2A- 51 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 870, PATCHOGUE-MEDFORD SCHOOL UNIT,

Charging Party,

-and-

CASE NO. U-15330

PATCHOGUE-MEDFORD UNION FREE SCHOOL DISTRICT,

Respondent.

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

INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER, REICH & SCRICCA (CHRISTOPHER VENATOR 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, Local 870, Patchogue-Medford School Unit (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the Patchogue-Medford Union Free School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally furloughed employees in CSEA's unit for one conference day without pay. The ALJ decided that CSEA had waived its right to negotiate the District's decision to furlough and that the District's action was consistent with the past

practice that existed between the parties regarding the assignment of these unit employees.

CSEA alleges in its exceptions that the ALJ erred in finding a waiver and in determining that the District's actions were consistent with its prior implementation of the contract clause in issue. The District supports the ALJ's decision.

After a review of the record and consideration of the parties' arguments, we affirm the decision of the ALJ.

The District employs kindergarten, computer and library aides in its elementary schools. The aides work three hours a day, assisting the classroom teachers, who teach for six hours a day. For several years, aides have been scheduled to work on parent-teacher conference days, even though the instructional days are shortened and the aides have no involvement in the conferences themselves. On November 18, 1993, a parent-teacher conference day was scheduled, with students to be in attendance for only two hours and fifteen minutes. The District announced that the services of the aides would not be needed on that day and that, therefore, the aides would not be paid. Bruce Singer, Assistant Superintendent of Business, testified that he decided to furlough the aides on November 18 because of the District's financial difficulties.

The District points to Article II, §G of the parties' July 1, 1991 - June 30, 1994 collective bargaining agreement as, in relevant respect, a source of right to the District. That article provides, in relevant part:

Differentiated Schedules

> Subject to the provisions of Section C of the Article, the scheduling of the work of any member of the operational unit shall be at the discretion of the District and dependent on the times when such services are needed by the District....[1/]

Pursuant to this provision, the District had not scheduled the kindergarten aides to work on the last two days of the 1992-1993 school year. In 1989, the District had likewise determined that certain instructional and special education aides would not be needed on parent-teacher conference days. The collective bargaining agreement also guarantees 180 days of work a year to the food service workers and the monitor aides, but is silent as to the aides in issue.[2/]

CSEA argues that the language of Article II, §G cannot be construed as a waiver since it does not specifically address parent-teacher conference days and it must be read in conjunction with Article II, §C, which sets forth a Monday through Friday workweek. We do not find CSEA's argument to be persuasive. A waiver is the intentional relinquishment of a known right which

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[1/]Article II, §C reads:

> Work Week
> The normal work week for all employees shall be Monday through Friday, except for those employees who are hired for a different normal work week.

[2/]Article II, §E(2) provides:

> Food Service Workers, Monitor Aides
>
> Food service workers and monitor aides shall be guaranteed at least one hundred eighty (180) days of work in accordance with their regular schedule.

"must be clear, unmistakable and without ambiguity."[3/] The language of Article II, §G clearly gives the District the right to determine whether and when the aides are needed to work. The only restrictions are that the normal workweek is Monday through Friday and that certain other unit employees are guaranteed a minimum of 180 days of work per year. Neither of those contractual provisions restricts the District's contractual right to determine that the aides were not required to work on the parent-teacher conference day during the normal workweek.

Moreover, the at-issue action is consistent with the District's past practice and, apparently, the parties' joint interpretation of the agreement since, with respect to the scheduling of the aides, on two prior occasions the District determined that aides were not required to work and did not schedule them or pay them for those days.

CSEA's exceptions must, therefore, be dismissed and the ALJ's decision affirmed.

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

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[3/] CSEA v. Newman, 88 A.D.2d 685, 15 PERB 7011, at 7022 (3d Dep't 1982), appeal dismissed, 57 N.Y.2d 775, 15 PERB ¶7020 (1982).

2B- 5/ 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, MONROE COUNTY LOCAL 828, MONROE COUNTY EMPLOYEE UNIT,

Charging Party,

-and-

CASE NO. U-15287

COUNTY OF MONROE,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK of counsel), for Charging Party

BARRY C. WATKINS, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Monroe (County) to a decision of an Administrative Law Judge (ALJ) finding that the County had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted services provided by employees in a unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Monroe County Local 828, Monroe County Employee Unit (CSEA). The County argued that the work subcontracted was not exclusively bargaining unit work, that its use of a private contractor was temporary, and that it had

changed by the subcontract the level of service it was providing to its constituency.

The County operates Monroe County Hospital (MCH). CSEA represents the employees in MCH's Environmental Services Department (Department), which provides the cleaning service at MCH. Lynda Zimmer, a bargaining unit member, is the Supervisor of the Department and oversees the work of the building service workers, who are also unit members. For eight years, Zimmer, in addition to her day-to-day supervisory duties, has been responsible for pest control maintenance and staff training in cleaning, health and safety, and she has ordered supplies and equipment for the Department.

On December 20, 1993, the County entered into a three-year agreement with Servicemaster Company to provide equipment maintenance, supplies, training and other services, including pest control.[1/] While no County employees were displaced by the contracting with Servicemaster, the ALJ found that the County had violated the Act by unilaterally contracting out training of staff in cleaning and safety procedures and supply ordering.[2/]

The County excepts to the ALJ's decision, arguing that she erred in finding the work to be exclusive unit work, that the

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[1/]The contract has laundry and linen components which are not in issue.

[2/]The ALJ found that pest control maintenance was not exclusive to the bargaining unit and she did not find a violation in that regard. No exceptions have been filed with respect to that part of the ALJ's decision.

work was not temporary in nature and that the County had not changed its level of service. CSEA supports the ALJ's decision.

After a review of the record and consideration of the parties' arguments, we affirm the ALJ's decision.

Most of the work now being done by Michael Ruszaj, Servicemaster's coordinator[3/] with MCH, was previously performed by Zimmer. Zimmer designed and implemented a training program for new employees in basic cleaning techniques, patient interaction, safety and accident prevention and infection control,[4/] a program that involved two to three training hours a day for four or five days, including demonstrations and video tapes. After completing training and passing a written test, the new employees were assigned to clean with an experienced employee. Training in the use of new equipment and supplies was always done by the vendor of the product;[5/] fire safety training was done by a local fire department employee.

[3/]It appears that Ruszaj is the individual identified in the agreement between Servicemaster and the County as the Administrative Director of Physical Support Services and that the duties required of Servicemaster by the agreement include maintenance of time records, furnishing of data to MCH for the formulation of its payroll, and the provision and maintenance of all training equipment and materials, schedules and procedures for training employees of MCH.

[4/]There was a mandatory annual in-service training program for all building service workers. The accident prevention training was provided by Matt Morrison and the infection control training was done by Rachel Gaffney. Both are employees in the CSEA unit.

[5/]Such training was usually part of the purchase agreement and was done to reduce MCH's liability.

Zimmer was also responsible for the ordering of all supplies and equipment. If the supplies were already in MCH's inventory, Zimmer simply ordered them from stock. To purchase new equipment and supplies, Zimmer would deal directly with the vendor. She only needed prior approval of an order, from Thomas Yale, Assistant Director of Patient Services, if the purchase amount was over $500.

Zimmer wrote the original bid for pest control services. After MCH contracted with an exterminator, Zimmer would note sightings and complaints and arrange for at least an annual cleaning and spraying. Claire Bovier, Director of the Food Service Department, has also contacted the exterminator directly about pest control.

Ruszaj now conducts all training of new building service workers at MCH. He provides video tapes and one-on-one training, and calls in other Servicemaster employees, as needed, for assistance. All equipment and supplies are provided by Servicemaster. Except for the brand name, they are the same as those previously used under Zimmer's supervision. Health and safety training is limited to the viewing of videotapes. Ruszaj, with input from Zimmer's assistant, has determined the level of materials needed at MCH. A monthly inventory is now done and Ruszaj replenishes the supplies by orders to Servicemaster. Ruszaj makes notations of pest sightings and he has met with the contract exterminator.

The County first excepts to the introduction of evidence which covered the time frame between the filing of the instant charge, on January 25, 1994, and the hearing. The County argues that only evidence of facts in existence before the charge was filed can be introduced by CSEA. We do not agree. Here, CSEA merely introduced evidence during its case that the work that was transferred to and was being performed by Servicemaster was substantially the same as the work previously performed exclusively by unit employees, primarily Zimmer, and that the County had not changed the level of service or qualifications for doing the work during the time from the date the contract was entered into between the County and Servicemaster and the date of the hearing. This evidence was properly accepted by the ALJ.

The County also asserts that it contracted with Servicemaster to upgrade performance and technology at MCH. The County claims that since January 1, 1994, it has lowered its costs as well as increased the quality of its service. However, the record does not reflect a substantial change in the nature of the tasks performed, the quality of performance or the qualifications for performing the work since it has been undertaken by Servicemaster.[6/]

The County further argues that CSEA does not have exclusivity over the work now being performed by Servicemaster. With the exception of the pest control maintenance, which is not

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[6/]See State of New York (DOCS), 27 PERB ¶3055 (1994).

before us, the training of new employees in basic cleaning, health and safety has always been done by unit employees. Although the fire safety training is not exclusive to the unit, it is a specialized area of training, which, while important, does not constitute a large portion of the training of new employees. A discernible boundary may be reasonably drawn around that work. As such, the performance of fire safety training by nonunit employees does not disturb CSEA's exclusivity over the cleaning and safety training generally or the ordering of supplies previously performed by unit employees.[7/]

The County lastly argues that Servicemaster is only training employees on a temporary basis, until they become familiar with Servicemaster's methods and materials. However, Ruszaj did not just train Zimmer to enable her to train the building service workers; he has undertaken to train all the employees in the Department. Additionally, the County's contract with Servicemaster is for three years. A three-year contract which removes virtually all of the duties of at least one unit position is far from a temporary or de minimus action. We have previously held that any assignment of unit work outside the unit, regardless of its scope or duration, is a violation of the Act.[8/] As we held in Niagara Frontier Transportation Authority:

[7/]See County of Onondaga, 24 PERB ¶3014 (1991), conf'd, 187 A.D.2d 1014, 25 PERB ¶7015 (4th Dep't 1992), motion for leave to appeal denied, 81 N.Y.2d 706, 26 PERB ¶7003 (1993); Town of West Seneca, 19 PERB ¶3028 (1986).

[8/]See New York City Transit Auth., 19 PERB ¶3043 (1986).

> Even if no individual employees suffer a direct, immediate and specifically identifiable detriment to their terms and conditions of employment, their rights of organization and representation may be diminished if the scope of the negotiating unit is reduced.[2/]

We find, therefore, that the County's contracting of the cleaning and safety training and the supply ordering responsibilities to Servicemaster, without negotiations with CSEA, violated §209-a.1(d) of the Act.

For the foregoing reasons, we dismiss the County's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the County:

1. Restore the training in cleaning and safety and the supply ordering responsibilities to the unit represented by CSEA;

2. Make whole any unit employees who may have suffered a loss or diminution in pay or benefits or a change in terms and conditions of employment as a result of the subcontracting of the above duties to Servicemaster;

3. Sign and post the attached notice at all locations normally used to post notices of information to unit employees employed at the Monroe Community Hospital.

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[2/]18 PERB ¶3083, at 3182 (1985).

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, Monroe County Local 828, Monroe County Employee Unit (CSEA) that the County of Monroe will:

1. Restore the training in cleaning and safety and the supply ordering responsibilities to the unit represented by CSEA.

2. Make whole any unit employees who may have suffered a loss or diminution in pay or benefits or a change in terms and conditions of employment as a result of the subcontracting of the above duties to Servicemaster Company.

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

COUNTY OF MONROE

. . . . . .

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.

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOUTH COLONIE CENTRAL SCHOOL DISTRICT

CASE NO. E-1859

Upon the Application for Designation of Persons as Managerial or Confidential.

THEALAN ASSOCIATES, INC. (JOSEPH A. IGOE), for Employer

RICHARD GREENSPAN, P.C. (STUART A. WEINBERGER of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 (Local 424) to a decision of the Director of Public Employment Practices and Representation (Director) designating as confidential, in accordance with the criteria set forth in §201.7(a) of the Public Employees' Fair Employment Act (Act)[1/], the following employees of the South

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1/ Section 201.7(a) defines the term "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article,...persons...who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board....Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

Colonie Central School District (District): Carol Loson, Sr. Typist to Leonora Boehlert, the Administrative Assistant for Personnel; Joyce Gay, Sr. Typist to Theodore Gilkey, the Assistant Superintendent for Instruction; Beverly Miller, Treasurer/Principal Account Clerk to Peter Haessig, the Assistant Superintendent for Management Services; and Jeanette Abbate, Sr. Typist to John DeSanto, the Administrative Assistant for Business/Purchasing Agent. The District supports the Director's decision.

After a review of the record and consideration of the parties' arguments, we affirm the decision of the Director.[2/]

Boehlert is responsible for all the District's personnel actions, including hiring, firing, probation, discipline, second step grievances and arbitrations. She is a member of each of the District's five negotiating teams. Loson is Boehlert's secretary and does all of her typing and handles all of her correspondence, which includes grievance responses, negotiations proposals, minutes of negotiation sessions and Labor-Management Committee meetings, probationary extensions, and disciplinary reports. Boehlert is clearly a managerial employee.[3/]

[2/]No exceptions have been filed with respect to the Director's dismissal of the application as to Linda Gordiman, Sr. Account Clerk/Typist; we, therefore, do not consider it.

[3/]Act, §201.7(a). See also Town of Greece, 27 PERB ¶3024 (1994).

Boehlert's secretary, Loson[4/], who has access to materials which relate directly to the District's strategies and positions on contract proposals, grievance settlements and disciplinary actions, was appropriately designated as confidential by the Director.[5/] A confidential designation is warranted even though Boehlert has not given Loson material which relates to Local 424's unit. The District's strategies and proposals in one unit are generally relevant to negotiations in its other units and an employee with access to such information falls within the statutory definition of a confidential employee.

The Assistant Superintendent for Instruction, Gilkey, is responsible for the District's instructional program, including staffing and budget. He is second in command at the District, serving in the Superintendent's place when he is not available. He is the second level in the discipline procedure for teachers and is the first level for administrators. Gilkey is consulted about District proposals and responses both before and during negotiations and is also consulted on the handling of grievances and proceedings before PERB. He is currently working on several

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[4/]In its exceptions, Local 424 alleges for the first time that Loson is no longer employed by the District and that a new employee has replaced her. No facts were provided in support of this allegation. We note, further, that successor employees are covered by managerial or confidential designations so long as their duties are substantially the same as the duties which were relied on to support the original designation. Rome City Sch. Dist., 18 PERB ¶3032 (1985).

[5/]Yonkers Public Library, 11 PERB ¶3091 (1978).

different aspects of a plan for the District to reduce the number of teachers and administrators.

Gay is his secretary and as such has access to all work that flows through his office. Gilkey, by virtue of his role in making staffing level determinations, as well as his involvement with grievances, contract proposals and PERB proceedings, is a managerial employee. Gay's daily access to his correspondence, memoranda and files warrants her designation as confidential.[6/]

The District's Assistant Superintendent for Business, Haessig, is responsible for the District's financial operation and serves on two of the District's negotiating teams. He is also the second step in the grievance procedure for the District's four support staff units. His role in the development of the District's budget and administration of its financial operation, as well as his negotiations and grievance responsibilities, clearly demonstrate that he is a managerial employee.

Miller works directly for Haessig. She is responsible for maintaining and updating salary analyses, recording all revenues and expenditures and investing the District's revenues. She has done cost analyses for Haessig, comparing the relative costs of proposed salary levels and benefit packages during negotiations and budget forecasts, predicting fund balances. As the District's Treasurer and its "accountant", as Haessig

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[6/]See Manhattan and Bronx Surface Transit Operating Auth., 10 PERB ¶3094, aff'g 10 PERB ¶4037 (1977).

characterized her, Miller knows how much money the District has, where all the District's funds are located and which are encumbered. As the Director noted: "Miller is aware of the District's monetary bottom line", which warrants her designation as confidential.[7/]

DeSanto, the District's Administrative Assistant for Business/Purchasing Agent, is responsible for the District's budget office operations. He is a member of the negotiating teams for the District's four support staff units. DeSanto prepares the minutes of each negotiating session to be distributed to members of the District's teams. These minutes not only recite what occurred during the negotiations themselves, but what was discussed privately during caucuses of the District team and during meetings with any mediator or fact finder. DeSanto is, therefore, a managerial employee.

Abbate is his secretary and types any minutes he prepares, labelling them "confidential" and seeing to their distribution to members of the District's negotiating teams. As Abbate has access to these minutes, which reflect the District's discussions, positions, and strategies during negotiations, she is privy to confidential labor relations information and is appropriately designated confidential.[8/]

We, therefore, dismiss Local 424's exceptions and

[7/]Washingtonville Cent. Sch. Dist., 16 PERB ¶3017 (1983).

[8/]See City Sch. Dist. of the City of Glen Cove, 19 PERB ¶3017 (1986).

affirm the decision of the Director designating Carol Loson, Sr. Typist to the Administrative Assistant for Personnel; Joyce Gay, Sr. Typist to the Assistant Superintendent for Instruction; Beverly Miller, Principal Account Clerk/Treasurer to the Assistant Superintendent for Management Services, and Jeannette Abbate, Sr. Typist to the Administrative Assistant for Business/Purchasing Agent, as confidential.

SO ORDERED.

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2D- 5/ 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LACKAWANNA TEACHERS ASSOCIATION,

Charging Party,

-and- **CASE NO. U-12754**

LACKAWANNA CITY SCHOOL DISTRICT,

Respondent.

SUSAN D. COTELLESSA, ESQ., for Charging Party

JOSEPH V. DEREN, ESQ. and HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR (JEFF SWIATEK of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Lackawanna Teachers Association (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the Lackawanna City School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it subcontracted the work of a cosmetology teacher and two machine shop teachers, represented by the Association, to the Board of Cooperative Educational Services, First Supervisory District, Erie County (BOCES).[1/]

[1/]The charge also included an allegation that the District had improperly subcontracted the work of the attendance teacher. The parties requested a bifurcated proceeding to enable them to continue their attempts to resolve that aspect of the charge. The ALJ's decision, therefore, dealt only with the cosmetology teacher and the machine shop teachers.

The ALJ dismissed the charge on the basis of the Court of Appeal's decision in Webster Central School District v. PERB.[2/] The Court there held that Education Law, §1950(4)(bb) reflects the Legislature's intention to remove from mandatory negotiations the decision of a school district to contract with a BOCES for the provision of services previously provided by the school district.[3/]

The Association does not except to the ALJ's decision on its demand to negotiate the decision to subcontract. Rather, it excepts solely on the ground that the ALJ did not find that the District had violated §209-a.1(d) of the Act by refusing to negotiate the impact of its decision to subcontract. The District has submitted no statement with respect to the ALJ's decision or the Association's exceptions.

Based on the following, we affirm the decision of the ALJ.

The matter was submitted to the ALJ for decision on a stipulated record. Nowhere in the stipulation is there evidence that the Association demanded negotiations on the impact of the District's June 19, 1991 decision to subcontract the work of its cosmetology teacher or machine shop teachers to BOCES or that the District refused a demand to negotiate impact. Indeed, the Association's letter to the District demanding negotiations on

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[2/]75 N.Y.2d 619, 23 PERB ¶7013 (1990).

[3/]Section 1950(4)(bb) provides: "Boards of cooperative educational services may provide academic and other programs and services in the school year on a cooperative basis, including summer programs and services."

the decision to subcontract makes no mention of impact bargaining.[4/] The Association did not allege a failure to negotiate the impact of the District's subcontracting decision in its charge or in its brief to the ALJ.

The Association argues in its exceptions that the ALJ erred when she failed to order the District to negotiate impact because the demand to negotiate impact was implicit in its demand to negotiate the subcontracting decision. It is simply not reasonable, however, to infer a refusal to bargain impact issues from a charge which alleges only a failure to bargain the decision, and it is clear that prior to the filing of exceptions, neither party did so. It remains to be decided, therefore, whether this claim is properly made for the first time in the Association's exceptions. We have often held that facts which are included for the first time in the exceptions may not be considered in support of the charge.[5/] Our review is limited to the record as it was developed before the ALJ.[6/] As the

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[4/]The July 3, 1991 letter states:

> The Lackawanna Teachers' Federation demands to negotiate the decision to sub-contract the two (2) Machine Shop and one (1) Cosmetology position at the Lackawanna High School.
>
> We request a meeting immediately to resolve this situation.

[5/]County of Suffolk, 26 PERB ¶3076 (1993); Oswego City Sch. Dist., 25 PERB ¶3052 (1992).

[6/]Margolin v. Newman, 130 A.D.2d 312, 20 PERB ¶7018 (3d Dep't 1987), appeal dismissed, 71 N.Y.2d 844, 21 PERB ¶7005 (1988); Town of Greece, 26 PERB ¶3004 (1993).

Association never raised against the District a claim of failure to negotiate impact in either its charge, the stipulation of facts or in its brief to the ALJ, we cannot consider it when raised for the first time in the exceptions. The facts as set forth in the charge and the stipulated record provide no evidence that a demand to negotiate impact was ever made by the Association. Such a demand must be clearly made; it cannot be inferred from a demand to negotiate a decision as impact and decisional bargaining rights and obligations are different.[7/]

The Association's exceptions must, therefore, be dismissed and the ALJ's decision affirmed.

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

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[7/]See County of Nassau (Nassau County Police Dep't), 27 PERB ¶3054 (1994), for a detailed discussion of the difference between decisional and impact bargaining. See also City of Rochester, 17 PERB ¶3082 (1984).

2F- 5/ 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION, LOCAL 424, A DIVISION OF UNITED INDUSTRY WORKERS DISTRICT COUNCIL 424 **CASE NO. DR-053**

Upon a Petition for Declaratory Ruling.

RICHARD M. GREENSPAN, P.C. (RICHARD M. GREENSPAN and STUART A. WEINBERGER of counsel), for Petitioner

VLADECK, WALDMAN, ELIAS & ENGELHARD, P.C. (LARRY CARY of counsel), for Local 144, Long Island Division, Service Employees International Union, AFL-CIO

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel), for Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO

INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER, REICH & SCRICCA (JONATHAN HEIDELBERGER of counsel), for Northport/East Northport Union Free School District and Islip Union Free School District

RAINS AND POGREBIN, P.C. (BRUCE R. MILLMAN of counsel), for Harborfields Central School District, Sayville Union Free School District and Eastern Suffolk BOCES

DUNN & SMITH (OLIVER SMITH of counsel), for Roosevelt Union Free School District

GEORGE A. JACKSON, for South Huntington Union Free School District

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) and Local 144, Long Island Division, Service Employees International Union, AFL-CIO (SEIU) to a declaratory ruling made after a hearing by the Director of Public Employment Practices

and Representation (Director). The Director ruled that United Public Service Employees Union, Local 424 (Local 424), A Division of United Industry Workers District Council 424 (District Council), following our decision finding Local 424 not to be an employee organization within the meaning of §201.5 of the Public Employees' Fair Employment Act (Act),[1/] had made changes in their constitutions sufficient to bring Local 424 within that definition. Specifically, the Director concluded that the constitutional changes afforded Local 424 "sufficient autonomy to carry out the duties and responsibilities of a negotiating agent" under the Act.

CSEA and SEIU argue that the record does not establish that Local 424 is now free from the District Council's domination or control. Local 424 argues in response that the Director was correct in concluding that the changes made in its relationship with the District Council are sufficient to satisfy all of the concerns we have articulated about Local 424's ability to serve as a certified bargaining agent.

Having reviewed the record and considered the parties' arguments, we affirm the Director's ruling and conclude that Local 424 as presently constituted meets the definition of an employee organization in §201.5 of the Act.

[1/] Northport/E. Northport Union Free Sch. Dist., 27 PERB ¶3053, motion for reconsideration den., 27 PERB ¶3061 (1994), conf'd sub nom. Boyle v. PERB, 28 PERB ¶7001 (Sup. Ct. Kings Co. 1995).

In our earlier decision, we held that provisions in the constitutions of Local 424 and the District Council affirmatively prevented Local 424 from having or exercising the autonomy minimally necessary to enable it to serve as the statutory negotiating agent for public employees. Those constitutions have been amended. Although certain of the provisions which we mentioned in our earlier decision have not been changed, that decision was based upon the cumulative effect of many constitutional provisions examined in the totality of the circumstances. The issue before us, therefore, is only whether the changes made are sufficient to require a change of result from our earlier decision. To that end, and as always, our interpretations of the controlling statutory definition are not intended to effect any one type of employee organization structure, any single pattern of employee organization affiliation, or any single model of collective negotiations, lest the right of employees to "organize and bargain collectively through organizations of their own choosing be unnecessarily circumscribed."[2/] Consistent with the Act's policy in this respect, our past and current practice is to examine an organization's internal affairs and operations only to the extent necessary to make the threshold jurisdictional determination that a petitioner seeking representation rights is an employee organization within the meaning of the Act. For all other

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[2/]27 PERB ¶3053, at 3113.

relevant purposes, a union's structure, operations and policies are simply points to be considered by employees in making decisions regarding their choice of a negotiating agent or their membership in that organization.

Kevin E. Boyle, Jr., the President of Local 424 and the General Executive Vice-President of the District Council, was the only witness at the hearing held on this matter. As argued by SEIU, we find certain aspects of Boyle's testimony are not credible or are evasive.[3/] However, our decision in this matter is based upon the written constitutional provisions and other uncontroverted facts not subject to any credibility assessment.

As summarized by the Director, and as described more completely in his decision, the constitutional amendments exempted Local 424 from being bound automatically to all District Council constitutional amendments and empowered Local 424 to amend its own constitution without the District Council's approval. Local 424 now also has ownership and control of its statutory dues and fees and has the specific power to incur debt, to use its revenue, and to pay its own expenses.

Despite these constitutional amendments and certain operational changes reflecting Local 424's recent empowerment, there remains some potential for the District Council to control

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[3/]Boyle testified, for example, that he could not recall any of the particulars of a meeting of Local 424 which he said was held to discuss the constitutional changes in issue in this proceeding, including the number or identity of any of the attendees.

Local 424. However, the stated purposes of the relevant constitutional amendments are to permit Local 424 to have discretion over its affairs and its representation of public employees and to expand Local 424's authority in these respects. At this juncture, the amendments actually made are fairly and appropriately read in light of those declared purposes. There is, therefore, no reason to presume that any of the facially acceptable constitutional provisions or operational relationships will be used by the District Council to deprive Local 424 of the independence required by our first decision. Should the potential for the District Council's control become manifest by actual practice, we have full authority to take the steps appropriate to ensure the requisite autonomy of Local 424 and to protect the statutory rights of any public employees it may represent.

We have considered the several indicia of the District Council's continued domination or control of Local 424 as alleged by CSEA and SEIU, and conclude that the constitutional impediments which we previously found to exist to Local 424's right and power to serve as a recognized or certified negotiating agent for units of public employees have been removed. All elements of the statutory definition of an employee organization are satisfied and, therefore, we rule, in agreement with the

Director, that Local 424 is an employee organization within the meaning of the Act.[4/]

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[4/]Local 424 has withdrawn its recusal motion and "any objection it has with respect to [Chairperson Kinsella's or Member Schmertz's] participating and determining matters and issues involving Local 424 before the Board". Moreover, Supreme Court has determined that Local 424 has not set forth any ground for recusal of any Board member.

2F- 5/ 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOLVAY UNION FREE SCHOOL DISTRICT,

Charging Party,

-and- **CASE NO. U-14623**

SOLVAY TEACHERS ASSOCIATION,

Respondent.

SUSAN L. KING, for Charging Party

BERNARD G. PERRY, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Solvay Union Free School District (District) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the District against the Solvay Teachers Association (Association). The District alleges in its charge that the Association violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by insisting upon the continuation in a successor agreement of a clause in the parties' expired agreement which the District alleges is not mandatorily negotiable.

The clause in issue provides as follows:

> No member of the bargaining unit will be disciplined, reprimanded, reduced in rank or compensation or deprived of any professional advantage without just cause.

The ALJ concluded that the Association had presented this demand to fact-finding, the point of insistence for purposes of

assessing charges such as this one.[1/] A fact-finding report was not issued, however, because the parties thereafter reached a tentative agreement, although agreement was not reached on the disputed clause. Instead, the parties agreed that the negotiability determination would control the inclusion or exclusion of the clause from their successor agreement. If held nonmandatory, the clause would be excluded from the new agreement; if mandatory, the clause would be incorporated into the new agreement unchanged.

The ALJ dismissed the charge for two reasons. First, after reviewing several of our decisions, the ALJ held that the charge was moot. She determined that there was no improper insistence and no actual controversy because the clause had been withdrawn from fact-finding. On the merits, the ALJ held the clause to be mandatory as involving disciplinary penalties, disagreeing with an earlier decision on a similar negotiability question by a different ALJ.[2/]

The District argues that the ALJ erred in dismissing the charge as moot and in finding the clause mandatorily negotiable. It argues that the demand is rendered nonmandatory by the inclusion of the phrase "or deprived of any professional advantage". The Association supports the ALJ's decision.

[1/]Peekskill City Sch. Dist., 16 PERB ¶3075 (1983).

[2/]Mohonason Teachers Ass'n, 14 PERB ¶4604 (1981).

For the reasons set forth below, we reverse the ALJ insofar as she held the charge to be moot, but affirm her dismissal on the basis that the clause in issue is mandatorily negotiable.

The District argues that the charge is properly before us for consideration of the negotiability of the Association's demand under our decision in Seneca Falls Teachers Association.[3/] In that case, the Board assessed the negotiability of a demand in circumstances substantially the same as those here. We there indicated that parties could, by mutual agreement, consent to the Board's issuance of a bargaining determination and thereby effectively waive any mootness defense.

In dismissing the charge, the ALJ relied upon the following two cases decided after Seneca Falls Teachers Association. In Buffalo Police Benevolent Association, Inc. (hereafter Buffalo),[4/] a union withdrew during the course of proceedings on an improper practice charge a demand which it had submitted in a petition for compulsory interest arbitration. The City in that case had complained that the demand which had been submitted by the union was not mandatorily negotiable. Although the City wanted a determination on the negotiability of the withdrawn demand, we declined to make a negotiability determination because in our view, given the withdrawal of the demand, "no purpose is

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[3/]23 PERB ¶3032 (1990).

[4/]23 PERB ¶3036 (1990).

served by our making a scope determination at this time".[5/] In dismissing, however, we observed that there could be "special circumstances"[6/] which would warrant our making a scope determination notwithstanding the withdrawal of a demand.

Our most recent discussion of mootness is found in City of Peekskill,[7/] a unilateral change case. The charges filed by one of the unions in that case were dismissed as moot because contracts had been reached which effectively rescinded the change in practice. We held that traditional mootness concepts could be applied in our improper practice proceedings and stated that we would no longer follow any prior decisions holding or suggesting to the contrary. At the same time, however, we recognized in City of Peekskill that "the application of a mootness concept is controlled by the particular facts of the case and applied only to the extent consistent with the policies of the Act".[8/]

The ALJ concluded that our decisions in the latter two cases required a dismissal of this charge as moot notwithstanding our earlier decision on the merits in Seneca Falls Teachers Association. We find, however, no inconsistency in the cases cited by and relied upon by the ALJ, and conclude that the

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[5/]Id. at 3073.

[6/]Id.

[7/]26 PERB ¶3062 (1993).

[8/]Id. at 3109.

negotiability question in this case was not mooted by intervening events.

In circumstances in which the parties specifically agree to the preservation of a scope of negotiation question and, thereby, rely upon our assessment of negotiability to determine a term of their agreement, there are presented the "special circumstances" we spoke of in Buffalo which warrant our exercise of jurisdiction. Whether the case is never mooted in that circumstance or there has been a waiver of a mootness defense is largely immaterial. Application of a mootness concept under the circumstances presented here would not be "consistent with the policies of the Act" for only by reaching the negotiability question do we resolve the parties' collective bargaining impasse.

Reaching the merits, we affirm the ALJ's decision that the clause in issue is mandatorily negotiable. The clause defines and limits both the grounds for the imposition of discipline and the penalties which may be invoked upon satisfaction of the predicate for disciplinary action. These are clearly mandatorily negotiable subjects,[9/] even though one or more of the "professional advantages" of which a disciplined employee could be deprived might conceivably be nonmandatory, e.g., assignment of certain duties. There is no restriction upon the exercise of

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[9/] City of Glens Falls, 24 PERB ¶3015 (1991); City of Buffalo, 23 PERB ¶3050 (1990); New York City Transit Auth., 20 PERB ¶3037 (1987); City of Newburgh, 16 PERB ¶3030 (1983).

any managerial prerogative because the clause is applicable only in the disciplinary context and the District remains privileged in that context to effect disciplinary sanction, including the loss of "professional advantage", upon a finding of just cause for discipline. Because the removal of a professional advantage is subject to review only if done for reasons of discipline, and not otherwise, the clause is mandatorily negotiable.

For the reasons set forth above, we reverse the ALJ's mootness determination, but affirm her dismissal of the charge on the ground the demand in issue is mandatorily negotiable.

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

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

26- 51 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

- and -

CASE NO. C-4394

GREATER AMSTERDAM SCHOOL DISTRICT,

Employer,

- and -

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, AMSTERDAM SCHOOL CUSTODIAL AND MAINTENANCE UNIT OF MONTGOMERY COUNTY, LOCAL #829,

Intervenor.

RICHARD M. GREENSPAN, P.C. (STUART A. WEINBERGER of counsel), for Petitioner

RONALD E. LIMONCELLI, for Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel), for Intervenor

INTERIM BOARD DECISION AND ORDER

The Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Amsterdam School Custodial and Maintenance Unit of Montgomery County, Local #829 (CSEA), the current representative for a unit of noninstructional employees of the Greater Amsterdam School District (District), asks that we review a ruling by the Director of Public Employment Practices and Representation (Director) made during the processing of a petition filed by the United Public Service Employees Union,

Local 424, A Division of United Industry Workers District Council 424 (Local 424). By its petition, Local 424 seeks to replace CSEA as the bargaining agent for the existing noninstructional unit.

In May 1994, Local 424 had petitioned to represent this same unit. The Director dismissed that petition by decision dated January 19, 1995, on the ground that Local 424, as constituted when that petition was filed, was not an employee organization as defined in §201.5 of the Public Employees' Fair Employment Act (Act).[1/] Local 424 withdrew the exceptions it had filed to the Director's decision in that case such that the Director's dismissal of that earlier petition became final.

The petition in this case was filed on February 9, 1995. In its response to this petition, CSEA alleged that its processing was barred by §201.3(g) of our Rules of Procedure (Rules), which prohibits the filing of a new petition for one year after a previous petition to represent the same employees has been processed to completion. The Director, however, ruled that the petition was not barred because it had not been processed to completion within the meaning of Rules §201.3(g). CSEA seeks to appeal that ruling.

[1/]The Director's decision was based upon our decision in Northport/E. Northport Union Free Sch. Dist., 27 PERB ¶3053, motion for reconsideration den., 27 PERB ¶3061 (1994), conf'd sub nom. Boyle v. PERB, 28 PERB ¶7001 (Sup. Ct. Kings Co. 1995). By decision this date in DR-053, we held that changes in Local 424's constitutional and operational relationship with the District Council were sufficient to bring Local 424 within the definition of an employee organization under the Act.

An appeal at this point of the representation proceeding is with our permission only.[2/] In the exercise of our discretion to consider interlocutory appeals, we will review the Director's ruling at this time. The question presented is whether our jurisdiction over this representation question has been properly invoked or whether the exercise of that jurisdiction is barred by existing rule. Moreover, the question presented is one of law, is novel and is of interest and importance to the labor relations community generally.

Section 201.3(g) of the Rules provides that:

> No petition may be filed for a unit which includes job titles that were within a unit for which, during the preceding 12-month period, a petition was processed to completion. (emphasis added)

The question presented on this appeal is whether Local 424's earlier petition was processed to completion under §201.3(g) of the Rules. If it was, this petition is barred; if it was not processed to completion, this petition may be processed.

CSEA argues that the dismissal of a petition on the ground that the petitioner is not an employee organization is a dismissal on the merits or otherwise satisfies the purposes sought to be advanced by Rule §201.3(g), such that this petition must be dismissed.

Local 424 argues in response that its earlier petition was not processed to completion because the Director's dismissal was procedural in nature and did not constitute a determination on the merits.

[2/]Rules §201.9(c)(4).

We have held that Rules §201.3(g) is triggered by a "determination on the merits".[3/] We have also held that the Rule is not applicable in circumstances in which the prior petition has been withdrawn[4/] or the petition has been dismissed as untimely.[5/]

Section 201.3(g) of the Rules is intended to promote labor relations stability by affording an employer and an employee organization a respite between challenges to either the composition of a unit or a union's majority status. Secondarily, the Rule seeks to avoid an unnecessary dissipation of both PERB's and the parties' resources. Neither of those purposes can override, however, the fundamental statutory right of public employees to periodically reassess their selection of a negotiating agent. Concerns about the expense and temporary instability caused by the processing of a representation petition are plainly secondary to the employees' rights.

A determination as to the employee organization status of a petitioner is no more "on the merits" than is a timeliness dismissal or the closing of a case pursuant to an approved withdrawal. Section 201.3(g) of the Rules requires that the petition alleged to constitute a bar to the processing of a second petition be processed to completion with respect to the merits of the representation question or questions presented.

[3/] Power Auth. of the State of New York, 19 PERB ¶3073 (1986).

[4/] Board of Educ. of the City of Yonkers, 10 PERB ¶3100, aff'g 10 PERB ¶4055 (1977).

[5/] Power Auth. of the State of New York, supra note 3.

A certification/decertification petition raising only a majority status question is processed to completion when it resolves that question of majority status.

Although the status of a petitioner may sometimes be in dispute, as it was under Local 424's earlier petition, and although the resolution of that disputed representation question is clearly necessary to the processing of such a petition, it is an issue incidental to the basic question of majority status. The Director's dismissal of Local 424's first petition did not in any way address any aspect of that question. Therefore, Local 424's first petition was not "processed to completion" within the meaning of Rules §201.3(g) and this petition is not barred by that Rule.

For the reasons set forth above, the Director's ruling that Local 424's petition in this matter is not barred by Rules §201.3(g) is affirmed.

SO ORDERED.

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

2H- 5/ 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, RENSSELAER COUNTY LOCAL 842, CITY OF TROY UNIT 8251,

Charging Party,

-and-

CASE NO. U-16301

CITY OF TROY,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT, JEROME LEFKOWITZ AND JANNA PFLUGER of counsel), for Charging Party

PETER R. KEHOE, CORPORATION COUNSEL (ROBERT E. MOLLOY of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Troy (City) and cross-exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Rensselaer County Local 842, City of Troy Unit 8251 (CSEA) to a decision by an Administrative Law Judge (ALJ) on CSEA's charge against the City. After a hearing, the ALJ held that the City violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it stopped deducting and transmitting CSEA membership dues and agency shop fees as required by §208.1(b) and §208.3(b) of the Act, respectively. The ALJ dismissed allegations that the cessation of dues and fees checkoff also violated §209-a.1(b) and (d) of the Act.

The City argues[1/] that the ALJ erred by excluding reference to and analysis of certain provisions of the parties' collective bargaining agreement pertaining to agency shop fees. The focus of the City's exceptions, however, is upon the ALJ's recommended remedial order, which the City alleges is punitive or otherwise inconsistent with the policies of the Act in certain respects.

In its cross-exceptions, CSEA alleges upon information and belief that the exceptions are untimely. Substantively, it argues that the ALJ erred in dismissing allegations that the City's action violated §209-a.1(b) and (d) of the Act. As to remedy, CSEA argues that the ALJ also should have ordered the City to cease and desist from violating §209-a.1(a) and to forward to each employee in CSEA's unit a letter explaining the violations found.

For the reasons set forth below, we affirm in part, reverse in part, and modify the remedial order.

We note first that the City's exceptions are timely. It received the ALJ's decision on March 15, 1995. It filed its exceptions by mail on April 5, 1995, within the time allotted by §204.10(a) of our Rules of Procedure.

[1/]Injunctive relief having been granted by the Supreme Court, Albany County in conjunction with this charge (28 PERB ¶7002), the case is before us at this time pursuant to the statutory preference granted by §209-a.4(g) of the Act. In the interest of expedition required by the Act, and because the exceptions and cross-exceptions fully set forth the factual and legal issues involved, the City's request for oral argument is denied.

Next considered are those parts of the exceptions and cross-exceptions relating to the ALJ's substantive determinations.

As to the City's exceptions, Article X, sections "E" and "F" of the parties' contract, the ones the City argues were incorrectly disregarded by the ALJ, are not part of the record. The City included in an exhibit to its answer to the charge only sections "A" through "D" of Article X. Further, upon inquiry by the ALJ at the hearing, the City confirmed that the exhibit attached to its answer contained the relevant provisions of the contract. The ALJ plainly did not err by not considering evidence which is not in the record or arguments which were not presented to him.

Even if official notice were to be taken of sections "E" and "F" of the parties' contract, they would not affect the disposition of the merits of the charge. These contract provisions condition the City's obligations and CSEA's rights to agency shop fees upon acquisition and retention of seventy percent union membership. There is also "hold harmless" language and a clause which limits the City's liability to the remittance of actual deductions from wages earned by employees.

Agency shop fees for employees of local governments were mandatory subjects of collective negotiation until 1992. The Legislature amended §208.3(b) of the Act that year to make municipal employers' deductions of agency shop fees compulsory, rather than subject to bargaining, commencing with the first pay period after August 23, 1992. Section 208.3(b) of the Act

controls the City's agency shop fee deduction obligations, not the provisions of any prior contract negotiated at a time when the applicable law was different from that governing at the date the deductions were stopped.[2/]

Those parts of sections "E" and "F" of the contract which purport to limit the City's agency shop fee liability have no bearing upon the City's statutory obligation to deduct and transmit the agency fees. If considered at all, they would be relevant only to the remedial order. Having concluded that a modification of the remedial order is necessary and appropriate to effectuate the policies of the Act for reasons apart from any contract question, the relevancy of sections "E" and "F", even as to remedy, is, therefore, both academic and immaterial.

As to CSEA's cross-exceptions, the ALJ properly dismissed the §209-a.1(b) allegation. That subsection of the Act is intended to ensure that an employee organization serves as the independent representative of the unit employees by proscribing employer domination or unlawful assistance or support.[3/] CSEA's independence was not compromised by the City's cessation of the

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[2/]The record does not reveal exactly when contract sections "E" and "F" were first negotiated. The language dates back to at least the mid-1980s and probably back to the late 1970s when the City began deducting agency shop fees.

[3/]See generally City of Buffalo, 15 PERB ¶3123 (1982), aff'd sub nom. Buffalo PBA v. Newman, 97 A.D.2d 574, 16 PERB ¶7025 (3d Dep't 1983); County of Onondaga and County of Onondaga Sheriff, 14 PERB ¶3029 (1981); County of Rockland and Rockland County Community College, 13 PERB ¶3089 (1980); Board of Educ. of the City Sch. Dist. of the City of Albany, 6 PERB ¶3012 (1973).

dues and fees deductions, regardless of the motives for that action.

We reverse, however, the ALJ's decision insofar as he dismissed the §209-a.1(d) allegation.

The City's refusal to deduct and transmit membership dues and agency shop fees was a form of economic interference with employees' statutory rights and per se unlawful.[4/] We have held that even a threat of unlawful economic pressure during negotiations is "inimical to good faith negotiations".[5/] If the threat of such action is improper, a fortiori, the actual doing of the unlawful act is improper.

Although recognizing the legal framework for analysis of the §209-a.1(d) allegation, the ALJ dismissed it upon the conclusion that there was insufficient evidence that the City's refusal to deduct and transmit the dues and fees was linked to the parties' collective negotiations. The record, however, shows persuasively that the City decided to stop all dues and fee deductions in an effort to influence the outcome of negotiations being held pursuant to a voluntary reopening of the parties' existing agreement.

[4/]See Onondaga-Cortland-Madison BOCES, 25 PERB ¶3044 (1992), rev'd on other grounds, 198 A.D.2d 824, 26 PERB ¶7015 (4th Dep't), motion for leave to appeal den., 81 N.Y.2d 706 (1993). Although the case involved agency shop fee deductions only, the rationale is equally applicable to dues deductions.

[5/]East Meadow Teachers Ass'n, 16 PERB ¶3086, at 3142 (1983) (strike threat).

Until it stopped the deductions in November 1994 during the reopener negotiations and after a tentative agreement had been rejected by CSEA, the City had a long-standing, uninterrupted history of dues and fee deductions without question as to the adequacy of payroll deduction authorizations. The City's order stopping the deductions was not tailored to meet the circumstances which allegedly prompted it, for it applied to all unit employees, including those for whom no membership "discrepancies" had been uncovered, as well as agency shop fee payers who do not authorize deductions in any way. Moreover, the City Manager stated during negotiations that the order stopping the deductions would be withdrawn and that it would "go away" if a tentative agreement were to be ratified by CSEA's membership. These facts, when coupled with the timing of the City's actions, establish the linkage between the unlawful cessation of the deductions and the collective negotiations necessary to support a violation of §209-a.1(d) of the Act.

We turn now to a consideration of the ALJ's recommended remedial order.

The ALJ ordered, inter alia, the City to pay CSEA from "City funds" any dues and fees owed to CSEA which remained uncollected despite the alternative collection methods CSEA had instituted in response to the City's action. He also ordered the City to reimburse CSEA for the reasonable expenses it incurred in that collection effort. The City excepts to the ALJ's order in these respects.

Under §205.5(d) of the Act, it is our right and obligation upon finding an improper practice to have been committed to order such remedial relief as will effectuate the policies of the Act and it is that principle which both guides and limits our remedial determination.

Our remedial order is shaped in a unique context. The City's obligation to deduct dues and fees was clear and its cessation of all but a few of those deductions, at best, was without colorable defense. Its action was, as noted, inimical to the bargaining process, it compromised and continues to compromise the relationship between CSEA and its members and nonmembers, and it reflects a complete disregard for the duties imposed upon it under law. If exemplary damages were within the range of options available to us, an award in that regard would be appropriate. Our power, however, is remedial only and we are constrained to conclude that in making a good-faith, and not unreasonable, effort to redress egregious wrongs, the ALJ exceeded the scope of our purely remedial relief powers by ordering the City to pay CSEA from its own funds.

Although the ALJ's order does not prohibit the City from recouping the monies paid from its treasury in negotiations with CSEA, and that appears to have been what he contemplated, the ALJ's order exempts certain unit employees from an obligation which is theirs alone and shifts that obligation, however temporarily, to the City. Pursuant to §208.1(b) and §208.3(b) of the Act, the dues and fees are to be paid by the employees. The

employer is merely the statutory agent for the deduction and transmittal of those monies, thereby ensuring both payment by the employees and receipt of the monies by the union representative. The City itself was never required to pay any monies to CSEA and we cannot create a statutory duty or responsibility when it has been lodged elsewhere by the Legislature, despite the impropriety of the City's cessation of dues and fee deductions. Moreover, the ALJ's order in this respect does not best effectuate the policies of the Act because it exempts those unit employees who did not pay their dues and fees voluntarily from an obligation to pay, at least for a time, thereby further aggravating the division among employees caused by the City's action.

Having determined that the part of the ALJ's order requiring the City to pay CSEA with City funds is not appropriate, we need not consider the City's arguments which are wholly contingent upon our affirmance of that part of the ALJ's order.[6/]

A sum of money equal to the dues and fees not deducted and remaining uncollected, however, is still owed to CSEA. The total amount is certain, as is the method of calculation and the

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[6/]The City argues that payment of dues and fees from City funds represents support of CSEA in violation of §209-a.1(b) of the Act and that the portion of the agency fees which represent CSEA's expenditures in aid of political or ideological causes should be offset from any payment obligation. The ALJ also ordered interest on the monies to be paid by the City. Having determined that monetary relief in this form is not appropriate, interest is not properly ordered. Waverly Cent. Sch. Dist., 19 PERB ¶3080 (1986). It is appropriately ordered, however, in conjunction with the order requiring reimbursement of reasonable collection expenses.

persons responsible for the payment. It is the schedule of collection which creates the remedial dilemma. That schedule clearly cannot be at the City's direction for that would have the wrongdoer establish the remedy for its own statutory violation. It cannot be established through collective negotiations for that would make negotiable what is a statutory entitlement and it would further delay CSEA's receipt of monies owed to it since November 1994. To have the collection schedule established by CSEA would force it to make the very types of decisions which we knew would be divisive of its membership and which led us to seek injunctive relief in connection with this case. Therefore, the only viable option is for us to establish the collection schedule, including the amounts to be deducted from the employees' checks, after permitting the parties an opportunity to submit arguments or position statements on these issues, such papers to be filed with us within seven working days after their receipt of this decision. Thereafter, we will issue the appropriate supplemental order as necessary.

The ALJ's order in all other respects is remedial only and plainly necessary and appropriate to effectuate the policies of the Act. Even if CSEA's effort to collect the dues and fees wrongfully withheld from it were not required under a mitigation of damages principle, its efforts in that regard were clearly permissible. The City denied CSEA its statutory entitlements and the City cannot now be heard to complain that CSEA should not be reimbursed for the expenses it reasonably incurred in an effort

to obtain what had been illegally withheld from it. Such reimbursement constitutes make-whole relief, not punitive damages, and is clearly within our authority to order. The exact expenses which CSEA is entitled to have reimbursed will be fixed, if and as necessary, through subsequent compliance investigation and enforcement proceedings, as is our policy and practice.

CSEA's exceptions to the ALJ's remedial order are denied. The order we have entered fully remedies the violations found. As the ALJ determined, the broad cease and desist order CSEA seeks is unnecessary and inappropriate, as is the individualized notice to unit employees.

Having found the City to have violated §209-a.1(a) and (d) of the Act, IT IS, THEREFORE, ORDERED that the City:

1. Commencing with the next pay period, and continuing thereafter, resume the deduction from the salary or wages of any and all nonmembers of CSEA who are included in the negotiating unit it represents an amount equivalent to the dues levied by CSEA and transmit the sums so deducted to CSEA.[7/]
2. Commencing with the next pay period, and continuing thereafter, except for those members of CSEA for whom CSEA has waived the payment of dues, resume the

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[7/]The payroll deductions of agency shop fees from the salary or wages of any CSEA nonmembers must be in an amount equal to that of the membership dues deductions and those deductions must be upon the same conditions as are applicable to membership dues deductions.

deduction from the salary or wages of any and all members of CSEA who have presented executed dues deduction authorization cards pursuant to §208.1(b) of the Act an amount for the payment of his or her membership dues in CSEA and transmit the sums so deducted to CSEA.[8/]

3. Make CSEA whole for any reasonable expenses that it incurred in collecting membership dues and agency shop fees from unit employees by virtue of the City's cessation of membership dues and agency shop fee deductions and transmissions, until such time as the City resumes those deductions and transmissions in accordance with its obligations under the Act, with interest on the sum owed at the currently prevailing maximum legal rate.

4. Deduct from the salary or wages of the unit employees described in paragraphs 1 and 2 of the order herein the amount of the dues and agency shop fees not received by CSEA, such deductions to be made, and thereafter transmitted to CSEA, pursuant to the terms of the Board's supplemental order to be rendered following receipt of any position statements filed by the parties

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[8/]If the City has already resumed dues and fee deductions consistent with the requirements of paragraphs 1 and 2 of our order, no further action pursuant to those paragraphs is required. Those parts of the order will then have application only for continuing enforcement purposes.

within seven working days after their receipt of the decision and order herein.

5. Negotiate in good faith with CSEA by desisting from discontinuing membership dues or agency shop fee deductions pursuant to §208 of the Act as a negotiating tactic.

6. Sign and post the attached notice at all places ordinarily used to post notices of information to CSEA unit employees.

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

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 bargaining unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Rensselaer County Local 842, City of Troy Unit 8251 (CSEA), that the City of Troy will:

1. Commencing with the next pay period, and continuing thereafter, resume the deduction from the salary or wages of any and all nonmembers of CSEA who are included in the negotiating unit it represents an amount equivalent to the dues levied by CSEA and transmit the sums so deducted to CSEA.

2. Commencing with the next pay period, and continuing thereafter, except for those members for whom CSEA has waived the payment of dues, resume the deduction from the salary or wages of any and all members of CSEA who have presented executed dues deduction authorization cards pursuant to §208.1(b) of the Act an amount for the payment of his or her membership dues in CSEA and transmit the sums so deducted to CSEA.

3. Make CSEA whole for any reasonable expenses that it incurred in collecting membership dues and agency shop fees from unit employees by virtue of the City's cessation of membership dues and agency shop fee deductions and transmissions, until such time as the City resumes those deductions and transmissions in accordance with its obligations under the Act, with interest on the sum owed at the currently prevailing maximum legal rate.

4. Deduct from the salary or wages of the unit employees described in paragraphs 1 and 2 of the order herein the amount of the dues and agency shop fees not received by CSEA, such deductions to be made, and thereafter transmitted to CSEA, pursuant to the terms of the Board's supplemental order to be rendered following receipt of any position statements filed by the parties within seven working days after their receipt of the decision and order herein.

5. Negotiate in good faith with CSEA by desisting from discontinuing membership dues or agency shop fee deductions pursuant to §208 of the Act as a negotiating tactic.

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

CITY OF TROY

. . . . . .

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.

21- 51 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MOUNT VERNON FEDERATION OF TEACHERS,

Respondent,

upon the Charge of Violation of §210.1 of the Civil Service Law

CASE NOS. D-0258
D-0259
D-0260

BOARD DECISION AND ORDER

On March 14, 1995, this agency's office of counsel, filed three charges alleging that the Mount Vernon Federation of Teachers (Federation) had violated Civil Service Law (CSL) §210.1. The charges alleged that the Federation had caused, instigated, encouraged, or condoned strikes against the Mount Vernon City School District by employees in the teachers, teacher aides, and monitors bargaining units represented by the Federation, on September 9, 1994. The charges have been consolidated for decision.

The charges respectively allege that 50 out of 91 employees in the teacher aides unit, 28 out of 31 employees in the monitors unit, and 636 out of 757 employees in the teachers unit, participated in the respective strikes.

The Federation requested the associate counsel to indicate the penalties he would be willing to recommend to this Board as appropriate for the violations alleged. The associate counsel proposed, for each bargaining unit, a penalty of the suspension of the Federation's right to dues and agency shop fee deductions

to the extent of twenty-five percent of the amount that would otherwise be deducted during a year.[1/]

By mutual agreement, the Federation's time to answer these charges has been extended, with the understanding that the associate counsel would recommend those penalties and that this Board would approve them. The associate counsel has made that recommendation, and we determine that the recommended penalties are reasonable and will effectuate the policies of the Act.

WE ORDER, as to each of the at-issue bargaining units, that the dues and agency shop fee deduction rights of the Mount Vernon Federation of Teachers be suspended, starting on the first practicable date, and continuing for the period of time during which twenty-five percent of its annual dues and agency shop fees, if any, would otherwise have been deducted on its behalf by the Mount Vernon City School District, and until the Federation affirms that it no longer asserts the right to strike against any government, as required by CSL §210.3(g).

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

1/ This is intended to be the equivalent of a three-month suspension of dues and agency shop fee deduction privileges if deductions had been withheld in twelve monthly installments.

3A- 5/ 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOMERS SCHOOL RELATED PERSONNEL,

Petitioner,

-and-

CASE NO. C-4359

SOMERS 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 Somers School Related Personnel 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 part-time clerical, custodial, cafeteria, teacher aides, bus attendants, couriers, and school monitor personnel.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Somers School Related Personnel. 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: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

3B- 5/ 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PEARL RIVER TEACHING ASSISTANTS ASSOCIATION, NEA/NEW YORK,

Petitioner,

- and - CASE NO. C-4349

PEARL RIVER UNION FREE SCHOOL DISTRICT,

Employer,

- and -

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 964, 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 Pearl River Teaching Assistants Association, NEA/New York has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full and part-time teaching assistants.

Excluded: All others.

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

DATED: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 456, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, AFL-CIO,

Petitioner,

- and -

CASE NO. C-4243

TOWN OF CORTLANDT,

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 Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Bookkeeper, Program Coordinator, Youth Advocate, Recreation Supervisor, Planning Director, Assistant Planning Director, Assessor, Building Inspector, Court Clerk, Deputy Director of Code Enforcement, Deputy Comptroller, Deputy Town Engineer, Deputy

Planning Director, Deputy Superintendent of Highways, Deputy Town Clerk, Director of Nutrition, Purchasing Director, Recreation Supervisor I, and Youth Service Coordinator.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 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: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

3D- 5/ 4/95

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

OWEGO-APALACHIN ADMINISTRATORS AND SUPERVISORS ASSOCIATION/SAANYS,

Petitioner,

- and -

CASE NO. C-4229

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 Owego-Apalachin Administrators and Supervisors Association/SAANYS has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Principals, Assistant Principals, Supervisor of Buildings and Grounds, Supervisor of Transportation, Supervisor of Food Services, Athletic Director, Director of Computer Services, Director of Special Services and Director of Education.

Excluded: Assistant Superintendent of Business and Director of Operations.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Owego-Apalachin Administrators and Supervisors Association/SAANYS. 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: May 4, 1995
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member