STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BUFFALO POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and- **CASE NO. U-16519**

CITY OF BUFFALO,

Respondent.

In the Matter of

BUFFALO PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 282,

Charging Party,

-and- **CASE NO. U-16525**

CITY OF BUFFALO,

Respondent.

In the Matter of

AFSCME, LOCAL 650, AFL-CIO,

Charging Party,

-and- **CASE NO. U-16626**

CITY OF BUFFALO,

Respondent.

In the Matter of

PROFESSIONAL, CLERICAL AND TECHNICAL EMPLOYEES ASSOCIATION,

Charging Party,

-and- **CASE NO. U-16772**

BUFFALO CITY SCHOOL DISTRICT,

Respondent.

W. JAMES SCHWAN, ESQ., for Buffalo Police Benevolent Association and Buffalo Professional Firefighters Association, Local 282

ROBERT J. REDEN, ESQ. for AFSCME, Local 650, AFL-CIO

PAUL D. WEISS, ESQ. for Professional, Clerical and Technical Employees Association

EDWARD PEACE, CORPORATION COUNSEL (JAMES L. JARVIS, JR. of counsel), for City of Buffalo and Buffalo City School District

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the City of Buffalo (City) and the Buffalo City School District (District) (jointly, respondents) to a decision of an Administrative Law Judge (ALJ) holding that §209-a.1(d) of the Public Employees' Fair Employment Act (Act) was violated when a ban on smoking on all City property and in all City vehicles was imposed.

In January 1995, the Buffalo City Council amended Article IV of Chapter 399 of the Code of the City of Buffalo, effective April 1, 1995, to prohibit smoking within any City building or any vehicle owned or leased by or to the City and imposed a fine of up to $500 per day for each violation.[1/] On March 6, 1995, the District's Superintendent of Schools sent a memo to all District staff, notifying them of the amendment to the City Code and its effective date. The memo went on to state:

> [A]ll employees of the [District] are effected [sic] by this policy even though the Board of Education will not

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[1/]Prior to the adoption of the amendment, smoking was permitted on a limited basis on property owned or leased by the City and in City vehicles.

> formally adopt their policy until the April 12, 1995 Board meeting.... However, please be advised that smoking is not allowed in City Hall offices effective immediately. Violators are subject to a fine of $1,000.00 per day.[2/]

On March 1, 1995, the Buffalo Police Benevolent Association (PBA) filed an improper practice charge (U-16519) alleging that the City had violated §209-a.1(d) of the Act by unilaterally banning smoking in all City buildings and vehicles, including police buildings, police vehicles and police property. The Buffalo Professional Firefighters Association, Local 282 (Association) filed, on March 3, 1995, a charge (U-16525) alleging that the City had violated §209-a.1(d) of the Act by unilaterally banning smoking in all City property, including fire buildings, vehicles and property. On March 31, 1995, the American Federation of State, County and Municipal Employees, Local 650, AFL-CIO (AFSCME) filed an improper practice charge (U-16626) alleging that the City had violated §209-a.1(a) and (d) of the Act by unilaterally imposing a smoking ban. The Professional, Clerical and Technical Employees Association (PCTEA) filed an improper practice charge (U-16772) on May 15, 1995, alleging that the District had violated §209-a.1(d) of the Act by unilaterally prohibiting unit employees from smoking at their work stations throughout the Board of Education offices, which are located in City Hall.

[2/]No evidence was offered to explain the discrepancy between the maximum amount of the fine imposed by the legislation ($500 per day) and the amount of the fine ($1000 per day) described in the Superintendent's memorandum.

The City did not file an answer to any of the charges against it. The District's answer raised the defense that such smoking restrictions may be unilaterally imposed pursuant to §1399-o of the New York Public Health Law (PHL) and Title 20 U.S.C. §§6083 and 6084.[3/]

A stipulation of facts was prepared by the parties in lieu of a hearing. Thereafter, the parties submitted briefs to the ALJ. In addition to its claim that the unilateral imposition of the smoking ban was permitted by PHL §1399-o, the City alleged, for the first time in its brief, that the imposition of the ban applied to the general public, as well as City employees, and that it was, therefore, not mandatorily negotiable. Characterizing the latter defense as an affirmative defense, the ALJ rejected it, reasoning that an affirmative defense that is not raised in a timely answer is waived and may not be raised thereafter for the first time in a brief. Finding that the City's ban had exceeded the requirements of PHL §1399-o, the ALJ determined that the smoking ban was mandatorily negotiable[4/] and that the City and the District had, accordingly, violated §209-a.1(d) of the Act.[5/] The ALJ ordered that the ban not be

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[3/]The parties later stipulated that Title 20 U.S.C. §§6083-6084 were not relevant to the case before the ALJ.

[4/]State of New York (Dep't of Law), 25 PERB ¶3024 (1992); Newark Valley Cent. Sch. Dist., 24 PERB ¶3037 (1991), conf'd, 83 N.Y.2d 315, 27 PERB ¶7002 (1994).

[5/]The ALJ dismissed the alleged violation of §209-a.1(a) of the Act as no facts were alleged or proven to support a finding of that violation. No exceptions were taken to this determination.

enforced as to the employees in the bargaining units represented by the PBA, Association, PCTEA, and AFSCME, and that the prior smoking practices be restored.

The respondents except to the ALJ's decision, arguing that the City's defense should have been addressed on its merits and the charges, as a result, dismissed in their entirety. The PBA, the Association, AFSCME and PCTEA support the ALJ's decision.

Our initial review of the charges and the record before us raised the question of whether and to what extent there exists on the record evidence of executive branch adoption and implementation of the City Code by the City and the District. We apprised the parties of this issue and afforded them the opportunity to submit supplemental briefs addressing this question, which was not raised before the ALJ, and whether in the absence of executive branch adoption and implementation, enactment of the City Code by the City Council sets forth a cognizable violation of §209-a.1(d) of the Act. The City and District responded as one, arguing that the action of the City Council was legislative and, therefore, could not violate the duty to bargain, which is vested in the chief executive officer of a public employer.[6/] The Association, PBA, AFSCME and PCTEA responded that the record supported a finding that the smoking ban had been adopted and implemented by both the Mayor and the Superintendent of Schools. They further argued that, should we

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[6/]See cases cited infra note 7.

determine that the record did not support such a finding, the cases ought to be remanded to the ALJ for further proceedings to allow for the introduction of additional evidence.

Based upon a review of the record and consideration of the parties' arguments, we reverse the ALJ's decision.

The action complained of under all of these charges is simply and solely an amendment to the City Code passed by the Buffalo City Council in its capacity as a legislative body. We have previously held that a "legislative body's action is not reviewable under the refusal to negotiate provisions of the Act since it has neither right nor duty to bargain."[7/] Here, the record shows only that the City Council enacted legislation about which the City then advised its employees.[8/] Had the City, as employer, separately adopted the terms of the legislation as work rules and advised its employees that, as employees, they would face discipline or any other employment-related consequences for failure to comply with the legislation then a cause of action under §209-a.1(d) would lie. Likewise, the District simply advised its employees of the City Council's enactment of the amendment, its effective date, and the terms and penalties of

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[7/]City of Glens Falls, 24 PERB ¶3015, at 3030 n. 4 (1991). See also Odessa-Montour Cent. Sch. Dist., 27 PERB ¶3050 (1994), 28 PERB ¶3013 (1995), rev'd, __ A.D.__, 29 PERB ¶7008 (3d Dep't 1996); Niagara County Legislature and County of Niagara, 16 PERB ¶3071, rev'd on other grounds, 17 PERB ¶7003 (Sup. Ct. Niagara Co. 1984).

[8/]The method of notification is not apparent from the stipulated record.

that legislation, with no separate employment consequence imposed by the District as employer.[9/] As the action complained of in these charges is merely the legislative imposition of a smoking ban applicable not just to employees but to the public generally, without executive adoption, there can be no violation of §209-a.1(d) of the Act, as a matter of law. As the record affirmatively establishes that the charges fail as a matter of law,[10/] we are required to dismiss them as we are powerless to find a violation of the Act which does not exist on the record before us.

The Association, PBA, AFSCME and PCTEA have not offered any facts which would warrant a contrary conclusion. Indeed, while they request that the cases be remanded and a hearing held to take evidence in support of the contentions raised in their supplemental briefs that the City's Mayor and the District's

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[9/]While the District's March 6, 1995 memorandum to employees mentions that the Board of Education will adopt a policy at its April 12, 1995 meeting, the charge against the District makes no mention of such Board policy or its terms. In any event, the promulgation of a Board of Education resolution, by itself and without evidence of executive implementation in the employment context, would not violate the District's duty to negotiate. Odessa-Montour Cent.Sch. Dist. v. PERB, supra note 7. The Superintendent's statement in the memo that the fine was $1000, not a maximum of $500 per day as set forth in the legislation, does not render the memorandum evidence of a separate enactment or adoption of the ban by the Superintendent.

[10/]If the record had shown that the chief executive officer of either the City or the District, or any executive branch agent thereof, had sought the legislation, participated in the legislative process leading to enactment or otherwise adopted the legislation, then a cause of action under §209-a.1(d) might have been stated.

Superintendent in fact adopted and implemented the smoking ban, there is no indication that they have any evidence to offer that was not available at the time they agreed to the stipulation of facts in these cases. That our decision in these cases is based on a legal theory not raised by the parties does not entitle them to a hearing to introduce evidence which is not newly discovered.[11/]

Because of our finding, we do not reach the exception filed by the respondents concerning the negotiability of the smoking ban. We, therefore, express no opinion on the merits of a charge directed to the respondents' implementation of an employer-created and enforced smoking ban.

Based upon the foregoing, the decision of the ALJ is reversed.

IT IS, THEREFORE, ORDERED that the charges must be, and they hereby are, dismissed.

DATED: December 18, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

Joseph Farneti, Member[12/]

[11/]Margolin v. Newman, 130 A.D. 2d 312, 20 PERB ¶7018 (3d Dep't 1987), appeal dismissed, 71 N.Y.2d 844, 21 PERB ¶7005 (1988); Town of Greece, 26 PERB ¶3004 (1993); and Civil Service Employees Ass'n, Inc. (Reese), 25 PERB ¶3012 (1992).

[12/]Member Farneti did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

FULTON FIREFIGHTERS ASSOCIATION, LOCAL 3063, IAFF, AFL-CIO,

CASE NO. DR-058

Upon a Petition For Declaratory Ruling

BLITMAN & KING (CHARLES E. BLITMAN of counsel), for Petitioner

ROEMER WALLENS & MINEAUX, LLP (ELAYNE C. GOLD of counsel), for City of Fulton

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Fulton Firefighters Association, Local 3063, IAFF, AFL-CIO (FFA) to a decision by the Acting Director of Public Employment Practices and Representation (Acting Director). The Acting Director dismissed as deficient a declaratory ruling petition filed by the FFA by which FFA seeks a determination regarding the negotiability of two demands the City of Fulton (City) had raised in response to FFA's March 1996 petition for compulsory interest arbitration. In negotiations and in its response to the arbitration petition, the City had proposed to replace a management rights clause appearing in the parties' expired collective bargaining agreement with another, differently worded version and to eliminate a minimum shifts clause. Although the City had filed an improper practice charge regarding certain of

FFA's proposals as submitted in its arbitration petition,[1/] the FFA did not file an objection to any of the City's proposals as raised in its response to the petition for interest arbitration until it filed this petition.

Notwithstanding the pendency of FFA's petition for interest arbitration, the parties agreed to meet in an effort to reach a contract. Meetings were held on June 27 and 28, 1996, but the parties did not reach an agreement. On July 1, 1996, the FFA filed an amended petition for interest arbitration. The City has not responded to that amended petition. On July 18, 1996, FFA filed this petition for a declaratory ruling regarding the City's management rights and minimum shifts proposals.

FFA argues that its declaratory ruling petition was properly and timely filed pursuant to Part 210 of the Rules of Procedure (Rules) and that processing the petition pursuant to that part of the Rules is in the public interest and furthers the policies of the Public Employees' Fair Employment Act (Act).

The City argues in response to FFA's exceptions that the Acting Director's decision is correct and should be affirmed because any other decision would "ignore . . . clearly

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[1/]On November 13,1996, an Administrative Law Judge issued a decision on the City's charge (Fulton Fire Fighters Ass'n, Local 3063, 29 PERB ¶4651). One of FFA's proposals was held a mandatory subject of negotiation as originally proposed. Two others were held mandatory as amended. As the amended proposals had not been negotiated, the ALJ ordered the amended demands withdrawn from arbitration.

articulated rules [and] would fly in the face of the entire spirit and intent of the Taylor Law".

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

Part 210 is the part of our Rules generally covering petitions for declaratory rulings which may be sought "with respect to the scope of negotiations" under the Act without any specified time restrictions. Part 210 was added on May 8, 1987. Effective that same date, §205.6(a) of the Rules was amended and a new subsection (c) was added to permit an objection to arbitrability to be raised not only by an improper practice charge but also by a declaratory ruling petition, but only if it were filed within ten working days after the receipt of the petition for interest arbitration or the response thereto.

Two points are clear from the history and development of the cited Rules. The first is that declaratory ruling petitions have application and purpose apart from the interest arbitration context. The second is that although a declaratory ruling petition is a proper mechanism for raising an objection to arbitrability, if used for that purpose or to that effect, the filing must satisfy the specific requirements of Rules §205.6, not the general requirements of Part 210.

In this case, it is clear from FFA's papers that it is using the declaratory ruling petition to raise an objection to arbitrability, the goal being to prevent the City's two proposals

from being considered by an interest arbitration panel. For example, in describing its petition, FFA states that it is seeking a declaration as to whether the City's two demands are "non-mandatory and thus not arbitrable." (emphasis added) In the petition itself, FFA urges that we "prevent the City's efforts to place before a compulsory interest arbitration panel issues which . . . are non-mandatory". These two statements clearly establish that FFA intends this declaratory ruling petition to be the procedural device by which it raises objections to the City's two demands for the purpose of preventing an arbitration panel from considering those demands on their merits. Although Part 210 may be broad enough to allow for a simple determination as to whether the City's demands are mandatorily negotiable, a processing under Part 210 would not result in any order requiring the City to withdraw those demands from arbitration or any order requiring the panel not to consider those demands. A ruling on a scope of negotiations having no effect upon the arbitration process is not what the FFA wants under this petition and we would distort the declared purpose of its declaratory ruling petition were we to issue such a limited scope ruling.

The FFA argues, however, that we should process this petition under Part 210 and still prevent the arbitration of the two demands - if we hold them to be nonmandatory subjects of negotiation - because there are special circumstances present. Those special circumstances consist of the fact that the parties

voluntarily resumed negotiations, apparently at FFA's request, after FFA had filed its petition for interest arbitration and the City had filed its response. FFA argues that in these circumstances its petition for a declaratory ruling did not arise from or because of the City's response to its petition for arbitration, which would trigger §205.6 of the Rules, but from the parties' subsequent negotiations, which triggers Part 210 of the Rules. We are not persuaded by this argument for several reasons.

First, regardless of the reason for or source of its declaratory ruling petition, FFA's purpose, as previously noted, is to prevent the City from having the two demands in issue considered by an arbitration panel. Therefore, the more specific provisions of §205.6 of the Rules, including its time requirements, must control the general provisions of Part 210. As we held in County of Rockland,[2/] timeliness of the petition is "an initial requirement for processing, which a petitioner must satisfy before any merits determination may be made."

Even were we to consider FFA's policy arguments, we would not be persuaded to hold that this petition should be processed. The two demands in issue were raised in the City's response to FFA's petition for arbitration and those demands are unchanged since their submission. FFA could have objected to the arbitrability of those demands pursuant to §205.6 of the Rules.

[2/]26 PERB ¶3071, at 3134 (1993).

According to FFA, it made a calculated decision not to raise an objection upon receipt of the City's response. That was its choice, one which was made in circumstances in which any matter in dispute could be the subject of further negotiations, either by agreement of the parties or by the order of the arbitration panel.[3/] Nothing before us persuades us that there is a reason to release FFA from the consequences of its tactical decision when it knew or should have known that further negotiations were possible.

Moreover, the negotiations between these parties were not of a type or to an effect that would warrant the result FFA seeks. By FFA's own allegations, the City never offered to modify or withdraw the two proposals in issue. No agreement was reached on any issue. FFA argues, however, that simply because it offered to modify or withdraw certain of its arbitration proposals, it should be allowed to file a declaratory ruling petition for the purpose of preventing the arbitration of the City's demands. We fail to see how unaccepted offers of settlement exchanged during negotiations change the parties' position to the point of allowing one of them to file an otherwise time-barred petition for a declaratory ruling. Having failed to reach an agreement, the exact same impasse existing before the post-petition negotiations began still exists for resolution by the arbitration panel.

[3/]Act, §209.4(c)(iv).

Finally, we believe that processing FFA's declaratory ruling petition for its declared purpose would be contrary to the policies of the Act and inconsistent with the public interest. The Act clearly encourages the voluntary resolution of disputes even after the invocation of any of the statutory impasse procedures. The willingness of parties to engage in good faith negotiations after a petition for compulsory interest arbitration has been filed would be severely compromised if those negotiations afforded either party a second right to object, whether by improper practice charge or declaratory ruling petition, to issues in dispute before an arbitration panel.

To expedite completion of the statutory interest arbitration process, our rules allow parties only a very limited timeframe within which to raise objections to demands presented for resolution by an arbitration panel. Those rules have been strictly construed.[4/] Absent the most extreme and compelling of circumstances, which we frankly cannot envision, but do not wish to foreclose as a possibility, we should not alter that carefully structured scheme. Finding no such extraordinary circumstances here, FFA's petition must be dismissed.

For the reasons set forth above, the Acting Director's decision dismissing the petition is affirmed and FFA's exceptions are denied.

[4/]See, e.g., County of Rockland, supra note 2; Elmira Police Benevolent Ass'n, Inc., 25 PERB ¶3072, aff'g 25 PERB ¶4568 (1992).

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

DATED: December 18, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

Joseph Farneti, Member[5/]

[5/]Member Farneti did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DEPUTY SHERIFFS BENEVOLENT ASSOCIATION OF ONONDAGA COUNTY, INC.,

Charging Party,

-and-

CASE NO. U-17193

COUNTY OF ONONDAGA and ONONDAGA COUNTY SHERIFF,

Respondents.

COSTELLO, COONEY & FEARON, LLP (MICHAEL A. TREMONT of counsel), for Charging Party

JOHN A. GERBER, COUNTY ATTORNEY (LAWRENCE R. WILLIAMS of counsel), for Respondents

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Deputy Sheriffs Benevolent Association of Onondaga County, Inc. (DSBA) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the County of Onondaga (County) and the Onondaga County Sheriff (Sheriff) (together, Employer) violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it used employees in the unit represented by the Onondaga County Sheriff's Police Association (Association) to transport and supervise pretrial and presentence detainees from the County Justice Center to a local medical facility for treatment, work that DSBA claimed was exclusively the work of its unit.

Until April 1, 1994, employees in the Sheriff's Department in both the police and custody divisions were represented by the DSBA. On April 1, the Association became the exclusive bargaining representative for a unit of employees in the police division. The DSBA remained the representative of the employees in the custody division. At all times thereafter, the 1992-95 collective bargaining agreement between the County and DSBA remained in effect and was also made applicable by agreement to the unit represented by the Association. That agreement contains the following management rights clause:

> Article IV
> County Management
>
> The Association agrees that the County of Onondaga and/or the County Legislature and the Sheriff, hereinafter known as the Employer, shall retain complete authority for the policies and administration of all County departments, offices or agencies which it exercises under the provisions of law and the Constitution of the State of New York and/or the United States of America and in fulfilling its rights and responsibilities under this agreement. Any matter involving the management of governmental operations vested by law in the Sheriff and not covered by this agreement is in the province of the Sheriff.
>
> The rights and responsibilities of the Employer include, but are not necessarily limited to the following: (1) to determine the standards of service to be offered by its offices, agencies and departments; (2) to direct, hire, promote, appraise, transfer, assign, retain employees and to suspend, demote, discharge or take disciplinary action against employees; (3) to relieve employees from duties because of lack of work or for other legitimate reasons; (4) to maintain the efficiency of government operations entrusted to them; (5) <u>to determine the methods, means and personnel by which such operations are to be conducted</u>; (6) to take whatever actions may be necessary to carry out the mission, policies or purpose

> of the department, office or agency concerned; (7) to establish any reasonable rules or regulations; (8) to establish specifications for each class of positions and to classify or reclassify and to allocate or reallocate new or existing positions.
>
> The Association further agrees that the provisions of this Article are not subject to grievance procedures as set forth herein unless in the exercise of said rights and responsibilities the Employer has violated a specific term or regulations of this agreement. (emphasis added)

The ALJ determined that the transport of pretrial and presentence prisoners was and had been exclusively the work of the custody division employees who are represented by the DSBA. However, based upon our decision in County of Onondaga and Sheriff of the County of Onondaga (hereafter, County of Onondaga)[1/], issued after the briefs had been received in this matter, the ALJ determined that the Employer was privileged to make the assignment to the police division employees who are represented by the Association and dismissed the charge.

The DSBA excepts to the ALJ's decision, arguing that the ALJ erred in relying on County of Onondaga. The Employer supports the ALJ's decision insofar as he found a waiver, but excepts to the ALJ's conclusion that the work in issue was exclusively the work of members of DSBA's bargaining unit.

For the reasons set forth in our decision in County of Onondaga, we affirm the decision of the ALJ.

[1/]29 PERB ¶3046 (July 31, 1996). In that case, the County assigned duties previously performed by employees in the Association's unit to employees in the unit represented by DSBA.

In County of Onondaga, we found that the Employer had reserved the right, under the language of Article IV, to assign duties performed by any employees in the former overall unit to any of the job titles that were in that unit when this management rights clause was negotiated. The DSBA and the Association both agreed at the time they became the representatives for the new units that all the terms of the 1992-95 agreement between DSBA and the County, which included Article IV, would remain in effect. The Employer is, therefore, privileged to use employees in the unit represented by the Association to perform work which had been done previously by the deputy sheriff-jailers who are still represented by DSBA, even if they had performed that work exclusively.

Based on the foregoing, we affirm the decision of the ALJ and dismiss the DSBA's exceptions. Our decision makes it unnecessary to reach the Employer's cross-exceptions.

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

DATED: December 18, 1996, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

Joseph Farneti, Member[2/]

[2/]Member Farneti did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORCHARD PARK POLICE BENEVOLENT, ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-17997

TOWN OF ORCHARD PARK,

Respondent.

HARRIS, BEACH & WILCOX (LAWRENCE J. ANDOLINA of counsel), for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Orchard Park Police Benevolent Association, Inc. (Association) to a decision of the Acting Director of Public Employment Practices and Representation (Acting Director) dismissing its charge that the Town of Orchard Park (Town) violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) by refusing to incorporate the terms of an interest arbitration award into a collective bargaining agreement.

The Association was notified by the Acting Director that the charge was deficient on both procedural and substantive grounds. The Association thereafter amended the charge. While the Acting Director found that the amendment had corrected the procedural deficiencies, he nonetheless dismissed the charge. The Acting Director found that the Association had only asserted that it had

been the parties' practice in the past to incorporate the terms of an arbitration award into a collective bargaining agreement. No facts were alleged upon which a finding could be made that the Town had agreed to incorporate the terms of the particular interest arbitration award in issue into a collective bargaining agreement and there were likewise no facts alleged to evidence that the Town had failed to continue the terms of any expired agreement.

The Association argues in its exceptions that the Acting Director erred both in determining that there was no evidence that the parties had agreed to incorporate the terms of the interest arbitration award into the collective bargaining agreement and in finding no evidence of the Town's failure to continue the terms of an expired agreement. The Town has not filed a response.

Based upon our review of the record and a consideration of the Association's arguments, we affirm the decision of the Acting Director.

In City of Niagara Falls[1/], we held that, absent an agreement to do so, neither party to an impasse which is resolved by the issuance of an interest arbitration award has any statutory obligation to incorporate that award into a signed collective bargaining agreement because an award is not an

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[1/]23 PERB ¶3039 (1990).

agreement for purposes of the Act.[2/] Here, the Association asserts that the Town has agreed in previous years to incorporate the terms of interest arbitration awards into collective bargaining agreements. Such a practice, even if established, does not evidence the Town's agreement to incorporate the terms of the 1995 interest arbitration award into a collective bargaining agreement. Without an agreement to do so, the Town had no obligation under the Act to execute an agreement containing the terms of that interest arbitration award.[3/] Although the Association argues to the contrary, the arbitration panel's suggestion that certain terms of the interest arbitration award "should" be included in a new agreement does not establish the requisite consent by the Town to do so.

The Association also argues that the Town's refusal to incorporate the terms of the interest arbitration award into a collective bargaining agreement is a violation of §209-a.1(e) of the Act because "any negotiations that take place on a new collective bargaining agreement will not be based on the terms of the expired agreement, which the [Association] considers the Interest Arbitration Award." Section 209-a.1(e) simply requires a public employer to continue the terms of an expired collective bargaining agreement until a new one is reached unless the union which is a party to that agreement has violated the no-strike

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[2/]This does not mean, however, that an interest arbitration award is not binding and enforceable.

[3/]County of Suffolk, 12 PERB ¶3014 (1979).

provisions of the Act. The Association's assertion that §209-a.1(e) confers a right to the incorporation of the terms of an interest arbitration award into a collective bargaining agreement has no basis in fact or legislative history. While parties may agree to do so, as we held in Niagara Falls, supra, the Association has presented no evidence here that these parties so agreed.

The Association's exceptions are denied and the Acting Director's decision is affirmed.

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

DATED: December 18, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

Joseph Farneti, Member[4/]

[4/]Member Farneti did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS LOCAL UNION 182,

Petitioner,

-and-

CASE NO. CP-415

TOWN OF NEW HARTFORD,

Employer.

JOHN P. AMODIO, for Petitioner

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C. (MARC H. REITZ and CRAIG M. ATLAS of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of New Hartford (Town) to a decision by the Acting Director of Public Employment Practices and Representation (Acting Director) issued pursuant to a unit clarification/placement petition filed by Teamsters, Chauffeurs, Warehousemen & Helpers Local Union 182 (Local). The Local is seeking by its petition to represent the positions of account clerk and receptionist/data entry within its existing blue-collar highway department unit consisting of twenty-two employees.

A conference was held on June 29, 1996, at which the Local was represented by John P. Amodio, its vice-president and business agent, and the Town was represented by its attorney of record at the time, John C. Scholl. The Town's highway superintendent, John S. Topor, was also in attendance. At the conference, the

Acting Director ascertained that the Town did not oppose the petition,[1/] that the employees in the two positions in issue worked only in the highway department, and that they had the same supervisors and some of the same duties as the blue-collar employees in the existing unit. The Acting Director summarized those facts in a letter and informed the parties' representatives that a decision would issue on the basis of his letter unless notified to the contrary by August 7, 1996.[2/]

By decision dated August 26, 1996, the Acting Director placed the two titles into the Local's existing unit. The petition was granted because "the Town does not oppose the petition" and because "the facts support such a finding". The facts recited were that "the employees in the two positions work with and under the same supervision as, and perform some of the same functions as unit employees".

Through new counsel, the Town claims in these exceptions that Scholl's failure to object to the petition is not binding upon the Town because his actions were not authorized by the Town and were actually contrary to the instructions given him. Similarly, the Town argues that Topor's willingness to include the two titles within the Local's unit cannot bind the Town. Moreover, the Town argues that the Acting Director's decision rests improperly on a

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[1/]Topor had on February 1, 1996, written Amodio to inform him that the "Town of New Hartford" had no objection to the inclusion of the two titles in issue into the Local's existing unit.

[2/]The representatives had waived the filing of any memoranda.

stipulation obtained from Amodio, who is not an attorney.[3/] Finally, the Town argues that the Acting Director's decision is based on mistakes of fact about the positions in issue. According to the Town, neither of these two white collar employees shares any community of interest with the blue-collar employees in the Local's existing unit and, moreover, the account clerk is confidential and not entitled to any representation in any unit.

The Local argues in response that it is "incredible" to believe that Scholl was acting outside the scope of his authority. Therefore, the Local argues that the Town's failure to object to the petition should not be excused.

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

The Town's exceptions contest the appropriateness of the Acting Director's unit determination. Throughout the entirety of the proceedings before the Acting Director, the Town affirmatively represented that it did not oppose the very placement the Acting Director ordered. Although there is a question about the appropriateness of the placement ordered because it creates a mixed unit of white-collar and blue-collar employees,[4/] we are

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[3/]In Union-Endicott Cent. Sch. Dist. v. PERB, 168 Misc. 2d 284, 29 PERB ¶7004 (Sup. Ct. Albany Co., 1996), the Supreme Court held that certain appearances before PERB constitute the practice of law such that, upon objection, only an attorney could act as a party representative. That decision was recently reversed on appeal. ___ A.D.2d ___, 29 PERB ¶7020 (3d Dep't Nov. 7, 1996).

[4/]See Town of Ramapo, 8 PERB ¶3057 (1975); Town of Smithtown, 8 PERB ¶3015 (1975).

empowered to review the appropriateness of the unit in this context[5/] only if that question is properly before us under these exceptions. For example, if these exceptions had been untimely filed, we could not reach an issue regarding the appropriateness of the unit. Therefore, we must first decide whether the Town should be permitted to contest before us an issue it did not contest below. We hold that a compelling interest in the finality of our proceedings and labor relations stability forecloses such review.

The Town could have and should have challenged the appropriateness of the Local's proposed unit placement if it wished to do so by a response filed pursuant to §201.5(d) of the Rules of Procedure (Rules) and at the conference. Indeed, that section of our Rules requires such a response, which was not filed. The Town, instead, affirmatively represented more than once and through more than one agent that it did not oppose the petition.

The Town now argues through different counsel that we should entertain this new issue because its agents' actions in stating that the Town did not oppose the petition were not authorized. To consider this appeal for that reason, however, would open all of

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[5/]The appropriateness of the unit would necessarily be before us if we were being asked to issue a certification and bargaining order.

our proceedings to exceptions upon grounds never raised below.[6/] Finality would be jeopardized, for any party with an arguable excuse would have an opportunity to convince us that it should be allowed to litigate an issue or issues it did not raise previously. The resolution of whatever statutory questions were before us would be substantially delayed while we litigated an issue - here the scope and exercise of Scholl's and Topor's authority - having nothing whatever to do with the question submitted under the Act for our determination. The resulting delay and labor relations instability is clearly contrary to the policies of the Act.

Any issues arising from the Town's relationship with its agents Scholl and Topor are issues for resolution in the appropriate forums. Those relationships cannot, however, permit the Town to raise to us on appeal a nonjurisdictional issue never raised even indirectly at any prior time. Without foreclosing a possibility that there might be some circumstances so compelling as to warrant a remand for investigation or hearing of issues not raised below, we hold that the circumstances alleged here do not warrant that result.

[6/]In contrast to the nature of the issue raised here, jurisdictional issues may be raised at any time because those issues involve our very power to hear and decide a case.

For the reasons set forth above, the Town's exceptions are denied.[7/] As there is no issue properly before us concerning the appropriateness of the unit placement ordered, the Acting Director's decision must be affirmed.

DATED: December 18, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

Joseph Farneti, Member[8/]

[7/]The Town's claim that the account clerk is confidential can be raised by the Town in an application filed pursuant to §201.10 of the Rules.

[8/]Member Farneti did not participate.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROBERT DIMEO,

Charging Party,

-and-

CASE NO. U-16943

LOCAL 1359, DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent,

-and-

STATE OF NEW YORK (DIVISION OF HOUSING AND COMMUNITY RENEWAL),

Employer.

ROBERT DIMEO, pro se

ROBERT PEREZ-WILSON (ALAN M. BROWN of counsel), for Respondent

WALTER J. PELLEGRINI, GENERAL COUNSEL (REBECCA L. CAUDLE of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Robert DiMeo to a decision by an Administrative Law Judge (ALJ). DiMeo alleges in his charge that Local 1359, District Council 37, AFSCME, AFL-CIO (DC 37) breached its duty of fair representation in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act):

We reach the merits of DiMeo's arguments as the exceptions are in a form substantially in compliance with our Rules.

The first two allegations were dismissed by the ALJ upon findings of fact resting on credibility resolutions. Nothing in the record or DiMeo's exceptions warrants a reversal of those credibility determinations.

DiMeo's exceptions to the dismissal of the third numbered allegation rest on the mistaken assumption that a bargaining agent is duty bound under the Act to refrain from doing or saying anything which a grievant might consider to be detrimental to his or her personal interests. A bargaining agent, however, has duties running to the negotiating unit as a whole and to the collective bargaining agreement covering that unit. In this case, DC 37 advanced to the State's grievance representative the union position that determinations in all out-of-title work grievances must be based only on the duties actually performed by an employee and that is why it told the State's representative that signing as a "processing attorney" was not relevant. That is a position which is certainly not unreasonable on its face and one the ALJ found upon a credibility resolution to have been taken in good faith. Nothing in the record evidences that DC 37 had ever taken a contrary position and nothing evidences that DC 37 promised in the settlement of the earlier improper practice charge not to disagree with any of the arguments DiMeo might make at the step 3 grievance meeting. There is, therefore, nothing in the simple disagreement between DC 37 and DiMeo about the

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NINTH JUDICIAL DISTRICT COURT EMPLOYEES ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4582

NYS UNIFIED COURT SYSTEM (OFFICE OF COURT ADMINISTRATION),

Employer,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 704, 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 Ninth Judicial District Court Employees 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.