STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SHARON HOKE,

Charging Party,

-and-

CASE NO. U-17243

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 182,

Respondent,

-and-

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

Intervenor.

SHARON HOKE, pro se

MURAD & MURAD (FREDERICK W. MURAD of counsel), for Respondent

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the International Brotherhood of Teamsters, Local 182 (Local 182) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) on a charge filed by Sharon Hoke. Hoke alleges that Local 182 breached its duty of fair representation in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it discontinued her medical and disability benefits immediately after it lost a

representation election to United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 (Local 424), which has intervened in the proceeding.

After a hearing, the Assistant Director held that Local 182 had violated the Act because it caused Hoke's benefits as provided by and through a separate benefit fund to terminate before it was decertified and that its disclaimer of representation rights prior to its decertification on September 19, 1995, was ineffective because it was neither unequivocal nor in good faith.

Local 182 argues in its exceptions that our jurisdiction over this charge is preempted under the federal Employee Retirement Income Security Act (ERISA), as amended,[1/] which allegedly vests the judiciary with exclusive jurisdiction over all issues pertaining to health, hospital and other trust fund benefits. On the merits, Local 182 argues that its actions cannot be arbitrary because it acted in compliance with benefit fund rules as fixed by ERISA. It argues that it was the benefit fund, not it, which terminated Hoke's and all other unit employees' benefits pursuant to a disclaimer of representation which was unequivocal and in good faith. Local 182 also takes exception to that part of the Assistant Director's order requiring it to reimburse Hoke for financial loss attributable to the cessation of fund coverage for the period from September 1,

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[1/] 29 U.S.C. §§1001 et seq. as amended by the Multi-Employer Pension Plan Amendments Act of 1990, 29 U.S.C. §§1332(a) et seq.

1995, through September 19, 1995, the date of Local 424's certification. Local 182 argues in that regard that the benefit fund is solely responsible for any medical or disability benefits which might be owed to Hoke.

Local 424 argues that the Assistant Director's decision is correct and should be affirmed. It argues that an incumbent union should not be permitted to abandon a unit after it has participated in a representation election. Local 424 argues also that the Assistant Director's remedy is correct because Local 182 caused Hoke's benefits to end. Hoke has not filed a response to the exceptions.

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

The material facts are not in dispute and we merely summarize them because they are set forth in detail in the Assistant Director's decision.

By petition filed in June 1995, Local 424 challenged Local 182's status as the exclusive bargaining agent for a unit of employees of the Utica Transit Authority (Authority) which included Hoke. A count of mail ballots was held on August 31, 1995. Local 424 received a majority of the valid votes cast. Local 424 was certified pursuant to that vote by our order dated September 19, 1995.[2/]

[2/]Utica Transit Auth., 28 PERB ¶3000.53 (1995).

The benefits in issue are both medical and disability. Those benefits were provided to Hoke and other unit employees by the New York State Teamster Council Health and Hospital Fund (Fund), an entity distinct from Local 182, pursuant to a collective bargaining agreement between Local 182 and the Authority. During the election campaign, Local 182 informed unit employees that their Fund-sponsored benefits would end if Local 424 won the election because only units represented by participating Teamster locals were eligible to receive those benefits.

On August 31, after the ballot count, Local 182's president, Terence Majka, distributed a letter to unit employees informing them that Fund benefits would cease at the end of that day because Local 182 was "not a participating Teamster local within the Fund structure". That same day, Majka faxed the PERB election agent a letter notifying him that it accepted the election results and acknowledged Local 424 as the representative of the unit employees. Also that day, Majka notified the Fund that Local 182 was no longer the bargaining agent for unit employees.

In response to a letter from the Assistant Director stating that Local 182's responsibilities as bargaining agent would continue until Local 424's certification, which was expected on September 19, Majka wrote a letter to the Assistant Director dated September 11, 1995, clarifying this August 31 fax. This letter was copied to Local 424 and the Authority. Majka's

September 11 letter stated that Local 182 was accepting the election results, that it wanted to avoid any problems with transition and that it disclaimed the unit for the benefit of the employees. In that same September 11 letter, Majka also stated that the Fund's rules required the termination of Fund benefits immediately as to "any unit that decertified from a Teamster local".

Hoke entered the hospital for surgery on September 8, 1995. While in the hospital, Hoke was notified by hospital officials that she no longer had any medical insurance coverage, which she later learned had been cancelled as of September 1, 1995. On October 2, 1995, the Fund rejected Hoke's earlier claim for disability benefits.

All of Local 182's arguments which rest on the distinction between it and the Fund are rejected. The violation of the Act by Local 182 as found and affirmed rests on Local 182's actions only. Nothing the Fund did or did not do is in issue under this charge and no remedy is directed against the Fund. By disclaiming its representation rights prior to Local 424's certification, and notifying the Fund on August 31 that it had done so, Local 182 caused the termination of Hoke's benefits. Nothing in this record even suggests that the Fund would have taken that action on its own prior to September 19, when Local 182 was decertified pursuant to the certification of Local 424. The only substantive question presented to the Assistant Director and to us on appeal is whether Local 182's voluntary disclaimer

violated its duty of fair representation under §209-a.2(c) of the Act. There being no issue affecting the Fund, no preemption issue is raised and all of the other defenses resting on the nature or operation of the Fund simply have no application in this case.

The issue before us is not whether Local 182 had the statutory right to remain the bargaining agent until Local 424's certification on September 19. It clearly could have retained its status as the exclusive bargaining agent, with the accompanying rights and representation responsibilities, until Local 424 was certified. The question for us is whether and under what circumstances a union may renounce its status as the exclusive bargaining agent for a unit, disclaim its statutory representation rights and duties, and lawfully abandon a unit it has represented.

As the Assistant Director observed, we spoke to this issue in Cove Neck Police Benevolent Association.[3/] We there recognized that a union's abandonment of its unit might violate the Act. Lacking precedent of our own specifying the circumstances under which a disclaimer is proper and those in which it is improper, the Assistant Director appropriately turned to decisions under the National Labor Relations Act for guidance. Having examined those private sector decisions,[4/] we conclude

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[3/]24 PERB ¶3028 (1991).

[4/]E.g., Dycus v. NLRB, 615 F.2d 820, 103 LRRM 2686 (9th Cir. 1980).

that they are entirely consistent with the purposes and policies of the Act and strike a proper balance of the rights of public sector unions, employers and employees. Those decisions find and we ourselves hold that a union may voluntarily relinquish its authority and rights as the exclusive representative of a negotiating unit, and thereby terminate its corresponding duty of fair representation, by both unequivocally and in good faith disclaiming further interest in representing the unit. The good faith component of this standard, we believe, requires that the disclaimer be for a proper purpose and that it be communicated to all interested persons and parties reasonably in advance of a date certain by which the union will cease serving as the employees' bargaining agent.

As this case well demonstrates, these standards are minimally necessary to promote stability in the transition between bargaining agents, to help ensure that public employers can continue the terms and conditions of their employees' employment without interruption, and to prevent a union from unfairly influencing the conduct or outcome of representation elections, or penalizing employees for exercising their fundamental statutory right to seek representation by an employee organization of their own choosing.

Without regard to the purpose behind Local 182's disclaimer of representation, it was not even arguably unequivocal and on notice to all interested persons until September 11, and by that date, Hoke's medical and disability benefits had already been

cancelled pursuant to Local 182's August 31 notice to the Fund. It was not until September 11 that Local 424 and Hoke's employer were first notified that Local 182 unequivocally disclaimed the unit. Nor did Local 182 ever give advance notice to anyone of its intent to disclaim representation as of a future date certain. All of its communications, including the September 11 letter, were disclaimers which were either without reference to a date certain or ones intended to be effective immediately. As Local 182's disclaimer was not unequivocal and not on advance notice before it caused the Fund to cancel Hoke's benefits, it did not have the right under the Act to disclaim its representation rights and duties. Therefore, its disclaimer was not effective to terminate its duty of fair representation. By causing the Fund to prematurely terminate Hoke's medical and disability benefits, Local 182 violated §209-a.2(c) of the Act because its actions were arbitrary as a matter of law.

One remedial issue is presented on appeal which necessitates comment. There is apparently no dispute that Hoke's medical bills have been paid by Local 424. It is unknown, however, whether Hoke received any disability benefits from any other source. Make-whole relief is intended to place aggrieved parties in the position they would have been in had the statutory improper practice not been committed.[5/] The Assistant Director's order covers Hoke's "financial loss". The meaning of

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[5/]State of New York (Semowich), 26 PERB ¶3026 (1993); Burnt Hills-Ballston Lake Cent. Sch. Dist., 25 PERB ¶3066 (1992).

the order is unclear. If it is intended to mean that Local 182 is not required to pay Hoke's medical expenses because they may have been paid by another, then the order is inadequate because it absolves Local 182 of one of the major consequences of its statutory violation. The order also does not effectuate the policies of the Act, however, if it requires Local 182 to pay Hoke a sum of money equal to the medical and disability benefits she would have received from or through the Fund because Hoke would thereby receive a windfall to the extent those benefits were actually paid by Local 424 or another, unless the payor were to recoup from her, either voluntarily or in some other proceeding, the monies it actually paid to her or others on her behalf. Both of these remedial issues are addressed if the order is amended to ensure that Hoke is merely made whole and that Local 182 is held fully responsible for the violation of the Act we have found it to have committed.

For the reasons set forth above, Local 182's exceptions are denied and the Assistant Director's decision and order, as amended hereafter, are affirmed. IT IS, THEREFORE, ORDERED that Local 182:

1. Pay to Hoke a sum of money equal to the medical and disability benefits, not received by her from any other source, which would have been paid by or through the Fund to her, or to others on her behalf, for the period from September 1, 1995, to September 19, 1995, with

interest on this sum at the rate of nine percent per annum.

2. Pay to Local 424, and any others making payment of medical or disability benefits to Hoke, or to others on her behalf, a sum of money equal to any payments of medical or disability benefits actually made to her, or to others on her behalf, which would have been paid by or through the Fund to her, or others on her behalf, for the period from September 1, 1995 to September 19, 1995, with interest on any sum owing at the rate of nine percent per annum.

3. Mail the attached notice to the last known home address of each of the employees in the negotiating unit of Authority employees which includes Hoke.

DATED: January 29, 1997
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 of the Utica Transit Authority (Authority) in the unit formerly represented by the International Brotherhood of Teamsters, Local 182 (Local 182), which is now represented by United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 (Local 424), that Local 182 will:

1. **Pay to Sharon Hoke a sum of money equal to the medical and disability benefits, not received by her from any other source, which would have been paid by or through the New York State Teamster Council Health and Hospital Fund (Fund) to her, or to others on her behalf, for the period from September 1, 1995, to September 19, 1995, with interest on this sum at the rate of nine percent per annum.**

2. **Pay to Local 424, and any others making payment of medical or disability benefits to Hoke, or to others on her behalf, a sum of money equal to any payments of medical or disability benefits made to her, or to others on her behalf, which would have been paid by or through the Fund to her, or others on her behalf, for the period from September 1, 1995 to September 19, 1995, with interest on any sum owing at the rate of nine percent per annum.**

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

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL 182

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMALGAMATED TRANSIT UNION, DIVISION 726, AFL-CIO,

Charging Party,

-and-

CASE NOS. U-15254 & U-16037

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

GLADSTEIN, REIF & MEGINNISS (WALTER M. MEGINNISS, JR., and ELLEN DICHNER of counsel), for Charging Party

MARTIN A. SCHNABEL (JOYCE R. ELLMAN of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the New York City Transit Authority (Authority) and cross-exceptions filed by the Amalgamated Transit Union, Division 726, AFL-CIO (ATU), to a decision of an Administrative Law Judge (ALJ) finding that the Authority violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred work exclusive to ATU's bargaining unit to nonunit employees represented by the Transit Workers Union (TWU).[1/] The ATU alleges that the Authority assigned bus maintenance and repair to nonunit employees on November 15, 1993 (Case No. U-15254) and again on August 4, 1994 (Case No. U-16037). The Authority denied

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[1/]The TWU was put on notice of these charges but it did not intervene.

the material allegations of the charges and raised several affirmative defenses.

After several days of hearing, the ALJ found that the regular maintenance and repair of buses depoted in Staten Island was the exclusive work of the unit represented by ATU. The assignment of that work to employees in the TWU's unit violated the Authority's duty to negotiate and to remedy that violation the ALJ ordered the Authority to make ATU unit employees whole for the loss of any wages or benefits suffered as a result of the transfer of this work to nonunit employees on November 15, 1993, and August 4, 1994. The Authority excepts to the ALJ's decision, arguing that the ALJ erred in finding that the work in issue was exclusive to ATU, in rejecting the Authority's defenses of operational necessity, managerial prerogative, change in level of service, waiver and timeliness, and in ordering the Authority to "make whole" the ATU unit employees. ATU supports the ALJ's decision, but it cross-excepts to his failure to issue a cease and desist order.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ, but modify the order as discussed infra.

The ATU represents all Authority employees in the title of bus maintainer at the Yukon and Castleton depots in Staten Island. These employees inspect buses assigned to Staten Island and perform routine repairs and maintenance on the buses to

ensure their uninterrupted service or their return to service.[2/] Buses that require major repair work are sent to the East New York base shop in Brooklyn. The TWU represents the bus maintainers who work at that shop, as well as the bus maintainers at the other depots located in the New York City boroughs, except for Staten Island.

The ALJ found that the Authority transferred the transmission work needed to be done on one bus, assigned to the Yukon depot in Staten Island, to the East New York base shop on November 15, 1993. That bus was returned to Staten Island after the transmission work was completed. On August 4, 1994, work on transmissions, air-conditioners, brakes, starters, generators and HSO work was done by TWU unit employees out of the Jackie Gleason depot in Brooklyn on several buses also assigned to the Yukon depot. When the repairs were completed, those buses were returned to Staten Island.

The ALJ found that unit employees had exclusivity over work he defined as the regular, routine repair and maintenance of Authority buses stationed in Staten Island. The Authority argues that the work should not have been defined by geographic location because the same work was performed at all of its depots and that, even as the ALJ defined the unit work, it has not been exclusively performed by ATU unit employees.

[2/]This work includes work on generators, transmissions, air-conditioners, starters, break relining and heavy scheduled operations (HSO), a task involving the complete overhaul of the undercarriage of the bus.

We have held frequently that the creation of a discernible boundary to unit work will allow an employee organization to retain exclusivity over work even though it would not have such exclusivity without such a boundary.[3/] Section 1.2 of the collective bargaining agreement between the ATU and the Authority recognizes the ATU as the "exclusive bargaining representative ... of all of the hourly paid operating and maintenance employees of the Authority in the titles listed in Appendix A, ... in the Staten Island Bus Division." It is evident that the Authority itself has seen fit to define ATU's unit by reference to the Staten Island depots. The only buses upon which these employees perform routine repairs and maintenance are buses stationed in Staten Island. As we noted in Hudson City School District:

> [J]ob location can form a discernible boundary to unit work within which a union may maintain its exclusivity even if there is no exclusivity over the job function beyond that boundary.[4/]

The record clearly establishes that only ATU's unit employees performed routine maintenance and repair of the buses stationed in Staten Island. That the same services are performed at depots located in the other boroughs on buses stationed at those locations by nonunit employees in the same job title does not disturb ATU's exclusivity over the work here in issue. A

[3/]Clinton Community College, 29 PERB ¶3066 (1996); Hudson City Sch. Dist., 24 PERB ¶3039 (1991); City of Rochester, 21 PERB ¶3040 (1988), conf'd, 155 A.D.2d 1003, 22 PERB ¶7035 (4th Dep't 1989).

[4/]24 PERB ¶3039, at 3080 (1991).

discernible boundary around the work at the Staten Island depots has been recognized and maintained by the Authority, and by this decision we merely recognize the unit work which the Authority itself has defined by contract and practice.

The Authority also argues that ATU lacks exclusivity even over the performance of routine bus maintenance and repair on buses stationed in Staten Island because vendors and nonunit employees have done that work. The ALJ found, however, and the record supports his finding, that the instances in which vendors performed routine maintenance or repair on buses assigned to Staten Island had been as part of repairs pursuant to warranty. These few instances and the circumstances surrounding them do not destroy ATU's exclusivity. Neither do the few occasions when nonunit employees, primarily those at the East New York base shop, did routine repair and maintenance on buses stationed in Staten Island. The record establishes that when a bus stationed in Staten Island breaks down in another borough, a road crew attempts to put the bus back in service. If that is not possible, attempts are made to bring the bus to its assigned depot for repair. In a few cases, warranted by the extent of repairs necessary, the buses have been repaired at the nearest available depot. Finally, the record indicates that there have been a few isolated incidents when a bus stationed in Staten Island had routine repair or maintenance performed at another depot. However, to the extent that the work was performed by nonunit personnel at the East New York base shop, it was

performed in conjunction with the more extensive repairs which are done there. We have previously found that a union does not forfeit exclusivity over bargaining unit work simply because of the performance of that work by nonunit personnel doing so "merely as an incident to the performance of nonunit work...."[5/]

The ALJ further found that the record evidenced only a few isolated incidents where nonunit employees performed routine repairs and maintenance on buses stationed in Staten Island. In those cases, the ATU either filed a grievance or received an assurance from the Authority that the situation was nonprecedential. We find, as did the ALJ, that this casual and occasional performance of the work in issue by nonunit employees and vendors did not breach the exclusivity that the ATU otherwise had over the routine repair and maintenance of buses stationed in Staten Island. There is no dispute that the work performed by nonunit employees on November 15, 1993, and August 4, 1994, was the routine repair and maintenance of buses assigned to Staten Island. Such transfers violated §209-a.1(d) of the Act, unless there is any merit to the Authority's defenses.

The Authority argues that the ALJ mischaracterized the basis for its waiver defense. The Authority relies on §1.12 of its collective bargaining agreement with the ATU, which provides, in pertinent part: "The decision with respect to the farming out of any particular work shall remain solely that of the Authority."

[5/]Village of Malverne, 28 PERB ¶3042, at 3099 (1995).

The Authority asserts that the ATU, by agreeing that the Authority may "farm out" work, clearly has waived its right to object to the assignment of unit work to nonunit employees in the same title. The ALJ found that neither this clause nor the Authority's broadly worded management rights clause[6/] evidenced the type of clear, unmistakable and unambiguous relinquishment of a known right required for the finding of a waiver. We agree. The language of §1.12 refers only to "farming out" unit work. We find that this reference is only to sub-contracting unit work to nonemployees of the Authority because the record evidences that the ATU and the Authority did not intend this language to cover the transfer of unit work to other, nonunit employees of the Authority. The ATU president gave unrebutted testimony that §1.12 was intended to cover the transfer of unit work to non-Authority employees only. The language of §1.12 does not clearly waive the ATU's right to negotiate transfers of unit work between groups of the Authority's own employees, and we cannot assume that because the ATU has agreed that the Authority may "farm out" unit work, that it must also have agreed to the unilateral

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[6/]The relevant language in §1.16 is:

> Without limitation upon the exercise of any of its statutory responsibilities, the Authority shall have the unquestioned right to exercise all normally accepted management prerogatives, including the right to fix operating and personnel schedules, impose layoffs, determine work loads, arrange transfers, order new work assignments, and issue any other directive intended to carry out its managerial responsibilities to operate the transit facilities safely, efficiently and economically.

transfer of all bargaining unit work in any circumstance.[7/]

Neither is the language of the management rights clause sufficient to grant the Authority the unfettered right to transfer unit work to nonunit employees. A general management rights clause does not give rise to the waiver of the right to negotiate in good faith, nor can it confer upon an employer the right to unilaterally transfer unit work to nonunit personnel.[8/]

The Authority also alleges that operational necessity required the transfer of unit work on November 15, 1993 and August 4, 1994. It argues that the ALJ erred in not allowing the introduction of evidence in support of its argument that it acted to return buses to service and to enhance its service to the public. The ALJ allowed an offer of proof in which the Authority argued that it had a shortage of buses in service and that this was affecting its ability to put enough buses on the road to provide adequate service to the public. The Authority did not make any offer of proof of a compelling need to act in the manner that it did, or that it had negotiated with the ATU to the point of impasse and remained willing to negotiate the transfer. Based upon the offer of proof, the ALJ correctly ruled that no further

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[7/] State of New York (Dep't of Correctional Serv.), 27 PERB ¶3055 (1994), conf'd, 220 A.D.2d 19, 29 PERB ¶7008 (3d Dep't 1996).

[8/] State of New York - Unified Court Sys., 28 PERB ¶3014 (1995); County of Broome, 22 PERB ¶3019 (1989).

evidence was necessary. Relying on our earlier decisions[9/], the ALJ held in his decision confirming his ruling at the hearing, that the Authority had not established a compelling need defense because it had not offered evidence that it had no other options open to it but to transfer ATU's unit work, that it had negotiated that transfer to impasse with ATU, or that it was willing to continue negotiations after the transfers. While the Authority had concerns relating to service, there were other options open to it to address the need to get certain buses back in service, such as negotiating with the ATU or authorizing overtime. It elected not to pursue these options and it chose instead to unilaterally transfer unit work. On balance, we do not find that the ALJ erred in either his ruling at the hearing or in his disposition of the Authority's defense.[10/]

The Authority argues also that the charges are untimely, not because they were not filed within four months of the transfers of unit work in November 1993 and August 1994, as required by our Rules of Procedure (Rules)[11/], but because it has been assigning work performed by ATU's unit to nonunit employees for years, with the ATU's knowledge and acquiescence. This argument is essentially one of waiver by conduct and is without merit. "An

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[9/]City of Rochester, 27 PERB ¶3031 (1994); New York City Transit Auth., 19 PERB ¶3043 (1986); Wappingers Cent. Sch. Dist., 19 PERB ¶3037 (1986).

[10/]County of Clinton, 28 PERB ¶3041 (1995).

[11/]Rules, §204.1(a)(1).

improper practice charge is not rendered untimely because a charging party might be found to have previously waived its right to negotiate."[12/] Here, as we have already found, there is no evidence of waiver by the ATU of its right to negotiate the transfers of unit work to nonunit employees which occurred in November 1993 and August 1994. As the charges were filed within four months of the acts alleged to be improper, they are timely.

Finally, we find that the make-whole remedy ordered by the ALJ is appropriate. First, there should be little difficulty in identifying the employees who have suffered any loss of wages or benefits as a result of the Authority's transfer of work to nonunit employees. Second, without the make-whole remedy, bargaining unit employees deprived of the unit work could not recoup whatever losses, if any, that they incurred by virtue of the violation.[13/] We do modify the ALJ's remedy, however, by including a cease and desist order. Such an order is appropriate to ensure that the rights of ATU unit employees will not be violated in the future by similar unilateral transfers.[14/]

Based on the foregoing, the exceptions of the Authority are denied, the cross-exception of the ATU directed to the remedial order is granted, and the decision of the ALJ is affirmed.

[12/]Auburn Enlarged City Sch. Dist., 25 PERB ¶3055, at 3116 (1992).

[13/]State of New York, 16 PERB ¶3050 (1983).

[14/]New York City Transit Auth., supra.

IT IS, THEREFORE, ORDERED that the Authority:

1. Cease and desist from unilaterally transferring to nonunit employees the work of employees of the unit represented by the ATU, consisting of the regular, routine repair and maintenance of Authority buses assigned to Staten Island.

2. Make ATU unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to nonunit employees of transmission work on November 15, 1993, and its transfer of transmission, HSO, brake relines, generator, starter and air-conditioning work on August 4, 1994, with interest at the currently prevailing maximum legal rate.

3. Sign and post the attached notice in all locations at which notices of information to ATU unit employees are ordinarily posted.

DATED: January 29, 1997
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 of the New York City Transit Authority (Authority) in the unit represented by the Amalgamated Transit Union, Division 726, AFL-CIO (ATU) that the Authority will:

1. Not unilaterally transfer to nonunit employees the work of employees of the unit represented by the ATU, consisting of the regular, routine repair and maintenance of Authority buses assigned to Staten Island.

2. Make ATU unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to nonunit employees of transmission work on November 15, 1993 and its transfer of transmission, HSO, brake relines, generator, starter and air-conditioning work on August 4, 1994, with interest at the currently prevailing maximum legal rate.

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

NEW YORK CITY TRANSIT AUTHORITY

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, TOWN OF CLARENCE UNIT OF LOCAL 815,

Charging Party,

-and-

CASE NO. U-17333

TOWN OF CLARENCE,

Respondent.

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

NICHOLAS J. SARGENT, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) finding that the Town of Clarence (Town) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally consolidated coffee breaks of its Water Department employees who are in a unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Town of Clarence Unit of Local 815 (CSEA).

After a hearing, the ALJ determined that the Town had unilaterally consolidated two fifteen-minute coffee breaks, one taken by unit employees in the morning and one in the afternoon,

into one thirty-minute coffee break to be taken in the morning. Although the Town alleged in its answer that the management rights clause in its 1992-95 collective bargaining agreement with CSEA waived CSEA's right to negotiate the change, the ALJ, determining that the language was too broad to evidence a clear and knowing waiver of CSEA's bargaining rights, found that the Town had violated §209-a.1(d) of the Act.

The Town excepts to the ALJ's decision, arguing that it was not required to bargain its decision to consolidate coffee breaks because the change did not increase the employees' workday or significantly increase their work load. CSEA supports the ALJ's decision.

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

Paid time off from work in the form of coffee breaks is mandatorily negotiable.[1/] The Town's contractual management rights clause gives it the right "to direct, deploy and utilize the work force...." The ALJ rejected the Town's waiver defense, finding that the language relied on by the Town was far too broad to establish a knowing and meaningful waiver of CSEA's right to negotiate the change in the scheduling of the coffee breaks. We affirm the ALJ's finding in this regard. The Town's management

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[1/] Inc. Village of Rockville Centre, 18 PERB ¶3082 (1985).

rights clause is "nonspecific and too general to operate as a plain and clear waiver of bargaining rights"[2/] in this regard.

For the first time in its exceptions, the Town argues that any change in break time which does not increase the employees' workday or their work load is not mandatorily negotiable and that, therefore, the charge should be dismissed. This argument is without merit. Absent a meritorious defense, a unilateral change in a mandatory subject of negotiations violates the Act, whether or not the change affects the length of the workday or work load.[3/] The number of times employees are released from their job duties for rest and refreshment are themselves mandatorily negotiable subjects. By unilaterally consolidating two fifteen-minute coffee breaks into a single thirty-minute coffee break, the Town violated §209-a.1(d) of the Act.

Based upon the foregoing, the Town's exceptions are denied and the decision of the ALJ is affirmed.

IT IS, THEREFORE, ORDERED that the Town:

1. Restore the practice of one fifteen-minute coffee break in the morning and one fifteen-minute coffee break in the afternoon previously enjoyed by Water Department employees.

[2/]Ulster County Sheriff, 27 PERB ¶3028, at 3069 (1994).

[3/]See, e.g., Town of Smithtown, 25 PERB ¶3081 (1992); City of Auburn, 23 PERB ¶3044 (1990); County of Yates, 22 PERB ¶3017 (1989).

2. Sign and post the attached notice in all locations at which notices of information to unit employees are ordinarily posted.[4/]

DATED: January 29, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[4/]While the ALJ ordered the Town to negotiate in good faith with CSEA concerning the number of coffee breaks taken by unit employees in the Water Department, we have deleted this portion pursuant to our decision in Middle Country Central School District, 23 PERB ¶3045 (1990).

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 of the Town of Clarence Water Department (Town) in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Town of Clarence Unit of Local 815 that the Town will restore the practice of one fifteen-minute coffee break in the morning and one fifteen-minute coffee break in the afternoon previously enjoyed by Water Department employees.

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

TOWN OF CLARENCE

. . . . . .

T' 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

KENNETH SWART,

Petitioner,

-and- **CASE NO. C-4535**

TOWN OF SAUGERTIES,

Employer

-and-

UNITED FEDERATION OF POLICE, INC.

Intervenor.

THOMAS P. HALLEY, Esq., for Intervenor

BOARD DECISION AND ORDER

The United Federation of Police, Inc. (Federation) seeks permission to appeal from a ruling made by the Administrative Law Judge (ALJ) assigned by the Director of Public Employment Practices and Representation (Director) to investigate a petition for decertification of the Federation filed by an employee in a unit of police officers of the Town of Saugerties (Town). The Federation objected to the petition on the ground, inter alia, that the employee petitioner had failed to indicate on the petition whether or not he had an affiliation. The Federation argues that the petition is invalid because the petitioner did not state on the petition form whether or not he had an affiliation. The ALJ dismissed this claim as without merit,

concluding that an individual employee is not required to indicate an affiliation on a decertification petition.[1/]

Appeals from rulings made during the processing of a representation petition which is still pending before the Director are considered with our permission only pursuant to §201.9(c)(4) of the Rules. In a recent decision,[2/] also involving the Federation and this same representative, we held that we would not entertain appeals from rulings which are made during the processing of a representation petition pending before the Director unless there are present unusual circumstances resulting in extreme prejudice to the party which is seeking the permission to appeal. We specifically held that no interlocutory appeal would be considered if the ruling sought to be appealed could be adequately reviewed after the Director had completed the investigation of all questions concerning representation. We came to this conclusion to prevent or minimize delays in the processing of representation petitions which are caused by interlocutory appeals.

[1/]The petition is not for certification of any employee organization. A petition seeking the decertification of a current bargaining agent may be filed by one or more employees pursuant to §201.2(a) of the Rules of Procedure (Rules).

[2/]Town of Putnam Valley and Town of New Paltz, 28 PERB ¶3049 (1995). The Federation representative's actions in conjunction with those cases led to misconduct charges being filed against him by the representative of the petitioners in those cases. The misconduct charges, which include allegations that the Federation's representative filed frivolous objections to those petitions, are currently pending before the agency.

The exceptions we are asked to consider in this case can be reviewed after the petition is processed to completion and they are of a type less warranting permission to appeal than those raised in the other cases. The Federation's request for permission to appeal the ruling in issue in this case is denied.

SO ORDERED.

DATED: January 29, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF NEWBURGH,

Charging Party,

-and-

CASE NO. U-17743

PATROLMEN'S BENEVOLENT ASSOCIATION OF NEWBURGH, NEW YORK, INC.,

Respondent.

HITSMAN, HOFFMAN AND O'REILLY (JOHN F. O'REILLY of counsel), for Charging Party

HAROLD, SALANT, STRASSFIELD AND SPIELBERG (CHRISTOPHER HAROLD of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Newburgh (City) to a decision of the Director of Public Employment Practices and Representation (Director) finding mandatory several demands submitted by the Patrolmen's Benevolent Association of Newburgh, New York, Inc. (PBA) to compulsory interest arbitration.

The City excepts to the Director's finding that demands numbered 20, 33, 36, 50 and 51 are mandatory subjects of negotiation.[1/] The PBA supports the Director's decision.

[1/]No exceptions were filed to the Director's determination that the demands numbered 1, 15, 21, 22, 30, 39, 43 and 44 are mandatory subjects of negotiation.

Having reviewed the record and considered the parties' arguments, we affirm the decision of the Director.

DEMAND NO. 20

> All employees shall receive a minimum of 4 hours pay when called in for or who voluntarily accept additional duty. If said employee is called in or voluntarily accepts duty the performance of which takes less than 4 hours, said employee shall have the option of leaving employment and not being paid for that part of the minimum call-back period not worked. Said employee shall be paid overtime at the rate of one and one-half their hourly rate of pay.

The Director found that this demand was essentially a demand for wages and was, thus, a mandatory subject of negotiation. The City argues that the demand, by setting a minimum call-in of four hours, requires it to allow employees to remain on duty when their services may no longer be needed. That is not correct. Nothing in this demand prevents the City from releasing the employee from duty at any time. It simply requires that when released the employee receives a minimum of four hours pay. Compensation is the necessary derivative of call-in demands, which are mandatory subjects of negotiation.[2/] The City further argues that by allowing employees to leave when the assignment for which they were called in is completed, its right to control staffing and manpower is limited. That part of the demand simply allows the employee the option, if the assignment for which the employee has been called in is completed in less than four hours, of leaving and taking overtime pay for the hours actually worked.

[2/] See Buchanan Police Ass'n, 29 PERB ¶3061 (1996).

The determination as to whether the assignment is complete rests with the City. Nothing in this demand prevents the delivery of any service. At most, it requires that further services be provided by someone other than the employee who has come in to perform the assignment identified by the employer. As the demand does not by its terms prevent the delivery of any service, it is no more than a demand for premium pay and is mandatorily negotiable.[3/]

DEMAND NO. 33, AS AMENDED

> Bargaining unit members shall be notified of the right, and shall be given the opportunity to acquire the assistance and representation of the Association and its attorney at any disciplinary action. The City shall notify the President of the Association prior to commencing any disciplinary action.

The City argues that the Director erred in determining that this demand is a mandatory subject of negotiation because it unduly interferes with the City's right to investigate potential disciplinary violations. The City objects only to the last sentence of the demand, which the Director found to be a reasonable notice requirement. Disciplinary procedures are generally mandatory subjects of negotiation unless they unduly delay the employer from carrying out its administrative responsibilities.[4/] This demand merely requires the City to notify the PBA president before it commences a disciplinary

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[3/]Orange County Community College Faculty Ass'n, 10 PERB ¶3080 (1977).

[4/]Amherst Police Club, Inc., 12 PERB ¶3071 (1979).

action; it cedes no control over the decision whether to discipline to the PBA and, as such, it is a mandatory subject of negotiation.

DEMAND NO. 36

> Provide contractual prohibition against City contracting out bargaining unit work.

The City argues that this demand is nonmandatory because it does not incorporate the various balancing tests we have used in determining whether a violation of §209-a.1(d) of the Act has occurred when an employer unilaterally transfers unit work to nonunit employees or employees of a third party.[5/] We have long held that a demand which seeks to preclude an employer from contracting out unit work is a mandatory subject of negotiation, as long as the demand involves current unit work.[6/] This demand is, therefore, mandatorily negotiable.

DEMAND NO. 50

> Association Release Time: Five (5) days exclusively for the Vice-President; ten (10) days exclusively for the President; five (5) days for other Board members to be selected by the President. Said release days may be utilized simultaneously.

The Director found this demand to be mandatory because it provides for paid organization leave for employees. The City asserts that the demand interferes with its right to determine

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[5/]See State of New York (Dep't of Correctional Serv.), 27 PERB ¶3055 (1994), conf'd, 220 A.D.2d 19, 29 PERB ¶7008 (3d Dep't 1996); Niagara Frontier Transp. Auth., 18 PERB ¶3083 (1985).

[6/]New York City Transit Auth., 22 PERB ¶6501 (1989); Somers Faculty Ass'n, 9 PERB ¶3014 (1976).

its staffing needs and its delivery of service to the public because the demand creates the potential for several employees to be on organization leave at the same time. We have previously held that paid time off for employees to work on behalf of their employee organization is mandatorily negotiable.[7/] We have also held some broadly worded time off clauses to be nonmandatory, but only when they have interfered with an employer's right to fix staffing levels to such an extent that the employer is unable to provide its services.[8/] However, here, the City argues only that there is a potential that several employees will take the same day off. The clause does not, therefore, interfere with staffing levels to the extent necessary to render it nonmandatory.

DEMAND NO. 51

> The City shall provide time during a police officer's training period for the purpose of Union President or his or her designee advising said trainee of his or her rights as a Bargaining Unit member.

The City argues that the above demand is nonmandatory because it requires it to provide the PBA with time during work and space on premises to meet with trainees to discuss employee organization business and that this constitutes improper assistance and support for the PBA. This demand was properly

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[7/]Troy Uniformed Firefighters Ass'n, Local 2304, 10 PERB ¶3015 (1977); City of Albany, 7 PERB ¶3078 (1974).

[8/]Cortland Paid Fire Fighters Ass'n, Local 2737, 29 PERB ¶3037 (1996); Patrolmen's Benevolent Ass'n of Newburgh, New York, Inc., 18 PERB ¶3065 (1985).

found by the Director to be a demand for access reasonably related to the PBA's duties as the bargaining agent and is, therefore, mandatorily negotiable.[9/]

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

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

DATED: January 29, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[9/] Local 2561, AFSCME, 23 PERB ¶3054 (1990).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matters of

AMALGAMATED TRANSIT UNION, DIVISION 726, AFL-CIO, and AMALGAMATED TRANSIT UNION, DIVISION 1056, AFL-CIO,

Charging Parties,

-and-

CASE NOS. U-17434 & U-17435

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

In the Matter of

LOCAL 100, TRANSPORT WORKERS UNION, AFL-CIO,

Charging Party,

-and-

CASE NO. U-17447

NEW YORK CITY TRANSIT AUTHORITY and MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY,

Respondents.

GLADSTEIN, REIF & MEGINNISS (KENT Y. HIROZAWA of counsel), for Amalgamated Transit Union, Divisions 726 and 1056, AFL-CIO

O'DONNELL, SCHWARTZ, GLANSTEIN & ROSEN (MALCOLM A. GOLDSTEIN of counsel), for Local 100, Transport Workers Union, AFL-CIO

MARTIN A. SCHNABEL (KENNETH H. SCHIFFRON and AUDREY DANIEL of counsel), for Respondents

BOARD DECISION AND ORDER

These cases come to us at this time pursuant to a motion filed by the charging parties, Amalgamated Transit Union, Divisions 726 and 1056, AFL-CIO (ATU), and Local 100, Transport Workers Union, AFL-CIO (TWU), to strike parts of the exceptions and supporting memorandum of law filed by the respondents, New York City Transit Authority (NYCTA) and Manhattan and Bronx Surface Transit Operating Authority (MABSTOA). NYCTA and MABSTOA have taken exceptions to a decision by an Administrative Law Judge (ALJ) finding that they violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when they unilaterally promulgated and implemented what were held to be new work rules and penalties pertaining to the removal of bus drivers from service as a result of drug or alcohol convictions, traffic accidents or certain violations of the State's Vehicle and Traffic Law (VTL).

ATU and TWU argue that certain parts of the exceptions and the supporting brief raise issues and arguments which the parties foreclosed from consideration by express stipulation.

NYCTA and MABSTOA oppose the motion and any further extension of time to respond to the exceptions.

ATU's and TWU's motion to strike was filed admittedly to "save them the trouble and expense of briefing issues that they should not have to address." This type of motion, however, has no precedent in practice and is not authorized by our Rules of

Procedure (Rules), which provide for responses to exceptions within specific and limited time frames, with such extensions of time as are necessary and appropriate. Such an extension of time was granted to ATU and TWU upon NYCTA's and MABSTOA's consent. However, in lieu of responding to the exceptions, ATU and TWU have filed this motion to strike.

Our policy of preventing the delay occasioned by the consideration of interlocutory appeals from interim ALJ determinations[1/] applies equally to this type of motion. Similarly, in the absence of a showing of substantial prejudice, we should and do defer the review of the issues raised by this type of motion until such time as the entire case is ready for decision. Applying these principles to the motion before us, we conclude that questions as to whether certain of NYCTA's and MABSTOA's exceptions are in derogation of the parties' stipulations and, if so, whether those stipulations should bind us to any extent on appeal can be fully reviewed as appropriate under the exceptions and any response thereto. We, therefore, deny the motion to strike parts of the exceptions and brief.

ATU and TWU have requested a further extension of time to file a response to the exceptions if their motion is denied. Given the uncertainties surrounding the filing and disposition of

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[1/]Interlocutory appeals from ALJ rulings and other nonfinal determinations are heard only if the underlying issues cannot be adequately reviewed upon exceptions and responses to the ALJ's dispositive decision and order.

this novel motion, and as NYCTA and MABSTOA are not prejudiced by an extension, an extension of time is hereby granted. A response to the exceptions will be deemed timely if filed and served in accordance with our Rules on or before February 11, 1997. SO ORDERED.

DATED: January 29, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MIGUEL SANCHEZ,

Petitioner,

- and -

CASE NO. C-4499

CONVENTION CENTER OPERATING CORPORATION,

Employer,

- and -

LOCAL 1180, COMMUNICATIONS WORKERS OF AMERICA, AFSCME, AFL-CIO,

Intervenor.

MIGUEL SANCHEZ, pro se

ELIZABETH BRADFORD, GENERAL COUNSEL, for Employer

WILLIAM F. HENNING, for Intervenor

BOARD DECISION AND ORDER

On January 16, 1996, Miguel Sanchez (petitioner) filed a timely petition for decertification of Local 1180, Communications Workers of America, AFSCME, AFL-CIO (intervenor), the current negotiating representative for employees of the Convention Center Operating Corporation in the following unit:

Included: All Public Safety Supervisors.

Excluded: All other employees.

Upon consent of the parties, a mail ballot election was held on August 6, 1996. The results of this election show that the majority of eligible employees in the unit who cast valid ballots

no longer desire to be represented for purposes of collective negotiations by the intervenor.[1/]

THEREFORE, IT IS ORDERED that the intervenor be, and it hereby is, decertified as the negotiating agent for the unit.

DATED: January 29, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

1/ By decision dated December 9, 1996 (29 PERB ¶4032), the Director dismissed election objections filed by the intervenor; no exceptions to the Director's decision have been filed. Of the three ballots cast, one was for representation and two were against representation. There were no challenged ballots.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Petition of

NASSAU COMMUNITY COLLEGE FEDERATION OF TEACHERS, NYSUT, AFT, AFL-CIO,

Petitioner,

CASE NO. I-0043

To review the implementation of local government provisions and procedures pursuant to §212 of the Civil Service Law and PERB Rule §203.8

CLAUDIA SCHACTER-deCHABERT, for Petitioner

JACK D. TILLEM, ESQ., for Nassau County Public Employment Relations Board

INGERMAN SMITH, L.L.P. (JOHN H. GROSS of counsel), for Nassau Community College

BEE, EISMAN & READY (HOWARD B. COHEN of counsel), for County of Nassau

PRYOR, CASHMAN, SHERMAN & FLYNN (RICHARD M. BETHEIL of counsel), for Adjunct Faculty Association of Nassau County, Amicus Curiae

BOARD DECISION AND ORDER

On or about November 9, 1995, the Nassau Community College Federation of Teachers, NYSUT, AFT, AFL-CIO (NCCFT), by its president Philip Y. Nicholson, filed a petition with the Board to review the continuing implementation of the provisions and procedures of the Nassau County Public Employment Relations Board (local board). NCCFT filed its petition under §212 of the Public Employees' Fair Employment Act (Act) and §203.8 of our Rules of Procedure (Rules).

The petition concerns an April 28, 1995 Hearing Officer's Report and Decision, adopted by the local board by an order dated October 24, 1995. The local board dismissed a petition by NCCFT to add four titles to a bargaining unit of instructional and non-instructional employees that it represents at the Nassau County Community College (College).[1/] The hearing officer found three of the titles to be confidential[2/] and excluded them from the bargaining unit. In addition, he found the Director of Special Programs for Business to be managerial and also excluded that position from the unit. It is undisputed that the local board's order adopting his decision was subject to judicial review under Article 78 of the Civil Practice Law and Rules (CPLR), and that no party filed such a petition.

NCCFT's petition before us alleges that the local board's decision and order is not substantially equivalent to PERB's decisions and that it deprives employees of their rights under the Act. NCCFT filed a brief asking us to assume jurisdiction over the representation petition, and to find that the four at-issue titles are neither managerial nor confidential and should properly be placed in its bargaining unit.

The local board and the College filed answers opposing the implementation petition. The County of Nassau (County)

[1/]NCCFT withdrew its petition as to a fifth position.

[2/]The Assistant to the Director/Administration and Finance, the Assistant to the Director/Special Programs for Business, and the Director of Special Programs.

intervened in the proceeding, and it, too, filed a brief opposing the petition, arguing that this Board lacks jurisdiction to review the findings of fact and conclusions of law of the hearing officer and the local board.

We designated Counsel to investigate the petition. In the course of that investigation, Counsel concluded that the petition could raise a material issue about the status of the College and County as joint employers and, therefore, about the jurisdiction of the local board over the representation petition. Therefore, on September 6, 1996, Counsel wrote to the parties about the jurisdiction issue. Counsel's letter called their attention to our precedents holding that community colleges are joint employers with their sponsoring counties, and invited them to submit briefs regarding what significance, if any, those cases might have regarding the local board's jurisdiction over the representation proceeding under review.

In response, NCCFT filed a brief which argues that the local board does not have jurisdiction over employees of the College/County, and which again urges us to assume jurisdiction and to add the at-issue titles to its unit. The College also filed a brief which asserts that the College and County are a joint employer of the College's staff and that the local board therefore has no jurisdiction over the representation petition.

The County filed a brief which maintains that we do not have the power in the context of an implementation petition to determine whether the local board has subject matter jurisdiction

over NCCFT's representation petition. The County argues that nothing in our Rules regarding implementation petitions permits us to annul the proceeding under review because of the local board's alleged lack of subject matter jurisdiction.

In addition, the Adjunct Faculty Association of Nassau Community College (AFA), the certified bargaining representative of the College's adjunct faculty, requested and was given the opportunity to submit a brief amicus curiae in this proceeding. AFA's brief argues that we have the authority to grant NCCFT's petition without reaching the issue of the local board's jurisdiction. Indeed, AFA urges us not to reach the jurisdiction issue, asserting that a determination by the Board that the College and the County are a joint employer of the College's faculty members, and that the local board does not have jurisdiction over them, will destabilize labor relations at the College, contrary to the purposes of the Act.

We will first consider the scope of our authority and jurisdiction in this proceeding. Section 212 of the Act provides that a local government may for its employees adopt its own provisions and procedures for resolving certain disputes, including representation disputes, designating employees as managerial or confidential, and settling impasses that arise in negotiations. This local option, however, is subject to our determination that the local provisions and procedures and their continuing implementation are "substantially equivalent" to the provisions and procedures provided by the Act.

On the basis of that authority, Part 203.8 of our Rules authorizes any person to file a "petition to review the question of whether provisions and procedures of a local government are being implemented in a manner substantially equivalent to the provisions and procedures set forth in the act and [our Rules]."[3/] That is the limited question we must decide here. Stated differently, §212 of the Act requires us to determine whether the local board is continuing to implement the purposes and protections of the Act, under its local law and procedures, in a manner that is substantially equivalent to what the Act promises to all of New York's public employees.

If a local board's jurisdiction to act were not a necessary part of our review under §212 of the Act, we could be required in a "continuing implementation" review proceeding to affirm that a local board had acted in a manner substantially equivalent to this Board even though it lacked threshold jurisdiction. We do not interpret §212 of the Act or our Rules as prohibiting or limiting our review of ultra vires acts by a local board. Therefore, our authority must encompass a determination in all cases of whether a local board has acted in excess of its jurisdiction in implementing its local law.

Having reached that conclusion, we turn next to the question of whether the County and College are a joint employer of the at-issue employees. If so, then the local board has no jurisdiction

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[3/]Rules §203.8(b).

over the employees of that joint employer and had no power to issue the determination in the proceeding under review here.

The NCCFT, the County and the College are all signatories to an agreement which sets terms and conditions of employment for employees in the bargaining unit represented by NCCFT.[4/] Moreover, the agreement states that "[t]he County of Nassau, through the Nassau Community College, is engaged in furnishing vitally important educational services to the public." Thus, we find that the College is a county-sponsored community college, sponsored by the County of Nassau.[5/]

Our decisions hold that "a county-sponsored community college is a . . . joint employer with the sponsoring county of the employees who work for the community college because control over the terms and conditions of employment of those employees is shared."[6/] Therefore, the College is a joint employer with the sponsoring county, the County of Nassau, and those who work at the College are employees of a joint employer as a matter of law.

[4/]The agreement, however, is cast only in terms of "mutual promises and obligations" running between the County and the NCCFT.

[5/]See Kuznetz v. County of Nassau, __ A.D.2d __, 645 N.Y.S.2d 520 (2d Dep't 1996) ("The County is the local sponsor of the College . . . .")

[6/]County of Jefferson and Jefferson County Community College (hereafter County of Jefferson), 26 PERB ¶3010, at 3018 (1993), conf'd sub nom. Jefferson County v. PERB, 204 A.D.2d 1001, 27 PERB ¶7010 (4th Dep't), leave to appeal denied, 84 N.Y.2d 804, 27 PERB ¶7014 (1994); Genesee Community College, 24 PERB ¶3017 (1991).

It is axiomatic that where a local government elects the local option under § 212 of the Act, the local board it creates has jurisdiction over the employees of only that local government as a public employer. If it were otherwise, then one local government, for example, a county, could claim that a board that it creates has jurisdiction over the labor relations between another local government, for example, a school district, and its employees. The joint employer here, the College and County, is an employing entity under the Act distinct and separate from the County as a public employer.[7/] Those who work at the College are not employees of the County. They are employees of a joint employer that consists of two otherwise distinct entities, which together constitute a public employer separate from the County.

The local board was formed by an ordinance of the Board of Supervisors of the County of Nassau and approved by its County Executive.[8/] As such, the jurisdiction of that local board can extend to the employees of only that local government.[9/] The

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[7/]See Jefferson County v. PERB, id.

[8/]Nassau County Ordinance No. 549-1981, section 1, states that "the Board of Supervisors hereby finds and declares that it is in the best interests of the citizens of the County and the employees of the Nassau County Government to provide for the effective implementation of the requirements of the Public Employees' Fair Employment Act, as set forth in Article 14 of the Civil Service Law . . . ."

[9/]The County argues that section 5(c)(6) of Nassau County Ordinance No. 549-1981 provides for the appropriate impasse resolution procedures "[w]here Nassau County is, for the purposes of this ordinance, the public employer of employees of an educational institution . . .," apparently arguing that this is a reference to the College. Even if this provision in fact intends to assert jurisdiction over the College, the State Legislature has not authorized it.

local board cannot extend its jurisdiction to the employees of any other government or public employer. Accordingly, the local board did not have jurisdiction over the representation petition at issue here, which sought to add titles to a bargaining unit of employees of the joint employer College/County.

We are aware that all parties have long assumed that the local board has jurisdiction over the College. This assumption is understandable if only because this is the first occasion we have had to review the continuing implementation of provisions and procedures by a local board in a matter involving a county-sponsored community college since our decision in County of Jefferson and its confirmation by the courts.[10/] However, an incorrect assumption regarding jurisdiction, no matter how long-standing or widely shared, cannot give jurisdiction to the local board that the State Legislature never gave to it.

Finally, no actions of the local board are before us other than its exercise of jurisdiction over NCCFT's representation petition and the determination it issued as a result.[11/] Although there is argument that a decision finding that the local board is without jurisdiction over disputes involving employees

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[10/]County of Jefferson, supra note 6.

[11/]The County urges in its brief that we find that the local board continued to have jurisdiction at least until the Appellate Division, Second Department's decision in Kuznetz v. County of Nassau, supra note 5, in which it specifically found that the College and County were the joint employers of an employee in the AFA's bargaining unit. We do not need to make that determination in this case.

of the joint employer will be disruptive because issues might be raised about the validity of actions taken by the parties based upon earlier determinations by the local board, those issues are not before us and we express no opinion about the disposition of them. Although we think it unlikely that the parties would choose to disrupt their labor relations, the potential for disruption cannot serve to vest the local board with the power to extend its jurisdiction to the employees of a different public employer. To the extent any disputes arise involving the parties' future actions, given that any local board's implementation of the Act must be substantially equivalent to our own and the fact that, in any event, no local board has jurisdiction over improper practice allegations, our decision will not disrupt the parties' future labor relationships to any appreciable degree, if at all.

In view of the discussion above, we find in regard to the NCCFT's representation petition that the local board did not implement its local provisions and procedures in a manner substantially equivalent to that required by the Act and this Board's Rules.

NOW, THEREFORE, IT IS ORDERED that the Order of the Nassau County Public Employment Relations Board, dated October 24, 1995, in its case No. R-060, is hereby annulled and

IT IS FURTHER ORDERED that the Nassau County Public Employment Relations Board implement its local provisions and procedures in a manner consistent with the determination herein.

DATED: January 29, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member