciary Law §302 or not owed under Judiciary Law §299. Although the record before the Court in Alweis contained the transcript payment practice within the Fifth Judicial District, a practice different from the one in this case, there is no suggestion from the Court's decision that it knew of the many varied transcript payment practices throughout the judicial

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[7/]69 N.Y.2d at 205 & 206.

[8/]69 N.Y.2d at 206.

system and intended to adopt the Fifth Judicial District's practice as the Judiciary Law's definition of "regular" transcripts. Nor did the Court decide the validity of UCS' directives for any purpose relevant to the disposition of this case. In response to the plaintiffs' claim in that regard, the Court of Appeals merely noted that it was the Judiciary Law itself, not any UCS directives, which determined whether the court reporters were entitled to compensation. The Court concluded that aspect of its decision with the observation that "no other contention is before us on this appeal."[9/]

Alweis, therefore, is a narrow decision regarding the validity and application of two provisions of the Judiciary Law. There is nothing in that decision which assesses in any way UCS' bargaining obligations under the Act regarding the rate and the circumstances of compensation for court reporters. Alweis represents only an effort to reconcile two facially inconsistent statutory provisions. The Court's review in that respect ended when it concluded that there was a "reasonable field of operation"[10/] for each statutory provision.

Despite these limitations, UCS claims that the Court in Alweis implicitly held that regular copy within the meaning of Judiciary Law §299 is any copy produced and delivered after three working days of recording, regardless of the stage of the

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[9/]69 N.Y.2d at 206.

[10/]69 N.Y.2d at 205.

judicial proceeding at which the request for the transcript is made. In rejecting this argument, the ALJ held that Alweis relieves the UCS of its obligation under §209-a.1(e) of the Act to pay the base rate for regular copy only when those transcripts are produced and delivered after the close of the judicial proceeding. According to the ALJ, it is the close of the judicial proceeding which marks the "conclusion of the proceedings" for purposes of application of Judiciary Law §299 under Alweis.

We concur with the ALJ's conclusion that Alweis requires free copy only when that copy is produced and delivered after the close of the judicial proceeding for two basic reasons.

First, the ALJ's conclusion in this respect is based upon specific language in Alweis, itself drawn from a much earlier decision of the Court of Appeals in Moynahan v. City of New York,[11/] which clearly equates the "conclusion of the proceedings" with the close of the case. In this respect, the Court appears to have held that "ordinary circumstances" arise only after the close of the case. UCS has discontinued all payments for any transcripts prepared and delivered in excess of three working days of their recording irrespective of the stage of the judicial proceeding, thereby disregarding Alweis' limitation.

[11/]205 N.Y. 181 (1912).

Moreover, UCS' unilateral stoppage of all payments for transcripts produced and delivered more than three working days from recording would violate the Act even if we assume, as UCS argues, that the phrase "conclusion of the proceedings", as used in Alweis, is susceptible to more than one meaning. The Court in Alweis described regular copy as that which is supplied under "ordinary circumstances" after the conclusion of the proceedings. Thus, even on UCS' theory of Alweis, there are at least two elements in any definition of regular copy and its arguments ignore or minimize the first. Even if, as UCS argues, the "conclusion of the proceedings" can mean at the close of the case, or after a pretrial motion or hearing, or after a daily session of court, Alweis nonetheless leaves the parties free by agreement or practice to define when a transcript is produced under "ordinary circumstances" and, therefore, when it becomes "regular" and ineligible for compensation under Judiciary Law §299. To borrow a phrase from the Court's decision in Alweis, Judiciary Law §299 allows a "field of operation" for the Act in supplying, for purposes of assessing bargaining rights and obligations, the definition of "ordinary circumstances" which the Court in Alweis did not offer. We do not read the Court in Alweis as having held that "ordinary circumstances" necessarily has but one definition for purposes of the Judiciary Law fixed exclusively by an immutable number of days between the recording and delivery of transcripts. Where the parties to a collective bargaining relationship have by labor agreement or by established

practice thereunder, or separately, supplied the conditions under which compensation will be paid to reporters for transcripts, those agreements and practices are required to be continued in accordance with the provisions of the Act because those agreements or practices are not in violation of Judiciary Law §299 but in definition or supplementation of the terms of that statute as interpreted. The "ordinary circumstances" which distinguish free, "regular" copy from compensated, daily or expedited copy rest on the work of the court reporters in the preparation and delivery of that copy and it is the Act which permits and requires bargaining regarding the terms and conditions under which that work is rendered and paid. The parties are free under Alweis to define and particularize by agreements or practices under the Act the "ordinary circumstances" which characterize regular transcripts submitted before the "conclusion of the proceedings", no matter the definition accorded the latter phrase.

In summary, neither the 1983 PRA, Judiciary Law §299, nor the Court of Appeals' decision in Alweis affords the UCS a defense to the violations of §209-a.1(d) and (e) of the Act as found by the ALJ. For the reasons set forth above, the ALJ's decision is affirmed and UCS' exceptions are dismissed.

IT IS, THEREFORE, ORDERED that UCS:

1. Reinstate its practice of paying court reporters double the base rate of $1.375 per page for the production and delivery of daily copy when only the court has ordered the transcript and

reinstate its practice of paying the base rate of $1.375 per page for transcripts produced and delivered in other than a daily or expedited time frame, but before the close of a case.

2. Reinstate its practice of paying court reporters $2.75 per page for rush copy produced and delivered by a reporter in the New York City Family Court when the copy is ordered by a judge and is produced and delivered within five working days.

3. Rescind and cease implementation of any work rules or directives requiring expedited or rush transcripts be supplied within three business days of the date of order to qualify for payment.

4. Reinstate its practice of paying court reporters in the New York City Criminal Court $1.65 per page for a transcript or portion thereof when ordered by a Judicial Hearing Officer and produced and delivered within five working days.

5. Make unit employees who produced and delivered daily transcripts and were not paid $2.75 per page when ordered only by the court whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

6. Make unit employees who produced and delivered rush transcripts for New York City Family Court within five working days and were not paid $2.75 per page when ordered only by the court whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

7. Make unit employees who produced and delivered transcripts for New York City Criminal Court within five working

days and were not paid $1.65 per page when ordered by a Judicial Hearing Officer whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

8. Make unit employees who produced and delivered transcripts in other than a daily or expedited time frame, but before the close of a case, and were not paid $1.375 per page whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

9. Sign and post the attached notice at all locations ordinarily used by UCS to post notices of information to DC 37 unit employees.

DATED: January 25, 1995
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 State of New York-Unified Court System (UCS) represented by District Council 37, AFSCME, AFL-CIO, and its affiliated Local 1070, that UCS will:

1. Reinstate its practice of paying court reporters double the base rate of $1.375 per page for the production and delivery of daily copy when only the court has ordered the transcript and reinstate its practice of paying the base rate of $1.375 per page for transcripts produced and delivered in other than a daily or expedited time frame, but before the close of a case.

2. Reinstate its practice of paying court reporters $2.75 per page for rush copy produced by a reporter in the New York City Family Court when the copy is ordered by a judge and is produced and delivered within five working days.

3. Rescind and cease implementation of any work rules or directives requiring expedited or rush transcripts be supplied)hin three business days of the date of order to qualify for payment.

4. Reinstate its practice of paying court reporters in the New York City Criminal Court $1.65 per page for a transcript or portion thereof when ordered by a Judicial Hearing Officer and produced and delivered within five working days.

5. Make unit employees who produced and delivered daily transcripts and were not paid $2.75 per page when ordered only by the court whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

6. Make unit employees who produced and delivered rush transcripts for New York City Family Court within five working days and were not paid $2.75 per page when ordered only by the court whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

7. Make unit employees who produced and delivered transcripts for New York City Criminal Court within five working days and were not paid $1.65 per page when ordered by a Judicial Hearing Officer whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

8. Make unit employees who produced and delivered transcripts in other than a daily or expedited time frame, but before the close of a case, and were not paid $1.375 per page whole for any loss of pay, with interest at the currently prevailing maximum legal rate.

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

STATE OF NEW YORK - UNIFIED COURT SYSTEM

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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.

2E- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AFSCME, COUNCIL 66, LOCAL 1614, AMSTERDAM, NEW YORK,

CASE NO. D-0255

Upon the Charge of Violation of Section 210.1 of the Civil Service Law

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BOARD DECISION AND ORDER

On January 14, 1994, this agency's Counsel filed a charge alleging, as amended, that AFSCME, Council 66, Local 1614, Amsterdam, New York (respondent) violated Civil Service Law (CSL) §210.1 in that it caused, instigated, encouraged, condoned and engaged in a strike against the City of Amsterdam (City) on December 19, 1993.

The respondent requested Counsel to indicate the penalty he would be willing to recommend to this Board as appropriate for the violation charged. Respondent proposed to withdraw its answer, and thereby admit the factual allegations of the amended charge, on the understanding that Counsel would recommend and the Board would accept a penalty of loss of respondent's right to have dues and agency shop fees deducted for a period of three months, commencing on the first practicable date following the issuance of this decision. Counsel has so recommended.

On the basis of the unanswered charge, we find that the respondent violated CSL §210.1 in that it engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one and will effectuate the policies of the Act.

WE ORDER that the dues and agency shop fee deduction rights of the AFSCME, Council 66, Local 1614, Amsterdam, New York, be suspended, commencing on the first practicable date following the issuance of this decision, and continuing for such period of time that twenty-five percent (25%) of its annual agency shop fees, if any, and dues would otherwise be deducted. Thereafter, no dues or agency shop fees shall be deducted on its behalf by the City of Amsterdam until the respondent affirms that it no longer asserts the right to strike against any government, as required by the provisions of CSL §210.3(g).

DATED: January 25, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2F- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNION-ENDICOTT MAINTENANCE WORKERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and- **CASE NO. U-14226**

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

The Union-Endicott Central School District (District) seeks to appeal a ruling by an Administrative Law Judge (ALJ) made during the processing of a charge filed by the Union-Endicott Maintenance Workers Association, NYSUT, AFT, AFL-CIO (Association).

As one defense to the charge, the District argues that it must be dismissed because the Association has not satisfied the notice of claim requirements under Education Law §3813. By letter dated December 13, 1994, the ALJ notified the parties that decision on the District's notice of claim defense was being reserved and that a second day of hearing on the charge was

scheduled for February 9, 1995.[1/] The parties were instructed in that letter to be prepared to present relevant facts regarding the notice of claim issue during the hearing.

The District seeks to appeal the ALJ's declination to render a decision on its notice of claim defense before resuming the hearing. It argues that the ALJ's ruling effectively deprives it of the benefit of that defense. According to the District, an ALJ has no discretion to proceed to a hearing on the merits of a charge when a notice of claim defense has been raised. It argues that the notice of claim issue must be severed from any other issues, any hearing required as to that defense must be held and a decision on that defense rendered before there can be any hearing or determination on any other issue raised in or by the improper practice charge.

An appeal from an ALJ's interlocutory ruling is by our permission only.[2/] As interlocutory appeals necessarily delay the completion of proceedings, we have not often entertained such appeals. Our review is warranted prior to the conclusion of the proceedings before the ALJ only if our declination to accept the appeal would cause harm to the appellant which cannot be remedied

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[1/]The case was held in abeyance after the first day of hearing until the Court of Appeals denied leave to appeal from the Appellate Division, Third Department's decision in Union-Endicott Cent. Sch. Dist. v. PERB, 197 A.D.2d 276, 27 PERB ¶7005 (1994), in which the Court held Education Law §3813 applicable to at least certain improper practice proceedings.

[2/]Rules of Procedure (Rules), §204.7(h)(2).

by our review of the final decision and order[3/] or the ruling subject to appeal constitutes a clear abuse of discretion.[4/]

The ALJ's decision to proceed with the hearing in this case does not deprive the District of its notice of claim defense, nor do we find any basis for a conclusion that severance of a notice of claim defense is required as a matter of law. Attendance and participation at a hearing on the merits is not the type of harm which warrants review of a nonfinal ruling or order simply because there is a possibility that the charge may be ultimately dismissed on other than a merits basis.[5/] Neither was the ALJ's ruling in this case without articulated reason such as might warrant review by us at this time on the basis of a clear abuse of discretion. The ALJ's letter to the parties states that there may be fact questions affecting the disposition of the notice of claim defense. A determination to continue the hearing in that circumstance is within the range of discretion regularly accorded to ALJs and is not so prejudicial to the District as to warrant the piecemeal review which our rule intends to avoid.

There being no ground presented which meets our standards for an extraordinary interlocutory review, we will not consider the District's appeal of the ALJ's ruling at this stage of the proceeding. Our decision is without prejudice to the District's

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[3/]State of New York (Div. of Parole), 25 PERB ¶3007 (1992); United Univ. Professions, 19 PERB ¶3009 (1986).

[4/]County of Nassau, 22 PERB ¶3027 (1987).

[5/]See, e.g., Mt. Morris Cent. Sch. Dist., 26 PERB ¶3085 (1993).

right to file such exceptions to the ALJ's final decision and order as it considers to be warranted pursuant to §204.10 of the Rules.

DATED: January 25, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2G- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., AFSCME, LOCAL 1000, AFL-CIO, SUFFOLK EDUCATIONAL LOCAL 870, DEER PARK UNIT,

Charging Party,

-and-

CASE NO. U-14038

DEER PARK UNION FREE SCHOOL DISTRICT,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (PAMELA BAISLEY of counsel), for Charging Party

COOPER, SAPIR & COHEN, P.C. (ROBERT SAPIR of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., AFSCME, Local 1000, AFL-CIO, Suffolk Educational Local 870, Deer Park Unit (CSEA) and cross-exceptions filed by the Deer Park Union Free School District (District) to a decision of an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed CSEA's charge that the District violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act)[1/] by unilaterally discontinuing its

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[1/]CSEA amended its charge at the hearing to withdraw an allegation relating to custodians. The ALJ also permitted CSEA to further amend its charge at the second day of hearing to include the alleged violation of §209-a.1(e) of the Act. No exceptions were taken to these rulings.

practice of paying bus drivers who drove parochial school and pre-kindergarten runs for "down time" when the District was closed or had no work for them to perform.

The District raised an affirmative defense of waiver in its answer and also argued that the New York State Constitution, Article 8.1, prohibited the continuation of the payments sought by CSEA. At the second day of hearing, the District amended its answer to allege that PERB lacked jurisdiction over the subject matter of the charge. After the close of the hearing, but before briefs were submitted, the District again sought to amend its answer, to assert as an additional defense that CSEA had failed to file a timely notice of claim as required by §3813 of the Education Law. CSEA opposed the amendment.

The ALJ refused to allow the District to amend its answer to include a defense that CSEA had failed to file a timely notice of claim pursuant to §3813 of the Education Law. On the merits, the ALJ dismissed the §209-a.1(d) allegation, finding that the parties' contract contained a management rights clause which effectively waived CSEA's right to negotiate the alleged change. She further found that CSEA had failed to establish a past practice which would entitle it to the payments it was seeking. The ALJ also dismissed the §209-a.1(e) allegation on the ground that the expired agreement did not contain any provision with respect to the payments in issue.

CSEA excepts to the dismissal of the charge, arguing that the ALJ erred in her findings that no past practice existed and that there was a waiver of negotiating rights.[2/] The District supports the ALJ's decision except to the extent that she did not allow the District to amend its answer to allege the Education Law §3813 claim. CSEA, in its response to the District's cross-exceptions, supports the ALJ's determination to disallow the post-hearing amendments to the answer.

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

CSEA represents a unit of noninstructional employees, including bus drivers. Some bus drivers bid for and are assigned to drive parochial school runs or pre-kindergarten runs, which are sometimes done on days when the District is closed. CSEA alleges that those drivers have always been paid for a full day by the District even though no mid-day or late afternoon runs were being made. In September 1992, the District's new Transportation Supervisor implemented a practice by which bus drivers would be paid only for the hours they actually worked and would no longer receive pay for down time.

[2/]CSEA takes no exception to the ALJ's dismissal of the alleged §209-a.1(e) violation.

Article XVIII of the parties' 1992-1995 collective bargaining agreement includes the following management rights clause:

> It is expressly understood and agreed that the Board, except as to those matters herein provided, reserves exclusively to itself the right to cancel, amend, change, modify, or revise any and all existing rules and policies and/or to institute or adopt new rules, regulations, orders and policies on any and all matters and subjects. The provisions of Article XVI shall not apply to this article.[3/]

Turning first to the District's cross-exceptions, it argues that the ALJ erred by not allowing it to amend its answer for a second time, to include a defense that CSEA had failed to include proof in its charge that it had filed a notice of claim as required by §3813 of the Education Law.[4/] The District argues that it should have been allowed to amend its answer post-hearing because the applicability of Education Law §3813 to improper practice proceedings had been decided by the Appellate Division in Union-Endicott Central School District v. Public Employment

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[3/]Article XVI provides: "It is agreed by and between the parties that any provision of this Agreement requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefore, shall not become effective until the appropriate legislative body has given approval." The contract also provides, at Article XVII: "It is expressly understood and agreed that all negotiable subjects have been discussed during the negotiations leading to this agreement and negotiations will not be re-opened on any matter whether contained herein or not during the term of this agreement."

[4/]Education Law §3813 requires a notice of claim to be filed with a school district as a condition precedent to the commencement of an action against the school district.

Relations Board[5] shortly before it made its motion to amend the answer. The Appellate Division there affirmed a finding of Supreme Court, Albany County that the notice of claim requirements of §3813 are applicable to at least certain of PERB's improper practice proceedings. The ALJ, exercising the discretion granted under §204.3(e) of our Rules of Procedure to permit an amendment to an answer for good cause shown, declined to grant the District's request. We affirm her ruling.

There is no abuse of discretion when an ALJ, after the close of the record, declines to allow a party to amend an answer where no good cause is shown and the facts or argument sought to be included in the amendment were known to or discoverable by that party before the hearing was concluded.[6]

While an Education Law §3813 claim, however, need not be raised in an answer,[7] it must be timely raised before the court of original jurisdiction or it is waived.[8] Here, although it did not raise it in its answer, the District placed the Education Law §3813 claim before the ALJ, whom we have held to be the administrative agency equivalent of the court of original

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[5]197 A.D.2d 276, 27 PERB ¶7005 (3d Dep't 1994), motion for leave to appeal denied, ___ N.Y.2d ___, 27 PERB ¶7012 (1994).

[6]Addison Cent. Sch. Dist., 17 PERB ¶3076 (1984).

[7]Flanagan v. Commack Union Free Sch. Dist., 47 N.Y.2d 613 (1979).

[8]Id.

jurisdiction.[9] Therefore, the question is whether that claim was timely raised before the ALJ. In Coger v. Davidoff,[10] the Appellate Division held that the failure to raise a notice of claim defense before answering on the merits waived the respondent's right to assert the Education Law §3813 claim. In Harder v. Binghamton City School District,[11] the Court, citing to Coger, supra, found that the notice of claim defense had been properly raised by the respondent in its answer and objections in point of law. These decisions support the conclusion that while the Education Law §3813 claim need not be raised as an affirmative defense in an answer, it must be raised to the ALJ either before or at least in the answer. Here, the District's failure to raise the issue of not filing a §3813 Education Law notice of claim until after the hearing in the case had been concluded constitutes a waiver of that defense.

As to CSEA's exceptions, the ALJ dismissed the charge on a finding that CSEA had waived its right to negotiate the change alleged to have been made in the charge on the basis of the language in Article XVIII of the CSEA-District contract[12] and the testimony of the CSEA unit president that she understood that "the contract is what the Board of Education has agreed to abide

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[9]See Mt. Markham Cent. Sch. Dist., 27 PERB ¶3030 (1994).

[10]71 A.D.2d 1044 (4th Dep't 1979).

[11]188 A.D.2d 783 (3d Dep't 1992).

[12]The ALJ did not address the language of Article XVII.

by, okay, and if it is not in here, they have the right to amend, modify or change if it is not part of this total agreement."[13]

We agree that the language of Article XVIII, although broad, is a clear grant of right to the District with respect to the subject matter of the instant charge.[14] It constitutes an explicit and unambiguous waiver of CSEA's right to bargain matters not contained in the parties' collective bargaining agreement during the contract term. We, therefore, find that the §209-a.1(d) allegation was properly dismissed. The ALJ's decision is, accordingly, affirmed.[15]

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

DATED: January 25, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

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[13]The CSEA President did question whether the complained of actions of the District constituted a change in "policy".

[14]County of Livingston, 26 PERB ¶3074 (1993); Sachem Cent. Sch. Dist., 21 PERB ¶3021 (1988).

[15]We, therefore, need not rule on CSEA's exceptions to the ALJ's decision that no past practice existed regarding the at-issue payments.

2H- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WASHINGTON COUNTY SEWER DISTRICT #II BARGAINING GROUP,

Petitioner,

-and-

CASE NO. C-4317

WASHINGTON COUNTY SEWER DISTRICT #II,

Employer,

-and-

TEAMSTERS LOCAL 294, IBT,

Intervenor.

RAYMOND HOAG, for Petitioner

JAMES FISCHBECK, for Employer

KEVIN HUNTER, for Intervenor

BOARD ORDER

On December 20, 1994, the Director of Public Employment Practices and Representation issued a decision in the above matter finding that the petition filed by the Washington County Sewer District #II Bargaining Group (petitioner) to decertify the Teamsters Local 294, IBT as negotiating representative for certain of its employees should be granted for lack of opposition.[1/] No exceptions have been filed to the decision.

1/ 27 PERB ¶4080.

IT IS THEREFORE ORDERED that the Teamsters Local 294, IBT be, and it hereby is, decertified as the negotiating representative of the following unit of employees of the employer:

Included: Sewage Treatment Plant Operator, Sewer Maintenance Worker, Sewer Line and Pump Station Maintainer and Laborer.

Excluded: All other employees.

DATED: January 25, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3A- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

THE UNION FOR CORRECTION OFFICERS & LAW ENFORCEMENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4303

STATE OF NEW YORK,

Employer,

-and-

SECURITY AND LAW ENFORCEMENT EMPLOYEES, DISTRICT COUNCIL 82, 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 Security and Law Enforcement Employees, District Council 82, 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: All employees within the Security Services Unit.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Security and Law Enforcement Employees, District Council 82, 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: January 25, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3B- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUBSTITUTES UNITED IN BROOME, NYSUT/ AFT/AFL-CIO, LOCAL 4707,

Petitioner,

-and-

CASE NO. C-4309

OWEGO APALACHIN 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, Local 4707 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: Per diem substitute teachers and per diem substitute nurses.

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, Local 4707. 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: January 25, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

30- 1/25/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOCES UNITED EMPLOYEES, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4334

MONROE BOCES #1,

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 BOCES United Employees, 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 counselors and instructors employed by Monroe BOCES #1 in the Adult and Community Education Program on a school or calendar year basis who are regularly scheduled to work at least 20 hours per week.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the BOCES United Employees, 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: January 25, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member