STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF CARMEL POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-16494

TOWN OF CARMEL,

Respondent.

RAYMOND G. KRUSE, ESQ., for Charging Party

ANDERSON, BANKS, CURRAN & DONOGHUE (JOHN M. DONOGHUE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Carmel Police Benevolent Association, Inc. (PBA) to a decision by an Administrative Law Judge (ALJ) on a charge against the Town of Carmel (Town). The PBA alleges that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused to negotiate three "safety stipend" demands made by the PBA after the Town decided to assign "light duty" police officers to unassisted desk duty in regular uniform with weapon. Previously, light duty officers worked the desk with a full status officer, they wore a uniform different from that worn by the full status officers and they were not required to carry a weapon. The PBA demanded to bargain because it believes that the

Town's change in past practice, which it does not here contest, exposes the light duty officers and the full status officers to greater on-the-job safety risks.

By its first demand, the PBA seeks to have the light duty officers paid $100 each day they are assigned to unassisted desk duty. The ALJ held this to be a prohibited subject of negotiation because it conflicted with the provisions of General Municipal Law (GML) §207-c(3), as interpreted, which authorize and regulate light duty assignments for police officers. Under the PBA's other demands, full status officers would be paid a stipend of $15 per hour when in station with a prisoner, and $10 per hour when otherwise on shift, if only a light duty officer is assigned to desk duty. The ALJ held these two demands to be nonmandatory subjects of negotiation because they are "punitive", relying again upon GML §207-c(3) and a finding that the demands do not have a reasonable relationship to job hazards.

The PBA argues that the ALJ erred as a matter of law because all of its demands are mandatory subjects of negotiation. The Town in response argues that the ALJ's decision is correct on the law in all respects.

Having reviewed the record and considered the parties' arguments, we reverse the ALJ's decision and hold all three demands to be mandatorily negotiable.

The PBA's first demand is for a wage stipend for light duty officers. The ALJ held this demand prohibited from negotiation

by GML §207-c(3) as interpreted in Schenectady Police Benevolent Association v. PERB (hereafter Schenectady).[1/]

GML §207-c(3) provides that a police officer who is properly assigned to light duty shall "continue to be entitled to his regular salary or wages, including increases thereof and fringe benefits, to which he would have been entitled if he were able to perform his regular duties." The ALJ held that this provision of the GML prohibited a light duty officer from being paid more than a full status officer. Finding that the PBA's first demand would vary that legislative scheme, the ALJ held it to be a prohibited subject of negotiation. We do not believe, however, that the ALJ's decision reflects a correct reading of GML §207-c(3).

Properly viewed, GML §207-c(3) is an entitlement program for both employers and employees. A municipality's assignment of a police officer to light duty is not a requirement, it is a privilege to be elected by a municipality at its option, circumstances permitting. The exercise of that option, however, is not unrestricted. The officer, for example, must be capable of performing light duty and the assignments given to the officer must be consistent with police officer status. The refusal of a proper light duty assignment extinguishes the officer's entitlement to the benefits of GML §207-c. Once on light duty, police officers are entitled under GML §209-c(3) to their regular salary and wages.

[1/]85 N.Y.2d 480, 28 PERB ¶7005 (1995).

GML §207-c(3) reflects a legislative policy that police officers who suffer line-of-duty injury or illness should not have their wages or salary adversely affected because of that injury or illness, even if they are thereby rendered unable to perform the full range of a police officer's duties. Therefore, GML §207-c(3) specifically provides that even those whom the employer has placed on light duty must continue to receive that which they would have received if they were able to perform their regular duties as police officers.

We interpret GML §207-c(3) to be a guaranteed minimum wage for light duty police officers. Like other minimum wage statutes, GML §207-c(3) may establish a floor below which an employer may not go, at least not unilaterally, but it does not prohibit the payment by an employer of more than the statutory minimum, and certainly not when that payment is made pursuant to a collective bargaining agreement entered into by two parties who are under a continuing, statutory duty to negotiate all terms and conditions of employment, including wages.

The compulsory negotiation of wages and other terms and conditions of employment reflects the broad and sweeping public policy of the State.[2/] As relevant in this case, an exemption from that wage bargaining obligation would arise only from a plain and clear statement of a legislative intent to effect that

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[2/]Board of Educ. of the City Sch. Dist. of the City of New York v. PERB, 75 N.Y.2d 660, 23 PERB ¶7012 (1990); Cohoes City Sch. Dist. v. Cohoes Teachers Ass'n, 40 N.Y.2d 774, 9 PERB ¶7529 (1976).

result either expressly or by inescapable implication.[3/] The ALJ found implicit evidence of that intent in a GML §207-c legislative scheme, which he construed to prohibit light duty officers from ever being paid more than full status officers. Light duty officers, however, are simply and obviously not similarly situated to full status officers. They are in some way disabled from the full performance of their duties either by injury or illness. We do not believe that any of the provisions of GML §207-c can reasonably be read to prohibit two parties to a bargaining relationship from negotiating a wage differential which takes into consideration those disabilities or illnesses, even if those negotiations result in light duty officers being paid more than full status officers who do not share the same conditions of work, if for no other reason than they are not disabled. We take no position, of course, on the merits of the demand that the light duty officers be paid any more money because of the risks associated with their job assignments or for any other reason. Whether they should be paid more money and, if so, how much, are matters to be resolved in conjunction with the parties' negotiations.

Schenectady does not conflict and, indeed, is in accord with our decision here. The Court of Appeals held in Schenectady that the employer was not required to bargain orders requiring employees to submit to light duty or to submit to surgery to correct disabling physical conditions because the express

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[3/]Webster Cent. Sch. Dist. v. PERB, 75 N.Y.2d 619, 23 PERB ¶7013 (1990).

provisions of GML §207-c give an employer the specific right to make such orders. As to a medical confidentiality waiver, however, the Court in Schenectady concluded that bargaining was required except to the limited extent the waiver was necessary for the employer's determination of the nature of the officer's medical problem and its relationship to his or her duties. A broader waiver, noted the Court, was bargainable because it could not be tied to any of the express provisions of GML §207-c or anything "inescapably implicit" therein.

In contrast to the light duty and surgery orders in Schenectady, the prohibition against the negotiation of a higher wage rate for light duty officers does not rest upon any express terms of GML §207-c. Rather, the ALJ found the prohibition implicit in a GML §207-c legislative scheme. As with the medical confidentiality waiver in Schenectady, there is nothing "inescapably implicit" in GML §207-c which either would prohibit the negotiation of light duty officers' salary or wages in the manner proposed by the PBA or which would render the negotiation of such supplemental wages nonmandatory.

As to the proposals submitted by the PBA on behalf of the full status officers, the ALJ appears to have found them nonmandatory for three reasons.

Again relying on GML §207-c(3), the ALJ first concluded that a light duty officer is statutorily deemed to be fit for duty and, therefore, light duty status is "not an appropriate basis to attempt to distinguish between officers". Light duty officers, however, are not fit for all duty. By definition, such officers

are fit for only some duty, unlike the full status officers. Their medical condition arguably exposes both them and the persons they work with to greater health and safety risks. Just as the PBA may negotiate wage increases for the light duty officers, so too may it negotiate wage increases for the full status officers who perceive themselves to be adversely affected by the unassisted assignment of armed light duty officers to desk duty.

The ALJ also relied on the absence of a claim by the PBA that regular officers were required to do additional tasks once the light duty officers were assigned to unassisted desk duty. Increased workload, however, is not the basis for the PBA's demand and it is not just increased workload which would entitle the PBA to have its salary demands negotiated. These are wage demands premised upon an admitted change in an assignment practice, which change has allegedly and arguably exposed the officers to greater peril on the job.

The third basis for the ALJ's decision is that there is no reasonable relationship between the demands for the full status officers and the circumstances prompting them, thus rendering them punitive in nature. It is unclear to us exactly what the ALJ was conveying by this last stated rationale. If it is that the PBA was required to affirmatively prove factually that the assignment change adversely affected the health and safety of either the light duty officers or the full status officers as a condition to any right to negotiate pursuant to demand, then we reject that construction of its bargaining rights. The duty to

negotiate hinges on the subject matter of the demand, not the facts of the particular case.[4] The subject in issue here is wages for safety risks, clearly a mandatory subject of negotiation that, for the reasons previously discussed, has been neither prohibited nor exempted from compulsory negotiation. The ALJ's citation to the decision in Village of Spring Valley Policemen's Benevolent Association[5] (Spring Valley) suggests, however, that this is not what the ALJ was conveying. The only alternative interpretation of the ALJ's last stated rationale is that he believed his result was required or allowed by Spring Valley. Spring Valley, however, does not require or support the ALJ's decision and, if anything, is contrary to it.

In Spring Valley, demands for premium pay for risks police officers might encounter if their employer were to exercise managerial prerogatives regarding minimum staffing levels and the provision of certain equipment were held to be mandatorily negotiable. An argument that the demands were nonmandatory as penalties was specifically rejected. A penalty was considered to arise if the demand in issue "bears no reasonable relationship to a particular hazard or to other circumstances affecting working conditions [the demand] is designed to compensate."[6] There is at least as much a reasonable relationship between the PBA's "safety stipends" and the exercise of the managerial prerogative

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[4]State of New York (Dep't of Transp.), 27 PERB ¶3056 (1994).

[5]14 PERB ¶3010 (1981).

[6]Id. at 3017.

in this case as there was between the "premium pay" demands and the exercise of managerial prerogatives in Spring Valley. We surely cannot say reasonably that the unassisted assignment of armed light duty officers to desk duty poses no greater risks to either those officers or those whose work brings them into contact with them than when the assignment practice was distinctly different.

Furthermore, the ALJ's observation that there has been "no change or quid pro quo for additional compensation" represents the very type of disguised merits evaluation Spring Valley and all other of our negotiability decisions strive to avoid. It is not our role to decide whether a bargaining demand is reasonable or justifiable on any basis, factual or otherwise. The only question before us in these types of cases is negotiability, not whether or to what extent the demands should be accepted. Our holding that these demands are mandatorily negotiable means only that the Town must bargain them, not that it must grant them or make concessions pursuant to them. Whether any of these officers deserve to be paid any more money is a question affecting only the merits of the demands, not their negotiability.

The parties' contractual management rights clause does not afford the Town any defense to this charge. The clause merely preserves the Town's rights and responsibilities as applicable under law. The Town had no legal right not to bargain the PBA's proposals. Rather, its responsibility was to do so pursuant to demand.

For the reasons, and to the extent, set forth above, the PBA's exceptions are granted and the ALJ's decision is reversed. The Town is hereby ordered to negotiate the demands as presented to the Town in the PBA's letter dated January 12, 1995, and to sign and post notice in the form attached in all locations at which notices of information to PBA unit employees are ordinarily posted.

DATED: May 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

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 Town of Carmel Police Benevolent Associatoin, Inc. (PBA) that the Town of Carmel will negotiate the safety stipend demands as presented to it in the PBA's letter dated January 12, 1995.

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

TOWN OF CARMEL

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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.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-15660

CITY OF BUFFALO (POLICE DEPARTMENT),

Respondent.

W. JAMES SCHWAN, ESQ., for Charging Party

EDWARD D. PEACE, CORPORATION COUNSEL (JAMES L. JARVIS, JR., of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the Buffalo Police Benevolent Association (PBA) and the City of Buffalo (Police Department) (City) to a decision by an Administrative Law Judge (ALJ) on the PBA's charge against the City. The PBA alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it changed its practice of always appointing or promoting the first of the three eligible candidates on a civil service list notwithstanding the "rule of three" in Civil Service Law §61 (CSL).[1/]

[1/]CSL §61 provides, in relevant part, as follows:

> Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate civil service commission as standing highest on such eligibility list who are willing to accept such appointment or promotion . . . .

On a stipulated record, the ALJ dismissed the charge on two grounds. The first ground was that the PBA had not established a past practice of always appointing or promoting the first person on the civil service eligible list. As exemplified by the four times the City had not chosen the first person on the eligible list for promotion to a police lieutenant position, the ALJ concluded that each appointment or promotion the City made over many years involved a discretionary decision. Second, the ALJ held that the subject matter of the claimed practice encompassed a permissive subject of negotiation. Therefore, even if the practice had existed as alleged by the PBA, the City's unilateral change in that nonmandatory subject of negotiation would not violate the City's duty to negotiate.

The PBA argues in its exceptions that it established a past practice for purposes of the Act as a matter of fact and law and that the practice embraces a mandatory subject of negotiation.

The City argues in its cross-exceptions that the practice alleged encompasses a prohibited subject of bargaining, but, if not, the subject is at least nonmandatory as the ALJ held. In addition, the City argues that the ALJ was correct in finding that there was no past practice of the type alleged by the PBA.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's dismissal of the charge on the ground that the alleged practice encompasses a subject which is at least a nonmandatory subject of negotiation. In affirming on this basis, it is not necessary for us to decide (and we do not) whether

there is an established past practice, as alleged by the PBA, or whether, as alleged by the City, such a practice is a prohibited subject of bargaining.

It has been held repeatedly and consistently, under a wide variety of circumstances, that the qualifications for appointment or promotion are nonmandatory subjects of negotiation.[2/]

The Court of Appeals, in Cassidy v. Municipal Civil Service Commission[3/] (hereafter Cassidy), held specifically that factors other than test scores on a civil service examination are relevant to a municipality's decision to hire or promote and may be considered. In reaching its decision, the Court in Cassidy stated the following, which is central to our disposition of this case:

> An individual's ability to achieve a high examination score does not necessarily demonstrate his capacity to perform the actual duties of a particular position. Moreover, examination success cannot reveal any possible defects of personality, character or disposition which may impair the performance of one's duties in a civil service position. [citations omitted] Hence, of necessity, the appointing authority must be cloaked with the power to choose a qualified appointee who possesses

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[2/]State of New York - Unified Court System, 25 PERB ¶3065 (1992) (definition of promotion units nonmandatory as inextricably intertwined with the determination of employment qualifications); Schenectady Patrolmen's Benevolent Ass'n, 21 PERB ¶3022 (1988) (determination of qualifications for filling positions and job assignments nonmandatory); Rensselaer City Sch. Dist., 13 PERB ¶3051 (1980), conf'd, 87 A.D.2d 711, 15 PERB ¶7003 (3d Dep't 1982) (criteria for promotion); Fairview Professional Firefighters Ass'n, Inc., Local 1586, 12 PERB ¶3083 (1979) (qualifications for promotion); Incorporated Village of Hempstead, 11 PERB ¶3072 (1978) (qualifications for appointment); Onondaga Community College, 11 PERB ¶3045 (1978) (qualifications for appointment); Somers Faculty Ass'n, 9 PERB ¶3014 (1976) (management prerogative for an employer to offer employment to whomever it wishes subject to requirements of law).

[3/]37 N.Y.2d 526 (1975).

> all the attributes necessary for the responsible performance of his duties. (37 N.Y.2d at 529)

The practice alleged to exist by the PBA makes a test score, and the accompanying placement on a civil service list, the sole basis for an appointment or promotion to a competitive class position. Under this practice, test score alone would establish absolutely who the City could hire or promote. But a test score is only one evidence of qualification for a position. As Cassidy makes clear, there are other relevant qualifications for a competitive class position which may be considered by a municipality. The practice asserted by the PBA plainly prohibits the City from considering these other relevant qualifications in making an appointment. Therefore, the practice asserted is a major substantive limitation on the City's managerial right to determine employment qualifications. As such, no persuasive argument can be made that the alleged practice is merely procedural in nature.

For the reasons set forth above, the ALJ's dismissal of the charge on the ground that the subject of the alleged practice is nonmandatory is affirmed.

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

DATED: May 15, 1996
Albany, New York

Pauling R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WEST SENECA POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-15978

TOWN OF WEST SENECA (POLICE DEPARTMENT),

Respondent.

W. JAMES SCHWAN, ESQ., for Charging Party

JAECKLE, FLEISCHMANN & MUGEL (PHILIP H. McINTYRE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the West Seneca Police Benevolent Association (PBA) and the Town of West Seneca (Police Department) (Town) to a decision by an Administrative Law Judge (ALJ) on the PBA's charge against the Town. The PBA alleges that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it changed a practice of always appointing or promoting the first of the three eligible candidates on a civil service list notwithstanding the "rule of three" in Civil Service Law §61 (CSL).[1/]

[1/]CSL §61 provides, in relevant part, as follows:

> Appointment or promotion from an eligible list to a position in the competitive class shall be made by the selection of one of the three persons certified by the appropriate Civil Service Commission as standing highest on such eligibility list who are willing to accept such appointment or promotion . . . .

The ALJ dismissed the charge on the ground that the subject matter of the claimed practice encompasses a permissive subject of negotiation. In so holding, the ALJ relied upon her decision in City of Buffalo,[2/] which we have this date affirmed in relevant part.

The PBA argues in its exceptions that the practice alleged embraces a mandatory subject of negotiation. The Town takes exception to the ALJ's having made any findings of fact regarding the existence of a past practice which, in any event, it argues encompasses a prohibited subject of bargaining. If not a prohibited subject, the Town argues that the alleged practice is at least nonmandatory and the ALJ, therefore, properly dismissed the charge.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision on the basis of our decision this date in City of Buffalo, which we incorporate by reference. The qualifications for employment or promotion are nonmandatory subjects of negotiation. The practice alleged by the PBA would prohibit the Town from considering anything other than civil service test score rank in making an appointment. It is, therefore, at least a nonmandatory subject of negotiation.

Having affirmed the ALJ's decision on this basis, we do not consider the Town's cross-exceptions.

[2/]29 PERB ¶4515, aff'd, 29 PERB ¶3023 (1996).

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

DATED: May 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WILBERT MOORE,

Charging Party,

-and-

CASE NO. U-16394

UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondent,

-and-

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Employer.

WILBERT MOORE, pro se

JAMES R. SANDNER, GENERAL COUNSEL (CLAUDE I. HERSH of counsel), for Respondent

DAVID BASS, GENERAL COUNSEL (THOMAS LIESE of counsel), for Employer.

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Wilbert Moore to a decision of an Administrative Law Judge (ALJ) dismissing his charge which alleges that the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) and the Board of Education of the City School District of the City of New York (District) had violated, respectively, §209-a.2(c) and §209-a.1(c) of the Public Employees' Fair Employment Act

(Act).[1/] After two conferences in this matter, the ALJ prepared a statement of facts of the case, which was accepted by all parties. UFT and the District then moved to dismiss the charge and Moore responded. Thereafter, the ALJ issued her decision, finding that UFT had not breached its duty of fair representation when a UFT representative, not an attorney, represented Moore at a grievance arbitration and when it failed to advise him before the arbitration that the District would be represented by counsel. The ALJ further found that UFT had not violated the Act by failing to inform the arbitrator of facts which Moore believed to be relevant to the arbitration.

Moore argues in his exceptions[2/] only that the ALJ erred in determining that the facts that he wanted UFT to present at arbitration would not have affected the arbitrator's decision because they were not relevant to the issues raised in the arbitration.

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

[1/]The case was processed as to the §209-a.2(c) allegation only. The District thus appears as a statutory party only pursuant to §209-a.3 of the Act.

[2/]After Moore filed exceptions to the ALJ's decision and after UFT and the District filed their responses to Moore's exceptions, Moore filed a document which he called "final exceptions". Moore made no request for permission to file such additional exceptions; UFT and the District object to his filing and, since neither UFT nor the District filed cross-exceptions, Moore is not even entitled to file a response thereto, much less additional exceptions, under Rules of Procedure, §204.11. We have not, therefore, considered Moore's final exceptions in reaching our decision herein.

Moore raises in his exception arguments which go to the District's decision to excess him from his position as a regular substitute teacher at P.S. 58. Whether the District's conduct was consistent with the terms of its collective bargaining agreement with UFT was decided by an arbitrator, who found no violation of the contract by the District. The arbitrator considered various arguments raised by both the UFT and the District in reaching his decision. Moore argues that the UFT failed to introduce evidence in support of various arguments he wanted UFT to make at arbitration. A review of the record, however, shows that as to some of those arguments, UFT, in fact, presented evidence to the arbitrator. The other points were not raised by UFT, but the ALJ found, and we agree, that those arguments were not relevant to the issue before the arbitrator. As found by the ALJ, there is nothing in the record which could support a finding that UFT's actions at arbitration were arbitrary, discriminatory or in bad faith.

Based on the foregoing, we deny Moore's exceptions and affirm the ALJ's decision.

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

DATED: May 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCHUYLERVILLE TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-17413

SCHUYLERVILLE CENTRAL SCHOOL DISTRICT,

Respondent.

RICHARD W. HORWITZ, for Charging Party

RUBERTI, GIRVEN & FERLAZZO, P.C. (JAMES E. GIRVIN, ESQ. of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Schuylerville Teachers Association, NYSUT, AFT, AFL-CIO (Association) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its charge that the Schuylerville Central School District (District) violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) by failing to pay a salary increment after the expiration of the parties' 1993-1995 collective bargaining agreement. The Association was notified by the Director that its charge was deficient but declined to withdraw it. Based on the pleadings in the charge that the 1993-1995 agreement included a continuation clause that specifically excluded salary increments,

the Director determined that the expired agreement contained a "sunset clause". He accordingly found that there was no violation of the Act when the District did not pay salary increments after the agreement's expiration.[1/]

The Association excepts to the Director's decision, arguing that §209-a.1(e) of the Act cannot be negated by a collective bargaining agreement, that there is no clear and explicit waiver by the Association of its §209-a.1(e) rights, that it has not forfeited its §209-a.1(e) rights by engaging in any strike, and that its agreement to the language in the 1993-1995 agreement is not a surrender of its rights under §209-a.1(e) of the Act. The District argues in its response to the Association's exceptions that the Director's decision is correct and must be affirmed.

Based upon a review of the record and consideration of the parties' arguments, we affirm the decision of the Director.

The Director relied on our decision in Waterford-Halfmoon Union Free School District[2/] in determining to dismiss the Association's charge. In that case, we considered, and rejected, the same arguments raised here by the Association. Section

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[1/]Article IV (B) of the Association-District contract provides:

> All terms and conditions of employment shall remain in full force and effect until a successor agreement is reached, excluding increments.

[2/]27 PERB ¶3070 (1994).

209-a.1(e)[3/] of the Act continues in effect after contract expiration only what the parties have agreed upon in their contract. If they have agreed that a term of a contract will end as of a certain date or upon a certain condition, §209-a.1(e) does not and cannot continue in effect that which they have agreed to terminate for that would extend to a charging party something more than that which had been agreed upon. By honoring, after contract expiration, the parties' agreement to end a term of their contract, we give full effect to §209-a.1(e) because their agreement was to terminate the benefit at contract expiration. The Association has not made any new legal arguments which would distinguish Waterford-Halfmoon or necessitate a modification of that decision. While the Association argues in its exceptions that the intent to remove increments from the coverage of §209-a.1(e) "must be manifested by plain and clear language", that language is plainly evident in Article IV (B) of the parties' last agreement. It provides for a continuation of all terms of the agreement except increments. Having agreed that salary increments would not be paid after contract expiration, the District was not under any statutory obligation to continue those payments. Therefore, for the reasons set forth in

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[3/]Section 209-a.1(e) provides that it is an improper practice for a public employer to refuse to continue all the terms of an expired agreement until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations, engaged in a strike.

Waterford-Halfmoon, we deny the Association's exceptions and affirm the Director's decision.

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

DATED: May 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA,

Charging Party,

-and-

CASE NO. U-14657

CONVENTION CENTER OPERATING CORPORATION,

Respondent.

WILLIAM F. HENNING, for Charging Party

JACKSON, LEWIS, SCHNITZLER & KRUPMAN (ANDREW A. PETERSON and JOSEPH M. MARTIN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Convention Center Operating Corporation (Center) to a decision of an Administrative Law Judge (ALJ) finding that it had violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act)[1/] by discharging John Allen and Frank Calderon for the exercise of protected rights in organizing for and supporting Local 1180, Communications Workers of America (CWA).

In its exceptions, the Center argues that the ALJ erred in finding that the Center was aware of Allen's and Calderon's activities on behalf of CWA, that they would not have been

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[1/]The ALJ dismissed the allegation that §209-a.1(b) of the Act had been violated. No exceptions were taken to that part of the ALJ's decision.

terminated but for their exercise of protected rights, that they received disparate treatment by the Center, and that the Center's reasons for their termination were pretextual. CWA supports the ALJ's decision.

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

Allen and Calderon were employed as control monitor technicians (CMTs) at the Jacob K. Javits Convention Center in New York City, which is operated by the Center.[2/] They, and the other six CMTs, were unrepresented in February 1993, when CWA filed a representation petition with the Director of Public Employment Practices and Representation (Director) seeking to represent CMTs in a separate unit.[3/] The Center opposed the petition, arguing that the CMTs were most appropriately placed in a unit of public safety officers (PSOs) represented by Local 237 of the International Brotherhood of Teamsters (IBT). A hearing regarding the uniting question was held on April 26, 1993, at which, as here relevant, Calderon and Henry Flinter, the Center's inspector general and director of safety, were present. The

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[2/]Calderon began employment at the Center in 1986 and Allen had been employed since 1990.

[3/]CWA represents a unit of public safety officer supervisors employed by the Center and sought, alternatively, to place the CMTs in that unit.

Director's decision, issued on October 25, 1993, placed the CMTs in the unit represented by the IBT.[4/]

Calderon and Allen had been active in soliciting signatures of the other CMTs on CWA membership cards and speaking to their fellow employees about the benefits of joining the CWA. Indeed, Flinter acknowledged that he knew that all the CMTs had signed cards designating CWA as their collective bargaining representative. The ALJ concluded, based upon all the evidence before him, and we find that the record supports his conclusion, that Calderon and Allen were engaged in protected activities and that Flinter was aware of those activities.[5/]

As CMTs, Calderon and Allen were assigned to the 12:00 a.m. to 8:00 a.m. shift in the Center's command center, where they were responsible for the general security of the Center. They monitored alarm systems, video cameras and video screens in the command center and dispatched PSOs to any area of the building in which a problem arose; they also monitored the heating, air conditioning and lighting systems. In the early morning hours of June 14, 1993, Allen and Calderon were at work at the Center.

[4/]New York Convention Center Operating Corp., 26 PERB ¶4052 (1993), aff'd, 27 PERB ¶3034 (1994).

[5/]The ALJ relied in part on our decision in City of Corning, 17 PERB ¶3022 (1984), conf'd, 116 A.D. 2d 1042, 19 PERB ¶7004 (4th Dep't 1986), to establish that it could be inferred that Flinter had knowledge of not only Allen's and Calderon's support of the CWA but of their organizing efforts on behalf of CWA because of the small size of the command center operation. There is nothing in the record which would warrant the contrary finding sought by the Center.

Flinter and two other members of management went to the Center to conduct a surprise inspection, pursuant to a request from Fabian Palomino, the Center's director, who had received reports that employees on that shift had been sleeping while on duty. The supervisor's log book filled in by Flinter at the time of his visit indicated that he and his team had found Myles Delvitt, a PSO stationed at the 39th Street entrance to the Center, asleep in his guard booth. Melville Anderson, the PSO on duty at the reception desk in the Center, was also noted as being asleep. Allen and Calderon were likewise noted to be asleep in the command center. Thereafter, on June 16, 1993, Allen was fired by Flinter and the next day Calderon was also discharged by Flinter for sleeping while on duty.[6/]

Flinter testified initially that Delvitt and Anderson were not asleep. However, on cross-examination, when he was shown the log book for the first time, he did admit that he would not have noted in the log book that the two were asleep if they were not. He testified then that he thought Anderson was only nodding, not sleeping, and that he did not personally see Delvitt asleep but that one of his colleagues must have told him that Delvitt was asleep as they passed by his security booth on their way into the Center. Flinter testified that no discipline was warranted for Anderson because, despite what he had noted in the log book, Anderson was not actually asleep on duty. He further testified

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[6/]Flinter had recommended to Palomino that Allen and Calderon be terminated and Palomino concurred with Flinter's decision.

that he had intended to terminate Delvitt but Delvitt went out on extended medical leave and, shortly thereafter, Flinter left the employ of the Center.[7/] Finding the Center's witnesses, including Flinter, to be evasive and less than credible, the ALJ found that all four employees had been discovered sleeping by Flinter but that he chose only to terminate Allen and Calderon. Having found that Allen and Calderon were engaged in activities protected by the Act, that Flinter had knowledge of those activities, and that Allen and Calderon had received disparate treatment when the Center terminated them and not Anderson and Delvitt, the ALJ concluded that the Center violated §209-a.1(a) and (c) of the Act when it dismissed Allen and Calderon. He further found that the reasons offered by the Center in justification for its treatment of Allen and Calderon were pretextual.

The Center argues to us that the ALJ erred when he rejected its rationale for its actions towards Allen and Calderon. It claims that the ALJ relied upon evidence of the Center's treatment of employees in different titles by supervisory employees other than Flinter in finding that the Center had treated Allen and Calderon in a discriminatory fashion. While the ALJ discussed the fact that other Center employees, all of whom were PSOs, were not terminated for a first offense of sleeping on the job, he relied primarily on the contradictory

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[7/]Delvitt was apparently written up for his infraction but was not terminated.

nature of Flinter's testimony and the disparate treatment applied to Allen and Calderon as compared to Anderson and Delvitt. He also rejected the Center's argument that the discharge of Allen and Calderon was warranted by the fact that they were CMTs as opposed to PSOs and, therefore, had a higher level of responsibility. The ALJ correctly found that the CMTs and PSOs worked together and were jointly responsible for the Center's security. That is the same conclusion reached by the Director in the earlier representation matter and, in fact, was the very position espoused by the Center in that proceeding. Indeed, Flinter, the individual responsible for seeking to discipline the employees, drew no distinction between the responsibilities of Allen and Calderon and those of Anderson and Delvitt in weighing the seriousness of their offense.

To establish the improper motivation necessary for a finding that §209-a.1(a) and (c) of the Act have been violated, the charging party has the burden of proving engagement in protected activities, that the employer had knowledge of the activities and that it acted because of those activities.[8/] If a prima facie violation has been established by direct evidence or by circumstantial evidence,[9/] the burden shifts to the respondent to rebut that violation by proof that legitimate business reasons

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[8/]City of Salamanca, 18 PERB ¶3012 (1985).

[9/]It is germane to note the timing of Allen's and Calderon's termination just two months after the hearing in the representation petition and before the issuance of the Director's decision placing the CMTs in the unit represented by IBT.

prompted the action.[10] As the ALJ found, the Center failed to meet that burden.

Rather, the record fully supports the ALJ's conclusion that Flinter was aware of Allen's and Calderon's exercise of protected rights and that they would not have been terminated but for the exercise of those rights. The reasons offered by the Center for its termination of Allen and Calderon were rejected by the ALJ as pretextual and further support his determination that the terminations of Allen and Calderon were improperly motivated, in violation of §209-a.1(a) and (c) of the Act.[11] The record affords no basis for a reversal of the ALJ's credibility resolutions or conclusions of fact.

Based on the foregoing, the exceptions of the Center are denied and the decision of the ALJ is affirmed.

IT IS, THEREFORE, ORDERED that the Center:

1. Forthwith offer John Allen and Frank Calderon reinstatement to their former positions.

2. Make John Allen and Frank Calderon whole for any loss of pay and benefits suffered by reason of their termination, from the date thereof to the date of the offer of reinstatement, with interest at the currently prevailing maximum legal rate.

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[10] City of Utica, 24 PERB ¶3044 (1991).

[11] Stockbridge Valley Cent. Sch. Dist., 26 PERB ¶3007 (1993).

3. Cease and desist from terminating the employment of John Allen and Frank Calderon for the exercise of rights protected by the Act.

4. Sign and conspicuously post the attached notice at all locations used throughout the Center to communicate with employees in the public safety department who are represented by Local 1180, Communications Workers of America and Local 237, International Brotherhood of Teamsters.[12/]

DATED: May 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[12/]Because both employee organizations represent employees in the public safety department, and the unit which CWA sought to represent is now represented by IBT, all of the employees in the public safety department should have notice of our decision. See County of Orleans, 25 PERB ¶3010 (1992).

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 Local 1180, Communications Workers of America that the Convention Center Operating Corporation will:

1. Forthwith offer John Allen and Frank Calderon reinstatement to their former positions.

2. Make John Allen and Frank Calderon whole for any loss of pay and benefits suffered by reason of their termination, from the date thereof to the date of the offer of reinstatement, with interest at the currently prevailing maximum legal rate.

3. Not terminate the employment of John Allen and Frank Calderon for the exercise of rights protected by the Act.

Dated . . . . . .

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

CONVENTION CENTER OPERATING CORPORATION

. . . . . .

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.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SIDNEY TEACHERS ASSOCIATION,

Charging Party,

-and-

CASE NOS. U-13923 & U-14052

SIDNEY CENTRAL SCHOOL DISTRICT,

Respondent.

PETER D. BLOOD, for Charging Party

MARK PETTITT, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Sidney Teachers Association (Association) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) dismissing its charges that the Sidney Central School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it assigned certain duties previously performed exclusively by unit school nurse teachers (SNT) to nonunit employees.

Some description of the history of the processing of these charges is necessary before we discuss the Association's exceptions. The charges were filed in 1992. Case No. U-13923 alleges that the District violated the Act when, in June and August of 1992, it assigned registered nurses to assist the school physician in the performance of school athletic physicals,

a job previously performed, the Association alleges, by an SNT. The District's answer admitted the assignment to and performance of the duties in question by nonunit employees, but denied that the work was exclusive unit work and raised several affirmative defenses.[1/] Case No. U-14052 alleges a similar violation with respect to other SNT duties.[2/]

The charges were thereafter conditionally dismissed, but were reopened at the Association's request,[3/] and consolidated for hearing before the Assistant Director. After the hearing, the charges were dismissed by the Assistant Director upon his finding that the Association had failed to meet the notice of claim requirements of Education Law §3813.[4/] The Association filed exceptions, which we sustained in part and dismissed in part.[5/] As to Case No. U-13923, we held that the Association

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[1/]The Association alleged, and the District admitted, that on or about August 6, 7, 12, and 19, 1992, registered nurses who were not members of the bargaining unit performed duties relating to the assisting of the district physician in the conducting of summer 1992 student athletic physical examinations.

[2/]The Association filed a letter in December 1992, attempting to amend the charge to allege similar conduct by the District between August and September 1992. As the letter was not sworn to and there was no proof that it had properly been served on the District, as required by PERB's Rules of Procedure, it was not accepted as an amendment to the charge. Thereafter, on January 13, 1993, the Association filed an amendment which was accepted by the assigned Administrative Law Judge and which made the same allegations.

[3/]25 PERB ¶4675 (1992) and 26 PERB ¶4649 (1993).

[4/]28 PERB ¶4591 (1995).

[5/]28 PERB ¶3066 (1995).

had not met the ninety-day notice requirement of Education Law §3813 with respect to the transfers of unit work which took place in June 1992.[6/] As to the August 1992 transfers of unit work and the transfers alleged in U-14052, the case was remanded to the Assistant Director for further processing. On remand, the Assistant Director determined that as to the allegations of transfer of unit work in August 1992 set forth in Case No. U-13923, the Association had met the requirements of Education Law §3813. He dismissed that charge, however, because he found that the Association had not proven that unit work had been performed by nonunit personnel. He dismissed all of Case No. U-14052, finding that the Association had not complied with the notice of claim requirements of §3813 of the Education Law.

The Association excepts to the Assistant Director's decision, arguing that the assignment of unit work[7/] to nonunit employees in August 1992 had been admitted by the District in its answer to the charge in Case No. U-13923. It also argues that the Assistant Director erred in finding that its charge and "amendment" in Case No. U-14052 were not filed within ninety days

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[6/]In Deposit Cent. Sch. Dist. v. PERB, 214 A.D.2d 288, 28 PERB ¶7013 (3d Dep't 1995), the Appellate Division held that where no separate notice of claim has been tendered to a school district, the notice of claim provisions of §3813 of the Education Law are nonetheless satisfied if the school district's governing body receives a copy of an improper practice charge which is sufficiently detailed within 90 days after the claims asserted in the charge accrued.

[7/]For the purposes of his decision, the Assistant Director assumed, without specifically so finding, that the at-issue work was exclusive to the unit.

of the occurrence of the acts complained of, as required by Education Law §3813. The District has not responded to the Association's exceptions and it has not filed cross-exceptions.

After a review of the record and consideration of the Association's exceptions, we affirm, in part, and reverse, in part, the Assistant Director's decision.

We reverse the Assistant Director's dismissal of the charge in Case No. U-13923. The Association alleges in its charge that in August 1992 registered nurses "performed duties relating to the assisting of the District medical physician in the conducting of Summer 1992 student athletic physical examinations". The District's answer admitted these allegations, but denied that the duties were exclusive to the unit SNTs. For the purposes of his decision the Assistant Director assumed that the at-issue work was exclusive to the unit represented by the Association. However, he dismissed the charge for lack of proof because the Association's witness, Lynne Dionne, the SNT who, in prior years, had assisted the school physician in the performance of the student athletic physicals, was not present at the time the work was performed by the registered nurses and she could not identify with specificity the duties that they performed.

The Association excepts to the Assistant Director's failure to rely upon the District's admission in its answer that in August 1992 the nonunit registered nurses performed the at-issue work. The Assistant Director disregarded the admission in the District's answer and focused on the testimony of the

Association's witness, who testified that she did not perform the work in question in 1992 although only she, as an SNT, had done so in prior years. She further testified that the registered nurses had performed the work in 1992, although she did not specifically see them do so. The Assistant Director discounted her testimony as being of less value than hearsay. We, however, find that the testimony, coupled with the District's admission, is more than sufficient evidence to sustain the charge, for it is certainly well-settled that an admission in a verified answer is evidence of the fact admitted.[8/] As noted above, the Assistant Director, for the purposes of his decision, assumed that the work in question was bargaining unit work. While the District denied in its answer that the assisting of the school physician in the conduct of the summer student athletic physicals was exclusive bargaining unit work, no evidence was produced by the District in support of that position. In fact, the record supports a finding that the SNT, specifically Dionne, was the only employee who assisted the school physician in the conduct of the summer student athletic physicals, and we so find. Therefore, as the District in the summer of 1992 unilaterally assigned nonunit registered nurses to assist the school physician in the conduct of summer student athletic physicals, work substantially similar to that which had previously been performed exclusively by the SNT, we find that it violated §209-a.1(d) of the Act.

[8/]CPLR 3018. See Urraro v. Green, 106 A.D.2d 567 (2d Dep't 1984); Ward v. Davega City Radio, 163 Misc. 335 (1937).

With respect to Case No. U-14052, it is alleged that during the summer of 1992, the District assigned unit work to nonunit employees and that the Association did not discover these assignments until November 1992. The Assistant Director determined that the record established that the events complained of in the charge occurred in June 1992 and the events complained of in the amendment to the charge, filed in January 1993, occurred in August and September 1992. He further held that the Association had not produced any evidence that it did not learn and could not have learned of these assignments until November 1992. As the original charge in Case No. U-14052 was not filed until November 23, 1992, he found that the Association had not complied with the requirements of §3813 of the Education Law because it had not filed a notice of claim on the District and it had not filed an improper practice charge within the ninety-day time frame permitted under Deposit, supra. The Association focuses on the failure of the District to raise timeliness as a defense in its answer and our finding that the charge in Case No. U-13923 met the Education Law §3813 filing requirements. Asserting that the allegations in Case No. U-14052 are virtually identical to those in Case No. U-13923, the Association argues that the Assistant Director erred in finding that the charge and amendment in Case No. U-14052 were not in compliance with Education Law §3813. These arguments are without merit.

The District timely raised its Education Law §3813 defense. It did not need to further assert that the charge was untimely

under PERB's Rules of Procedure to raise the notice of claim defense. The filing periods for filing a charge and filing a notice of claim are dissimilar, as are the defenses themselves. Compliance with one filing period does not necessarily mean that there has been compliance with the other. On its face, the charge in Case No. U-14052 is timely filed pursuant to our Rules. However, based on the Assistant Director's finding that the Association knew or should have known of the at-issue assignments of unit work to nonunit personnel before November 1992 when the charge was filed, we affirm his determination that the charge was not filed within the ninety-day time period required by Education Law §3813 and, therefore, was properly dismissed.[9/] That the allegations in Case No. U-14052 and the amendment thereto are similar to the allegations in Case No. U-13923, which was found to be in compliance with the requirements of Education Law §3813, is not sufficient to establish that Case No. U-14052 satisfied the notice of claim requirements of that statute solely because of the similarities in the pleadings. The charges are separate and each had to have satisfied the Education Law §3813 requirements. That one improper practice charge satisfies Education Law §3813 does not mean that another charge filed later is exempt from

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[9/]The amendment to Case No. U-14052 was filed on January 13, 1993, and refers to events which occurred between June 30 and September 10, 1992, but alleges that the Association did not learn of the alleged improper conduct until November 1992. The Assistant Director found that the Association knew or should have known of the alleged violations at the times they occurred.

those requirements or has had those requirements satisfied by the notice of claim associated with the first.

Based on the foregoing, we, therefore, grant the Association's exceptions and reverse the Assistant Director's decision in Case No. U-13923. The Association's exceptions in Case No. U-14052 are denied and the Assistant Director's decision in that case is affirmed.

IT IS, THEREFORE, ORDERED that the District

1. Cease and desist from unilaterally assigning nonunit employees to assist the school physician in the conduct of the summer student athletic physicals;

2. Make Lynne Dionne whole for any wages and benefits lost as a result of the District's assignment of nonunit employees to assist the school physician in the conduct of the summer student athletic physicals, with interest at the current prevailing maximum legal rate; and

3. Sign and post the attached notice in all locations regularly used to communicate with employees in the unit represented by the Association.

DATED: May 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

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 Sidney Teachers Association that the Sidney Central School District will:

1. **Not unilaterally assign nonunit employees to assist the school physician in the conduct of the summer student athletic physicals.**

2. **Make Lynne Dionne whole for any wages and benefits lost as a result of the District's assignment of nonunit employees to assist the school physician in the conduct of the summer student athletic physicals, with interest at the current prevailing maximum legal rate.**

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

SIDNEY CENTRAL SCHOOL DISTRICT

. . . . . .

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PETER REESE,

Charging Party,

-and-

CASE NO. U-16749

PUBLIC EMPLOYEES FEDERATION, AFL-CIO and STATE OF NEW YORK (DEPARTMENT OF HEALTH),

Respondents.

PETER REESE, pro se

RICHARD E. CASAGRANDE, ESQ. (JEFFREY G. PLANT of counsel), for Respondent PUBLIC EMPLOYEES FEDERATION, AFL-CIO

WALTER J. PELLEGRINI, GENERAL COUNSEL (RICHARD W. McDOWELL of counsel), for Respondent STATE OF NEW YORK

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Peter Reese to a decision by an Administrative Law Judge (ALJ) on a charge he filed against the Public Employees Federation, AFL-CIO (PEF) and the State of New York (Department of Health) (State). Reese alleges that PEF breached its duty of fair representation (DFR) in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by failing or refusing to take action to compel the State to adhere to the contractual time frames for decision on an out-of-title work grievance. The State is alleged to have violated §209-a.1(b) of the Act by acting "in concert" with PEF regarding its alleged noncompliance with the contractual time frames.

The ALJ dismissed the charge against PEF on the ground that the allegations in the charge, as supplemented by Reese's offer of proof, did not evidence a DFR breach. The charge against the State was dismissed because there was nothing pleaded which would evidence any collusion between PEF and the State for the purpose of delaying the disposition of Reese's grievance.

Reese argues in his exceptions that the ALJ erred in dismissing the charge. He argues that PEF's inaction, which allowed the State to withhold a disposition of his grievance beyond the contractual time frames, in and of itself amounts to the arbitrary or bad faith conduct necessary to establish a DFR violation. PEF argues in response that the ALJ's dismissal of the charge represents a correct application of DFR principles and her decision should be affirmed.

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

Reese filed his out-of-title work grievance pursuant to Article 17 of the PEF-State contract at step 2 on April 26, 1994. The contract provides that a step 2 determination is to be made "as promptly as possible, but no later than ten working days after receipt of the grievance unless PEF or the employee agrees to an extension of such time limit." The step 2 decision was rendered October 11, 1994, after a hearing on August 11, 1994.

Reese alleges that he did not agree to an extension of time for a step 2 decision, did not authorize any extension, and neither, to his knowledge, did PEF agree to an extension except

to the extent it allegedly did not take any action to hold the State to the step 2 time limits.

Only PEF may appeal to step 3, which it did on or about October 18, 1994. The step 3 procedure calls for the Director of the Governor's Office of Employee Relations (GOER), or the Director's designee, to promptly forward the grievance to the Department of Civil Service's Director of Classification and Compensation for a review and a determination as to whether the duties at issue are out-of-title. Under the contract, the Director of Classification and Compensation "will make every reasonable effort to complete such review promptly". The Director of Classification and Compensation's findings are sent to the Director of GOER, who then is to issue a step 3 determination "forthwith". The step 3 determination, favorable to Reese, was rendered January 13, 1995.

For purposes of this appeal, we, as did the ALJ, assume the truth of Reese's allegations and afford him the benefit of all reasonable inferences therefrom. Therefore, we assume that PEF did not take any affirmative action to secure compliance with the contractual time limits and did not affirmatively and specifically consent to an extension of those time limits.

Against this set of assumptions, the question becomes whether PEF was under a DFR duty to take some action seeking to compel the State to adhere to the contractual time limits because, until such time as his grievance was finally decided, Reese was required to do the duties which were ultimately found

to be out-of-title. As the duties which Reese was required to perform were appropriate to a salary grade lower than his grade 35, the PEF-State contract prohibits any monetary award; the assignment may be and was only ordered discontinued. Given this inability to provide him with make-whole relief, Reese argues that PEF should be held to a statutory duty to enforce the contractual time limits because each day beyond those limits was another day that he was forced to perform lower-rated duties without effective remedy.

A union violates its duty of fair representation only by conduct which is arbitrary, discriminatory or in bad faith. Reese offers no facts which would even suggest discriminatory or bad faith motivation. There is no claim of disparate treatment. We are left, therefore, to decide whether, as a matter of law, PEF's assumed declination to undertake action to compel compliance with the contractual time limits for the disposition of Reese's grievance can be considered arbitrary. On the time frames submitted here, we think not.

Our decisions have always recognized that a union is and must be afforded a wide range of reasonableness in making decisions associated with the processing of a grievance.[1/] By Reese's own allegations, the time it took for final disposition of his grievance was "typical" of all out-of-title work grievances between PEF and the State. What PEF has done

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[1/]See, e.g., District Council 37, AFSCME, 28 PERB ¶3062 (1995).

according to Reese's allegations is to have tacitly consented to an extension of the contractual time limits. Just as a union and an employer may fix the time lines for the filing, prosecution and decision of grievances, so too may they thereafter in good faith extend or modify them either generally or specifically. Parties to a bargaining relationship often fix contractual time lines for grievance processing, but just as often they thereafter waive or modify those time lines to conform to the realities of the work place, which often engender delays in grievance processing. Reese's own allegations reflect an awareness of that circumstance when he asserts that his grievance was typical of all out-of-title work grievances under the State-PEF contract. Notwithstanding that awareness, he appears to argue that PEF owed him a duty which it might not owe other grievants because there was no effective remedy for him, only the possibility of an order directing the State to discontinue the out-of-title work assignment. But all grievants are similarly situated to Reese in the sense that their contract rights are also abridged for however long it takes for a grievance to be decided in their favor. In net effect, therefore, an acceptance of Reese's arguments would compel us to create a broad duty upon unions to generally undertake actions upon a grievant's demand to secure strict compliance with contractual time limits. We do not believe that the policies of the Act are favorably advanced by

the creation of such a per se duty.[2/] Such a duty would erode a significant part of a union's discretion regarding the processing of grievances. Moreover, it would ultimately cause unions and employers never to agree to any time frames for grievance processing or decision to avoid any claim that nonadherence to those time frames is improper.

Our decision is further guided by the realization that, as PEF argues, there were no practical mechanisms available to PEF to compel compliance with the contractual time limits. The State's alleged failure to abide by the contractual time lines for decision of the out-of-title work grievance was probably itself grievable, but by the time such a grievance worked its way through the multiple steps of the contract, including arbitration, the underlying out-of-title work grievance would surely have been decided.

Although we find no DFR breach in PEF's assumed failure to compel the State's strict compliance to the contract's terms, the charge is also susceptible to a reading that the time it actually took for completion of this particular grievance was so long as to be arbitrary. Reese's grievance to final decision favorable to him took approximately nine months. The proceedings involved two stages, a hearing, and the involvement by persons beyond PEF's control, including persons outside the facility and at

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[2/] Accord Teamsters Local 355, 95 LRRM 1232 (1977) (union's failure to demand compliance with a contract provision held no violation where the provision was not enforced or invoked on a regular basis).

least one who is not directly accountable to either of the parties to the contract. Under such circumstances, we cannot hold that the processing of his grievance took so long as to be held arbitrary.

The dismissal of the allegations against the State was plainly correct. There were no facts alleged to support a finding of collusion between the State and PEF. Absent evidence of such collusion, the charge pleads, at most, a contract violation by the State which does not give rise to any statutory improper practice.

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

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

DATED: May 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-17316

TOWN OF PENFIELD,

Respondent.

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

RICHARD J. HORWITZ, ESQ., for Respondent

BOARD DECISION AND ORDER

The Town of Penfield (Town) by motion seeks permission to appeal from a ruling by an Administrative Law Judge (ALJ) denying the Town's request that the ALJ recuse herself from this case. The underlying charge, filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) alleges that a Town employee was issued a counseling memorandum because she attended a PERB proceeding pursuant to subpoena issued by an attorney for CSEA.[1/] The Town's action allegedly violated §209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act). The charge was later amended to allege that the

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[1/]The proceeding was in conjunction with a pending representation case involving the Town. CSEA lost a representation election held on April 24, 1996, but it has filed objections to the election which are currently pending.

employee was given a false and unfavorable evaluation because of her organizing activities on behalf of CSEA and her attendance at the PERB proceeding.

The case was originally scheduled for hearing on February 27, 1996. The Town's representative[2/] requested a two-week adjournment of that date to investigate the amended allegations and to prepare its witnesses in response thereto. The ALJ rescheduled the hearing to March 8, 1996. The ALJ cancelled the March 8 date because of adverse weather conditions in the Buffalo area, which she believed might prevent the Town from traveling from Rochester and CSEA from Albany. The hearing was rescheduled to March 21, 1996, and it was at that hearing that the ALJ denied the Town's request that she recuse herself. A second day of hearing has been scheduled for early June 1996.

The Town alleges that the ALJ's conduct beginning in February 1996 "has brought into question her neutrality and objectivity". The following conduct is cited by the Town in support of its recusal request: the ALJ's suggestion to the Town that it settle the case by rescinding the counseling memorandum; her raising of an issue for hearing that, up to that time, had not been raised by CSEA; her adjournment of the February 27 hearing to a date less than the two weeks from that date as the Town had requested, coupled with a statement that no further

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[2/]Until this appeal, the Town was represented by a nonattorney. Counsel has been substituted after the motion before us was filed.

adjournments would be granted; and her weather-related adjournment of the March 8 hearing at CSEA's request.

CSEA argues in response to the motion that we should not allow an interlocutory appeal because the circumstances do not warrant any deviation from our customary practice to deny such requests. It argues that the Town's motion is "frivolous" and intended only to "protract the improper practice case". CSEA argues that the ALJ's statements and rulings do not evidence any favoritism towards CSEA or bias against the Town and do not prevent the Town from having a fair hearing with a decision on the record facts and prevailing law.

Permission to appeal from the ALJ's ruling is by permission only pursuant to §204.7(h)(2) of our Rules of Procedure (Rules). We have held repeatedly that we will not grant permission for such appeals except in extraordinary circumstances.[3/] In State of New York (Bruns),[4/] we held specifically that an interlocutory appeal from an ALJ's declination to recuse will be permitted only if the allegations would require disqualification of the ALJ. The allegations made to us here do not set forth any basis upon which it must be concluded either that a fair decision cannot be reached or that there is any per se basis presented for recusal. The Town's bias allegations are substantially similar to the allegations raised in State of New York (Bruns). There,

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[3/]See, e.g., Greenburgh No. 11 Union Free Sch. Dist., 28 PERB ¶3034 (1995).

[4/]25 PERB ¶3007 (1992).

too, the alleged bias was premised upon the ALJ's rulings and conduct in processing the charge. We denied permission to appeal in State of New York (Bruns) on the ground that the allegations were not of a type requiring the ALJ's disqualification and we reach the same conclusion here. Our denial of the Town's motion is without prejudice to its right to file exceptions to the ALJ's decision pursuant to §204.10 of the Rules.

DATED: May 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

- and -

CASE NO. C-4496

WEEDSPORT CENTRAL SCHOOL DISTRICT,

Employer.

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

MATTHEW R. FLETCHER, ESQ. for Employer.

BOARD DECISION AND ORDER

On January 3, 1996, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Weedsport Central School District.

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating was appropriate:

Included: School Bus Driver, Custodian, Building Maintenance Helper and Building Maintenance Person.

Excluded: Head Bus Driver, Head Building Maintenance Person and all other employees of the District.

Pursuant to that agreement, a secret-ballot election was held on April 29, 1996, at which eight ballots were cast in favor of representation by the petitioner and twelve ballots were cast against representation by the petitioner.[1/]

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

Dated: Albany, New York,
May 15, 1996

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

1/ One person, who was not on the list of eligible voters, cast a challenged ballot. There are 20 employees in the stipulated unit.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-4460

VILLAGE OF PATCHOGUE,

Employer,

-and-

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

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the

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

Unit: Included: All part-time Constables and part-time Code Enforcement Officers in the Village of Patchogue.

Excluded: All others.

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

DATED: May 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE POLICE SUPERVISORS ASSOCIATION, IUPA, LOCAL 93, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4502

STATE OF NEW YORK (DIVISION OF STATE POLICE),

Employer,

-and-

POLICE BENEVOLENT ASSOCIATION OF THE NEW YORK STATE TROOPERS, INC.,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Police Benevolent Association of the New York State Troopers, Inc. 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 members of the Division of State Police in the following titles: Major, Captain, Lieutenant, Technical Lieutenant, Station Commander, Sergeant, Technical Sergeant, Zone Sergeant, First Sergeant, Chief Technical Sergeant and Staff Sergeant.

Excluded: All other employees of the Division.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Police Benevolent Association of the New York State Troopers, Inc. 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 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE TROOPERS ASSOCIATION, IUPA, LOCAL 81, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4513

STATE OF NEW YORK (DIVISION OF STATE POLICE),

Employer,

-and-

POLICE BENEVOLENT ASSOCIATION OF THE NEW YORK STATE TROOPERS, INC.,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Police Benevolent Association of the New York State Troopers, Inc. 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: Troopers.

Excluded: All other employees of the Division.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Police Benevolent Association of the New York State Troopers, Inc. 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 15, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

#6A-5/15/96

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD
80 WOLF ROAD
ALBANY, NEW YORK 12205-2604
(518) 457-2690

RICHARD A. CURRERI
DIRECTOR OF CONCILIATION

May 17, 1996

A. Thomas Van Wart II
Old Roaring Brook Road
Mt. Kisco, NY 10549

Dear Mr. Van Wart:

The Board has instructed me to inform you that, at its regular meeting of May 15, 1996, and after review of all correspondence related to your conduct in Town of New Paltz [Koch], PERB Case No. A95-031, it removed your name from PERB's roster of grievance arbitrators. The Board's action is specifically grounded in your continued refusal to issue a decision and award in said case until you receive compensation for services rendered in unrelated assignments. You were advised by my letters to you of February 8 and March 4, 1996 that such conduct was not acceptable, and were asked to render your award by March 25, 1996. You were also advised that failure to do so could result in the action the Board has now taken regarding your panel status.

The Board has further instructed me to remind you that removal from the panel has no bearing upon your existing professional responsibilities, which include issuance of the decision and award in the aforementioned arbitration proceeding.

Very truly yours,

Richard A. Curreri

RAC:jhs
cc: Pauline R. Kinsella
Eric J. Schmertz
Patti Lou Zabawczuk