STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter 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 on exceptions filed by the New York City Transit Authority (NYCTA) and the Manhattan and Bronx

Surface Transit Operating Authority (MABSTOA) to a decision of an Administrative Law Judge (ALJ) finding that they violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act). The charges allege that NYCTA and MABSTOA unilaterally promulgated and implemented work rules and penalties affecting certain employees of NYCTA represented by the Amalgamated Transit Union, Division 726, AFL-CIO and the Amalgamated Transit Union, Division 1056, AFL-CIO (ATU) and employees of NYCTA and MABSTOA represented by Local 100, Transport Workers Union, AFL-CIO (TWU). The new rules were allegedly more stringent and carried greater penalties than those set forth in Vehicle and Traffic Law (VTL) Article 19A, §509-c[1/] pertaining to the disqualification of bus drivers.

The parties entered into a stipulation of facts in lieu of a hearing. The ALJ thereafter issued a decision finding that the work rules involved mandatory subjects of negotiation. He further found that VTL §509-j(b)[2/] did not exempt NYCTA and MABSTOA from bargaining the promulgation and implementation of work rules which exceeded the requirements of VTL §509-c.

[1/]VTL §509-c sets forth the conditions under which a bus driver may be disqualified from driving a bus.

[2/]VTL §509-j(b) provides, with respect to the grounds for disqualification of bus drivers, that

> (b) Nothing contained herein shall prevent a motor carrier or political subdivision from imposing qualifications that are more stringent than those contained in this article ....

NYCTA and MABSTOA filed exceptions arguing that the ALJ erred in determining that they had not been excused from any bargaining obligation by virtue of the language of VTL §509-j(b) and in determining that the subject matter of the charges was a mandatory subject of negotiation. ATU and TWU thereafter filed a motion with us seeking a determination that NYCTA and MABSTOA were foreclosed from raising in the exceptions the negotiability of the work rules by virtue of the stipulation of fact entered into by the parties in lieu of a hearing. We issued a decision denying the motion to strike parts of NYCTA's and MABSTOA's exceptions and brief, finding that the issues raised by the motion were properly addressed when the entire case was ready for decision and not as an interlocutory appeal.[3/]

NYCTA and MABSTOA previously utilized the disqualification standards set forth in VTL §509-c as the criteria to determine whether and to what extent bus drivers would be warned, reprimanded, reclassified or suspended based upon their driving records. On December 8 and 15, 1995, the NYCTA issued two memoranda to all NYCTA and MABSTOA bus drivers, implementing more stringent standards than those set forth in VTL §509-c for traffic accidents, drug and/or alcohol convictions and moving violations. The parties stipulated that it was the position of NYCTA and MABSTOA that the revised standards are not mandatory subjects of negotiation by virtue of VTL §509-j(b). The parties

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[3/]New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority, 30 PERB ¶3006 (1997).

further stipulated that NYCTA and MABSTOA believed they were acting pursuant to managerial prerogatives and that was why they had determined that the revised standards would not be subject to the contractual grievance and arbitration procedures.

Initially, we deal with the issues raised by ATU and TWU in their interlocutory appeal and again in their responses to the exceptions filed by NYCTA and MABSTOA. Notwithstanding ATU's and TWU's interpretation of the stipulation of facts, NYCTA and MABSTOA are not precluded from raising the negotiability of the revised standards in the exceptions. The ALJ did not read the stipulation as limiting him solely to a determination of the legislative intent of VTL §509-j(b) and neither do we. The stipulation clearly puts in issue the negotiability of the revised standards by referencing both the defenses raised in the answer filed by NYCTA and MABSTOA and its position that because the revised standards were enacted pursuant to managerial prerogative they could not be reviewed in the context of the contractual grievance arbitration procedure. In any event, it is certainly within our power to consider any relevant legal theory in our analysis of the negotiability of the subject matter of an improper practice charge alleging a unilateral change or a refusal to negotiate in violation of §209-a.1(d) of the Act, whether or not a party has advanced that legal theory to us.[4/]

[4/]Sidney Cent. Sch. Dist., 28 PERB ¶3032 (1995).

Turning to the merits of the charge, after a careful review of the record and consideration of the parties' arguments, we affirm the decision of the ALJ.

ATU and TWU argue that the revised standards are work rules and that NYCTA's and MABSTOA's implementation of them affects terms and conditions of employment. It is further argued that the revised standards carry a disciplinary component which is itself mandatorily negotiable. NYCTA and MABSTOA argue that the standards are in fact qualifications for employment, are within their managerial prerogative to implement unilaterally and are sanctioned by VTL §509-j(b).

Under the prior standards, bus drivers may be required to take a road test, face eighteen months probation or from one to five years of disqualification as a bus driver for the accumulation of points on their licenses, involvement in accidents, drug and/or alcohol possession and moving violations, as specifically provided in VTL §509-c. Adverse actions taken against an employee under these circumstances could be addressed through the contractual grievance and arbitration procedure.[5/] Under the revised standards, employees' driving records are reviewed for a longer period of time and with more stringent requirements and employees may be required to take a road test, face from six months to two years probation or a one year

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[5/]Such adverse actions have included discharge, suspension, demotion to nondriving positions (NYCTA only) or retraining, reclassification, and reprimands.

disqualification. For the first time, bus drivers may be permanently disqualified from driving a bus for various repeat offenses and be removed from their jobs permanently or for an extended period of time.[6/]

In County of Montgomery[7/], we reviewed a similar policy unilaterally implemented by the employer. There, County employees who drove County-owned vehicles were required to possess a valid New York State driver's license. The County then unilaterally imposed a requirement that those employees apply for and obtain a County driving permit. The issuance of the permit was dependent upon the County's review of the employee's driving record, both on and off the job. Failure to obtain the permit involved the employee in an appeal procedure. In the meantime, the employee could not operate a County vehicle. Refusal to participate in the process resulted in discipline. We found the imposition of the permit requirement to violate §209-a.1(d) of the Act because it was a new condition of employment, involving a disciplinary component, unilaterally imposed upon the employees.

[6/]For example, under the old standards, an employee involved in three accidents in an eighteen month period would be required to take a road test. After passing the road test, the employee would be on probation for eighteen months. Three more accidents within the probation period would result in the employee being disqualified for one year. Under the revised standards, an employee having three accidents in a twenty-four month period would be subject to the road test requirement. After passing the road test, the employee would be on probation for twenty-four months and three accidents within that period would result in permanent disqualification.

[7/]18 PERB ¶3077 (1985).

Here, the employees were required to possess a valid New York State driver's license and meet the requirements of VTL §509-c to drive buses for NYCTA and MABSTOA. NYCTA and MABSTOA now require that the bus drivers represented by ATU and TWU meet additional conditions, in excess of those required under the Vehicle and Traffic Law. Failure to comply with the revised standards results in reclassification, reprimand, demotion, suspension or discharge. These revised standards are no different from the imposition of the permit requirement we found negotiable in County of Montgomery. It is a new condition created by NYCTA and MABSTOA for continued employment imposed upon current employees and failure to comply with it results in discipline or discharge. The grounds for the imposition of discipline and the penalty to be imposed are likewise mandatorily negotiable.[8/] Therefore, NYCTA and MABSTOA violated §209-a.1(d) of the Act when the revised standards were unilaterally implemented unless VTL §509-j either directs that such action be taken, thereby leaving no discretion to these employers to negotiate, or establishes a plain and clear legislative intent to exempt the employers from a duty to bargain.

The language of VTL §509-j provides that nothing contained therein shall prevent a political subdivision from imposing qualifications that are more stringent than those contained in that article. The parties concede, and the record shows, that

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[8/]City of Buffalo, 23 PERB ¶3050 (1990); New York City Transit Auth., 20 PERB ¶3037 (1987), aff'd, 147 A.D.2d 574, 22 PERB ¶7001 (2d Dep't 1989).

the revised standards promulgated and implemented by NYCTA and MABSTOA are more stringent than the grounds for disqualification set forth in VTL §509-c. In Board of Education of the City School District of the City of New York v. PERB,[9/] the Court of Appeals stated that:

> The obligation under the Taylor Law to bargain as to all terms and conditions of employment is a "strong and sweeping policy of the State". (footnote omitted)

The Court recognized that the Legislature might abrogate this obligation by the explicit terms of a statute or by implication inherent in a statute or a statutory scheme. In Webster Central School District v. PERB,[10/] the Court held that:

> While legislative expression is the best evidence of legislative intent, it is not the only evidence; legislative intent may also be implied from the words of an enactment. It should be apparent, however, that in order to overcome the strong State policy favoring the bargaining of terms and conditions of employment, any implied intention that there not be mandatory negotiation must be "plain and clear" (Syracuse Teachers Assoc., Inc. v. Board of Educ., 35 N.Y.2d 743, 744), or "inescapably implicit" in the statute (Matter of Cohoes City School Dist. v. Cohoes Teachers Assn., 40 N.Y.2d 774, 778; see also, Matter of City School Dist. of City of Elmira v. New York State Pub. Employment Relations Bd., 74 N.Y.2d 395). Anything less threatens to erode and eviscerate the mandate of collective bargaining.

The language of VTL §509-j does not prohibit bargaining more stringent requirements, neither is it "so unequivocal a directive to take certain action that it leaves no room for bargaining."[11/]

[9/]75 N.Y.2d 660, 23 PERB ¶7012, at 7013 (1990).

[10/]75 N.Y.2d 619, 23 PERB ¶7013, at 7018 (1990)

[11/]Board of Educ. of the City Sch. Dist. of the City of New York v. PERB, supra, at 7013 (1990).

There is no evidence of a legislative intent to grant NYCTA and MABSTOA a right to take any specific action with respect to broader bases for disqualification of bus drivers free from the bargaining obligations imposed by the Act. NYCTA and MABSTOA are, therefore, left with the discretion to act and thus, have the duty to negotiate any revised, more rigorous, standards for bus drivers. The unilateral implementation of new work standards and the imposition of greater penalties violates §209-a.1(d) of the Act.

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

THEREFORE, IT IS ORDERED that NYCTA and MABSTOA

1. Restore the standards for the removal from service of a bus driver for convictions for DWI or DUI, accidents and moving violations in effect prior to the issuance of the December 8 and 15, 1995 memoranda;

2. Make whole any affected unit employees for any wages and benefits lost that would not have been lost but for the implementation of the December 8 and 15, 1995 memoranda, with interest at the currently prevailing maximum legal rate;

3. Amend any and all records of disciplinary action taken pursuant to the implementation of the December 8 and 15, 1995 memoranda to delete any reference to any disciplinary action taken pursuant to those memoranda which would not have been taken under the standards in effect prior to the

implementation of the December 8 and 15, 1995 memoranda, and substitute, where appropriate, the action which would have been taken under the prior standards; and

4. Sign and post the attached notice at all locations ordinarily used by NYCTA and MABSTOA to post notices of information with employees represented by ATU and TWU.

DATED: May 28, 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 (NYCTA) and the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) in the units represented by the Amalgamated Transit Union, Division 726 and 1056, AFL-CIO and Local 100, Transport Workers Union, AFL-CIO, that NYCTA and MABSTOA shall:

1. **Restore the standards for the removal from service of a bus driver for convictions for DWI or DUI, accidents and moving violations in effect prior to the issuance of the December 8 and 15, 1995 memoranda.**

2. **Make whole any affected unit employees for any wages and benefits lost that would not have been lost but for the implementation of the December 8 and 15, 1995 memoranda, with interest at the currently prevailing maximum legal rate.**

3. **Amend any and all records of disciplinary action taken pursuant to the implementation of the December 8 and 15, 1995 memoranda to delete any reference to any disciplinary action taken pursuant to those memoranda which would not have been taken under the standards in effect prior to the implementation of the December 8 and 15, 1995 memoranda, and substitute, where appropriate, the action which would have been taken under the prior standards.**

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

NYCTA and MABSTOA

. . . . . .

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

AUBURN TEACHERS' ASSOCIATION, NYSUT/AFT AFL-CIO, LOCAL 2476,

Charging Party,

-and-

CASE NO. U-18419

AUBURN ENLARGED CITY SCHOOL DISTRICT,

Respondent.

PETER C. LUDDEN, for Charging Party

MATTHEW R. FLETCHER, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Auburn Teachers' Association, NYSUT/AFT, AFL-CIO, Local 2476 (Association) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing as deficient a charge against the Auburn Enlarged City School District (District) alleging that the District violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued a practice pursuant to which unit employees were allowed to take time off from work for religious observance without charge to accrued leave time.

The Director dismissed the charge on the basis of our recent decision in Eastchester Union Free School District[1/] (hereafter Eastchester). In Eastchester, we concluded that the Court of

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[1/] 29 PERB ¶3041 (1996).

Appeals' decision in Griffin v. Coughlin[2] compelled a determination that the practice of granting employees paid time off for religious observance without charge to leave accruals was an unconstitutional establishment of religion and, therefore, not a mandatory subject of negotiation. The rescission of such a practice, therefore, was held to not constitute a violation of the Act.

The Association's exceptions, although questioning the wisdom of our considering a constitutional issue,[3] set forth no basis to distinguish Eastchester, which the District argues was properly applied by the Director in dismissing the charge.

This case has the same fact pattern as the one in Eastchester. On the basis of our decision in Eastchester, the Association's exceptions are denied and the Director's decision is affirmed.

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

DATED: May 28, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[2] 88 N.Y.2d 674 (1996).

[3] In Eastchester, we expressed our extreme reluctance to address constitutional issues, but concluded that it was necessary to do so when the constitutionality of a practice is dispositive of the question whether the practice is a mandatory subject of negotiation.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE FEDERATION OF POLICE, INC.,

Charging Party,

-and-

CASE NO. U-17856

TOWN OF CORTLANDT,

Respondent.

THOMAS P. HALLEY, ESQ., for Charging Party

THOMAS F. WOOD, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Cortlandt (Town) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the New York State Federation of Police, Inc. (Federation). The Federation alleges in its charge that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it adopted and implemented a General Municipal Law (GML) §207-c policy and procedure applicable to unit police officers who are injured or become ill as a result of their job duties.

On a stipulated record, the ALJ held that several aspects of the Town's GML §207-c policy and procedures were mandatorily negotiable subjects. Therefore, he held that the Town's unilateral promulgation and implementation of those procedures and policy violated the Act as alleged. As relevant to the Town's exceptions, the ALJ held the following parts of the GML §207-c

policy and procedure to be mandatory[1] subjects of negotiation: 1. Termination of any police officer who has received GML §207-c benefits for one year or more;[2] 2. A requirement that a police officer notify the Town within fixed times of any job related accident, injury or illness with disqualification for GML §207-c benefits for noncompliance with the notice requirements; 3. A requirement that a police officer applying for GML §207-c use accumulated leave credits until the Town makes a determination on GML §207-c eligibility subject to restoration if the officer is determined to be eligible under that statute; and 4. A ten-day time limit for appealing a proposed light-duty assignment or GML §207-c benefit determination.

The Town excepts to the ALJ's conclusion that the above parts of its policy and procedures are mandatory subjects of negotiation. It argues that these four parts of its policy and procedures are consistent with its managerial rights under law, are not in any respect disciplinary in nature and, as to the

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[1]The ALJ held that several parts of the GML §207-c procedures were not mandatorily negotiable and he dismissed the charge to that extent. No exceptions have been taken to the ALJ's decision in this respect.

[2]Upon termination, the police officer retains the right to salary and medical payments as required by GML §207-c, but loses eligibility for all benefits under the applicable collective bargaining agreements between the Town and the Federation. An exception is provided if the police officer has a retirement application pending with the Retirement System. In that circumstance, the officer retains contractual medical and dental insurance pending a determination on the application.

required use of leave credits, merely codify the parties' past practice.

The Federation argues in response that the GML §207-c policy and procedures subject to review under these exceptions are mandatorily negotiable for the reasons set forth by the ALJ.

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

Preliminarily, that part of the Town's exceptions in which it argues that the required use of leave credits pending a GML §207-c eligibility determination was not a change in existing practice must be denied.[3/] Having stipulated that the GML §207-c policy and procedures were adopted and implemented unilaterally, it was incumbent upon the Town to prove that its unilateral action merely codified existing, unwritten practices. There is not on this record any allegation in that regard or even argument to that general effect.

The only issues remaining concern negotiability. In that respect, our decision in City of Schenectady[4/] is dispositive as to those aspects of the Town's GML §207-c procedures numbered herein as 2, 3 and 4. We held in City of Schenectady that as GML §207-c benefits are a form of wages, procedures which condition,

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[3/]Had the procedures merely codified the Town's existing practice, the Town's adoption of a policy or procedures statement would not have violated its bargaining obligations under a unilateral change theory.

[4/]25 PERB ¶3022 (1992), aff'd, 85 N.Y.2d 480, 28 PERB ¶7005 (1995).

restrict or potentially deny an employee's receipt of those benefits are terms and conditions of employment within the meaning of the Act, which must be negotiated before they are adopted or implemented except as negotiations are preempted by law or public policy. As neither law nor public policy prohibits negotiations or renders the subject matters in issue nonmandatory, the ALJ correctly held the GML §207-c procedures in issue mandatorily negotiable.

The Town's policy requiring termination of employment and loss of contract benefits after one year or more of receipt of GML §207-c benefits requires a different analysis because that policy does not affect a police officer's receipt of GML §207-c statutory benefits as do the procedures numbered 2, 3 and 4.

Whether or not disciplinary in nature, the grounds upon which an employee is discharged from employment are necessarily mandatory subjects of bargaining because termination from employment on any ground occasions the loss of all terms and conditions incident to that employment. Changes in the grounds for termination from employment are mandatorily negotiable unless termination is required by law or controlling provisions of law establish a legislative intent to exempt an employer from a duty to bargain the decision to terminate.

The Town does not argue that any provision of law requires it to terminate an employee after one year of absence from work. It does argue, however, that Civil Service Law (CSL) §71, as interpreted, allows it to terminate an employee after a cumulative

absence from work for one year and its exercise of that right should not be subject to any bargaining obligation under the Act.

The ALJ understood that the Town's argument in this respect rested upon CSL §73, an argument raised, apparently erroneously, by the Town in its answer. CSL §73 deals with separation from service due to nonoccupational injuries or illness and it is admittedly inapplicable to any analysis of the Town's termination policy, which applies only to occupational injuries or illness. The Town's brief to the ALJ, however, relies upon CSL §71. As the question before us involves only an issue of law, the relevance of CSL §71 to the required negotiability analysis is properly before us whether or not it had been raised by the Town. We could not hold the Town in violation of the Act if on any theory the unilateral change was to a nonmandatory subject of negotiation.[5/]

Civil Service Law §71 provides as follows:

> Where an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he shall be entitled to a leave of absence for at least one year, unless his disability is of such a nature as to permanently incapacitate him from the performance of the duties of his position. Such employee may, within one year after the termination of such disability, make application to the civil service department or municipal commission having jurisdiction over the position last held by such employee for a medical examination to be conducted by a medical officer selected for that purpose by such department or commission. If, upon such medical examination, such

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[5/]A party is not prohibited from raising new legal arguments in support of unchanged claims. Sidney Cent. Sch. Dist., 28 PERB ¶3032 (1995).

> medical officer shall certify that such person is physically and mentally fit to perform the duties of his former position, he shall be reinstated to his former position, if vacant, or to a vacancy in a similar position or a position in a lower grade in the same occupational field, or to a vacant position for which he was eligible for transfer. If no appropriate vacancy shall exist to which reinstatement may be made, or if the work load does not warrant the filling of such vacancy, the name of such person shall be placed upon a preferred list for his former position, and he shall be eligible for reinstatement from such preferred list for a period of four years. In the event that such person is reinstated to a position in a grade lower than that of his former position, his name shall be placed on the preferred eligible list for his former position or any similar position. This section shall not be deemed to modify or supersede any other provisions of law applicable to the re-employment of persons retired from the public service on account of disability.

Although written in terms protecting employees' rights, CSL §71 has been interpreted to allow an employer to terminate an employee who is absent from work for a cumulative period of one year due to an occupational injury or disease.[6/]

Our inquiry under this charge is not ended, however, simply upon recognition that the Town is empowered to terminate an employee pursuant to CSL §71. Indeed, it is the Town's very power to terminate or not which is necessary before there can be any basis for the imposition of a bargaining obligation. For example, if the Town were required by CSL §71 to terminate an employee after one year's absence from work, then there could not be any decisional bargaining. The question before us is whether the Town's exercise of the discretion bestowed under CSL §71 must be bargained or whether CSL §71 plainly and clearly establishes a

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[6/]Allen v. Howe, 84 N.Y.2d 665 (1994) (upholding Civil Service Department's regulations as against claims that they abridged constitutional rights).

legislative intent to exempt an employer from a duty to bargain discharges from employment based upon the length of absence from work attributable to job-related injury or illness.[7/]

There is nothing in CSL §71 which deals explicitly with collective negotiations under the Act, nor is there anything inescapably implicit in that statute which establishes the Legislature's plain and clear intent to exempt the Town from the State's strong public policy favoring the negotiation of all terms and conditions of employment.[8/] Although the Court of Appeals in Allen v. Howe[9/] recognized that terminations under CSL §71 promote a governmental interest in a productive and economically efficient civil service, it also recognized the substantial interests of employees in their continued employment. The system of mandatory collective negotiations under the Act is intended to permit and promote the mutual reconciliation of precisely these types of competing interests. By requiring the negotiation of decisions to terminate employees from employment based upon the length of time they are away from work due to occupational injuries or illnesses, and in the absence of a plain and clear

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[7/]Compare, e.g., Board of Educ. of the City Sch. Dist. of the City of New York v. PERB, 75 N.Y.2d 660, 23 PERB ¶7012 (1990) (exercise of statutory rights regarding employees' financial disclosure subject to decisional bargaining obligations under the Act) with Webster Cent. Sch. Dist. v. PERB, 75 N.Y.2d 619, 23 PERB ¶7013 (1990), and City Sch. Dist. of the City of Elmira v. PERB, 74 N.Y.2d 395, 22 PERB ¶7032 (1989) (legislative intent to exempt decisions from mandatory negotiation found).

[8/]City of Schenectady v. PERB, 85 N.Y.2d 480, 28 PERB ¶7005 (1995).

[9/]Supra note 6.

legislative intent to the contrary, we give effect to the State's declared public policy favoring collective negotiations. The Town's unilateral adoption of a policy requiring termination of employment and contractual benefits after one year of occupational disability is permitted but not required by CSL §71 and constituted a change in terms and conditions of employment.

The Town's exceptions are, accordingly, denied and the ALJ's decision is affirmed.

IT IS, THEREFORE, ORDERED that the Town:

1. Immediately cease enforcement or implementation of its "Administrative Policy §207-c", which provides for the termination from employment of officers who have been receiving GML §207-c benefits for one year or more.
2. Immediately reinstate any officer who was terminated pursuant to said "Administrative Policy §207-c", and make whole unit employees for any wages or benefits lost as a result of any enforcement or implementation of "Administrative Policy §207-c", with interest at the currently prevailing maximum legal rate.
3. Immediately cease enforcement or implementation of those parts of the Town's "§207-c Administrative Procedure" pertaining to notification of accident, injury or illness; required use of leave credits; and time limits for appeal of light duty assignments or GML §207-c determinations.

4. Immediately rescind the denial of any GML §207-c application occasioned by an officer's noncompliance with the parts of the "§207-c Administrative Procedure" set forth in paragraph 3 above.

5. Make whole unit employees for any wages or benefits lost as a result of a denial of a GML §207-c application occasioned by an officer's noncompliance with the parts of the "§207-c Administrative Procedure" set forth in paragraph 3 above, with interest at the currently prevailing maximum legal rate.

6. Sign and post notice in the form attached at all locations where written communications for unit employees are ordinarily posted.

DATED: May 28, 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 in the unit represented by New York State Federation of Police, Inc., that the Town of Cortlandt will:

1. Immediately cease enforcement or implementation of its "Administrative Policy §207-c", which provides for the termination from employment of officers who have been receiving General Municipal Law (GML) §207-c benefits for one year or more.

2. Immediately reinstate any officer who was terminated pursuant to said "Administrative Policy §207-c", and make whole unit employees for any wages or benefits lost as a result of any enforcement or implementation of "Administrative Policy §207-c", with interest at the currently prevailing maximum legal rate.

3. Immediately cease enforcement or implementation of those parts of the Town's "§207-c Administrative Procedure" pertaining to notification of accident, injury or illness; required use of leave credits; and time limits for appeal of light duty assignments or GML §207-c determinations.

4. Immediately rescind the denial of any GML §207-c application occasioned by an officer's noncompliance with the parts of the "§207-c Administrative Procedure" set forth in paragraph 3 above.

5. Make whole unit employees for any wages or benefits lost as a result of a denial of a GML §207-c application occasioned by an officer's noncompliance with the parts of the "§207-c Administrative Procedure" set forth in paragraph 3 above, with interest at the currently prevailing maximum legal rate.

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

TOWN OF CORTLANDT

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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

VESTAL EMPLOYEES ASSOCIATION, NEA/NY, NEA,

Charging Party,

-and-

CASE NO. U-17344

VESTAL CENTRAL SCHOOL DISTRICT,

Respondent.

JANET AXELROD, GENERAL COUNSEL (HAROLD G. BEYER, JR. of counsel), for Charging Party

HOGAN & SARZYNSKI, LLP (JOHN B. HOGAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Vestal Central School District (District) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Vestal Employees Association, NEA/NY, NEA (Association). The Association alleges in its charge that the District violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when, on September 1, 1995, it unilaterally transferred, pursuant to a contract with the Broome-Tioga Board of Cooperative Educational Services (Broome BOCES), the printing duties which had been performed exclusively by a District employee in the Association's unit.

After a hearing, the ALJ held that the District violated §209-a.1(d) of the Act.[1] In finding the refusal to negotiate, the ALJ held that: 1. the Association had satisfied the notice of claim requirements of Education Law §3813 by timely serving a copy of the charge upon the Secretary to the Clerk of the Board of Education; 2. the Association had exclusivity over the printing, copying and related duties transferred for performance by the Broome BOCES' employee[2]; 3. the transfer was mandatorily negotiable because Education Law §1950(4)(d) and Webster Central School District v. PERB[3] (hereafter Webster) did not apply to a shared service arrangement involving printing services because that statute and that decision are limited to agreements among school districts and a BOCES to share academic services and services which are closely related thereto involving the "nurturance of pupils and academics"[4]; and 4. the transfer was executive in nature, not legislative, such that Odessa-Montour Central School District v. PERB[5] was not applicable.

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[1]The ALJ dismissed the §209-a.1(a) allegation for lack of proof and no exceptions have been taken to the ALJ's decision in this respect.

[2]The District's former employee accepted employment with BOCES in the same capacity.

[3]75 N.Y.2d 619, 23 PERB ¶7013 (1990).

[4]Contra Scio Cent. Sch. Dist., 29 PERB ¶4525 (1996) (Webster applicable to agreements to share the delivery of noninstructional services).

[5]___ A.D.2d ___, 29 PERB ¶7009 (3d Dep't 1996). The Appellate Division there held that no cause of action under §209-a.1(d) of the Act is stated where the action in issue is taken by a legislative body of government in its legislative capacity.

The District takes exception to the conclusions of law underlying each of the ALJ's enumerated holdings. The Association in response argues that the ALJ's decision is correct in all respects and should be affirmed.

Having reviewed the record and considered the parties' arguments, we reverse on the ground that the Court of Appeals' decision in Webster is controlling and requires a determination that Education Law §1950(4)(d) establishes a plain and clear legislative intent that the District's transfer of printing services pursuant to contract with Broome BOCES is not a mandatory subject of negotiation.

Webster involved a school district's contract with a BOCES for summer school instructional programs pursuant to Education Law §1950(4)(bb). The Court of Appeals held that, although the Education Law was not explicit, it nevertheless "plainly and clearly" established a legislative intent that a school district's decision to contract with a BOCES for an academic summer school program, which effected a transfer of exclusive bargaining unit work, not be subject to mandatory collective bargaining. In reaching its conclusion in Webster, the Court relied upon the following features of the Education Law regarding contracts for shared academic services: 1. the annual nature of the procedure for securing BOCES' services; 2. the need for a request by two or more school districts; 3. the approval required of the Commissioner of Education (Commissioner) of the contract with BOCES; 4. the short time frame for compliance with the

statutory procedures; and 5. the job protections available by law to teachers upon a BOCES takeover of a school district's academic program.

This case presents two questions pertaining to the issue of legislative intent. The first is whether Education Law §1950(4)(d) applies to the noninstructional services in issue under this charge because the Education Law cannot be the source of any relevant legislative intent if it is not applicable.

Education Law §1950(4)(d) provides in relevant part as follows:

> At the request of component school districts, and with the approval of the commissioner of education, provide any of the following services on a cooperative basis: school nurse teacher, attendance supervisor, supervisor of teachers, dental hygienist, psychologist, teachers of art, music, physical education, vocational subjects, guidance counsellors, operation of special classes for handicapped children, as such term is defined in article eighty-nine of this chapter; pupil and financial accounting service by means of mechanical equipment; maintenance and operation of cafeteria or restaurant service for the use of pupils and teachers while at school, and such other services as the commissioner of education may approve.

In our opinion, the ALJ's holding that §1950(4)(d) is inapplicable to contracts between school districts and a BOCES to share noninstructional services is incorrect. The District's contract with Broome BOCES was a so-called "CO-SER" agreement involving other school districts. Such contracts cannot exist without the approval of the Commissioner. The Commissioner had to have approved the District's CO-SER contract with Broome BOCES to have enabled Broome BOCES to perform. The Commissioner's

approval of that CO-SER agreement necessarily represents the Commissioner's opinion that the printing services in issue in this case fall within the "other services" which may be the subject of a shared services agreement under Education Law §1950(4)(d). Deference is properly accorded to the Commissioner's interpretation of this Education Law provision, which is unrelated by its terms to the labor relations issues within our recognized expertise. That deference is all the more appropriate because Education Law §1950(4)(d) is reasonably susceptible to the interpretation given it by the Commissioner. Financial accounting services are among those specifically listed as ones which school districts can deliver on a cooperative basis through a BOCES. That type of service is unrelated to either the instruction or the nurturing of pupils. The specific inclusion in §1950(4)(d) of a noninstructional service as one eligible for a shared services agreement is persuasive evidence that Education Law §1950(4)(d) is not limited to instructional programs or services closely related to instructional services.

Although Education Law §1950(4)(d) is applicable to the noninstructional services in issue under this charge, there is still left for consideration the second question: whether Education Law §1950(4)(d), like §1950(4)(bb) in issue in Webster, similarly reflects a plain and clear legislative intent to exempt the District's decision to contract with Broome BOCES for printing services from the scope of mandatory bargaining under the Act.

On that second question, Education Law §1950(4)(d) has every factor relied upon by the Court of Appeals in Webster except one. Unlike the situation in Webster, the Education Law does not address the job protections for employees who have lost their nonteaching positions with a school district as a result of a takeover by a BOCES of some aspect of that school district's noninstructional services. Although the absence of statutory job protections is relevant in assessing the legislature's intent as to a school district's bargaining obligations, we do not consider it sufficient to occasion a result any different from that in Webster.[6/] As Webster is not reasonably distinguishable, and as the Court's decision is binding upon us, it must be concluded that the District's transfer of printing services to Broome BOCES was not a mandatory subject of negotiation.[7/]

Having held that the District was not required to negotiate its decision to contract with Broome BOCES for the services in issue under this charge, the charge must be dismissed. Accordingly, we do not reach any of the District's other exceptions.

[6/]Accord Marcus Whitman Cent. Sch. Dist., 27 PERB ¶4508 (1994) (Webster applicable notwithstanding the absence of job protections for employees affected by a transfer of work to a BOCES).

[7/]See, e.g., City Sch. Dist. of the City of Elmira v. PERB, 74 N.Y.2d 395, 22 PERB ¶7032 (1989) (legislative intent to exempt decision as to whether or not to apply for funds to be used for salary found where imposition of bargaining obligation would frustrate intent of Education Law).

For the reasons set forth above, the ALJ's decision is reversed and the charge must be, and it hereby is, dismissed.

DATED: May 28, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WILLIAM B. DYE,

Charging Party,

-and-

CASE NO. U-18321

NEW YORK CITY TRANSIT AUTHORITY and TRANSPORT WORKERS UNION, LOCAL 100,

Respondent.

WILLIAM B. DYE, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by William B. Dye to a decision of the Director of Public Employment Practices and Representation (Director) dismissing as untimely his improper practice charge. Dye's charge alleges that the New York City Transit Authority (Authority) violated §209-a.1(a) and (c) and §209-a.2(a) of the Public Employees' Fair Employment Act (Act). Dye was informed that the charge was deficient and he filed several amendments, including one filed on November 28, 1996, which was not sworn to, and one on December 20, 1996. The November 28 and December 20 amendments named for the first time the Transport Workers Union, Local 100 (TWU) as a respondent.

Dye excepts to the Director's dismissal, arguing that his receipt, on June 25, 1996, of an arbitrator's decision in a disciplinary action was within four months of the filing of his

improper practice charge and, therefore, the charge is timely filed.

Based upon our review of the record, we affirm the decision of the Director.

Dye's original charge was filed against the Authority on October 25, 1996. He alleges in that charge, and in his subsequent amendments, that he was engaged in protected activity, that the Authority filed disciplinary charges against him and caused delays in the processing of those charges because of his activities. In his subsequent amendments, Dye alleges that the TWU failed to adequately represent him on those disciplinary charges. At the close of a disciplinary hearing on June 25, 1996, the arbitrator issued a "bench award" setting Dye's penalty as "time served" and returning him to work. A written decision, confirming the bench ruling, issued on October 12, 1996.

The alleged violations by the Authority occurred before June 25, 1996, more than four months prior to the filing of the original charge. There is no allegation of misconduct by the Authority on or after June 25. Section 204.1(a)(1) of PERB's Rules of Procedure, requires that an improper practice charge be filed within four months of the occurrence of the acts alleged to be improper. The Director's dismissal of the allegations against the Authority is, therefore, affirmed.

As to the TWU, the charge is also untimely. Dye did not name the TWU as a respondent until November 28, 1996. The timeliness of the allegations against TWU must be measured from

the date the amendment first naming TWU as a respondent was filed, not the date of the original charge against the Authority. The last action by TWU alleged to have violated the Act occurred on June 25, 1996, the last day of Dye's disciplinary hearing, when TWU allegedly unfairly represented him. As this was more than four months before the filing of the amendment to the charge which first named TWU as a respondent, the charge against TWU is untimely. The issuance of the written decision in October 1996, although within four months of the charge against TWU, was a purely ministerial act because it merely confirmed the terms and implementation of the June 25 bench award. TWU's representation function ceased as of June 25, which was also the date Dye knew of the disposition of his disciplinary charges. Therefore, Dye's receipt of a written confirmation of that disposition cannot serve to extend his time to file his charge against TWU.

Based upon our review of the record and consideration of the arguments made by Dye, the Director's decision is affirmed.

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

DATED: May 28, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-4630

THREE VILLAGE SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All employees of the School Aged Child Care and Kids Place Program employed by the Three Village School District in the positions of Clerical, Child Care Assistant, Child Care Teacher, Teacher Assistant, Assistant Supervisor and Supervisor.[1/]

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 28, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

1/ The parties agree that the Assistant Supervisor and Supervisor do not perform the traditional supervisory duties that might create a conflict of interest.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-4643

UPPER MOHAWK VALLEY REGIONAL WATER BOARD,

Employer,

-and-

TEAMSTERS LOCAL 182,

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 Teamsters Local 182 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of

grievances.

Unit: Included: All full-time employees of the Upper Mohawk Valley Regional Water Board

Excluded: All upper level management personnel and employees represented by the Management Employees Association of the Upper Mohawk Valley Regional Water Board.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 182. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 28, 1997
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member