STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHENANGO FORKS TRANSPORTATION ASSOCIATION, NEA/NY,

Charging Party,

-and-

CASE NO. U-16833

CHENANGO FORKS CENTRAL SCHOOL DISTRICT,

Respondent.

JANET AXELROD, GENERAL COUNSEL NEA/NY, for Charging Party

HOGAN & SARZYNSKI, LLP, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Chenango Forks Central School District (District) to a decision of an Administrative Law Judge (ALJ) finding that the District violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally directed both the president and secretary of the Chenango Forks Transportation Association, NEA/NY (Association) that they were henceforth prohibited from discussing union business on District property.

This charge was originally administratively closed but it was reopened on consent of the District.[1/] A hearing in this case was conducted by the ALJ later on the same day that a

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[1/]The District initially objected to the Association's request that the case be reopened, but it later agreed to open the case.

hearing in another case involving these parties was held.[2/] Both parties were represented at the hearing by nonattorneys without objection by either party.

The ALJ found that the District had always allowed the president and secretary of the Association, both bus drivers, to discuss Association business, without restriction, with each other and other unit employees while on the District's property. As the District's transportation supervisor had unilaterally abolished that practice and had, on April 6, 1995, ordered the Association president to leave District property when not on duty, the ALJ found that the District had violated the Act by preventing employees from the lawful discussion of employment issues while on District property.[3/]

The District's exceptions are taken to procedural issues only. The District argues that the ALJ erred by allowing the Association to reopen the charge because the Association had not filed a second notice of claim pursuant to Education Law §3813 when the case was reopened, by allowing nonattorneys to represent the parties at the hearing in contravention of Judiciary Law, §478 and §484, and by not recusing himself pursuant to the District's motion. The Association is in accord with the ALJ's decision.

[2/]See Chenango Forks Cent. Sch. Dist., 29 PERB ¶4588 (1996). No exceptions have been filed to the ALJ's decision in that case.

[3/]Staten Island Rapid Transit Operating Auth., 28 PERB ¶3080 (1995).

After a review of the record and consideration of the parties' arguments, we affirm the ALJ's decision.[4/]

The District's first exception is denied. The District agreed to reopen the case and it cannot now argue that the reopening was error. By granting its consent to the reopening, the District waived any claim that the reopening should have been denied. Additionally, we do not read Education Law §3813 as requiring a second notice of claim to be filed when a case is reopened without prejudice and with the consent of the school district,[5/] since, by its nature, the reopening of a case can only reactivate the original case, as to which the notice of claim requirement was met.

The District's argument under the second exception focuses on the nonattorney status of not only the Association's representative, but also its own representative. The District's argument is apparently based upon the decision of the Supreme Court, Albany County in Union-Endicott Central School District v. PERB,[6/] in which the Court held that a party's timely objection

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[4/]The District did not file a brief in support of its exceptions.

[5/]The District apparently relies on the holding of the Appellate Division, Third Department in Deposit Cent. Sch. Dist., 214 A.D.2d 288, 28 PERB ¶7013 (3d Dep't 1995). That Court first held that Education Law §3813 is applicable to at least some improper practice charges in Union-Endicott Cent. Sch. Dist. v. PERB, 197 A.D.2d 276, 27 PERB ¶7005 (3d Dep't 1994), motions for leave to appeal denied, 84 N.Y.2d 803, 27 PERB ¶7012 and ¶7013 (1994).

[6/]29 PERB ¶7004 (1996) (appeal pending).

to the representation of another party by a nonattorney at a hearing required discontinuance of the hearing.

At the time the hearing in this case was held, the decision in Union-Endicott had not been rendered and the ALJ proceeded with the hearing in accordance with our twenty-eight-year practice of allowing nonattorneys to represent parties. There was no objection to lay representation raised by the District. Further, while it has been held that a party can object to the nonattorney status of its own representative at an administrative hearing "upon a timely demonstration of prejudice as a result of representation by an ineligible practitioner,"[7/] here, the District has not demonstrated that it was prejudiced by its election to have a nonattorney represent it at the hearing. Indeed, the District has not presented any evidence or argument which sets forth the basis for its claim in this regard. Finding no basis for it, it is, therefore, denied.

The District's third exception is that the ALJ erred when he failed to recuse himself pursuant to the District's motion. PERB's Rules of Procedure, §204.7(h)(1) provide that "except upon a showing of extraordinary circumstances, a motion for recusal shall be made as soon as reasonably possible after the basis for such motion becomes known to the party making it." That rule is itself simply a particularized version of our general policy to

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[7/]Jenkins Covington, N.Y., Inc. v. NYS Dep't of Taxation and Finance, 195 A.D.2d 625, 627 (3d Dep't 1993), motion for leave to appeal denied, 82 N.Y. 2d 664 (1994).

require all motions to be made as soon as reasonably possible.[8/]

The District's motion to the ALJ was made more than five weeks after the close of the hearing and more than two weeks after the receipt of the transcript in the hearing. The motion was based on the ALJ's conduct of the hearing and it should have been made at the hearing or shortly thereafter. The District has offered no reasons, either in its motion or in its exceptions, for the substantial delay in filing its motion. Therefore, we affirm the ALJ's denial of the motion to recuse as untimely made.

In any event, although the District's motion points to several instances during the hearing where the ALJ allegedly engaged in conduct which, the District believes, evidences a bias against the District and which overstepped the bounds of appropriate conduct by an ALJ at a hearing, no transcript references were provided. After our review of the transcript, however, it appears that most, if not all, of the conduct complained about by the District occurred during that part of the hearing which constituted the hearing in the other improper practice charge,[9/] which is not before us and is unrelated to the charge under review. If, as the District alleges, the ALJ's conduct at the hearing was biased against it, then the District would have filed exceptions to the decision in the case that was being heard at the time the allegedly egregious conduct occurred.

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

[9/]Supra, note 2.

It did not file any exceptions in the other case and has filed the exceptions in this case, apparently on the basis that the bias allegedly exhibited by the ALJ in the first case carried over and affected his decision in this case. As noted, the District has not clarified in its exceptions what conduct by the ALJ it found objectionable, nor has the District provided any legal argument in support of this exception. Our review of the transcript does not persuade us that the ALJ was biased against the District or that any bias affected either the findings of fact or conclusions of law. While the ALJ did question a witness, our rules provide that an ALJ has the power to examine witnesses to ensure a clear and complete record.[10/] Such questioning becomes inappropriate only when it becomes "susceptible to an appearance or perception that the ALJ has supported the position of a party",[11/] and that is not the case here. Therefore, even were the recusal motion timely made, we would affirm the ALJ's denial of the motion for the reasons set forth here and in the ALJ's letter response to the motion.

As no exceptions were taken to the ALJ's findings of fact or his conclusions of law, we do not review those facts or conclusions. We hereby deny the District's exceptions and affirm the decision of the ALJ.

[10/]Rules, §204.7(d).

[11/]Canandaigua City Sch. Dist., 27 PERB ¶3046, at 3100 (1994).

IT IS, THEREFORE, ORDERED that the District rescind the directive of the transportation supervisor which prohibits the discussion of union business on school district premises, restore the practice which had existed prior to that date, and sign and post notice in the form attached in all locations in which notices of information for employees in the unit represented by the Association are ordinarily posted.

DATED: September 25, 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 Chenango Forks Transportation Association, NEA/NY (Association) that the Chenango Forks Central School District will:

1. **Rescind the directive of the transportation supervisor which prohibits the discussion of union business on school district premises.**

2. **Restore the practice which had existed prior to that date.**

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

CHENANGO FORKS 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

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

Charging Party,

-and-

CASE NO. U-17227

COUNTY OF MONROE,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (PAMELA BAISLEY 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 by an Administrative Law Judge (ALJ) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Monroe County Local 828, Monroe County Employee Unit (CSEA). After a hearing, the ALJ held that the County violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) by unilaterally upgrading unit employees employed in the physical therapist (PT) and occupational therapist (OT) title series. The ALJ found a violation both as to those employees who remained within CSEA's unit despite their upgrade and those employees whose upgrade

removed them from the unit.[1/] The ALJ held that the upgrades were mandatorily negotiable, that the County had acted unilaterally in making those upgrades, that its unilateral action was not privileged by any compelling need and that the upgrades violated §209-a.1(a) of the Act on a per se basis because the employees received a wage increase as a result.

The County excepts to what it argues was an impermissible expansion of the charge through an amendment granted by the conference ALJ. According to the County, CSEA's charge is and was intended to cover only the twelve employees whose upgrade removed them from the unit. The conference ALJ, however, read the charge to include all employees who were given an upgrade and the hearing ALJ accepted that reading of the charge. On the merits, the County argues that it was not improper for it to upgrade employees because that action was not unilateral, rather it was an exercise of contract right. The County argues that the contract does not restrict its power to allocate positions to salary grade, and the upgrades were consistent with rights necessarily flowing to it from the contractual definition of the bargaining unit, which anticipates the occasional movement of employees both within and without the unit according to their salary grade.

[1/]CSEA represents County employees in grades 16 and below. Of the 24 employees who were upgraded, 12 were upgraded to grade 17 and above.

CSEA argues in response that the County's exceptions are untimely. On the merits, it argues that the scope of the charge was correctly determined by both the conference and hearing ALJs and that the disposition of the charge on the merits was correct on the facts and the law.

Having reviewed the record and considered the parties' arguments, we reverse that part of the ALJ's decision finding the County in violation of the Act.

Preliminarily, we must address the timeliness of the exceptions and the scope of the charge before us.

As to the first of these preliminary issues, the County received the ALJ's decision on May 23, 1996. June 14, 1996 was the last of the fifteen working days available to the County for filing exceptions[2/] and it filed the exceptions by mail that date. The exceptions are, therefore, timely.

As to the second of the preliminary issues, CSEA did not amend its charge at or after the conference and the conference ALJ did not grant an amendment. The conference ALJ's letter to the parties merely confirmed a clarification of the charge made apparent as a result of discussions at the conference. Clarification of issues is a main purpose of a pre-hearing conference[3/] and the conference ALJ committed no error by confirming CSEA's clarification; nor did the hearing ALJ err in

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[2/]Rules of Procedure §204.10(a).

[3/]Rules of Procedure §204.6.

accepting that clarification. CSEA represents that its charge was always intended to cover all employees who received an upgrade, whether or not they were thereby removed from its unit, and the charge as filed is reasonably susceptible to that interpretation. The hearing ALJ committed no error by addressing the charge as filed and clarified.

As to the merits, the County could have violated the Act as alleged only if it had a duty to negotiate the upgrades. Its motive for making the upgrades was only to pay Pts and OTs at a rate competitive in the marketplace so that it might be more successful in attracting and retaining employees in that title series and thereby improve its chances of being able to deliver PT and OT services to its constituency. The removal of certain employees from CSEA's unit was merely a derivative effect of the upgrades, not an object or motive for them. CSEA had already negotiated the pay rates for the salary grades within its unit and there is no allegation or evidence that the County paid those employees who remained in the unit at a rate in excess of the rate negotiated for any salary grade in the unit. The salary rates for employees in grades 17 and above were not subject to negotiation by CSEA as the employees in those grades are not in CSEA's unit. Therefore, the dispositive merits question becomes whether the County's reallocation of unit employees to a higher salary grade was mandatorily negotiable.

In regard to that merits question, the courts in Evans v. Newman[4/] (hereafter Evans), and we in response in County of Tompkins[5/] (hereafter Tompkins), have held that an employer's allocation or reallocation of positions to salary grade are not mandatorily negotiable subjects.

Evans reflects a belief that allocations to salary grade are primarily related to the mission of a government and are tied inherently to the level and quality of a government's service. Our contrary conclusion,[6/] resting upon the effects all allocations to grade have upon an employee's wages, was specifically reversed in Evans. In reversing, the Court noted the close relationship between allocation and classification, the latter a nonmandatory subject of negotiation. The Court further observed that allocation decisions affecting State employees in the classified service are specifically exempt from mandatory negotiation. The Court in Evans read the legislative reports and the memoranda supporting that exemption broadly and concluded that the rationale expressed therein was not intended to apply only to State employees. Rather, the Court in Evans concluded that the legislature had articulated a general policy against the required negotiation of allocation decisions to avoid "the disruptions of the delicate relationships existing among job

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[4/]71 A.D.2d 240, 12 PERB ¶7022 (3d Dep't 1979), aff'd, 49 N.Y.2d 904, 13 PERB ¶7004 (1980).

[5/]County of Tompkins, 15 PERB ¶3092 (1982).

[6/]12 PERB ¶3075 (1979).

titles which would result from fluctuations inherent in collective bargaining".[7/]

To be sure, some of the Court's rationale in Evans is unique to the unified court system and legislation applicable only to it. It is clear, however, that Evans is not restricted to employees of the judiciary. To the contrary, the Board in Tompkins read the holding in Evans as one "intended as a general statement of the law whose applicability was not restricted to the parties to that case".[8/] On that basis, the Board in Tompkins held that "allocation and reallocation are an essential aspect of the level and quality of service to be provided a public employer"[9/] and that "allocations to salary grade are not mandatory subjects of negotiation".[10/]

There is nothing in Evans or Tompkins, also involving employees of a county government, which distinguishes allocation from reallocation, nor is there anything in those decisions suggesting that the negotiability of allocation decisions might vary, as the ALJ held here, according to either the identity or status of the body or officer making the allocation[11/] or the

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[7/]71 A.D.2d at 245, 12 PERB at 7045.

[8/]15 PERB at 3140.

[9/]Id.

[10/]Id.

[11/]Neither Evans nor Tompkins involved an allocation made by a civil service commission. Moreover, the County's legislative
(Footnote cont'd on next page)

effects resulting from an allocation. In that latter respect, some additional comment is warranted regarding the removal of some employees from the unit, as that appears to be a major issue for both parties.

The removal of certain employees from the unit is not a factor in assessing the negotiability of the County's reallocations. The removal of some employees from the unit was effected by the parties' unit definition. Our analysis is no different than if a bargaining unit were to be defined by job title. If an employee were hired into a nonunit title, or a unit employee were to be promoted to a nonunit title, the hiring or promotion decision would not become mandatorily negotiable simply because a consequence of the hiring or promotion was to determine the employee's unit status. As the County argues persuasively, these parties necessarily contemplated through their unit definition the possibility, if not the certainty, that employees would enter and leave the unit periodically through the exercise of some managerial prerogative, whether it be hiring, promotion, or reallocation. It is the unit definition in those instances which determines any employee's unit status, not the hiring, promotion or reallocation.

(Footnote 11 cont'd)
body appears to have the power to allocate positions to salary grade under County Law §§204 & 205. Indeed, if the reallocations were beyond the County legislature's power, review of its action would not lie with PERB, for any statutory duty to negotiate assumes and is dependent upon the power to act.

In regard to that unit definition, nothing in this decision should be construed to mean that the former unit positions which were reallocated to salary grades 17 and above should not be appropriately placed into CSEA's unit. A unit placement petition, which may be filed at any time, would be an appropriate procedure for determination of that question. For purposes of this decision, however, the unit status of any particular employee is simply not material to a determination regarding the negotiability of a decision to reallocate positions to salary grade.

In conclusion, the County did not violate its duty to bargain because the reallocations were not mandatorily negotiable subjects under Evans and we are bound by the Court of Appeals' decision in that case. The wage increases extended to employees were merely an inherent by-product of the implementation of the decision about that nonmandatory subject. The salary increases paid were at a rate which was either negotiated by CSEA or one which was not subject to mandatory negotiation by CSEA at any relevant time. Neither the payment of the wage increases stemming automatically from the reallocations nor the removal of some employees from CSEA's unit violated §209-a.1(a) on a per se basis and those actions were not improperly motivated.

For the reasons set forth above, the ALJ's decision is reversed to the extent it holds the County in violation of the Act.

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

DATED: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF BUCHANAN,

Charging Party,

-and-

CASE NO. U-17427

BUCHANAN POLICE ASSOCIATION,

Respondent.

RAINS & POGREBIN, P.C. (JESSICA S. WEINSTEIN of counsel), for Charging Party

THOMAS P. HALLEY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Buchanan Police Association (Association) to a decision of an Administrative Law Judge (ALJ) finding, as charged by the Village of Buchanan (Village), that the Association violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it submitted a demand for a nonmandatory subject of bargaining to compulsory interest arbitration.

The Village and the Association were parties to a collective bargaining agreement for the period June 1, 1991 through May 31, 1994. After the parties engaged in negotiations and mediation, the Association filed a petition for compulsory interest arbitration on December 13, 1995. Included in the Association's petition was its demand to "amend Article 3, Section B, to

reflect that the officer called-in as a 'floater' can be floated for only full (four day) tours of duty."[1/]

The Village asserted that the demand was nonmandatory because it interfered with its right to determine staffing needs. The ALJ concurred, finding that the demand required a floater to be on duty a minimum of four days, regardless of the Village's need for a floater, and, thus, it interfered with the Village's right to determine the number of police officers on duty at a given time.

The Association excepts to the ALJ's decision, arguing that the ALJ erred by categorizing the demand as a manpower demand when it is a demand relating to call-in procedures. The Village supports the ALJ's decision.

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

[1/]Article 3, Section B of the parties' expired agreement states:

> When the department manpower reaches five (5) rotating police officers (including Sergeant), the police officer with the least seniority with the Buchanan Police Department shall be utilized as a "floater" to fill voids in the rotating schedule.
>
> (1) The "floater" shall be given at least twenty-four (24) hours notice on change of scheduled working tours, unless he/she consents to such change on less notice.
>
> (2) In the event that such "floater" works more than eight (8) consecutive hours within a twenty-four (24) hour period, said "floater" shall be entitled to overtime pay for hours worked in excess of eight (8) hours at the applicable rate.

While the Association characterizes its demand as setting forth the minimum time period during which a "floater" will work, likening it to a demand for guaranteed minimum hours of overtime, in its brief to the ALJ it asserted that the

> proposal would provide that in the event a floater is used to fill voids in the rotating schedule, he would not only be given the 24 hours notice and the overtime, as presently set forth in the contract, but he would also be guaranteed a full four-day tour of duty.

Limited to and based upon the foregoing, the ALJ correctly analyzed the demand as one which would require the Village to assign a "floater" to a minimum of four days work, whether or not the staffing shortage which prompted the "floater" to be called in to work in the first place still existed on the second, third and fourth days of the tour. Such a demand interferes with the Village's management prerogative to determine its staffing needs and the deployment of its personnel.[2/] While in general demands for call-in procedures are mandatory, as are demands for guaranteed pay for call-ins, the Association's demand in this matter as defined by it is neither. This demand restricts the Village's right to determine the number of officers to be on duty for any given tour.[3/] The Village is not required to negotiate

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[2/]Troy Uniformed Firefighters Ass'n, Local 2304, 10 PERB ¶3015 (1977); Int'l Ass'n of Firefighters of the City of Newburgh, Local 589, 10 PERB ¶3001 (1977).

[3/]Patrolman's Benevolent Ass'n of Newburgh, New York, Inc., 18 PERB ¶3065 (1985), conf'd on other grounds, 19 PERB ¶7005 (Sup. Ct. Albany Co. 1986); Local 589, Int'l Ass'n of Fire Fighters, AFL-CIO, 16 PERB ¶3030 (1983); Hudson Falls Permanent Fire-Fighters, Local 2730, 14 PERB ¶3021 (1981).

for a minimum staffing level on any given day irrespective of its assessment of its staffing needs.

Based on the foregoing, we find that the Association violated §209-a.2(b) of the Act by submitting to compulsory arbitration the demand above found to be a nonmandatory subject of negotiation. The Association's exceptions are, therefore, denied and the decision of the ALJ is affirmed. The Association is, therefore, ordered to withdraw the demand from arbitration.

SO ORDERED.

DATED: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DUNKIRK SUPERVISORS' ASSOCIATION,

Petitioner,

-and- **CASE NO. C-4458**

DUNKIRK CITY SCHOOL DISTRICT,

Employer.

HODGSON, RUSS, ANDREWS, WOODS & GOODYEAR, LLP (JEFFREY F. SWIATEK of counsel), for Employer

BOARD DECISION AND ORDER

This case[1/] comes to us on exceptions filed by the Dunkirk City School District (District) to a decision by an Administrative Law Judge (ALJ) as adopted and confirmed by the Director of Public Employment Practices and Representation (Director)[2/] on a petition filed by the Dunkirk Supervisors' Association (Association).

The Association petitioned to represent two employees: the District's School Business Manager/Treasurer and its Supervisor of Buildings, Grounds and Transportation (Supervisor BG&T).

[1/]This case was originally consolidated with the District's application for designation of its School Business Manager/Treasurer as managerial or confidential (E-2016). The confidential designation granted as to that title pursuant to that application was not appealed.

[2/]The decision was issued by both the ALJ and the Director in response to a decision by Supreme Court in Union-Endicott Cent. Sch. Dist. v. PERB, 29 PERB ¶7004 (Sup. Ct. Alb. Co. March 1996) (appeal pending). In relevant part, the Court held that a decision in a representation case must be made by the person who conducted the hearing, in this case, the ALJ.

After designating the former position confidential and, therefore, ineligible for representation in any unit, the ALJ/Director determined that a unit consisting of only the Supervisor BG&T could not be created because a unit of one employee is per se inappropriate.[3/] Faced with a question regarding the uniting of the Supervisor BG&T, the ALJ/Director determined that the title was most appropriately added to an existing unit consisting of the District's administrators, a unit which is represented by the Dunkirk Administrators' Association (DAA).[4/] The DAA had moved to intervene in the representation proceeding, but it withdrew its motion after the District opposed it. DAA has stated, however, that it does not have any objection to the inclusion of the Supervisor BG&T in its unit.

The District excepts to the inclusion of the Supervisor BG&T in DAA's unit. It argues that the Supervisor BG&T does not have a community of interest with the administrators in DAA's unit. The District emphasizes that the Supervisor BG&T, unlike the administrators, does not have any involvement with instruction; that he has a much more limited supervisory responsibility over District employees than do the administrators; that he does not

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[3/]Auburn Indus. Dev. Auth., 15 PERB ¶3039 (1982).

[4/]In addition to the DAA unit, there is in the District a teachers unit and a noninstructional unit. The ALJ/Director specifically found that it would be inappropriate to place the Supervisor BG&T into the noninstructional unit because the Supervisor BG&T supervises many of the employees in that unit. No specific rationale was given for the exclusion of the Supervisor BG&T from the teachers unit.

have any employment responsibilities similar to the administrators, except as both he and the administrators are responsible for the physical maintenance of the District's property; that he lacks education or certification qualifications in any way similar to those required of the administrators as professional educators; and that he has a greatly dissimilar salary and benefit package. These differences, the District argues, establish the absence of any community of interest between the Supervisor BG&T and the administrators and the substantial likelihood of a conflict in negotiations were the Supervisor BG&T to be added to DAA's unit, either of which requires that the Supervisor BG&T not be added to that unit, even if that leaves the position temporarily unrepresented. In the latter regard, the District emphasizes that the record does not establish that the Supervisor BG&T is the only supervisory employee in the District who is eligible for representation. Therefore, the ALJ/Director's conclusion that the Supervisor BG&T would be or might be unrepresented if not added to DAA's unit is not supported by the record. No response to the District's exceptions has been filed.[5/]

[5/]The Association, by letter we received before the exceptions were received, withdrew from the proceeding, stating that it would no longer represent the parties (i.e., the two individual employees). We do not consider this letter to have been intended as a request to withdraw the petition itself, but as the Association's withdrawal from its status as representative of the employees' interests, a status it apparently considered to be no longer necessary or appropriate given the ALJ/Director decision.

Having reviewed the record and considered the exceptions, we remand the case for further proceedings.

The ALJ/Director correctly reached the uniting of the Supervisor BG&T, there being a pending representation question and no issue regarding his status as a covered public employee. They were also justified in expressing a concern about a possible deprivation of any covered employee's representation rights which might be caused by a uniting determination. Although we also believe that deprivation of a covered employee's statutory representation rights is a factor that may be considered in making a unit determination, this record does not permit a determination as to whether the Supervisor BG&T will be denied representation if not added to DAA's unit because we do not have sufficient information regarding the nature and extent of the Supervisor BG&T's supervisory responsibilities and the nature and extent of the District's unrepresented supervisory workforce, if any. As such, it is appropriate to remand the case to the ALJ/Director to enable them to investigate these issues. If there are unrepresented supervisors currently employed by the District, the ALJ/Director should assess the appropriateness of a unit consisting of nonadministrative supervisory personnel. Adding the Supervisor BG&T to DAA's unit or some other existing unit in the District might not be most appropriate in that circumstance. If, however, the Supervisor BG&T is the only currently unrepresented supervisory employee employed by the District, then we should know that as a record fact, in addition

to the nature and extent of the Supervisor BG&T's supervisory responsibilities vis-a-vis other District employees, before deciding which, if any, of the District's existing units might appropriately include the Supervisor BG&T.

For the reasons set forth above, the case is remanded to the ALJ/Director for further investigation consistent with our decision herein and for such decision as is thereafter necessary and appropriate. SO ORDERED.

DATED: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GREECE SUPPORT SERVICES EMPLOYEES ASSOCIATION, NEA/NY,

Charging Party,

-and-

CASE NO. U-17214

GREECE CENTRAL SCHOOL DISTRICT,

Respondent.

HAROLD G. BEYER, JR., ESQ., for Charging Party

WAYNE A. VANDER BYL, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Greece Central School District (District) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Greece Support Services Employees Association, NEA/NY (Association).

On a stipulated record, the ALJ held that the District violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it "failed to pay salary increments in July 1995", after expiration of the parties' July 1, 1992 through June 30, 1995 collective bargaining agreement. The ALJ held that the parties' expired contract required the District to recalculate annually the wage rates for each of the several steps in the parties' salary schedules using a cost-of-living (COL) formula. By not recalculating the 1994-95 wage rates effective July 1, 1995, on a new 1995-96 salary schedule, the District,

according to the ALJ, both unilaterally changed a mandatory subject of negotiation and discontinued a term of the expired agreement.

The District argues in its exceptions that the ALJ was mistaken as to the nature of the parties' wage system. The District argues that although it must, and did, pay "salary increments" by advancing employees one step on schedule annually, the COL calculation was a formula only for the calculation of the specific wage rates assigned to the steps on the salary schedules covering the term of the 1992-95 contract. By creating salary schedules for the three years covered by the contract, and by adjusting those schedules through application of the COL calculation, the District argues that it satisfied entirely all of its obligations under the Act by paying on step at the rate prevailing under the 1994-95 salary schedule.

The Association argues in its response that the ALJ was not mistaken as to the facts or the law, that her decision is correct and that it should be affirmed.

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

Our decision in Waterford-Halfmoon Union Free School District[1/] (hereafter Waterford-Halfmoon) is dispositive of this case. There, too, the parties had both a wage system consisting of multi-step salary schedules based on years of service and a

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[1/]27 PERB ¶3070 (1994).

formula for the calculation of the dollar amounts assigned to each of the steps on those salary schedules. We held in Waterford-Halfmoon, in relevant part, that the employer did not violate the Act when it failed and refused after expiration of the collective bargaining agreement to create new salary schedules which adjusted the dollar amounts on each salary step through the use of a formula. It was our conclusion in Waterford-Halfmoon that the parties intended the salary formula contained in their expired agreement to be used to calculate the dollar amounts assigned to the step schedule only for those salary schedules covering the term of their collective bargaining agreement and that the record did not establish that they intended to require the continuing use of the formula to refashion new salary schedules containing ever increasing step rates after contract expiration. There is nothing in the record in this case to evidence that these parties intended a result different from that in Waterford-Halfmoon as to the continuing use of the COL calculation.

The ALJ held that the District had to increase the dollar amounts associated with the salary steps by applying the COL formula to create new salary schedules for 1995-96 and thereafter. As we pointed out in Waterford-Halfmoon, however, a formula which is used simply to calculate the dollar amounts assigned to any particular step on a salary schedule is properly viewed no differently than if the parties had set those amounts in advance for the years covered by their contract by a fixed

percentage increase or a flat wage increase. Unit employees would not be entitled upon expiration of the contract to an increase in the wage or salary rate they were paid immediately prior to expiration of the contract by an amount equal to the salary or wage increase for the last year of the contract because it would be clear in that circumstance that the increases in rate were intended to be granted during the term of the contract only. We find nothing here evidencing an intent to require the District after contract expiration to increase annually the rates assigned to the steps contained on the 1994-95 salary schedule.

Waterford-Halfmoon necessitates a determination as to what the parties reasonably intended by their agreement to any particular term of their contract. The absence of language specifically terminating an obligation is not dispositive. As in Waterford-Halfmoon, the most reasonable interpretation of the record in this case is that the COL formula was intended to be a device to fix the dollar amounts of each step for the salary schedules applicable for the years covered by the parties' contract. The parties' contract calls for the creation by July 1, 1993, of salary schedules for only the three years covered by the parties' agreement. The COL calculation is then used to adjust those particular schedules. As the District argues, linking the COL calculation to specific salary schedules evidences that the parties intended that the District would not be required to create a new salary schedule for 1995-96 or any year thereafter. Rather, such new salary schedules, as in

Waterford-Halfmoon, would be the product of negotiations for a successor collective bargaining agreement. As the parties have stipulated that there is no relevant bargaining history, and as the language of the agreement itself, reasonably construed under our analysis in Waterford-Halfmoon, does not contemplate the required creation of new salary schedules after expiration of the 1994-95 schedule, the District's refusal to create a new salary schedule for 1995-96, or any year thereafter, by using the COL formula in the expired agreement did not violate the Act. By advancing employees on step annually and paying them at the wage rates fixed by the 1994-95 salary schedule for the steps to which those employees advanced, the District continued unchanged the terms and conditions of the unit employees' employment and the terms of the parties' agreement. Therefore, there was no violation of §209-a.1(d) or (e) of the Act.

For the reasons set forth above, the District's exceptions are granted and the ALJ's decision is reversed.

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

DATED: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MARIETTA AMBRA,

Charging Party,

-and-

CASE NO. U-17592

ASSOCIATION OF MUNICIPAL EMPLOYEES, INC.,

Respondent,

-and-

COUNTY OF SUFFOLK,

Employer.

MARIETTA AMBRA, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Marietta Ambra to a decision by the Director of Public Employment Practices and Representation (Director) dismissing, as deficient, her charge against the Association of Municipal Employees, Inc. (AME). Ambra alleges that AME violated §209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) by not representing her in conjunction with disciplinary charges which had been brought against her by her employer, the County of Suffolk (County). Ambra is a nurse and she was charged by the County with improperly administering medications to patients and falsifying the recording of those medications.

The Director dismissed the charge as deficient upon his initial review, concluding that the allegations in the charge as amended established at most an initial difference of opinion between Ambra and AME regarding the seriousness of the disciplinary charges against her. Noting that AME's representative offered to provide Ambra with an attorney, although its qualified offer was not what Ambra wanted, that she declined to follow certain of AME's advice because she disagreed with it, and that she elected to retain private counsel to assist her because she did not have confidence in AME's representation, the Director concluded that the allegations did not evidence the arbitrary, discriminatory or bad faith conduct necessary to establish a breach of AME's duty of fair representation. According to the Director, even if AME's representatives initially miscalculated the seriousness of the disciplinary charges and otherwise erred in giving Ambra advice, that could not constitute a violation of the Act as a matter of law.

Ambra's exceptions reiterate the facts alleged to the Director and restate her belief that AME did not represent her as it was required to do under the Act. Neither AME nor the County has responded to the exceptions.

Having reviewed the record and considered Ambra's exceptions, we remand the case to the Director for further processing.

Ambra's exceptions reflect in one respect a misunderstanding of the charge. The only arguable violations of the Act involve

AME, not the County. It is quite clear, however, from parts of both the charge and the exceptions that Ambra wants us to clear her of the disciplinary charges and any other related investigations or consequences stemming from those disciplinary charges. However, we have no jurisdiction under this charge to consider those issues. Those are issues for review in other forums, if at all.

As to the allegations against AME, we disagree with the Director's determination that Ambra's charge fails as a matter of law to set forth an arguable breach of AME's statutory duty of fair representation. Ambra's charge, fairly read with the benefit of all reasonable inferences, alleges that AME denied her an attorney's representation until shortly before a hearing was to be held on the disciplinary charges. According to Ambra, AME's representative allegedly told her that an attorney would only be provided to her "one-half to one-quarter of an hour" before the disciplinary hearing. That denial of representation was allegedly continued and exacerbated when AME's representative advised her to plead guilty to the charges and then further told her to prepare her own defense by contacting any coworkers who could attest to any problems they might have had with the County's medication system, even though Ambra allegedly told AME's representative that that would not be a good idea, and, she alleges, she suffered employment consequences at the County's hands for doing as AME advised her.

At this stage of the proceeding, we do not know the totality of circumstances surrounding the statements alleged to have been made by AME's representatives. We have only Ambra's allegations without benefit of an answer or hearing which would place those statements, assuming they were made, in context. Standing alone and unexplained, the statements Ambra attributes to AME evidence conduct which we cannot say as a matter of law could not establish a breach of the duty of fair representation.

We do not suggest that AME violated its duty of fair representation, but hold only that there are sufficient allegations of fact set forth in Ambra's charge to require that it be processed further.

For the reasons set forth above, the Director's dismissal of the charge is reversed and the case is remanded to the Director for further processing consistent with this decision. SO ORDERED.

DATED: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-14226

UNION-ENDICOTT CENTRAL SCHOOL DISTRICT,

Respondent.

PETER D. BLOOD, for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the Union-Endicott Maintenance Workers Association/NYSUT/AFT/AFL-CIO (Association) and the Union-Endicott Central School District (District). After a hearing, the Administrative Law Judge (ALJ) dismissed the Association's charge which alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally contracted with a private company to have ballasts and lamps in existing fluorescent lighting fixtures replaced, a type of work previously done exclusively by the Association's unit employees. After rejecting the District's several

affirmative defenses,[1/] the ALJ held that employees in the Association's unit did not have exclusivity over the work in question.

Upon the testimony of Donald Siebert, the District's Director of Building and Grounds, the ALJ found that both unit employees and the employees of private contractors had previously replaced ballasts and lamps in lighting fixtures. The ALJ concluded that unit employees had done that work only on an as-needed basis as part of regular, day-to-day electrical maintenance or repair activities. The work in question involved the replacement of thousands of ballasts and lamps in existing fluorescent lighting fixtures with high efficiency, energy-saving lamps and electronic ballasts over several months by the contractor under a rebate program offered by the New York State Electric and Gas Corporation (NYSEG). The ALJ concluded that the work under the rebate program, although never done in the District before, was most closely analogous to the work done by private contractors previously in conjunction with major electrical projects. As the Association did not have exclusivity

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[1/]The District alleged that the Association had not satisfied the notice of claim requirements under Education Law §3813 or General Municipal Law §50-e; that we are without jurisdiction over the charge because it "arises out of" the parties' collective bargaining agreement; that the charge was untimely filed; that the Association had waived by agreement or inaction any right to negotiate the decision to subcontract; that unit employees were unqualified to do the work performed by the subcontractor's employees; and that the parties had negotiated and reached a verbal agreement regarding the subcontracting.

over the work done by the contractor under the rebate program, the ALJ held that the District's decision to subcontract the work subject to the rebate program was not mandatorily negotiable and, therefore, its unilateral subcontract of that work did not violate the Act as alleged.

The Association excepts to the ALJ's exclusivity determination. The District cross-excepts to the ALJ's dismissal of some, but not all, of the affirmative defenses previously noted and also to the ALJ's failure to find that the Association's unit employees do not have exclusivity over any electrical work of any type performed under any circumstances.

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

The analysis turns upon the Association's exclusivity over the work in question. On that issue, the record shows that unit employees have done a wide variety of electrical work over time, including ballast and lamp replacement in existing fluorescent lighting fixtures. The District, however, has also used electrical contractors to perform a wide variety of electrical jobs. The contractors were retained principally in conjunction with major construction projects, when the particular electrical job required specialized knowledge, skills or equipment not possessed by the employees in the Association's unit, or when the electrical work was of some emergency nature or time was of the essence. The replacement of ballasts and lamps called for under

the rebate program, however, did not require any special skills, knowledge or equipment and it was not of an emergency nature. Although time was a factor because the rebate program was to be completed within a set period, there is nothing in the record establishing that unit employees could not have completed the project within the required timeframe, especially as extended. Moreover, Siebert freely admitted that this was work which unit employees were fully qualified to do and had done on many occasions in the past.

As most directly relevant to our analysis of the exclusivity question, the record shows that the District has used private contractors for various electrical lighting projects. These projects, however, called for the installation of new lighting fixtures and/or the removal and reinstallation of existing fixtures elsewhere in the District's buildings in conjunction with new construction or rehabilitation or renovation projects. We find nothing in this record establishing that a contractor was ever retained in the past simply to perform some minor electrical work on an existing lighting fixture which was not to be disconnected and relocated or replaced. Siebert's testimony is quite generalized and, as the ALJ found, at points seemingly inconsistent, and as best we can determine from the record, his articulated belief that one or more contractors had occasionally replaced a defective ballast in an existing fixture which was not to be moved as part of some larger electrical project is not

supported by the documentary evidence. It may be, as Siebert's testimony suggests, that in wiring a new fixture or in removing an existing fixture and rewiring it elsewhere, lamps and ballasts occasionally may have been removed and replaced by a contractor. We may even assume, notwithstanding our preceding statement regarding Siebert's testimony, that on a few occasions a contractor may have replaced a defective lamp or ballast in an existing lighting fixture. Even upon that testimony, and with that assumption, the tasks were done by a contractor, not as an end unto themselves, but simply because, as the ALJ observed, they were necessary to and an integral part of the doing of the broader job which involved a number of different, discrete tasks.

We have held that a union does not lose exclusivity over the work of its unit employees simply because one or more nonunit employees has done that same work as an incidental aspect of performing a broader function. For example, in Village of Malverne,[2/] the fact that tree leaves were picked up by nonunit employees in conjunction with and ancillary to the performance of their jobs, such as cleaning parks or drains, did not breach the union's exclusivity over the work involved in collecting and removing leaves during an annual autumn leaf pickup program. Similarly, in County of Onondaga,[3/] a contractor's performance of a laboratory test for syphilis, which was done incidental to a

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[2/]28 PERB ¶3042 (1995).

[3/]27 PERB ¶3048 (1994).

battery of other tests, which had not been done by unit employees, was held not to breach a union's exclusivity over the work associated with syphilis testing.

On this record, whatever ballast and lamp replacement any contractors have done for this District in the past was merely a minor and incidental aspect of a broader electrical project. As the ALJ found, and the record confirms, there is no time that an electrical contractor has been retained by this District just for the purpose of replacing ballasts and lamps in existing lighting fixtures. As in Malverne and Onondaga, the occasional and incidental performance of the tasks in issue under this charge by electrical contractors in the past as a necessary part of the completion of the project for which those contractors were retained did not breach the exclusivity the Association otherwise had over the performance of that work.

Our conclusion that the work done by electrical contractors in the past did not breach the Association's exclusivity over ballast and lamp replacement in existing fixtures still leaves us with the question, however, as to whether the Association has established exclusivity over the work done under the rebate program. We turn now to that question.

In concluding that the Association did not have exclusivity over the work done under the rebate program, the ALJ considered the circumstances under which the Association's unit employees had done the work and found that they had not done the work in

circumstances comparable to that involved under the rebate program. We agree with the ALJ that the circumstances under which work is done can be relevant to an exclusivity determination. Indeed, in Malverne and Onondaga, we specifically looked to the circumstances in which nonunit employees had done the work which had allegedly been transferred improperly. If we are willing to examine work performance circumstances for purposes of determining whether a union's exclusivity has been preserved, the circumstances of work performance must be equally relevant in assessing whether exclusivity over certain work has ever been established. Although accepting the ALJ's articulation of this principle, we disagree with her application of it.

The ALJ held that the most the record would support would be an exclusivity by the Association's unit employees over ballast and lamp replacement when that work was done on an as-needed basis as part of normal maintenance or repair activities[4/] and that the contractor's work was not of that type. The circumstance the ALJ used in assessing the Association's exclusivity clearly reduces itself to the number of ballasts and lamps to be replaced. That is not reasonable in our opinion because the circumstance the ALJ used in denying the Association exclusivity over this work has nothing to do with the nature of the tasks performed.

[4/]The ALJ noted specifically, however, that she was not deciding whether and to what extent the Association had established and maintained exclusivity within even that perimeter of unit work.

We have held that a discernible boundary[5/] to unit work cannot and should not be based upon factors which are not related to the performance of the job. For example, in City of Buffalo,[6/] we rejected the union's argument that its unit work should be defined in reference to geographic location because that factor was wholly unrelated to the nature of the tasks performed. Just as geographic location was irrelevant to exclusivity in City of Buffalo because it was not task related, so, too, is the number of lamps and ballasts replaced unrelated to task. We cannot in this case use as a factor to defeat the Association's exclusivity a factor which we have declined to use to preserve a union's exclusivity. What was irrelevant in City of Buffalo cannot become relevant or dispositive here.

The work required to replace ballasts and lamps in existing lighting fixtures, and the skills necessary therefor, are precisely the same regardless of the number of fixtures involved. The only difference between what the Association's unit employees did in the past and what the contractor did under the rebate program is the number of ballasts and lamps replaced. Rather than a few on any given day, there were thousands to be replaced over a period of several months. We do not find persuasive an

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[5/]The creation of a discernible boundary can permit a union to retain exclusivity over work although it would not have exclusivity without that boundary.

[6/]24 PERB ¶3043 (1991). Accord County of Erie, 28 PERB ¶3053 (1995).

exclusivity determination which rests upon nothing more than the number of ballasts and lamps to be replaced. A project requiring nothing of a contractor but the doing of more of exactly the same which unit employees have done historically is no basis, in our opinion, for a determination that a union lacks exclusivity over the work of that project.

The ALJ's conclusion that the work under the rebate program was somehow different enough from that done by the unit employees to deny the Association exclusivity over that work also fails to consider the purpose of that program as it relates to the work done in the past by unit employees and contractors. The ballast and lamp replacement done in the past by unit employees was for that express purpose only. Replacement was the end goal of their work. That was not so for any contractor, to whatever limited extent their work necessitated the removal of a lamp or ballast. Contractors were not retained just for the purpose of replacing a lamp or a ballast. They were retained for different reasons and their limited work on a lamp or ballast was merely incidental to the completion of that other work. The purpose of the rebate program was simply ballast and lamp replacement and that was identical to the purpose of the work done by the unit employees, but not the contractors.

Our conclusion that the Association had exclusivity over the work done by the contractor on the rebate program would be the same even if we were to use the ALJ's approach. If, as the ALJ

held, "as needed" is the circumstance defining the Association's exclusivity, then the District's determination that its existing ballasts and lamps "needed" replacement because they were inefficient satisfied that criterion. The work done under the rebate program also fits that part of the ALJ's analysis restricting the Association's exclusivity to maintenance work on lighting fixtures. The concept of maintenance is certainly broad enough, we believe, to include not only the replacement of broken parts within an existing fixture, but preventive maintenance on that fixture as necessary or appropriate, in the District's estimation, to avoid the expenditure of resources in the future. If the District, for example, wanted for whatever reason to replace the functioning lamps and ballasts in a single existing fixture or all of the lamps and ballasts in the existing fixtures in a single room, it is inconceivable to us that that work could not be claimed by the Association's unit employees exclusively. We are again, therefore, asked to deny the Association exclusivity simply on the ground that there were not a few lamps and ballasts which the District wanted to replace, but a great many. As stated previously, we do not consider it reasonable to base an exclusivity determination solely and simply upon the number of tasks to be performed where the tasks themselves and the qualifications necessary to their performance are identical whether the work is done by a contractor or a unit employee.

Our reversal of the ALJ's exclusivity determination necessitates our consideration of the District's cross-exceptions.

In its cross-exceptions, the District argues that the ALJ erred in dismissing its notice of claim, timeliness and waiver defenses. We affirm the dismissal of each.

As to the notice of claim and timeliness defenses, the District argues that the refusal to bargain charge accrued for purposes of both Education Law §3813 and the Act in September 1992, not, as the ALJ held, in mid-November 1992 when the District's board of education issued a resolution accepting the contractor's bid and awarding it a contract. The District's accrual argument is based upon the public meetings held by the District's board of education during which the rebate project was discussed and approved. The District's argument, however, fails as a matter of law. In Odessa-Montour Central School District v. PERB,[7/] the Appellate Division, Third Department, held that a board of education's formal resolution awarding a contract to a private contractor was a lawful legislative action which could not give rise to a refusal to bargain charge. According to the Court, executive implementation of that legislative action was necessary to trigger a refusal to bargain charge, which implementation occurred when the subcontract was executed by the superintendent or the superintendent's agent.

[7/] ___ A.D. ___, 29 PERB ¶7009 (3d Dep't 1996).

The charge and notice of claim are both timely even when accrual is measured from mid-November 1992. Under Odessa-Montour, the accrual of this improper practice charge was even later than the mid-November 1992 date selected by the ALJ. The notice of claim and the charge itself are, therefore, clearly timely under Odessa-Montour. Moreover, and wholly apart from the holding in Odessa-Montour, we would find the notice of claim and the charge timely for the reasons stated by the ALJ.

Similarly, we affirm, for the reasons stated in the ALJ's decision, the holding that the notice of claim was properly filed and served based upon the holding in Deposit Central School District v. PERB.[8/]

The District's waiver defense was also properly denied by the ALJ. We affirm on this issue again for the reasons stated in the ALJ's decision and add a brief comment regarding the District's assertion that the Association's failure to protest the subcontract until early December 1992 induced it to contract with the electrical company for the work under the rebate program. There is nothing in this record which would lend any support to a claim that the District relied to its detriment upon the Association's silence and would not have subcontracted but for that silence. Just the opposite, it is clear beyond any reasonable doubt that the District's agents never believed that

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[8/]214 A.D.2d 288, 28 PERB ¶7013 (3d Dep't 1995), leave to appeal denied, 88 N.Y.2d 866, 29 PERB ¶7007 (1996).

the Association had any right to negotiate the decision to use a contractor on the rebate program. In accordance with that belief, the District never put the Association on notice of its intent to subcontract, it never requested the Association's position on that question, or offered it an opportunity to negotiate, as was its responsibility. As evidence of its belief and intent, the District's response when first questioned by the Association's president regarding the subcontract was that the work to be done was not the Association's and that the District could not afford to pay unit employees to do it. In entering into the subcontract, the District relied on those beliefs alone, not on anything the Association did or did not say or do.

We have in conjunction with our discussion and disposition of the merits addressed and rejected the District's claim that the Association does not have any exclusivity over any electrical work of any kind under any circumstances. Without deciding whether and to what extent the Association may have exclusivity over any other type of electrical work, it has exclusivity over the simple lighting tasks performed by the contractor under the rebate program.

In short, we are presented with an economically motivated decision which the District believed, albeit incorrectly, was its to make unilaterally, without any showing that unit employees were incapable of doing the work within the timeframe set for completion under the rebate program. In that latter regard, unit

employees could have been reassigned by the District, they could have worked overtime, existing staff could have been supplemented by temporary hiring of employees into the unit, or the work required might have been performed by existing staff at straight time over an extended period of time upon application to NYSEG. In addition to these options, which the District could have exercised unilaterally, there were many others possible under an agreement negotiated with the Association. The District elected not to use the options available to it in its managerial capacity, instead choosing to disregard its statutory bargaining obligation, a choice which deprived both it and the Association of any opportunity to bargain for an arrangement which could have avoided this charge and the accompanying litigation.

For the reasons set forth above, the Association's exceptions are granted and the ALJ's dismissal of the charge is reversed. The District's cross-exceptions are denied.

IT IS, THEREFORE, ORDERED that the District:

1. Cease and desist from subcontracting or otherwise transferring from the Association's unit the work of replacing ballasts or lamps in existing fluorescent lighting fixtures unless that work is done only as an incidental aspect of an electrical project.
2. Make unit employees whole for any wages or benefits lost as a result of the contracting for ballast and lamp replacement under the New York State Electric and

Gas Corporation's rebate program, with interest at the currently prevailing maximum legal rate.

3. Post Notice in the form attached in all locations at which notices of information to the Association's unit employees are ordinarily posted.

DATED: September 25, 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 Union-Endicott Maintenance Workers Association/NYSUT/AFT/AFL-CIO (Association) that the Union-Endicott Central School District will:

1. Not subcontract or otherwise transfer from the Association's unit the work of replacing ballasts or lamps in existing fluorescent lighting fixtures unless that work is done only as an incidental aspect of an electrical project.

2. Make unit employees whole for any wages or benefits lost as a result of the contracting for ballast and lamp replacement under New York State Electric and Gas Corporation's rebate program, with interest at the currently prevailing maximum legal rate.

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

UNION-ENDICOTT 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

COUNCIL 82, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-15360

STATE OF NEW YORK (DEPARTMENT OF ENVIRONMENTAL CONSERVATION),

Respondent.

HITE & CASEY, P.C. (KEVIN CASEY of counsel), for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the State of New York (Department of Environmental Conservation) (State) and Council 82, AFSCME, AFL-CIO (Council 82) to a decision by an Administrative Law Judge (ALJ) on Council 82's charge against the State. Council 82 alleges that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it denied individual Environmental Conservation Officers (ECOs) an opportunity to work more than seven holidays per year and changed existing work schedules to effect that result.

After a hearing, the ALJ sustained the charge. In finding a violation, the ALJ dismissed as inapplicable the State's

jurisdiction and waiver defenses, both of which are based upon provisions of the parties' collective bargaining agreement. The ALJ found a change in DEC Region 4's practice regarding holiday work and scheduling and she issued a remedy applicable to the ECOs in that geographic region only.

The State excepts to the ALJ's conclusion that the charge is within our jurisdiction. It argues that the parties' contract is a source of right to Council 82 with respect to the subject matter of the charge. On the merits, the State argues that the ALJ mischaracterized the practice Council 82 had to prove, that any practice which may exist embraces a nonmandatory subject of negotiation because it involves only the State's management right to set staffing levels, and that, if any practice found to exist embraces a mandatorily negotiable subject, Council 82 waived by agreement any right to negotiate the changes it made in the ECOs' holiday/work schedules.

Council 82 excepts only to the remedy. It argues that the remedy should extend to all ECOs in all of DEC's several geographic regions. In response to the State's exceptions, Council 82 argues that the ALJ's decision is correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, we remand on the jurisdictional and waiver issues.

ECOs are regularly scheduled to work on certain of the twelve paid holidays designated by the parties' agreement. Workdays, including holidays, are reflected on a duty schedule.

The ECOs' days off are called pass days and these days are reflected in a separate schedule. If an ECO works a holiday, the ECO may opt for an extra day's pay at straight time or bank eight additional hours of vacation accrual.

In January 1994, the Captain of DEC's Region 4 announced to Region 4 ECOs that they could not work more than seven holidays a year. At least two Region 4 ECOs were directed to take off from work a holiday which they had been scheduled to work. At least one ECO's duty schedule was revised to indicate that he would not work certain holidays originally scheduled as his workdays.

The jurisdictional issue raised by the State concerns our power to entertain this charge. In that regard, it is axiomatic that we may only exercise the powers which have been bestowed upon us by the Legislature. In relevant respect, the Legislature, in §205.5(d) of the Act, provided that the Board "shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such agreement that would not otherwise constitute an improper employer or employee organization practice". We have held repeatedly that §205.5(d) of the Act is triggered if the provisions of an unexpired collective bargaining agreement constitute a reasonably arguable source of right to a charging party with respect to the subject matter of the improper practice charge.[1/] Recognizing that it is sometimes unclear, even to the parties to the contract,

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[1/]See, e.g., County of Nassau, 23 PERB ¶3051 (1990).

whether the contract is a source of right to a charging party, we several years ago adopted in Herkimer County BOCES[2/] (hereafter Herkimer) a jurisdictional deferral policy. Under that policy, if there is a pending contractual grievance alleging that the respondent's actions which are the subject of the improper practice charge violated the parties' collective bargaining agreement, then we will defer our determination of the jurisdictional issue necessarily raised by the filing of the contractual grievance until the grievance procedure has been completed. Disposition of the jurisdictional issue can then be made by us, as necessary,[3/] in light of the final determination on the grievance, which will usually reveal whether the contract terms are applicable and, if so, whether they have been violated.

Section 15.3 of the parties' agreement is captioned "Shift Changes" and provides as follows:

> (a) No employee shall have his shift schedule changed for the purposes of avoiding the payment of overtime, unless he has been notified of such change one week in advance of the time in which the changed work period is to begin provided, however, that the circumstances necessitating such change are foreseeable prior to such one-week period.
>
> (b) In the event that circumstances necessitating such shift changes are not foreseeable, then such notice shall be given as soon as possible.
>
> (c) In the event such notice of shift change is not given at least 48 hours prior to the starting time of the scheduled shift which the employee is directed to work such employee shall not be deprived of the

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[2/] 20 PERB ¶3050 (1987).

[3/] A jurisdictional deferral results in the conditional dismissal of the charge. The jurisdictional issue is presented to us only on a motion to reopen the charge.

> opportunity to work his normal shift and to be paid overtime for the hours worked in excess of 40 hours in the workweek.
>
> (d) Employees who compete in New York State Civil Service examinations and whose shift ends less than eight hours before the starting time of such an examination shall not be required to work that shift and such absence shall not be charged to accrued leave credits.
>
> (e) Except as otherwise provided herein, regularly scheduled days off shall not be changed for the purpose of avoiding the payment of overtime.
>
> (f) Prior to the making of a final decision with respect to instituting a charge in shift system from fixed to rotating shifts or rotating to fixed shifts the Employer shall inform the Union of such contemplated change and provide the Union with an adequate opportunity to review the impact of such change with the Employer at the appropriate level.

The ALJ determined that §15.3 of the contract was inapplicable to the ECOs because one witness at the hearing testified that ECOs do not work shifts. However, the record is also clear that many grievances have been filed either by or on behalf of ECOs since January 1994, the date the alleged unilateral change in holiday/workday scheduling practice was made, claiming that the State's change in the ECOs' work schedules violated §15.3 of the parties' contract. These grievances, however, were not introduced into evidence and the testimony did not reveal the exact nature of these grievances.

The simple fact that contractual grievances regarding changes in ECOs' work schedules have been filed under §15.3 raises substantial questions both as to whether Council 82's charge is within our jurisdiction and whether application of our jurisdictional deferral policy would be appropriate.

Section 15.3 cannot simultaneously be wholly inapplicable to the ECOs as the ALJ found, and yet be the basis for grievances alleging that changes in their work schedules violated their contract rights. As the State succinctly but correctly puts the point, Council 82 "cannot have it both ways". If any of the approximately fifty §15.3 grievances filed since January 1994 involve changes in an ECO's pass day/work day schedule, then a jurisdictional deferral under Herkimer is plainly required. In the event that none of those grievances involves the subject matter of this charge, then we must still decide whether we have jurisdiction over it. The very filing of the §15.3 grievances shows that the contract is not necessarily inapplicable simply because ECOs do not work a traditional "shift". Section 15.3 may well be broad enough to cover all unit employees' work schedules, even those of ECOs who do not work a traditional shift. Without the grievances, we cannot make an informed decision as to whether to defer consideration of the jurisdictional issue arguably raised by the §15.3 grievances or, if Herkimer is inapplicable because none of the grievances filed involves the scheduling changes in issue under this charge, whether we in fact have jurisdiction over this charge. Those decisions are ones we have to make.

The ALJ essentially concluded that there was not enough evidence before her on the jurisdictional/deferral issues to make a decision on those issues, that it was the State's obligation to introduce that evidence, and, because it was missing from the record, a merits determination was permissible and required.

These jurisdictional issues are not, however, affirmative defenses. They concern our very power to proceed with an investigation of a charge and the manner in which the existence of that power is decided and exercised. Substantial questions are presented on the existing record as to whether we have jurisdiction over this charge and whether consideration of that issue is properly deferred under our established policy. Disposition of those issues was required before addressing the merits of the charge as filed. Only receipt of the grievances can resolve the substantial jurisdictional/deferral issues which are presented by the §15.3 grievances themselves. Once, as here, a substantial question concerning jurisdiction was presented on the record, it became incumbent upon the ALJ to obtain the grievances to enable her to make a fully informed decision on the jurisdictional/deferral issues.

It is also clear that a remand is necessary for possible reconsideration of the State's waiver defense. The ALJ dismissed the State's waiver defense, in relevant part, only on her finding that §15.3 of the parties' contract is inapplicable to the ECOs. The ALJ did not otherwise address the merits of the State's argument. As the preceding discussion reveals, however, the ALJ could not determine whether §15.3 is applicable without the grievances. Upon remand, should the case not be jurisdictionally deferred under Herkimer, and should it be determined that the charge is within our jurisdiction to hear because §15.3 is not a reasonably arguable source of right in relevant respect to Council 82, it may still be that §15.3 is applicable to the ECOs'

work schedules. The ALJ would then have to decide whether the State has the contractual right to change the ECOs' holiday/work schedules in the manner and for the reasons the schedules were changed in this case.

For the reasons set forth above, the case is remanded to the ALJ for the introduction of the §15.3 grievances filed by or on behalf of ECOs, for the conduct of such hearing as may be necessary to that end, and for such decision thereafter as is appropriate. SO ORDERED.

DATED: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

POLICE BENEVOLENT ASSOCIATION OF LEWISTON, NEW YORK,

Petitioner,

-and-

CASE NO. C-4514

TOWN OF LEWISTON (POLICE DEPARTMENT),

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 Police Benevolent Association of Lewiston, 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-time and part-time nonsupervisory certified police officers employed by the Lewiston, New York Police Department.

Excluded: Employees of the Police Department in the rank of Corporal or higher.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Police Benevolent Association of Lewiston, 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: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

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-4544

ONEIDA-HERKIMER SOLID WASTE MANAGEMENT AUTHORITY,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 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: Solid Waste Management Worker; Solid Waste Management Laborer; Clerk Typist; Principal Account Clerk; Maintenance Mechanic; Maintenance Mechanic Welder; Supervising Landfill Operator; Landfill Operator; HME Operator/Vehicle Operator; Heavy Equipment Mechanic Foreman; Vehicle Mechanic; Baler Operator; Sorter; Electrical Technician

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424. 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: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GREENE COUNTY DEPUTIES' ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4557

COUNTY OF GREENE and GREENE COUNTY SHERIFF,

Joint Employer,

-and-

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

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

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

settlement of grievances.

Unit: Included: All full-time deputy sheriffs (criminal) and deputy sheriff sergeants (criminal).

Excluded: All other employees.

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

DATED: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 264,

Petitioner,

-and-

CASE NO. C-4567

VILLAGE OF LYNDONVILLE,

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 International Brotherhood of Teamsters, Local 264 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 full-time and part-time employees in the Public Works Department

Excluded: Superintendent of Public Works and all other employees

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Local 264. 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: September 25, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member