STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

- and -

CASE NO. U-17239

STATE OF NEW YORK,

Respondent.

WILLIAM P. SEAMON, ESQ. (JEFFREY G. PLANT of counsel), for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Public Employees Federation, AFL-CIO (PEF) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) on a charge PEF filed against the State of New York (State). PEF's charge as limited alleges that the State violated §209-a.1(d) of the Public Employees Fair Employment Act (Act) when it caused a change to be made to the classification standard for the position of Nurse II (Psychiatric) (NII) in the Office of Mental Health to enable it to avoid paying the NIIs compensation otherwise due them for working out-of-title as a Nurse

Administrator I (NA) and to increase the NIIs' workload. After a hearing, the Assistant Director dismissed the charge on several different and alternative grounds.

The classification standard in issue was changed by Barry Lorch, the Department of Civil Service Director of Classification and Compensation. The Assistant Director held that civil service classification standards are not mandatory subjects of negotiation and that Lorch's performance of statutory duties and his exercise of statutory powers in regard to classification are not subject to PERB's review under a refusal to bargain charge even if, as PEF alleges, the reason for the change was to enable the State to circumvent court decisions restricting the assignment of NA duties to the NIIs. The Assistant Director also held that PEF had waived any further decisional bargaining rights regarding classification standards, even if those standards were mandatorily negotiable, by a management rights clause in the parties' agreement which grants the State the right to "establish specifications for each class of positions ... in accordance with law ...." Accordingly, the Assistant Director dismissed that part of the charge objecting to the unilateral change in classification standard.

PEF's allegation that NIIs are being denied compensation due them for their additional duties was dismissed by the Assistant Director because the salaries of both NIIs and NAs are derived from the allocation of those positions to salary grade, a nonmandatory subject of negotiation; because negotiations on that issue had also been waived by terms of the parties' agreement; and because nonpayment for out-of-title work raised issues of contract violation beyond PERB's jurisdiction.

The allegations pertaining to changes in the NIIs' workload were dismissed as untimely filed because the State began assigning NIIs the duties which PEF alleges are the duties of NAs more than four months before the charge was filed.[1]

PEF takes exception to each of the Assistant Director's determinations, ones the State argues in its response are correct as a matter of fact and law.

Having reviewed the record and considered the parties' arguments, we affirm the Assistant Director's decision. Our affirmance rests on only some of the grounds used by the Assistant Director and we, accordingly, express no opinion regarding any of the other bases for the Assistant Director's decision.

As civil service classification standards are inextricably entwined with classification and reclassification processes, they are nonmandatory subjects of negotiation.[2] PEF argues, however, that classification standards, although ordinarily nonmandatory subjects of negotiation, become mandatorily negotiable in this case because the State caused this change in classification standard to be made to enable it to increase the NIIs' workload through the assignment to them of what would otherwise be out-of-title work, without having to pay extra for it. Negotiability, however, is determined by the nature of the subject matter in issue, not an employer's motivation for taking an action. PEF's arguments, which rest on this facts-of-the-particular-case approach to

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[1]Pursuant to §204.1(a)(1) of our Rules of Procedure, a charge must be filed within four months of the act giving rise to the alleged improper practice.

[2]See, e.g., Cortland Paid Fire Fighters Ass'n, Local 2737, 29 PERB ¶3037 (1996); City of Rochester, 12 PERB ¶3010 (1979). See also Office of Court Admin., 12 PERB ¶3075 (1979), rev'd in part, 12 PERB ¶7016 (Sup. Ct. Alb. Co. 1979), aff'd, 71 A.D.2d 240, 12 PERB ¶7022 (3d Dep't 1979), aff'd, 49 N.Y.2d 904, 13 PERB ¶7004 (1980).

negotiability assessment, are ones that have been specifically rejected.[3] Whether the change in the classification standard for NIIs was appropriate under other law or contract may be an issue litigable in other forums, but not in the context of a refusal to bargain charge resting on an alleged unilateral change because the subject of the at-issue change is nonmandatory by its nature.

That aspect of the charge alleging that NIIs are not being paid correctly is also properly dismissed. If the work being performed by the NIIs is consistent with the classification standard as changed, then the NIIs' work is no longer out-of-title and the NIIs are being paid correctly at the salary negotiated for their grade level. If the work being performed is not consistent with the classification standard as changed, or if in some other forum that change in classification standard is held inappropriate for some reason, then the NIIs may be working out-of-title when doing work allegedly that of an NA, a circumstance triggering the contractual, regulatory or other statutory review mechanisms available for such claims. In either circumstance, the nonpayment of monies allegedly owed to NIIs does not give rise to the refusal to bargain violation presented in this charge.

PEF argues that the Assistant Director's dismissal of the workload aspects of the charge was incorrect because the workload increases were caused by and made pursuant to the change in classification standard, a change in standard not first known to it until July 1995. That date would make this aspect of the charge timely. But as with the compensation aspects of the charge, the workload aspects present only two variables, neither of which gives rise to any cognizable decisional bargaining allegation. If and to the extent, as PEF argues, the workload changes were caused directly and necessarily by the unilateral change in classification standard, these effects of

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

that change in standard would expose the State, at most, to an impact bargaining obligation.[4] The State has recognized its duty to negotiate the impact of the standard change and any failure or refusal to bargain impact is not alleged as a violation under the charge as limited. If and to the extent the workload changes were made independently of the classification change, then the date of the change in classification is immaterial to an assessment of the timeliness of these allegations. In that circumstance, that aspect of the charge becomes one untimely filed for the reasons stated in the Assistant Director's decision.

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

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

[4]See, e.g., County of Nassau, 27 PERB ¶3054 (1994).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PLAINEDGE FEDERATION OF TEACHERS **CASE NO. DR-056**

Upon a Petition for Declaratory Ruling.

SCHLACHTER & MAURO (DAVID SCHLACHTER of counsel), for Plainedge Federation of Teachers

INGERMAN SMITH, L.L.P. (JOHN H. GROSS and NEIL M. BLOCK of counsel) for Plainedge Union Free School District

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Plainedge Union Free School District (District) to a declaratory ruling on negotiability made by the Director of Public Employment Practices and Representation (Director) pursuant to a petition filed by the Plainedge Federation of Teachers (Federation). The Federation's bargaining demand in issue would have the District pay the teaching assistants it represents a percentage salary increase equal to the median percentage increase paid annually as of a fixed date to teaching assistants employed in all other public school districts in Nassau County. The Director ruled upon a stipulated record that this was a mandatory subject of negotiation under Plainview-Old Bethpage Central School District[1] (hereafter Plainview-Old Bethpage). The Director reasoned that this wage "parity" provision was not of the

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[1]17 PERB ¶3077 (1984).

type held by this Board at different times to be either nonmandatory,[2] prohibited[3] or "nullifiable"[4] because it had "no impact upon the rights of the District." As the demand otherwise clearly affects only wages, the Director ruled it mandatorily negotiable.

The District argues that the Director misconstrued Plainview-Old Bethpage and this Board's earlier parity cases in reaching an erroneous legal conclusion. The Federation argues in response that the Director's decision is correct, supported by existing case law, and should be affirmed.

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

This demand is not properly classified as one for parity. Rather, the Federation's demand is for a substantive wage benefit,[5] albeit at a rate to be fixed at a future date pursuant to a mathematical formula resting upon conditions or circumstances not within either the Federation's or the District's control. Formulaic wage proposals, however, are quite common in collective negotiations and they do not present any negotiability issues under parity theories. A demand calling for a wage or salary rate to be set, for example, by future increases in the cost of living (COL), or the consumer price index (CPI) clearly would be a mandatorily negotiable subject. That this particular salary formula uses as its component factor the salary rates negotiated within a geographic area by employers other than the District and unions other than the Federation is inconsequential to a negotiability analysis. The District and the Federation are no more or less

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[2]City of Albany, 7 PERB ¶3079 (1974).

[3]City of New York, 10 PERB ¶3003 (1977).

[4]Plainview-Old Bethpage, supra note 1.

[5]See Lynbrook Police Benevolent Ass'n, 10 PERB ¶3067 (1977).

impacted or disadvantaged by this proposal than they would be by any other wage formula resting upon factors not within either party's control, such as the COL or CPI. The parties' inability to predict precisely the results derived from the proposed wage formula may be relevant to the parties' assessment of the merits of this demand, but not to our assessment of its negotiability.

Although we do not consider the Federation's demand to be a parity demand, to whatever extent it is analogous in some way to parity, it is not for the type of parity which raises any negotiability issues. The type of salary or wage parity proposals or agreements which have been previously considered have involved two or more units of employees of a single employer. The parity demands or contract provisions have typically involved ones in which a rate of pay or benefits negotiated by one union representing some of an employer's employees is subjected to an automatic increase should a second union representing other employees of the same employer obtain in subsequent negotiations with that employer a higher or better rate of pay or benefits than did the first union. The Federation's demand does not have these characteristics.

First, the Federation's demand does not automatically increase an already negotiated rate of pay. It merely uses the results of negotiations involving different employers and unions to define the formula by which the salary of the Federation's unit employees will be calculated. This type of formulaic salary proposal effects a type of pattern bargaining which has never been considered to do violence to the policies of the Act. Indeed, the Taylor Committee specifically recommended formulaic proposals by which the resolution of an issue, e.g., wages, would be determined by the wages prevailing in other designated localities as a salutary means to avoid

impasses.[6] It is inconceivable that what was specifically endorsed by the Taylor committee, whose report the legislature adopted almost without change in 1967, could be the basis for any public policy debate regarding the negotiability of demands like the Federation's in this case.

Second, even when a majority of this Board held parity clauses to be prohibited subjects of negotiation, specifically distinguished were demands or agreements linking future increases in fixed wages or benefits to the outcome of subsequent bargaining involving different parties.[7] This Board gave specific recognition to the mandatory negotiability of demands like the Federation's in Rockville Centre Principals Association (hereafter Rockville).[8] Recognizing that there are many types of "parity", the Board there stated:

> [A]demand for parity with the benefits to be paid to employees of a different employer .... [does] not interfere with ... negotiation rights ....[9]

Rockville and earlier cases reflect this Board's long-standing belief that a demand like the Federation's, to whatever extent it can be characterized as one for parity, is not for a type of parity which so unreasonably burdens any bargaining relationship as to remove what is a wage demand from the scope of mandatory negotiation. Plainview-Old Bethpage, relied upon by the Director, is to the same effect.

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[6]Governor's Committee On Public Employee Relations, Final Report at 35 (March 31, 1966).

[7]See City of New York, supra note 3. But see Voight v. Bowen, 53 A.D.2d 277, 9 PERB ¶7525 (2d Dep't 1976) (city police agreement requiring "complete parity" with salary of county police void as against Act's compulsory interest arbitration provisions and the public policy reflected therein).

[8]12 PERB ¶3021 (1979). See also Lynbrook Police Benevolent Ass'n., supra note 5.

[9]12 PERB ¶3021, at 3042 n.2.

In summary, the Federation's salary demand is mandatorily negotiable because it is not properly characterized as one for parity. As this demand is not one for parity, we express no opinion as to the negotiability of true parity clauses. To whatever extent the demand resembles one for parity, it is not for the type of parity which is other than mandatorily negotiable. Affirming the Director's ruling, we rule that the Federation's formulaic salary proposal is a mandatory subject of negotiation.

For the reasons set forth above, the District's exceptions are denied and the Director's ruling is affirmed.

DATED: July 23 , 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GERALD SINACORE,

Charging Party,

- and -

CASE NO. U-19210

LAW ENFORCEMENT OFFICERS UNION, COUNCIL 82, AFSCME, AFL-CIO,

Respondent,

- and -

STATE OF NEW YORK,

Employer.

GERALD SINACORE, pro se

WALTER J. PELLEGRINI, GENERAL COUNSEL (MAUREEN SEIDEL of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Gerald Sinacore to a decision by the Director of Public Employment Practices and Representation (Director) dismissing as deficient his charge against the Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO (Council 82) to which his employer, the State of New York, was joined pursuant to §209-a.3 of the Public Employees' Fair Employment Act (Act).[1] Sinacore alleges in his charge as amended that

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[1]That section of the Act requires an employee's employer be added as a party to a duty of fair representation charge against the employee's union representative grounded upon the union's processing or failure to process a claim that the employer has violated its collective bargaining agreement with the union.

Council 82 breached its duty of fair representation in violation of §209-a.2(c) of the Act by not taking a grievance to "full arbitration" after an arbitrator's award was rendered under a contractual "expedited arbitration" procedure. He also alleges that Council 82's decision to use the expedited arbitration procedure was itself arbitrary.

The Director dismissed the charge, concluding that the facts as pleaded did not evidence arbitrary, discriminatory or bad faith conduct only, at most, Sinacore's disagreement with Council 82's determinations.

Sinacore questions in his exceptions the correctness of the Director's articulation of the statutory duty of fair representation standard, but argues, in any event, that Council 82 had been arbitrary and had acted in bad faith. The State in response argues that Sinacore was afforded all relevant contract rights. Council 82 has not responded to the exceptions.

Having considered the exceptions, we affirm the Director's decision.

The Director's description of the duty of fair representation to which a union is held under the Act is the traditional formulation used by labor relations agencies and courts alike since it was articulated over thirty years ago by the United States Supreme Court in Vaca v. Sipes.[2] A union breaches its duty of fair representation under the Act only if its action can be properly characterized as arbitrary, discriminatory or in bad faith.

The contract grievance in issue was filed in October 1995, at which date the expedited arbitration procedures of the 1995-99 agreement between the State and Council 82, made retroactive to April 1, 1995, applied. Nothing in Sinacore's charge as amended even suggests that the submission of Sinacore's contract interpretation grievance for determination by an arbitrator under the expedited procedure was arbitrary, discriminatory or in bad faith. The

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[2]386 U.S. 171 (1967).

expedited arbitration process results in an award which is final and binding. Therefore, Council 82's statement to Sinacore that it could not then proceed to "full arbitration", even if the expedited award was technically "late", as Sinacore alleges, and even if it did not, as Sinacore again alleges, resolve his grievance, was not only reasonable, but correct.[3] Whether Council 82 was required to seek judicial review of either the expedited arbitration award or a prior disciplinary award issued by another arbitrator, upon which the expedited arbitration award rests, is an issue not raised by this charge and one to which we do not express any opinion.

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

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

[3]In restating Sinacore's allegations in these respects, we do not suggest that the expedited arbitration award was either untimely or that it failed to resolve the grievance.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF ORANGE,

CASE NO. E-2063

Upon the Application for Designation of
Persons as Managerial or Confidential

EPSTEIN, BECKER & GREEN, P.C. (ELLIOT J. MANDEL of counsel), for Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (DAREN J. RYLEWICZ of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Orange (County) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its application to designate Lori Wilson, Human Resources Associate, as a confidential employee within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act).[1] The at-

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[1]Section 201.7(a) defines the term "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article,...persons...who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board.... Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

issue title is in a unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Orange County Local 836 (CSEA), which opposes the designation.

Wilson works in the personnel department at the community college and reports to Sharon Giovanniello, the Human Resources Officer. The Director found that Giovanniello is not a managerial employee[2] and, therefore, Wilson could not be designated confidential. It appears that the Director also denied the application, even assuming that Giovanniello is managerial, because Wilson did not assist Giovanniello with her managerial duties. The County argues in its exceptions that the Director erred because Giovanniello is managerial by virtue of the duties she performs in contract negotiations and personnel and contract administration and Wilson, as her assistant, is, therefore, confidential.[3] CSEA supports the Director's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the Director on his secondary ground, without reaching the issue as to whether Giovanniello is managerial.

Section 201.7(a) states in part: "Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)." Clause (ii) managers are those with labor relations, personnel or contract administration functions. We have held that an actual managerial designation is not a condition precedent for a confidential designation of the person working for the manager, if the manager

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[2]Giovanniello has never been designated managerial by PERB. Her position is not in the CSEA bargaining unit and the County's application does not include her title.

[3]In an earlier decision, County of Orange, 29 PERB ¶4023 (1996), the Acting Director decided that Giovanniello's personnel and contract administration responsibilities, while potentially confidential in nature, did not support a managerial designation and that, therefore, Wilson was not a confidential employee. That decision was not appealed by the County.

clearly performs the duties which the Act considers managerial.[4] If the duties of the manager fall within the meaning of §201.7(a)(ii) of the Act, an application to designate the person who assists or acts in a confidential capacity to that managerial employee is properly entertained.

Since August 1996, when Giovanniello assumed the position of Human Resources Officer, she has been a member of the County's negotiating team and sits at the negotiating table, although not as spokesperson. Giovanniello is, however, privy to team caucuses where negotiating strategy, proposals and counter-proposals are discussed. She has acted in the capacity of a resource person for the County and has participated in at least one pre-negotiations strategy session where the information she had compiled was discussed and where the County's negotiating proposals were formulated and voted upon.

We need not decide whether Giovanniello's new duties would be sufficient to warrant a finding that she is a managerial employee.[5] Assuming Giovanniello is properly considered managerial within the meaning of §201.7(a)(ii) of the Act, it does not necessarily follow that everyone working with her, or for her, is confidential. To be designated confidential, an employee must assist in a confidential capacity in the carrying out of the managerial employee's duties respecting collective negotiations, contract administration or personnel administration. There is no evidence in the record that Wilson performs any duties for Giovanniello relating to Giovanniello's responsibilities for contract negotiations. Wilson's duties relate only to Giovanniello's personnel and contract administration responsibilities. In those latter respects,

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[4]Wappingers Cent. Sch. Dist., 19 PERB ¶3059 (1986); Byram Hills Sch. Dist., 5 PERB ¶3028 (1972).

[5]See City of Niagara Falls, 30 PERB ¶3058 (1977).

however, Wilson's limited access to personnel records and mere exposure to disciplinary matters already finalized are insufficient to support a confidential designation.[6]

Based on the foregoing, the County's exceptions are dismissed and the Director's decision is affirmed, in relevant part.

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairperson

Marc A. Abbott, Member

[6]See Schenectady City Sch. Dist., 29 PERB ¶3038 (1996).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GUY LO BIANCO,

Charging Party,

- and - **CASE NO. U-18799**

UNITED TRANSPORTATION UNION, LOCAL 1440,

Respondent,

- and -

STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY,

Employer.

CHARLES MUNAFO, for Charging Party[1]

COSTA, McKAY & DONNELLY (RICARDO A. McKAY of counsel), for Respondent

MARTIN A. SCHNABEL, GENERAL COUNSEL (DANIEL TOPPER of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Guy Lo Bianco to a decision by an Administrative Law Judge (ALJ) on his charge against the United Transportation Union, Local

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[1]Although Munafo is currently under a six-month bar on appearances before the agency in a representative capacity due to his misconduct during the processing of a different charge, the bar does not apply to appearances completed before July 1, 1998. Matter of Munafo, 31 PERB ¶3012 (1998). These exceptions were filed in October 1997.

1440 (UTU) to which his employer, the Staten Island Rapid Transit Operating Authority (SIRTOA), was joined pursuant to §209-a.3 of the Public Employees' Fair Employment Act (Act). The charge as filed alleges that UTU breached its duty of fair representation in violation of §209-a.2(c) of the Act in eight enumerated particulars. Of these eight "charges", the Director of Public Employment Practices and Representation (Director) determined that the first two were untimely filed. Specifications numbered four and six were withdrawn after filing. The remaining four allegations in the original charge are subsumed in an amended allegation that UTU failed to respond to a request for information Lo Bianco made by letter dated December 9, 1996. That allegation was processed by the ALJ who dismissed it upon the uncontested finding that UTU had responded to the several inquiries in Lo Bianco's December 9 letter by a December 10, 1996 letter received by Lo Bianco.

Lo Bianco excepts to the Director's/ALJ's declination to process the first two numbered allegations of the charge, the Director's/ALJ's determination to process only that part of the charge concerning his December 9, 1996 request for information, and the ALJ's dismissal of that allegation. Neither UTU nor SIRTOA has responded to the exceptions.

Having considered the exceptions, we affirm the ALJ's decision and the Director's determinations underlying that decision.

Lo Bianco argues initially and primarily that the ALJ was powerless to issue a decision on any aspect of this case until we decided motions filed by his representative seeking permission to appeal from rulings made earlier during the processing of this charge by the Director and other ALJ's. By these motions, Lo Bianco sought permission to appeal from rulings limiting this charge to UTU's alleged failure to respond to the December 9, 1996 request for information. The first

motion was denied by decision dated August 5, 1997[2] and the second by decision rendered this date.[3]

Neither of Lo Bianco's motions affected the ALJ's power to process to completion the charge as limited by the Director. If the charge had been incorrectly limited, as Lo Bianco argues it was, the error would have been corrected by reversal and remand for further processing. The ALJ's decision on the charge as limited by the Director, therefore, was not prejudicial to any party. The ALJ might have elected not to issue a decision on the charge as limited until we had decided the second motion for permission to appeal from the ruling limiting the charge, but the ALJ's determination to proceed was equally privileged and most reasonable because the first motion, identical in relevant part to the second motion, had been denied in August 1997, before the ALJ issued his decision in October 1997.

On the merits, the dismissal of the first two allegations concerning UTU's alleged "concealment" of certain documents and information, whether by the Director or the ALJ, was plainly correct because the charge itself reveals that the alleged concealment was known to Lo Bianco more than four months before this charge was filed.[4]

As communicated correctly to Lo Bianco by the Director and the ALJ, the remaining allegations are all encompassed in the amended allegation that UTU did not respond to Lo Bianco's December 9, 1996 request for information about his employment and membership

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[2]United Transp. Union, Local 1440 (Lo Bianco), 30 PERB ¶3039 (1997).

[3]United Transp. Union, Local 1440 (Lo Bianco), 31 PERB ¶3028 (1998).

[4]Section 204.1(a)(1) of our Rules of Procedure requires that a charge be filed within four months of the act of alleged impropriety.

relationship with UTU. As the ALJ found, the record establishes to a certainty that Lo Bianco received UTU's written response to that request for information.

Finding no merit to the allegations of impropriety against UTU or to the arguments raised in the exceptions, we affirm the ALJ's decision and dismiss the exceptions.

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GUY LO BIANCO,

Charging Party,

- and -

CASE NO. U-18799

UNITED TRANSPORTATION UNION, LOCAL 1440,

Respondent.

- and -

STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY,

Employer.

CHARLES J. MUNAFO, for Charging Party

MARTIN A. SCHNABEL, GENERAL COUNSEL (DANIEL TOPPER of counsel), for Employer

BOARD DECISION AND ORDER

By decision dated August 5, 1997,[1] this Board denied a motion made by Guy Lo Bianco's representative for permission to appeal several rulings by Administrative Law Judges (ALJ) assigned to this charge filed against the United Transportation Union, Local 1440 (UTU), which

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[1]30 PERB ¶3039 (1997).

alleges that UTU breached its duty of fair representation in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act). In relevant part, we were asked in 1997 to review an ALJ's statement to Lo Bianco's representative that the only allegation in the charge being processed was UTU's failure to respond to a December 9, 1996 letter because the rest of the charge was untimely or otherwise deficient. Permission to appeal that ruling was denied because there were no extraordinary circumstances warranting review.[2] By letter dated August 12, 1997, Lo Bianco's representative seeks to review a statement made by the Director of Public Employment Practices and Representation (Director) during a telephone conference call on July 23, 1997, reiterating that the charge was being processed only as to the one allegation set forth above.

This most recent motion for permission to appeal is denied because it is the same in relevant part as the request for permission to appeal that was denied in August 1997. For the second time, and very soon after the decision on this very issue, Lo Bianco's representative seeks permission to appeal the ruling he finds objectionable because he believes the charge should be processed in its entirety.[3] The making of these motions stems either from a fundamental lack of understanding of our Rules or a disregard of them. Regardless of the reason underlying the

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[2]An appeal from a ruling made during the processing of a charge before a decision is rendered on the charge is by permission only pursuant to §204.7(h)(2) of our Rules of Procedure (Rules). As stated in our August 1997 decision in this case, it has been held repeatedly that permission to appeal will be granted only in extraordinary circumstances.

[3]After this motion was made, LoBianco's representative was barred from appearing before the agency in a representative capacity for a period of six months because of his misconduct during and after a conference in another case. Matter of Munafo, 31 PERB ¶3012 (1998). The bar does not apply to papers filed before July 1, 1998.

request, motions of this type waste this agency's resources and delay the adjudication and disposition of charges. Party representatives are, therefore, again cautioned to refrain from making them. The motion is denied. SO ORDERED.[4]

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

[4]An ALJ rendered a decision on the charge as limited in October 1997. 30 PERB ¶4666 (1997). We denied exceptions to the ALJ's decision dismissing the charge by separate decision issued this date.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROBERT CASE,

Charging Party,

- and -

CASE NO. U-19298

MONROE COMMUNITY COLLEGE FACULTY ASSOCIATION and NEW YORK STATE UNITED TEACHERS,

Respondents,

- and -

MONROE COMMUNITY COLLEGE,

Employer.

ROBERT CASE, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Robert Case to a decision by the Director of Public Employment Practices and Representation (Director) dismissing his charge against the Monroe Community College Faculty Association (Association) and the New York State United Teachers (NYSUT) to which Case's former employer, Monroe Community College (College), was joined as a party as required by §209-a.3 of the Public Employees' Fair Employment Act

(Act).[1] Case alleges that the Association and NYSUT[2] breached their duty of fair representation in violation of §209-a.2(c) of the Act in their processing of a grievance, including their declination to appeal an arbitration award denying the grievance.

Case's improper practice charge was filed on September 6, 1997. The actions at issue took place no later than November 3, 1993, when Case was notified that the unions would not appeal the arbitration award. Case undertook an appeal of the arbitration award on his own, which was not finally decided until the Court of Appeals rendered a decision dismissing that appeal as untimely on February 11, 1997. Motions filed by the College to have the Court amend its opinion and for reargument were denied by the Court on May 13, 1997.

The Director dismissed the charge as untimely filed from the acts of alleged impropriety in 1993. In dismissing, the Director held that the Court's May 1997 decisions did not begin the period from which a charge against the Association or NYSUT should run and that the Court's decisions did not toll or waive the four-month period for filing improper practice charges.[3]

In his exceptions, Case continues to argue, as he did to the Director, that his charge is timely because a statement by the Court in its February 11, 1997 decision "stops or freezes the clock in terms of filing deadlines . . . ."

Having considered the exceptions, we affirm the Director's decision.

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[1]That section requires the joinder of the employee's employer to duty of fair representation charges arising from a union's processing or failure to process contract grievances.

[2]In setting forth Case's allegations, we do not suggest that NYSUT is under any statutory obligation to represent Case in any respect. The duty of fair representation is owed only by the certified or recognized negotiating agent for a unit.

[3]Rules of Procedure, §204.1(a)(1).

The Court held that Case's appeal of the arbitration award was not timely commenced. In dismissing, the Court stated in a footnote that "this result does not foreclose any plenary remedies that may be available to [Case] arising from the union's representation . . . ." That statement was not a recognition by the Court, as Case argues it was, of "the egregious and severe magnitude of the union's actions (or inactions) . . . ." The Court never reached the merits of Case's allegations. Nor was it a statement waiving or tolling our timeliness rules. PERB was not a party to the appeal of the arbitration award and it is inconceivable that the Court intended to affect in any way the rights and obligations of parties to future proceedings before this agency. The Court's quoted statement was simply a clarifying note to avoid or minimize misinterpretation of its decision. Such comments are often inserted for this purpose in decisions rendered by courts and administrative agencies. The Court was merely emphasizing that the dismissal of the arbitration appeal as untimely was simply that and nothing more. Whatever other rights or remedies which might be "available" to Case were not being addressed in the Court's self-described "narrow" decision on the timeliness of his appeal of the arbitration award. As the Director correctly observed, Case has no rights or remedies "available" to him under the Act pursuant to an untimely charge.

Moreover, even if we were to accept the principle underlying Case's argument, his receipt of the Court's February 11, 1997 decision would mark the date from which the filing period for this improper practice would run. The May 13, 1997 decisions were denials of ancillary motions filed by the College, which could not have changed the Court's February dismissal of Case's proceeding seeking an appeal from the arbitration award. Running the improper practice filing period from any date in February 1997 still renders this charge, filed in September 1997, untimely.

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

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

- and -

CASE NO. U-18158

CITY OF FULTON,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT of counsel), for Charging Party

ROEMER, WALLENS & MINEAUX LLP (WILLIAM M. WALLENS and JEFFREY S. HARTNETT of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision by an Administrative Law Judge (ALJ) on CSEA's charge against the City of Fulton (City). CSEA's charge, as amended, alleges that the City violated §209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) by first reassigning and later discharging Thomas Grant, a probationary employee in the unit CSEA represents. CSEA alleges that the City's actions were improperly motivated because they were in retaliation for Grant's pursuit of a grievance concerning the City's denial of a sick leave request, and for his having notified CSEA that a supervisor in the unit including Grant had

threatened another employee in that unit, which resulted in CSEA bringing internal membership charges against the supervisor. Under an amendment to the charge granted by the ALJ, CSEA also alleges that the City's termination of Grant's employment violated the Act because the termination was based on Grant's use of sick leave benefits provided for by the agreement between the City and CSEA.

After the first day of hearing, the City moved to dismiss the charge because it believed that an April 3, 1997 judicial decision, dismissing a proceeding Grant brought against the City under Civil Practice Law and Rules (CPLR) Article 78, barred litigation of the improper practice charge under res judicata or collateral estoppel principles. Pursuant to the motion, the ALJ adjourned the next scheduled hearing date and requested the parties' written arguments on the motion.

After reviewing the parties' arguments and the Court's decision in Grant's CPLR Article 78 proceeding, the ALJ granted the City's motion to dismiss. The ALJ held that CSEA was estopped from relitigating at PERB the alleged retaliatory motive for both the City's reassignment and later discharge of Grant, the basis for the City's discharge of Grant, and the effect of the parties' contractual sick leave provision on the City's decisions. The ALJ held that those issues had been decided in the judicial proceeding, that those issues were both material and essential to the Court's judgment, that there had been a full and fair opportunity to litigate those issues in the CPLR Article 78 proceeding, and that there was the required "privity" of interests between Grant and CSEA. In the last regard, the ALJ found that CSEA was "involved in" the CPLR Article 78 proceeding through an appearance by one or more attorneys characterized at different points in the ALJ's decision as "CSEA regional attorneys" and CSEA "staff".

CSEA argues that collateral estoppel was incorrectly applied for many reasons, while the City argues in a point-by-point response that the ALJ was correct in dismissing the charge on that basis.

Having reviewed the record and considered the parties' arguments, we remand the case to the ALJ for development of a factual record on the issue of privity between Grant and CSEA, and any other component parts of collateral estoppel, an opportunity denied both parties by the ALJ's ruling on the motion to dismiss.

Collateral estoppel precludes a party or one in privity with that party from relitigating in a second proceeding an issue raised and decided in a prior proceeding, no matter whether the tribunals or causes of action are the same.[1]

In this case, the City seeks to estop CSEA from relitigating issues allegedly decided by the Court adversely to Grant in the context of his CPLR Article 78 proceeding in which Grant generally alleged that the City's termination of his employment was arbitrary, capricious, unlawful and unconstitutional. CSEA was not a party to the CPLR Article 78 proceeding. Even assuming, as the ALJ held, that all other collateral estoppel elements were satisfied, to estop CSEA from litigating under this improper practice charge any issues decided in Grant's judicial proceeding, there must be a relationship between Grant and CSEA of a nature which will permit for a fair conclusion that Grant's loss in the judicial proceeding should be imposed upon CSEA in this administrative proceeding. To guard against deprivation of a party's due process rights, the courts have generally insisted that the party who is sought to be estopped in the second

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[1]See, e.g., Ryan v. New York Telephone Co., 62 N.Y.2d 494 (1984).

proceeding be in "strict privity" with the party to the first proceeding.[2] Unlike certain other component parts of collateral estoppel, this "privity" requirement is uniquely case specific and is primarily, if not exclusively, factual. Privity can exist, for example, in certain legal relationships, in the second party's control or substantial participation in the earlier litigation, or when there is a merger of interests between the two parties.[3]

The City's motion caused the ALJ to cancel further hearings and the record developed by that date does not afford us a basis to affirm or reverse the ALJ's conclusion that CSEA was estopped from litigating this improper practice charge. Our conclusion is particularly applicable to the ALJ's finding that privity existed between Grant and CSEA to a degree sufficient to require application of collateral estoppel principles. The only fact the ALJ used to support her conclusion on the privity issue was Grant's representation in the CPLR Article 78 proceeding by one or more attorneys who may or may not be correctly characterized as CSEA's agents.

Before we can adequately review the ALJ's decision, we must have additional factual information revealing the exact nature of any relationship between CSEA and Grant in the CPLR Article 78 proceeding. Relevant to our inquiry, for example, would be facts as to whether and under what circumstances CSEA employed, appointed or approved Grant's attorneys in the CPLR Article 78 proceeding, whether CSEA was involved in any other way with the decision to commence or continue the CPLR Article 78 proceeding, whether it paid in whole or in part for Grant's legal services, and whether and to what extent it controlled or assisted with the CPLR

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[2]David D. Seigel, New York Practice, §§458 & 461 at pp. 693-95 & 696-98 (2d Ed. 1991), citing People v. LoCicero, 14 N.Y.2d 374 (1964).

[3]Id.

Article 78 proceeding at any stage of that litigation. Our examples, relevant to the privity inquiry, are illustrative only, not restrictive. Any facts evidencing a material relationship between CSEA and Grant are properly considered pursuant to the remand as would any evidence relevant to an application of collateral estoppel.

For the reasons set forth above, the case is remanded to the ALJ for further proceedings consistent with our decision.[4] SO ORDERED.

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

[4]Our decision is not to be read to deny the ALJ discretion to reconvene the hearing on all aspects of the charge so long as any hearing, if necessary, permits for evidence on the collateral estoppel issue.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ESSEX COUNTY LOCAL 816,

Charging Party,

- and -

CASE NO. U-18774

COUNTY OF ESSEX,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (PAUL S. BAMBERGER of counsel), for Charging Party

DAVID P. MCKILLIP, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Essex (County) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Essex County Local 816 (CSEA).[1] As relevant to the exceptions,[2] the

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[1]The charge named the Chairman of the County Board of Supervisors as the public employer against whom the charge was brought. The Assistant Director treated the charge as one against the County and the County has not taken exceptions to that determination.

[2]The Assistant Director also read the charge to include a work load allegation. The Assistant Director dismissed that allegation for failure of proof and no exceptions have been taken to that part of the Assistant Director's decision.

Assistant Director read the charge to allege that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally increased the on-call hours of psychiatric social workers in the County's mental health department.

The County argues in its exceptions that the Assistant Director incorrectly converted the charge from one alleging a unilateral change in staffing into one alleging a unilateral increase in hours of work; that the charge raises contract issues appropriate for jurisdictional or merits deferral; that the record does not establish any change in practice, only conformity to practice; and that the remedial order is inappropriate because it will require the County to maintain a minimum staffing level.

CSEA argues in response that the Assistant Director's decision and order is correct in all material respects and should be affirmed.

Having reviewed the record and considered the parties' arguments, we reverse the Assistant Director's decision. In reversing, we assume, without deciding, that the charge can be read to allege a unilateral change in the hours of work of the unit employees at issue. On that assumption, we hold that CSEA has not satisfied its burden to prove a change in practice regarding hours of work.

The County is required by law to provide mental health crisis services on a 24-hour basis. The County has had a rotational on-call system for years, using both its employees and others to deliver these services.[3] There are 104 on-call shifts per year. Prior to the at-issue charge being filed, the County most recently had 8.5 personnel to cover these shifts, 3.5 of whom were State

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[3]The persons who are on-call are reached through an answering service by pager or telephone and then they respond to a request for assistance. Employees are paid pursuant to the parties' collective bargaining agreement $2.00 per hour for each hour they are on-call.

employees provided under contract with the County. The other five were County employees. As of November 11, 1996, the State stopped providing its employees to the County to cover on-call shifts. The County then started covering the on-call shifts with its five employees and a sixth person under private contract. As the rotation is now among six persons, rather than 8.5, the number of shifts worked by each person and, correspondingly, the number of on-call hours each person worked per month necessarily increased. The County's social workers, who had worked 12.2 on-call shifts per year for 62.5 hours per month for some time before 1996, are now working, on average, 18.4 shifts per year for 94.3 hours per month.

It is unclear what the Assistant Director held was the practice which the County had changed improperly. It appears that the practice the Assistant Director found was one under which unit employees would be assigned a maximum of 12.2 on-call shifts at no more than 62.5 hours per month. However, as the Assistant Director also focused upon the sizable percentage increase in shifts and/or on-call hours, he may have found that there was a scheduling practice which permitted the County to increase the on-call hours worked by unit employees, but only within some undefined range, a range which had been exceeded by the on-call shift assignments on and after November 11, 1996. The record, however, is also at least equally susceptible to a conclusion that the practice was on-call scheduling, not fixed at any number of hours or within any range of hours, but one which permitted the number of on-call shifts assigned per person and the derivative hours they worked on-call to be increased formulaically simply as a function of the number of persons available to cover the number of required on-call shifts.

There is certainly no change, unilateral or otherwise, under the third described version of a practice. There is only arguable or inconclusive change under the second described practice

because the record does not reveal what the range of the permitted increase in hours of work might be. There is cognizable change for purposes of the Act only under the first described practice. In that regard, the record establishes that the number of on-call shifts required of unit employees has increased over time, reaching 12.2 shifts, likely in 1995, but without anything then or after evidencing or establishing an understanding or expectation that 12.2 was the maximum number of shifts social workers could be required to work. Simply because 12.2 shifts was the number of on-call shifts most recently worked by the social workers before the at-issue increase does not necessarily establish that there is a practice of employees not working any more than that number.

CSEA bears the burden to prove a change in practice embracing a mandatory subject of negotiation.[4] Where the record is susceptible to two or more equally reasonable conclusions, one of which is inconsistent with the proposition asserted, the party bearing the burden of proof on the proposition asserted cannot prevail.[5] Having dismissed the charge on the basis that there is not on the record a demonstrated change in a mandatorily negotiable past practice, we do not reach any of the County's other exceptions or any other of the parties' arguments.

For the reasons set forth above, the Assistant Director's decision is reversed and the County's exceptions, as relevant to the basis for our decision, are granted.

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[4]Schuylerville Cent. Sch. Dist., 14 PERB ¶3035, aff'g 14 PERB ¶4505 (1981).

[5]New York State Canal Corp., 30 PERB ¶3070 (1997) (employer's waiver defense not proven).

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DONEL LYKES,

Charging Party,

- and -

CASE NO. U-18537

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

KENNEDY, SCHWARTZ & CURE (ARTHUR Z. SCHWARTZ of counsel), for Charging Party

MARTIN B. SCHNABEL, GENERAL COUNSEL (EDWARD F. ZAGAJESKI of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York City Transit Authority (Authority) to a decision by an Administrative Law Judge (ALJ) holding, upon a charge filed by Donel Lykes, that the Authority violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it denied him a union representative pursuant to his demand.

In lieu of a hearing, the parties entered into a stipulation of facts showing the following: Lykes was employed by the Authority as a Property Protection Agent[1] when, on January 28,

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[1]The Transport Workers Union, Local 100 (TWU) represents the unit which includes this title.

1996, he was observed as being absent from his post by one of his supervisors, Frank Martelli. Martelli demanded that Lykes submit a report explaining why he had left his post without obtaining permission and without making the necessary entries into the Authority's various logs and registries. Lykes asked to speak to a TWU representative before providing the statement but was informed that a representative was not available. Lykes then refused to write the requested report, writing instead: "L/S Martelli asked for a report. I asked to speak with my Union Rep. Union Rep. not available on this date."

On January 29, 1996, the Authority charged Lykes with being off-post, failing to document being off-post on the registry sheet and his memo book, failing to notify the operations desk, and insubordination. The insubordination charge stems from Lykes' refusal to complete, without union representation, the report requested by Martelli. The Authority sought Lykes' discharge.[2] Lykes grieved that disciplinary charge through the contractual grievance procedure set forth in the TWU - Authority collective bargaining agreement .[3] On October 17, 1996, a hearing was held before the Tripartite Arbitration Board established through that procedure. The Arbitration Board's decision, issued October 18, 1996, sustained the charges and the penalty of discharge. Pursuant to the award, Lykes was discharged by the Authority on October 19, 1996.

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[2]Lykes has a record of disciplinary charges, warnings and suspensions. The last disciplinary charge filed against him by the Authority had resulted in a "final warning".

[3]Pursuant to the TWU-Authority contract, an employee may challenge the Authority's decision to impose a disciplinary penalty upon the employee by filing a disciplinary grievance and appealing the decision to various "step" level hearings. The appeal procedure ends in binding arbitration before a Tripartite Arbitration Board consisting of a TWU representative, an Authority representative and an impartial chair. The impartial chair issues the written opinion and award for the Arbitration Board.

On December 23, 1996, Lykes filed this charge, alleging that the Authority had violated §209-a.1(a) of the Act because the "arbitrator's ruling and the discharge of complainant is contrary to the Public Employees' Fair Employment Act and should be rejected as repugnant to said Act." The Authority filed an answer in which it denied the material allegations of the charge and raised lack of jurisdiction, res judicata and/or collateral estoppel and contractual waiver as defenses. The Authority also sought a deferral of the charge to the arbitration award. The Authority thereafter moved to dismiss the charge on the grounds of res judicata and deferral to the contractual disciplinary grievance procedure. In its motion, the Authority stated that "[t]he gravamen of the charge is that the Transit Authority disciplined [Lykes] because he had requested union representation prior to submitting a written statement."

In her decision, the ALJ denied all the Authority's defenses except collateral estoppel, holding that the doctrine must be applied and that the parties were bound by the factual findings within the arbitration award, which had been incorporated in the parties' stipulation of fact in material respect. The ALJ further declined to defer the charge to the arbitration award. Turning to the merits of the charge, the ALJ framed the charge as one alleging that the Authority had charged Lykes with insubordination for refusing to submit the report as directed, even though he had requested union representation. Finding that the Act accorded an employee the right to consult with a union representative before submitting to an interrogation which the employee reasonably believes will result in discipline, the ALJ held that the Authority had violated

§209-a.1(a) of the Act when it charged Lykes with insubordination for refusing to submit the report on demand.[4]

The Authority excepts to the ALJ's decision[5], arguing that the issue which was before the ALJ was that the arbitration award and the discharge of Lykes pursuant thereto were repugnant to and in violation of the Act. The Authority further argues that even if the charge could be read as encompassing the violation as framed by the ALJ, it would be untimely because the Authority charged Lykes with insubordination on January 29, 1996, and the improper practice charge was not filed until December 17, 1996, well beyond the four-month period in which charges are allowed to be filed. Lykes has filed cross-exceptions to the remedy ordered by the ALJ, which did not include his reinstatement.

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

Section 204.1(b)(3) of our Rules requires that an improper practice charge contain the following:

> [A] clear and concise statement of the facts constituting the alleged improper practice, including the names of the individuals involved in the alleged improper practice, the time and place of each occurrence of each particular act alleged, and the subsection of §209-a of the [A]ct alleged to have been violated.

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[4]The United States Supreme Court in NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689, 2691 (1975), decided that the National Labor Relations Act (NLRA) accorded to a private sector employee a statutory right "to refuse to submit without union representation to an interview which he reasonably believes may result in his discipline." The ALJ found that the right to such representation is encompassed in the rights of public employees under the Act. We have not had the occasion to determine whether such rights extend to public employees under the Act and, because of our findings, infra, we are not required to decide that issue in this case. See County of Allegany, 27 PERB ¶3013 (1994).

[5]We do not reach the other exceptions filed by the Authority or Lykes' cross-exceptions given the basis for our decision.

Section 204.2(a) of our Rules provides:

> After a charge is filed, the director [Director of Public Employment Practices and Representation] shall review the charge to determine whether the facts as alleged may constitute a violation of the [A]ct. If it is determined that the facts as alleged do not, as a matter of law, constitute a violation, or that the alleged violation occurred more than four months prior to the filing of the charge, it shall be dismissed by the director....

Section 204.1(d) of the Rules, further authorizes the Director or an ALJ to permit a timely amendment to a charge.

Lykes does not allege in his charge that the Authority violated the Act when it charged him with insubordination for refusing to complete the report ordered by Martelli. Further, the charge was never amended by Lykes to include the allegation which formed the basis for the ALJ's decision. The only issues raised in the charge were whether the arbitration award was repugnant to the Act and whether Lykes' discharge pursuant to that award violated the Act. A charging party is bound by the allegations in the charge,[6] and with good reason. If a charging party could plead one allegation in the charge and then were permitted later to convert that charge into one raising a wholly different allegation without any amendment, the purposes underlying the sections of our Rules previously cited are substantially, if not entirely, undercut. For example, in this case the Director[7] or his agent has never passed upon the substantive or procedural sufficiency, including timeliness, of an allegation that the Authority violated the Act when, in January 1996, it denied Lykes a union representative upon request and shortly thereafter charged

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[6]City of Mount Vernon, 14 PERB ¶3037 (1981).

[7]The position of Director was vacant at the time the charge was filed. The Assistant Director of Public Employment Practices and Representation (Assistant Director) was, therefore, serving as the Acting Director.

him with insubordination. As the agency has its own interests in a party's compliance with the aforementioned Rules, no other party by design or negligence[8] can prevent the agency from carrying out its review functions or compel it to decide an issue not presented in the charge or an amendment thereto.[9]

As we will not find a violation that is not alleged in a charge or in a timely amendment thereto,[10] we cannot in this case sustain a finding that the Authority violated the Act by denying Lykes a union representative at a disciplinary interview in 1996.

The allegations actually raised in the charge do not make out a violation of the Act. The Authority has no control over the Arbitration Board. The Arbitration Board is not a part of the Authority, rather it is an independent body which renders decisions binding on the Authority and TWU pursuant to grievances presented to it for determination. Issuance of the arbitration award itself was not an act by the Authority and, therefore, it does not set forth a violation of the Act. The implementation of the award terminating Lykes was the Authority's act, but a purely ministerial act involving no exercise of discretion as the arbitration award is final and binding.[11]

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[8]It appears from the Authority's motion to dismiss that the Authority litigated this charge at the ALJ level as one encompassing an allegation that the denial of a union representative violated the Act.

[9]An initial review of a charge actually pleading the allegation that the ALJ decided would likely have resulted in a deficiency determination for failure of timeliness because both the alleged denial of representation and charge of insubordination were final acts by the Authority in January 1996, approximately eleven months before the charge was filed. Our Rules at §204.1(a) require improper practice charges to be filed within four months of the act alleged to be improper.

[10]City of Buffalo, 15 PERB ¶3027 (1980); East Moriches Teachers Ass'n, 14 PERB ¶3056 (1981).

[11]New York City Transit Auth. and Transport Workers Union, Local 100, 30 PERB ¶3032 (1997).

Because the issue decided by the ALJ which formed the basis for her finding of a violation of the Act by the Authority was not before her, we reverse the decision of the ALJ.

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOHN ANTHONY BARTOLINI,

Charging Party,

- and -

CASE NO. U-18241

WESTCHESTER COUNTY CORRECTION OFFICERS BENEVOLENT ASSOCIATION, INC. and COUNTY OF WESTCHESTER (DEPARTMENT OF CORRECTION),

Respondents.

JOHN ANTHONY BARTOLINI, pro se

GOODSTEIN & WEST (ROBERT DAVID GOODSTEIN of counsel), for Westchester County Correction Officers Benevolent Association, Inc.

WILLIAM H. POHLMAN, ESQ., for County of Westchester

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by John Anthony Bartolini to a decision by an Administrative Law Judge (ALJ) dismissing a charge he filed against the Westchester County Correction Officers Benevolent Association, Inc. (COBA) and the County of Westchester (Department of Correction) (County).

The charge alleges that the County violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by falsely leading Bartolini to believe that he had

resigned from employment with the County in 1994.[1] Bartolini alleges that COBA breached its duty of fair representation in violation of §209-a.2(a) and (c) of the Act when its president, on May 21, 1996, refused to file a grievance on his behalf under the collective bargaining agreement between COBA and the County to help him reclaim his job with the County.

The allegations against the County were not processed by the ALJ because the Director of Public Employment Practices and Representation (Director) held them untimely filed.[2] The charge against COBA proceeded to a hearing,[3] after which the ALJ dismissed it as untimely filed. The ALJ found that Bartolini had knowingly resigned from his County job in 1994 to attend college and that COBA had unqualifiedly denied him any assistance in reclaiming that job in January 1995, in April 1996, and again in May 1996, all on dates more than four months before September 21, 1996, when this charge was filed.

Bartolini argues in his exceptions that the ALJ was arbitrary and capricious in his actions and rulings before and during the hearing,[4] conduct which resulted in an inaccurate or incomplete hearing record and which denied him a fair opportunity to prove the merits of his

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[1]Bartolini alleges in this charge, as he did in another charge, that the County unlawfully terminated his employment in March 1995.

[2]Under §204.1(a)(1) of our Rules of Procedure (Rules), charges must be filed within four months of the act constituting the alleged improper practice.

[3]Bartolini was then represented by counsel.

[4]Given the basis for our dismissal of this charge, it is not necessary for us to discuss Bartolini's allegations regarding the ALJ's conduct during the processing of this charge. By not discussing these allegations, we do not suggest that there is any merit to Bartolini's claims that the ALJ conducted himself improperly or erred in making any rulings.

charge and hindered him in his "battle for justice". Neither COBA nor the County has responded to the exceptions.

Having reviewed the record and considered the exceptions, we affirm the ALJ's dismissal of the charge.

It is unclear from the exceptions whether Bartolini is seeking to appeal the Director's determination not to process the interference and discrimination allegations against the County. Assuming that Bartolini's intent is to appeal from that determination, we dismiss the allegations against the County as substantively deficient. Bartolini alleges only that the County deliberately misled him as to his employment status. There is, however, nothing in the charge to even suggest that this alleged misleading was done out of any motive improper under the Act, the only circumstance which would even arguably set forth a violation by the County of the Act's interference and discrimination provisions in this context. Therefore, whether or not the allegations that the County misled or lied to Bartolini were timely filed, they do not set forth any violation of §209-a.1(a) or (c) of the Act for there is no interference or discrimination grounded upon rights protected by the Act.[5]

Our affirmance of the ALJ's dismissal of the allegations against COBA is predicated on a decision in an earlier case (U-19051) dismissing another of Bartolini's charges against COBA, a basis for dismissal which does not require any assessment of the timeliness of those allegations.

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[5]Green Chimneys Children's Servs., 31 PERB ¶3014 (1998); New Paltz Cent. Sch. Dist., 31 PERB ¶3013 (1998).

In the charge the Board decided earlier, Bartolini alleged that COBA had breached its duty of fair representation by refusing his May 1997 request to institute a civil rights law suit to overturn what Bartolini alleged was the County's unlawful termination of him in March 1995. By decision rendered after the ALJ issued his decision on this charge, this Board held that Bartolini had no statutory cause of action against COBA in 1997 for events occurring two years earlier.[6] In dismissing that charge, it was held that an individual who would hold a union to a duty of fair representation is required to seek the union's assistance within a reasonable period of time after the action which has prompted the employee's request for assistance has occurred.

Even were we to accept as true Bartolini's allegation that COBA did not finally and effectively deny his April 1996 request for grievance representation until May 21, 1996, we hold on the basis of the earlier decision that COBA in 1996 did not owe Bartolini any duty of fair representation in conjunction with his loss of employment in 1994 whether that be, as the ALJ found, in late 1994 pursuant to an actual, intended resignation, or a resignation "deemed" by the County to have occurred earlier that year. Even accepting Bartolini's assertions as true, ones contrary to the ALJ's findings in relevant part, his request for grievance representation in April 1996 came far too late after the loss of his job in 1994 to expose COBA to any duty of fair representation grounded upon a refusal to grieve the loss of his former position. His alleged discovery in 1996 of County personnel records deeming him resigned as of February 1994 did not affect his employment relationship with the County in any way material to his allegations against COBA, which are entirely severable from those against the County.

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[6]30 PERB ¶3075 (1997).

Bartolini knew in 1994 that he no longer held a position with the County for he was that year actively seeking reinstatement to his former position. If Bartolini was to expose COBA to any duty of fair representation in conjunction with employment he knew in 1994 he had lost, he had to have requested COBA's assistance with a grievance within a reasonable period of time after the loss of that employment. Bartolini's request for grievance representation in April 1996 is one not made within a reasonable period of time after he lost his employment.

For the reasons set forth above, Bartolini's exceptions are denied[7] and the ALJ's dismissal of the charge is affirmed.

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

[7]By letter dated February 12, 1998, filed after his exceptions were filed, Bartolini requests that this case be reopened due to alleged misconduct by COBA's attorney, which Bartolini argues supports the timeliness of his charge. Having dismissed this charge because COBA did not owe Bartolini a duty of fair representation in 1996 in conjunction with employment lost in 1994, not because the charge was untimely filed, there is no reason to reopen this record even if the information presented by Bartolini were held to constitute newly discovered evidence.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SYRACUSE FIREFIGHTERS ASSOCIATION LOCAL 280, IAFF, AFL-CIO,

Charging Party,

- and -

CASE NO. U-18616

CITY OF SYRACUSE,

Respondent.

BLITMAN & KING LLP (CHARLES E. BLITMAN and TIMOTHY R. BAUMAN of counsel), for Charging Party

JOSEPH E. LAMENDOLA, CORPORATION COUNSEL (TERRI CONTI YORK of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Syracuse Firefighters Association Local 280, IAFF, AFL-CIO (Association) to a decision by an Administrative Law Judge (ALJ) on a charge filed against the City of Syracuse (City). The Association alleges that the City violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented respirator fitness testing for unit employees in 1996.

The ALJ dismissed the charge after a hearing upon a finding that the respirator fitness testing in 1996, although more extensive than the two previous respirator fitness tests in 1990 and

1993, conformed to the City's testing practice under which the content of the respirator tests is determined by a physician.

The essence of the Association's exceptions is that the ALJ erred in dismissing the charge because the City did not establish that the Association had waived its right to negotiate by acquiescing in an unequivocal, long-established practice under which employees expected that testing would be as determined by the City's physician.

The City argues in response that the ALJ's decision is correctly grounded upon the Association's failure to prove any change in testing practice.

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

The Association's arguments do not differentiate between a union's affirmative obligation to prove a unilateral change in practice in a charge grounded upon such an alleged change, and an employer's privilege to defend a proven unilateral change in practice by proof that its bargaining obligation has been satisfied or that the union's right to bargain has been waived. The Association would have waiver criteria and burdens of proof be the standards by which a change in practice is to be evaluated. Change and waiver are, however, two separate issues.

The union always bears the burden to prove the change element of a unilateral change in practice charge,[1] a burden which requires proof, in no particular order, of a practice embodying a mandatory subject of negotiation and a change in that practice effected without the employer having satisfied its bargaining obligations.

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[1]Schuylerville Cent. Sch. Dist., 14 PERB ¶3035 (1981).

The ALJ did not hold that the Association had waived its right to bargain. The Association's charge was dismissed upon the ALJ's conclusion that the practice in issue was one under which the content of respirator fitness testing was left to the medical judgment and discretion of the City's Fire Surgeon.

The record is entirely consistent with the ALJ's finding that the practice was respirator fitness testing periodically under content determined by the City's Fire Surgeon. The City's Fire Surgeon established the content of the initial respirator fitness examination in 1990,[2] changed that examination, albeit relatively slightly in 1993, and changed it more significantly in 1996 after a different physician had become the City's Fire Surgeon.[3] The record does not prove that the practice was a respirator fitness test fixed as to its content as of 1990 or 1993. Accordingly, the Association, not having proven that the testing in 1996 changed the City's respirator testing practice, cannot prevail upon its unilateral change charge. Having dismissed the charge on this basis, we express no opinion as to the negotiability of any aspect of the City's respirator fitness test or attendant procedures or the City's duty to bargain on demand any component of the testing or the effects thereof.[4]

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

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[2]That examination had been ordered by the State Department of Labor.

[3]The new respirator testing includes for the first time an electrocardiogram (EKG), diabetes testing by urinalysis, and the employee's completion of a more comprehensive medical history form.

[4]The ALJ did not treat the charge as one also alleging a refusal to bargain the 1996 test pursuant to demand and no exceptions have been taken to the ALJ's reading of the violation pleaded in the charge.

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF CARMEL POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

- and -

CASE NO. U-18481

TOWN OF CARMEL,

Respondent.

RAYMOND G. KRUSE, ESQ., for Charging Party

DONOGHUE, THOMAS, AUSLANDER & DROHAN (JOHN M. DONOGHUE and STUART S. WAXMAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Carmel (Town) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Town of Carmel Police Benevolent Association, Inc. (PBA). The PBA alleges in this charge that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the Town's Chief of Police issued and revised a departmental General Order that imposed upon tour supervisors new duties regarding their verification that PBA unit employees on leave from work are in compliance with the Town's confinement to residence policy applicable to employees on sick leave and those who are absent

from work under provisions of the Workers' Compensation Law (WCL) or General Municipal Law (GML) §207-c.

After a hearing, the ALJ held that the charge was timely, there being no evidence to establish that the charge was filed more than four months after the date the PBA's agents first knew of the General Order.[1] On the merits, the ALJ held that the terms of the General Order changed the Town's existing practices in several respects and that those changes embodied mandatory subjects of negotiation. Accordingly, the ALJ ordered the General Order rescinded.

The Town has filed twenty-seven exceptions which fall into two categories. The Town argues first that the ALJ incorrectly based his decision, not on the Chief's General Order, but on the Town Board's confinement to residence policy, adopted by legislative resolution in April 1996, which is not alleged as a violation of the Act and which the Town argues is clearly time barred anyway under this charge filed in December 1996. The Town argues also that the provisions of the Chief's General Order relating only to a supervisor's duties regarding an employee's use of contractual or statutory leave rights are not mandatory subjects of negotiation.

In response, the PBA argues that the ALJ was correct in concluding that the General Order unilaterally changed the Town's practices embracing mandatory subjects of negotiation.

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

As to the first category of the Town's exceptions, the ALJ did not by design or inadvertance issue a decision resting on the Town Board's confinement to residence policy. It is

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[1]The Town takes no exception to the ALJ's finding that the charge, as it relates to the General Order, was timely filed.

manifestly clear from the charge as filed, the record, and the ALJ's decision and order that the ALJ knew of the difference between the confinement policy and the Chief's General Order, and that he knew that only the latter was in issue before him. The only issues the ALJ addressed concerned the Chief's General Order, and those are the only issues before us.

There being no question presented as to the timeliness of the charge as restricted to the General Order, the only issue on appeal is whether and to what extent the terms of the General Order changed prior practices embodying mandatory subjects of negotiation. On that issue, we hold that the General Order as revised did not change any practices regarding leaves of absence which are mandatory subjects of negotiation.

The General Order deals only with a supervisor's duties in conjunction with an employee's use of leave time. It is within the range of managerial prerogative for an employer to assign to supervisory personnel, whether or not they are represented within a rank-and-file unit, tasks associated with the investigation and prevention of leave abuse and/or the verification of an employee's compliance with the conditions attached to the grant of that leave.[2] Such functions are inherently part of a supervisor's job or tasks incidentally related thereto.[3] It is similarly the prerogative of management to establish for itself the triggers which will cause it to invoke investigatory/verification processes in these regards.[4] The parts of the General Order which the

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[2]Poughkeepsie City Sch. Dist., 19 PERB ¶3046 (1986).

[3]Waverly Cent. Sch. Dist., 10 PERB ¶3103 (1977).

[4]Poughkeepsie City Sch. Dist., supra note 2.

ALJ found changed the Town's past practices are within this trilogy of related managerial prerogatives.

Several parts of the General Order concern the points or conditions triggering the supervisory duties (e.g., supervisor to investigate if an employee has been on leave for ten days during the past twelve-month period regardless of the employee's submission of a physician's note regarding the absences). Decisions regarding those triggering conditions are not subject to mandatory negotiation.

That part of the General Order extending the investigation/verification system to employees on WCL or GML §207-c leave, instead of to only those reporting off duty as sick, was also an exercise of managerial prerogative. Employers may elect to use supervisory personnel to investigate potential abuse of conditional leave entitlements or to verify compliance with those leave conditions as to an absence from work for any reason.

The General Order also requires supervisors to make telephone calls to verify an officer's presence at the officer's designated place of confinement. The Town's prior practice left that decision to the supervisor's discretion. That part of the General Order reflects the exercise of a managerial prerogative as it involves a duty assignment to supervisors within the range of normal supervisory functions. An employer may extend to or retract from a supervisor discretion with respect to the performance of supervisory functions without incurring a decisional bargaining obligation in that regard.

With respect to the required supervisory contacts, the only differences between the General Order and the prior work rule are that a supervisor's calls were discretionary with the

supervisor under the prior rule and they were made only to officers on sick leave, circumstances which resulted in very few telephone calls actually being placed to an officer. These calls are now mandated and they are required to be made to officers on sick leave or WCL or GML §207-c leave. We have earlier held in this decision that the Town could remove discretion from supervisors as to whether to contact employees on leave and it could also expand the class of police officers subject to those contacts to include those on WCL or GML §207-c leave without incurring any duty to bargain the imposition of those rules.

The PBA observes that the Town's use of supervisory personnel to investigate employees' use of leave entitlements can be abused. The PBA expresses a concern, for example, that telephone calls could be made by supervisors at times which would disrupt the employee's household or that they could be made without any regard to the effect of the call on an officer's medical condition. We have no evidence of actual abuse in this case, nor any reason to believe that the Town would act in callous disregard of individual or family circumstances. Even had we such evidence, it would relate only to the reasonableness of the Town's rules and the supervisory actions taken pursuant thereto. The reasonableness of an action or a proposal, whether employer or union, simply has no bearing on the negotiability of the subject matter at issue under a charge.[5] The potential unreasonableness of the Town's directives as applied by its supervisors in some future, unknown context no more makes this part of the General Order mandatorily negotiable

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[5]Town of Carmel v. PERB, ___ A.D.2d ___, 31 PERB ¶7002 (3d Dep't 1998), conf'g 29 PERB ¶3026 (1996) (reasonableness of union demand immaterial to its negotiability); State of New York (Dep't of Taxation and Finance), 30 PERB ¶3028 (1997) (reasonableness of employer's action has no bearing on negotiability).

than would the arguable unreasonableness of a PBA bargaining demand render that demand a nonmandatory subject of negotiation.

For the reasons set forth above, the Town's exceptions relating to the negotiability of the General Order are granted, its exceptions are otherwise denied, and the ALJ's decision on the merits is reversed.

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF COHOES,

Charging Party,

- and -

CASE NO. U-17838

UNIFORM FIREFIGHTERS OF COHOES, LOCAL 2562, IAFF, AFL-CIO,

Respondent.

In the Matter of

UNIFORM FIREFIGHTERS OF COHOES, LOCAL 2562, IAFF, AFL-CIO,

Charging Party,

- and -

CASE NO. U-17875

CITY OF COHOES,

Respondent.

ROEMER, WALLENS & MINEAUX, LLP (ELAYNE G. GOLD of counsel), for City of Cohoes

GRASSO & GRASSO (JANE K. FININ of counsel), for the Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO

BOARD DECISION AND ORDER

These two cases, consolidated for decision, come to us on exceptions by the City of Cohoes (City) and the Uniform Firefighters of Cohoes, Local 2562, IAFF, AFL-CIO

(Firefighters) to a decision by an Administrative Law Judge (ALJ) on the negotiability of certain demands they submitted to compulsory interest arbitration pursuant to provisions in the Public Employees' Fair Employment Act (Act).

In U-17838, the City objects to the arbitrability of the Firefighters' demand that "all in-house training shall be attended by members in lieu of their regular duties." Because compulsory job training is a duty assignment, the ALJ viewed this demand as merely requiring the replacement of one set of job duties with another and held the demand nonmandatory. The Firefighters except to the ALJ's decision in that case.

Both parties except to the ALJ's decision in U-17875, the Firefighters' charge against the City. The City excepts to the extent the ALJ held that certain of its demands are nonmandatory. The Firefighters except to the ALJ's holding that certain of the City's demands are mandatorily negotiable. As relevant to the exceptions in U-17875, the ALJ held the following City demands to be nonmandatory subjects of negotiation: no. 9 re Article XI, §C.2;[1] no. 10 re Article XI, §C.3; no. 25 re Article XIII, §C.5; no. 31 re Article XVII, §D.1; two parts of demand no. 40 seeking to replace Article XVII with a new procedure to resolve General Municipal Law (GML)§207-a issues;[2] and no. 42 re the addition of a due process hearing procedure for hearings required by law. The ALJ held the following demands in U-17875 mandatory subjects of negotiation: no. 24 re Article XIII, §C.2; and no. 40 as described above, except for the two parts the ALJ held nonmandatory.

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[1]References to articles are to provisions in the parties' expired collective bargaining agreement.

[2]GML §207-a provides for the payment of salary, medical and hospital expenses of fire fighters who are disabled by injury or illness incurred in the performance of their duties.

Having considered the parties' arguments, we affirm the ALJ's decision in U-17838, but affirm in part, reverse in part, and remand in part in U-17875.

U-17838

The Firefighters argue that its training demand is mandatorily negotiable because it is intended to ensure that the City will not add duties or hours of work to unit employees' existing workload or workday if the City should elect to train them.

The ALJ held that the Firefighters' demand as written did not address either hours of work or workload, only the substitution of one set of job duties (training) for another ("regular" fire fighter duties). An employer's determination as to whether and when job duties will be performed during the workday is a management prerogative. Although one effect of the Firefighters' demand might be an unchanged number of working hours or an unchanged work load, the ALJ correctly held that negotiability of its demand was to be assessed by the wording of the demand. As the demand as written concerns job assignments only, it is nonmandatory on traditional negotiability analysis.

Although traditional analysis renders the Firefighters' training demand nonmandatory, in U-17875, we have expanded the scope of bargaining by adopting a supplemental theory of negotiability under which nonmandatory subjects contained within a contract between two parties to a bargaining relationship can be converted into mandatory subjects for purposes of collective negotiations between those parties. This conversion theory of negotiability is, however, targeted to specific terms in the parties' agreement. We do not intend to require negotiation pursuant to demand about any and all nonmandatory subjects of negotiation which might be related in some arguable way to a topic or a category addressed generally in parties' contracts. Although these

parties' contract contains a general training article, the Firefighters' proposal admittedly calls for the addition of a new section to that multi-section training article. There being nothing in these parties' contractual training article concerning the circumstances under which in-house training during work hours will be conducted, the Firefighters' demand cannot be held to be mandatorily negotiable on the supplemental theory of negotiability.

U-17875

Many of the demands which the ALJ held in U-17875 to be nonmandatory subjects of negotiation are ones by which the City seeks to modify or eliminate language in the parties' expired agreement which restrains the City's exercise of managerial prerogatives with respect to different subjects[3]. The City argues that its proposals to either ease or eliminate the existing restrictions on the exercise of its managerial prerogatives are mandatorily negotiable. The theories underlying this argument are not embellished but appear to be two.

The City argues that because management prerogatives are within its sole control, it can choose to waive those prerogatives. The argument continues from this correctly stated proposition to conclude that if it waives its managerial prerogatives, that waiver exposes the Firefighters to a duty to bargain about those prerogatives upon its demand. This first theory of negotiability is flawed for two basic reasons.

First, traditional negotiability analysis is controlled solely by the subject nature of the demand at issue.[4] The City's demands by their subject nature are nonmandatory precisely because

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[3]Proposed for bargaining and arbitration are demands concerning staffing composition and levels, job qualifications or content, and personnel appointments.

[4]See, e.g., State of New York (Dep't of Transportation), 27 PERB ¶3056 (1994); Peekskill City Sch. Dist., 16 PERB ¶3075 (1983).

the existing contract language which the City proposes to bargain are managerial prerogatives. Being nonmandatory by their nature, the City's demands are nonmandatory even if the City wants to negotiate about those managerial prerogatives and sees some potential advantage in trying to obtain or restore rights yielded in prior negotiations.

The City's first theory of negotiability is also flawed because it would make bargaining regarding managerial prerogatives optional with the employer only. An employer could force a union to bargain the easing of contractual restrictions on the exercise of its managerial prerogatives by waiving its prerogatives, but the employer would hold a veto over union proposals regarding those same subjects. As discussed in another part of our decision, we cannot countenance a negotiations policy which produces or continues a "one-way street" of negotiability under which only one party may force negotiations about any particular subject, whether it be "one-way" for employers or for unions.

As correctly recognized by the ALJ, the City's second theory of negotiability would have terms contained in a collective bargaining agreement, which would be nonmandatory subjects under traditional subject nature analysis, converted into mandatory subjects of negotiation. This so-called "metamorphosis" or "conversion" theory of negotiability is one which this Board has twice specifically rejected, first in Johnstown Police Benevolent Association[5] (hereafter Johnstown) and most recently in City of Glens Falls[6] (hereafter Glens Falls). For reasons which follow, we believe that the time has come to adopt this conversion theory of negotiability for bargaining demands between municipal police officers and fire fighters and their employers. We

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[5]25 PERB ¶3085 (1992).

[6]30 PERB ¶3047 (1997).

restrict our decision to that group of employers and employees because that is the only issue now before us. We leave open the question whether this conversion theory of negotiability should or should not be extended to bargaining demands exchanged between any other type of government and category of employees.

The advantages and disadvantages of making nonmandatory terms contained within a collective bargaining agreement mandatorily negotiable were discussed fully in the Board's decisions in Johnstown and Glens Falls. That discussion does not warrant any detailed repetition here. We there spoke about the damage done to collective negotiations and the Act's police/fire impasse procedures by a scope of bargaining which does not match an employer's obligation under §209-a.1(e) of the Act to continue all terms of an expired agreement, whether or not those terms are mandatorily negotiable. In Johnstown, the Board declined to adopt a conversion theory of negotiability on the expressed hope that this problem could be addressed in ways other than by changing our negotiability analysis. Our hope has faded in the five plus years since Johnstown issued.

Parties still refuse to negotiate nonmandatory subjects contained within their agreements, notwithstanding our warnings about the possible legal consequences of those refusals and our encouragement that they voluntarily negotiate those subjects. These refusals to bargain continue to spawn litigation which is disruptive to the Act's bargaining and impasse processes. Moreover, our declination to date to adopt a conversion theory, coupled with an unwillingness to reject it categorically, has contributed to a pervasive uncertainty about the scope of negotiations in police and fire services, which is itself contrary to the policies of the Act and the public interest. Parties focus more on what their legal rights and obligations may be after contract expiration and during

and after exhaustion of the impasse resolution processes than they do on creative resolutions to their bargaining disputes through good faith negotiations on all of the issues which actually divide them. It is unwise to continue to warn and implore while leaving undecided the issue as to whether to alter the traditional negotiability analysis.

At a more fundamental level, Johnstown and Glens Falls reveal this Board's deep and continuing concern about the simple unfairness of requiring an employer under §209-a.1(e) of the Act to continue all terms of an agreement upon expiration of that agreement "until a new agreement is negotiated", whether or not those terms are mandatory subjects of negotiation, while simultaneously denying that same employer any right to negotiate the nonmandatory terms in that agreement which it is obliged to continue.[7] This unilateral veto power over the scope of collective negotiations, whether wielded by employers or unions, is itself contrary to the policies of the Act. The result is as ironic as it is unfair for it has elevated nonmandatory subjects of negotiation to a legal status above that of mandatory subjects. Continuation of the latter is subject to a right and duty to bargain, while the former continue without corresponding right or obligation unless the union party to an agreement violates the Act's no-strike provisions. Nonmandatory subjects of negotiation, which before 1982 were the source of lesser rights and obligations, have since that date become the source of greater union rights and employer obligations.

Judicial or legislative resolution of this problem is unlikely. Since the decisions in Johnstown and Glens Falls issued, the Court of Appeals has upheld §209-a.1(e) of the Act as

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[7]For commentary on this issue with recommendation for change in negotiability analysis, see Moses, Scope of Bargaining and the Triborough Law: New York's Collective Bargaining Dilemma, 56 Alb. Law Rev. 53 (1993).

against a municipality's challenge upon both constitutional and public policy grounds.[8] Relief from a judicial narrowing of the application of §209-a.1(e) of the Act is, therefore, no longer realistic. A legislative resolution of a problem existing since 1982 with the enactment of §209-a.1(e) has not occurred to date and does not appear to be forthcoming.

The administrative "solutions" suggested to date as an alternative to the adoption of a conversion theory of negotiability are unworkable. One solution lay in the suggestion in Johnstown that a union which exercised its statutory right to refuse to negotiate a nonmandatory subject upon an employer's demand might result in that union waiving its rights under §209-a.1(e) to a continuation of that subject after expiration of the collective bargaining agreement. There is, however, a substantial question as to whether we could premise a waiver of one statutory right, i.e., §209-a.1(e), upon an assertion by a union of another of its statutory rights, i.e., to refuse to bargain nonmandatory subjects. Even if we could effect that result, the waiver approach provides only unions with an incentive to negotiate nonmandatory subjects. Employers presented with demands by unions to bargain nonmandatory subjects in an existing or expired collective bargaining agreement would not face any similar incentive to negotiate for they have no equivalent §209-a.1(e) rights to be placed at risk under a waiver analysis. As the waiver approach does not effect the mutuality of bargaining rights and obligations established by the Act, it must be rejected as contrary to the policies of the Act.

We might try to deal with the identified problem by denying unions any meaningful remedy were they to prevail under an improper practice charge brought under §209-a.1(e) of the Act if during negotiations, or at any stage of the impasse procedures, that union had refused an

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[8]City of Utica v. Zumpano, 91 N.Y.2d 964, 31 PERB ¶7501 (1998).

employer's demand to negotiate a subject which was later held to have been discontinued improperly by the employer. The remedial approach, like the waiver approach, is unworkable because it encourages only unions to negotiate about the nonmandatory subjects contained within collective agreements.

We are, therefore, presented with two choices. We can adopt a supplemental theory of negotiability which requires both parties to a contractual relationship to bargain on demand nonmandatory subjects of negotiation contained within their agreement and thereby effectuate the fundamental policies of the Act. Alternatively, we can stay with the traditional negotiability analysis which, in this context, will lead to continuing litigation, uncertainty as to bargaining rights and obligations, and likely prevent either party from changing any nonmandatory subjects contained within an agreement, regardless of when those terms were first negotiated or whether the circumstances which caused the parties to enter their agreement have since changed. We choose the first, a choice with advantages far outweighing the disadvantages of staying with the second.

We fully recognize that our adoption of a conversion theory of negotiability for police and fire negotiations will require refinement as the theory is actually applied during negotiation and impasse processes. Our application of the theory to the Firefighters' demand in U-17838 has begun the refinement of a new, supplemental negotiability analysis which will produce results more fair, more workable and more consistent with the current policies of the Act than one measuring the negotiability of a contract demand only by its inherent subject nature.

Application of this conversion theory of negotiability renders the following City demands, all seeking only a modification or deletion of language already contained within the parties'

expired agreement mandatorily negotiable: demand no. 9 regarding Article XI, §C.2; demand no. 10 regarding Article XI, §C.3; and demand no. 31 regarding Article XVII, §D.1.

The City's other demands, the first two of which concern retiree benefits, require more analysis and discussion.

City proposal 24, to delete from any successor contract Article XIII, §C.2 of the parties' now expired agreement, was held mandatorily negotiable by the ALJ. The ALJ held that the clause as written was restricted to a continuation of health insurance benefits for current employees after their retirement from City service, a mandatory subject of negotiation under current law.[9] The Firefighters except to this aspect of the ALJ's decision, arguing that a confirmed arbitrator's award interpreted Article XIII, §C.2 to require the City to pay health insurance costs of current retirees. Noting that this did not appear to be the arbitrator's holding, the ALJ held that even if the Firefighters' interpretation of the arbitration award were correct, that would not affect the negotiability analysis of the City's demand because the language proposed to be deleted under the City's demand covered only current employees.

The Firefighters' exceptions regarding City proposal 24 are denied. The ALJ correctly held that the negotiability of demands to delete from any future contract the language in an existing or expired contract is to be assessed by the demand as written. The City is not seeking by its proposal regarding Article XIII, §C.2 to establish or disestablish any financial obligations to current retirees. It seeks by its terms only to discontinue its financial obligations regarding health

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[9]Cohoes Police Benevolent and Protective Ass'n, 27 PERB ¶3058 (1994).

insurance to current employees after they retire.[10] The continuation or discontinuation of such benefits of current employees is mandatorily negotiable. How alteration of that language might affect current retirees is an issue not before us and about which we express no opinion.

City proposal no. 25 relates to Article XIII, §C.5 of the parties' expired contract which covers prescription drug deductibles. That Article provides that effective "January 1, 1994, the prescription drug deductible shall increase to $3.00 for brand name drugs and $1.00 for generic drugs". The ALJ held the City's demand to increase those deductibles to $7.00 and $5.00, respectively, to be nonmandatory because the City intended the demand to apply to persons who are currently retired from City service. The ALJ stated in the decision that it was "clear" that the demand sets a drug deductible for persons currently retired from City service, a clarity apparently stemming from the word "retirees" in the City's proposal. Retirees, however, can be persons already severed from employment or persons now working who may become retired in the future. It is clear to us from the coupling of the City's two health insurance proposals (24 and 25) and the language in those demands that proposal 25, like number 24, is directed to current employees who later retire, not persons already retired. As nothing in the language of the proposal is to the contrary, and consistent with the City's intent as articulated, this demand, applicable to future retirees only, is mandatorily negotiable under traditional analysis.

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[10]Our holding renders it unnecessary to decide whether a union or employer is required or even permitted to bargain about benefits of any kind extended to current retirees. If bargaining were prohibited, even a conversion theory of negotiability could not make demands regarding benefits extended to current retirees mandatorily negotiable.

Under proposal no. 40, the City would replace existing Article XVII, §R concerning fringe benefits for disabled unit employees in GML §207-a status with a contractual GML §207-a policy and procedure.

The ALJ held that the part of proposal 40 seeking to delete Article XVII, §R from any future contract was a nonmandatory subject of negotiation because the current language in §R states that the Firefighters "agrees not to seek impact negotiations" if the City opts to retire a GML §207-a fire fighter under applicable laws. Holding that a union cannot be compelled to negotiate a waiver of any statutory rights of unit employees, and finding that a waiver of the Act's impact bargaining rights was the consideration for the benefits described in Article XVII, §R, the ALJ held the demand to be a unitary one and nonmandatory as such.[11]

The City argues in its exceptions that the deletion of the existing language in Article XVII, §R always was and is irrelevant to the parties. Rather, it claims the only proposal it has ever placed in issue is the one creating a new GML §207-a policy and procedure.

Whether the City was ever seeking to negotiate the deletion of Article XVII, §R, it is clear from its exceptions and brief that it has withdrawn any specific proposal to delete that section. The policies of the Act favor that we not decide in an improper practice proceeding the negotiability of a demand no longer, if ever, in dispute between the parties.

The City's proposed new GML §207-a policy and procedure was held mandatorily negotiable by the ALJ except as to the first half of a preamble and as to a requirement that the City's Mayor sign and swear to the policy and procedure before a notary and affix the City's seal.

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[11]Under unitary demand analysis, the whole of a demand is nonmandatory if an inseparable part of the demand is nonmandatory. See, e.g., Pearl River Union Free Sch. Dist., 11 PERB ¶3085 (1978).

These two parts were held by the ALJ to be severable from the rest of this demand. Both parties except to the ALJ's decision regarding the GML §207-a policy and procedure.

The City claims that all of the preamble is mandatory and that the proposal does not require the Mayor to take any action on the procedure. According to the City, the language regarding mayoral action is from the contract signature page, not any part of the City's proposed GML §207-a procedure.

Turning to the latter claim first, whether or not the language pertaining to the Mayor's signing and sealing was appended to the City's proposed GML §207-a procedure, the City has now clarified that that language is not part of its GML §207-a proposal, never was part of its proposal, and any appearance of that language in any copy of its proposal is by mistake. Accordingly, we will not consider in this case whether this type of language regarding mayoral action is mandatorily negotiable.

The preamble referenced in the ALJ's decision appears to be §1(a) of the City's proposed GML §207-a procedure. Section 1 governs the intent and purpose of the GML §207-a procedure, paragraph (a) of which states as follows:

> (a) In order to insure that determinations arising by virtue of the administration of the provisions of Section 207-a of the General Municipal Law satisfy the interest of those potentially eligible for its benefit, the City of Cohoes, and the public, the following procedure shall be utilized to make determinations in regard to benefits authorized by Section 207-a. (Underlining added).

The ALJ held the underlined portion of this preamble to be nonmandatory as prefatory language. The part of the preamble not underlined was held mandatorily negotiable by the ALJ.

We reverse the ALJ's determination that the underlined part of this paragraph is nonmandatory. Language identifying the parties' intent regarding proposed terms and conditions

of employment aids in both the application and interpretation of those terms and conditions of employment. Being part and parcel of the terms and conditions of employment which follow, this language is itself mandatorily negotiable.[12]

The Firefighters renew before us arguments to the ALJ that several sections of the proposed GML §207-a policy and procedure are nonmandatory either because they reiterate statutory language or seek to compel a waiver of employees' statutory rights.

As to City proposal no. 40, we affirm on different grounds the ALJ's holding that the parts of this demand which seek to reiterate or restate statutory language in the parties' next agreement or award are mandatorily negotiable, but remand for consideration of the Firefighters' arguments that parts of the proposal compel bargaining about waivers of various statutory rights in light of a new framework for analysis of demands of this latter type.

The ALJ correctly stated that the Board's current case law renders nonmandatory demands which seek to incorporate statutory language into collective bargaining agreements.[13] Without having to decide whether the ALJ fairly distinguished that case law, we take this opportunity to reverse it for we find it lacking in persuasive rationale.

The rationale underlying the existing case law regarding the nonmandatory nature of demands for reiteration of statutory language in collective bargaining agreements is that these demands effect a redundancy. The prevailing rationale has it that the parties already have rights and obligations under law if the subject of a bargaining demand is addressed by statute, such that

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[12]Cortland Paid Fire Fighters Ass'n, Local 2737, 29 PERB ¶3037 (1996).

[13]See, e.g., Chateaugay Cent. Sch. Dist., 12 PERB ¶3015 (1979); City of New Rochelle, 8 PERB ¶3071 (1975).

neither may compel bargaining for contractual recognition of those rights or obligations. There is, however, no redundancy in a demand seeking to reiterate statutory language in a collective bargaining agreement or interest arbitration award for the simple reason that the placement of statutory language into an agreement or an award gives at least one party, often both, nonstatutory causes of action for violation of what is now more than a statutory right, and makes available different procedures for an alleged violation of those nonstatutory rights. As the reiteration of statutory language in a contract or award is the potential source of additional and different rights and remedies, bargaining demands with that purpose or effect can never be "redundant". Therefore, if the subject proposed for negotiation by employer or union otherwise embraces a term and condition of employment, that the bargaining proposal duplicates in whole or part the language of a statute is not, by itself, reason to treat the proposal as a nonmandatory subject of negotiation. We will not follow any prior decision holding or suggesting to the contrary.

There may be occasions when the nature of the statutory provision sought to be incorporated into a contract or award might raise policy considerations significant enough to render a specific reiteration proposal nonmandatory or prohibited. We have no need to speculate in this case as to what those occasions might be because the nature of the City's reiteration language in the proposed GML §207-a procedure does not raise any such policy issues..

In holding almost all of City proposal 40 to be mandatorily negotiable, the ALJ did not, however, consider the Firefighters' arguments that the City's proposal for a GML §207-a procedure would effect a waiver of statutory rights flowing to unit employees. It is appropriate to

remand this case to the ALJ for consideration of those arguments because we are changing the framework under which the Firefighters' statutory waiver arguments are to be analyzed.

Under existing case law,[14] a union can never be compelled over its objection to bargain pursuant to employer demand a modification or a waiver of any right existing under explicit or implicit statutory grant. Stated differently, all employer demands seeking a modification or waiver of union or employee statutory rights are always at least nonmandatory subjects of negotiation. As this approach to negotiability assessment is overly broad and produces results inconsistent with the policies of the Act, we reverse that body of case law and substitute a more focused analysis which will produce the mutuality of bargaining rights and obligations the Act intends.

The analysis under existing case law proceeds no further than to make a determination as to whether the employer's demand seeks to modify or eliminate rights of employees or their union representative under any statutory provision. Prevailing law requires no analysis of the nature of the right, the purpose for the grant, or the legislative history behind it. The better and correct approach, we believe, is to require a more particularized analysis, one focusing on these several factors and any other which may be relevant in defining the nature of the statutory right to be modified or waived. To us, the reasoning underlying this result is as simple as it is persuasive.

The change in analytical approach to proposed waivers of statutory right is first of all fundamentally fair. Just as a union is the collective representative of unit employees, government is the collective representative of its citizens. Since passage of the Act, employers, with rare exception, have been required to bargain for an alteration or waiver of the rights it possesses

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[14]See, e.g., City of Binghamton, 9 PERB ¶3026, conf'd, 9 PERB ¶7019 (Sup. Ct. Alb. Co. 1976). The Court merely confirmed PERB's analytical approach; it did not require that analysis.

under law as a government when those rights embrace terms and conditions of employment. Our existing case law requires employers to bargain on union demand, but permits a union to automatically exempt itself at will from similar obligation by merely asserting "statutory right" to block negotiation pursuant to employer demands. We can no longer in fairness hold that a government is obligated to bargain a waiver of citizen interests, but a union is always exempt from bargaining any and all of its or its unit employees' statutory rights.

The second reason for changing the existing framework for analysis of demands seeking waivers or modification of statutory rights is grounded upon the clear terms and policies of the Act itself. The Legislature plainly intends the bargaining rights as between unions and employers to be mutual and identical. This intent is revealed clearly in the definition of the duty to negotiate in §204.3 of the Act that refers to bargaining as a "mutual obligation" of the public employer and union. The Act's improper practice provisions, the administrative mechanism for enforcement of the rights the Act bestows, makes a refusal to bargain improper under either union charge or employer charge. Our existing case law on the negotiability of employer demands to bargain waivers or modification of union or employee statutory rights denies mutuality of bargaining right and obligation by creating a "one-way street" of negotiability under which employers must bargain pursuant to union demand but unions need not. Our approach restores the mutuality of bargaining the Act always intended to exist.

The analysis in relevant part will no longer simply ask and answer whether a demand would alter in some way some statutory right. If an employer's demand to modify a statutory right or privilege otherwise embraces a term and condition of employment, then that demand is mandatorily negotiable unless the waiver or modification proposed is against public policy or the bargaining has been foreclosed or the bargaining obligation has been lifted pursuant to a plain and

clear expression of legislative intent. This is the position employers are in pursuant to union demands. By placing unions in the same position as employers pursuant to employer demands involving statutory provisions, we eliminate the unfairness inherent in the prior approach and simultaneously effectuate the terms and policies of the Act.

In reshaping the framework for analysis of demands of this type, we fully recognize that there will be close questions of public policy and legislative intent which will arise pursuant to employer demands upon unions, just as there have been pursuant to union demands upon employers. There are certainly, for example, individual rights so fundamental that waiver or modification of them would be against public policy. There are just as surely other statutory rights as to which the legislation reveals clearly an intent that bargaining for waiver or modification of those rights is prohibited or not required. The purpose of the remand to the ALJ is to permit for consideration of arguments directed to precisely such questions.

Only City proposal 42 remains for discussion. City proposal 42 would establish a hearing procedure to be followed whenever a due process hearing is required by law. A hearing officer appointed by the City would take evidence on the matter in issue and would issue an award binding upon the parties. The ALJ held the demand nonmandatory because it was not restricted to hearings involving terms and conditions of employment.

As the City correctly notes, due process hearings are required when an employee's property or liberty interests are in issue. Those property or liberty interests, however, may embrace issues which are not terms and conditions of employment within the meaning of the Act. The City seems to assume that any action it were to take involving an employee could necessarily only affect that person's terms and conditions of employment. Although the City's action may arise out of or affect an employee's employment relationship, that would not necessarily make all

hearings proposed to be held under this demand ones involving terms and conditions of that employee's employment. Not all matters arising from or affecting the employment relationship are terms and conditions of employment within the meaning of the Act. To the contrary, most nonmandatory subjects of negotiation arise from or affect to some degree an employee's employment relationship; but connection to or effect upon the employment relationship does not necessarily make the subject a term and condition of employment within the meaning of the Act. Were it otherwise, there would be far fewer nonmandatory subjects of negotiation than currently exist. City demand 42 likely would have been mandatorily negotiable had it been limited to hearings required under law where the subject of the hearing is about an employee's terms and conditions of employment. This demand, however, attaches to any hearing required by law, including times when the hearing may not be about terms and conditions of employment. The demand, being overly broad, is nonmandatory.[15]

For the reasons set forth above, the ALJ's decision in U-17838 is affirmed. The Firefighters is ordered to immediately withdraw its proposal regarding Article XV, §6 from consideration at interest arbitration. In U-17875, we dismiss the charge as it concerns City proposals numbered 9, 10, 24, 25 and 31 because those numbered proposals are mandatory subjects of negotiation. The ALJ's decision is affirmed to the extent it is consistent with our holding in these several respects and otherwise reversed as to these numbered demands. The ALJ's holding that City proposal 42 is a nonmandatory subject of negotiation is affirmed and the

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[15]Fairview Professional Firefighters Ass'n, Local 1586, 12 PERB ¶3083 (1979); City of Rochester, 12 PERB ¶3010 (1979).

City is ordered to immediately withdraw that demand from consideration at interest arbitration.

Case U-17875 is remanded for decision on City proposal No. 40 in light of our decision herein.

SO ORDERED.

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ORANGE COUNTY LOCAL 836, CITY OF NEWBURGH UNIT,

Charging Party,

- and -

CASE NO. U-16637

CITY OF NEWBURGH,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Charging Party

HITSMAN, HOFFMAN & O'REILLY (ALISON C. FAIRBANKS and KEVIN J. MCGUCKIN 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 by the Director of Public Employment Practices and Representation (Director) on a charge filed against the City by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Orange County Local 836, City of Newburgh Unit (CSEA). As relevant to the exceptions, CSEA alleges in its charge that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, on January 1, 1995, it assigned to nonunit police officers animal control duties of a nonemergency nature which had been performed exclusively by an animal

control officer and an assistant animal control officer. Both of the latter two positions were in CSEA's unit until the positions were abolished effective December 31, 1994.[1] After a hearing, the Director held that the City's unilateral transfer of CSEA's unit work violated §209-a.1(d) of the Act as alleged.

The City has filed exceptions to the Director's decision on several grounds. CSEA in its response to the exceptions argues that the Director's decision is correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, we remand the case to the Director for consideration of the balancing test required by Niagara Frontier Transportation Authority [2] (hereafter Niagara Frontier).

The County's transfer of the work in issue from animal control officers to police officers resulted necessarily in a significant change in qualifications under existing case law.[3] Niagara Frontier requires a balance of party interests in that circumstance. As the Director did not undertake the required balance, the case is properly remanded to him for decision upon application of that balancing test.[4]

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[1]CSEA also alleged that the County's action violated §209-a.1(e) of the Act, which requires an employer to continue all terms of an expired agreement until a new agreement is negotiated. The Director dismissed that aspect of the charge and no exceptions have been taken to that dismissal.

[2]18 PERB ¶3083 (1985).

[3]See, e.g., State of New York (Dep't of Correctional Servs.) v. PERB, 220 A.D.2d 19, 29 PERB ¶7008 (3d Dep't 1996), conf'g 27 PERB ¶3055 (1994); Fairview Fire Dist., 29 PERB ¶3042 (1996).

[4]By our remand, we do not express any opinion as to the disposition of any other issues raised by the Director's decision or the parties' papers.

For the reasons set forth above, the case is remanded to the Director for further processing consistent with our decision. SO ORDERED.

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**CITY FIRE FIGHTERS UNION, LOCAL 28
IAFF, AFL-CIO,**

Charging Party,

- and -

CASE NO. U-17519

CITY OF SCHENECTADY,

Respondent.

DeCATALDO and DeCATALDO (KATHLEEN R. DeCATALDO of counsel), for Charging Party

ROEMER, WALLENS & MINEAUX, LLP (MARY M. ROACH of counsel), for Respondent

BOARD DECISION AND ORDER

Both the City of Schenectady (City) and the City Fire Fighters Local 28, IAFF, AFL-CIO (Union) have filed exceptions to a decision by an Administrative Law Judge (ALJ) on the Union's charge against the City. The Union's amended charge alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the City contacted the Mohawk Ambulance Service (Mohawk) to provide backup paramedic services that bargaining unit employees had exclusively provided.

After a hearing, at which the parties also stipulated many material facts, the ALJ found that acting as "first responder" to all calls for emergency medical services (EMS) through the

City's dispatch system was exclusive bargaining unit work. The ALJ further found that the City violated §209-a.1(d) of the Act on January 2, 1996, when it subcontracted that work to Mohawk. The amended charge also alleges that similar violations occurred in or about March and April of 1996, and later. The ALJ dismissed those allegations.

The City has filed exceptions to the ALJ's decision on several grounds. Among those grounds the City asserts that "first response" was not exclusive unit work, that the ALJ inappropriately applied our decision in Niagara Frontier Transportation Authority[1] to the facts of this case, and that she incorrectly inferred that the City arranged with Mohawk to act as first responder on the night of January 2, 1996. The City also objects to the ALJ's remedial order.

The Union's exceptions assert that the ALJ incorrectly rejected its claim that the City established a discernible boundary around the bargaining unit work by keeping three paramedic-equipped vehicles in service. The Union also maintains that the ALJ wrongly concluded that the record lacked evidence that the City arranged with any entity outside the bargaining unit to provide first-responder services, except on January 2. In response to the City's exceptions, the Union asserts that the ALJ's decision was otherwise correct and supported by the record.

Having reviewed the record and considered the parties' arguments, we affirm in part and otherwise reverse the ALJ's finding that the City violated the Act by arranging with Mohawk to provide first-responder services on January 2, 1996.

"EMS" is the general term that the parties use to encompass advanced life support services (ALS), basic life support services (BLS), and the transportation of persons requiring EMS. ALS is the same as paramedic services. BLS includes first aid and emergency medical

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[1] 18 PERB ¶3083 (1985).

technician (EMT) services. Since the mid-1980's, the Department has required newly hired fire fighters to be certified as EMTs. While the Department does not require fire fighters to be certified as paramedics, many are. But it employs none solely as a paramedic.

From approximately 1981 to December 31, 1995, except when there was a short-term emergency or some other extraordinary circumstance, the City kept three ALS units in service, using a combination of ALS-ready engines and rescue rigs. It staffed those units with fire fighter-paramedics represented by the Union. From 1993 through 1995 the total staffing level of the Department dropped from 151 positions to 139, mainly through attrition. Effective January 1, 1996, the City Council eliminated an additional 19 fire fighter positions, reducing the total to 120 fire fighters.

The Department is not certified to provide emergency transportation to injured or medically distressed persons. In addition, state law requires the City to maintain backup EMS services. On May 30, 1995, the City and Mohawk entered into a contract under which, among other things, the City agreed to dispatch Mohawk in the first instance to all emergency medical calls that the Department receives requiring the transport of a patient to an area hospital. Mohawk agreed in turn to provide backup EMS for the City. Two other organizations, the Rotterdam Police Department and Niskayuna Fire District No. 1, also provide backup EMS to the Department.

As stipulated by the parties, since the Department began providing paramedic or advanced life support services in 1981, it would first dispatch an ALS unit to a call requiring EMS. If all of its ALS units were engaged, the Department would dispatch its closest available BLS vehicle. If the fire fighters on that vehicle determined that ALS was required, but an ALS unit was still not

available, the Department would refer the call to one of the backup organizations. If an emergency was limited in scope, but the Department had neither a BLS vehicle nor an ALS unit available, it would simply request backup EMS. In those same circumstances, if the emergency was more extensive, the Department would refer EMS calls to the backup organizations as well as order fire fighters back on duty as long as needed.

On the afternoon of January 2, 1996, in the face of an impending snow storm, Fire Chief Varno asked Mayor Jurczynski for permission to open the Bellevue Fire Station by calling back three fire fighters on overtime. Jurczynski asked how many ALS units were scheduled to be in service that night and Varno told him two. Jurczynski then "contacted Mohawk Ambulance Service and asked whether Mohawk Ambulance would stand by to provide ALS services to City residents, in the event only one [Department] ALS unit was available." Mohawk assured him that they would have ALS units available from 8 p.m. on January 2 to 8 a.m. on January 3. Jurczynski then directed Varno to take one of the two scheduled ALS units out of service, and to use the two fire fighters from that unit to open Bellevue, along with one fire fighter on overtime.

The Department took the second ALS unit out of service at 11:30 p.m. on January 2, but did not direct any emergency calls to Mohawk during the night in question. The Department also lowered from three to two the number of ALS units in service on April 24, June 15, September 25, and September 29 of that year, due to staffing levels and contractual leaves.

The amended charge alleges that the City's actions constituted an unlawful unilateral subcontract, which the ALJ thus properly considered. With respect to a charge of unlawful subcontracting, the initial questions are whether the transferred work had been performed exclusively by unit employees, and whether the transferred work is substantially similar to the

work they previously performed.[2] The unit work in any transfer case is primarily defined by reference to the job duties performed by the unit employees.[3] An employer may create a discernible boundary that defines the unit work by establishing a clearly circumscribed past practice.[4]

The Union argues that the unit work at issue is the first response to ALS calls routed through the City dispatcher. It also maintains that the performance of that work by keeping three ALS units in service is a second basis for drawing a discernible boundary. The City, assuming for the sake of argument that the issue of subcontracting is properly before us, would define the unit work more broadly. It argues that the at-issue work is EMS, including ALS, BLS, and the transportation of EMS patients, but that it is improper to draw a boundary around a specific level of service. The parties do not dispute that the work at issue arises only from calls routed through a City dispatcher.

The ALJ adopted a definition of the unit work broader than the Union's and narrower than the City's. The work, as the ALJ defined it, is to assess, as first responder, the level and type of EMS needed, and to provide that service if qualified and available, or request backup services. The ALJ declined to draw a discernible boundary based on the type or level of equipment the City

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2 Niagara Frontier Transp. Auth., 18 PERB ¶3083 (1985).

3 Union-Endicott Cent. Sch. Dist., 26 PERB ¶3075 (1993).

4 Town of West Seneca, 19 PERB ¶3028 (1986).

chooses to provide its services, and we affirm that ruling. Staffing and equipment are issues about which an employer does not have to bargain.[5]

No matter what EMS-related tasks are at issue, the Union must be arguing to us that the parties' practice established a discernible boundary qualified by two conditions.

The first condition is that unit members did the EMS work if they were available. This is necessarily inferred from the parties' stipulated description of the protocols the City used to assign EMS calls. Those protocols provide that in circumstances where the Department had neither ALS nor BLS vehicles available, it referred those calls to the backup organizations. If availability is not such a condition, the performance of identical tasks by the backup organizations — including acting as first-responders when the City had neither ALS nor BLS units available — automatically defeats any claim of exclusivity.

As to the second condition, the parties also stipulated that unless there was a "short term emergency or some other extraordinary circumstance," the City kept three ALS units in service to respond as needed. Thus, even if we were to accept the Union's argument that a specific level of staffing or equipment established a discernible boundary, in order to find a violation we still must find that no emergency or other extraordinary circumstance existed at the time the City acted.

The Union concedes that the City's exercise of its staffing and equipment prerogatives made unit members unavailable on the dates in question. It nevertheless contends that by taking the ALS unit out of service and placing the phone call to Mohawk on January 2, the City unlawfully subcontracted unit work. Thus, the Union's position necessarily is that no short-term

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[5] City of Saratoga Springs, 18 PERB ¶3009 (1985); White Plains Police Benevolent Ass'n, 9 PERB ¶3007 (1976).

emergency or other extraordinary circumstance existed when the City acted. The Union submitted no proof, however, that deciding to open the Bellevue Station in the face of an impending snowstorm did not involve a short-term emergency or other extraordinary circumstance as established by the parties' practice. A charging party has the burden of proving exclusivity and, thus, the alleged breach of a discernible boundary.[6] Thus, even accepting the Union's definition of the unit work for the sake of argument, it submitted insufficient evidence to find a violation. Deciding to open an additional fire station when a snowstorm threatens is at least arguably a short-term emergency or other extraordinary circumstance.

Moreover, to whatever extent the Union argues that the City violated the Act when Jurczynski called Mohawk on January 2, we disagree. The only evidence of the January 2 conversation is the parties' stipulation that Jurczynski asked Mohawk if it "would standby to provide ALS services to City residents, in the event only one [Department] ALS unit was available." That inquiry and Mohawk's affirmative response, without more, are not evidence of an agreement to subcontract or transfer first responder services. No evidence is in the record that this was anything more than a reaffirmation of the existing backup agreement. Jurczynski did not ask Mohawk to act as a first responder. He specifically asked if Mohawk would "stand by," and he specifically implied that one Department ALS unit was going to remain in service. One ALS unit remained in service, and existing protocols called for that unit to be the first responder. Moreover, there is undisputed testimony that Mohawk received no EMS calls from the City on the night in question, either as a first responder or otherwise. Thus, under no sustainable view of the evidence

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[6] County of Erie (Erie County Medical Ctr.), 28 PERB ¶3015 (1995); Niagara Frontier Transp. Auth., supra note 1.

did the City unlawfully subcontract first responder or any other EMS services on the night of January 2.

Finally, the ALJ dismissed the charge as to the allegations that the City violated the Act on April 24, June 15, September 25, and September 29,[7] because she found no evidence that the City arranged with any entity outside the bargaining unit to be first responder on these dates. We affirm that ruling, and further find no evidence that any outside entity actually acted as first responder on any of those dates. In addition, as to those dates too, the Union submitted no evidence that the City's actions were inconsistent with the conditions that the Union must be arguing define a discernible boundary.

Therefore, we affirm so much of the ALJ's decision as dismissed the charge regarding events on April 24, June 15, September 25, and September 29, 1996, and reverse so much of that decision as found that the City violated the Act on January 2, 1996.

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

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[7] The ALJ's decision refers to September 19.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-4552

CITY OF AUBURN,

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 Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included:[1] Community development program manager, capital improvement program manager, street maintenance supervisor, water maintenance supervisor, sewer maintenance supervisor, sanitation supervisor, secretary to director of planning/economic development, director of human rights, assessor, superintendent of parks and recreation, deputy city clerk and treasurer.

Excluded: All other employees.

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

DATED: July 23, 1998
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

[1/]This is an amended description of the unit for which the petitioner was certified on July 1, 1998. The unit description as amended excludes the assistant fire chief, a title which had been included inadvertently in the unit described in the July 1, 1998 certification.