

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ANTHONY IMBRIALE,

Charging Party,

- and -

CASE NO. U-18670

UNITED TRANSPORTATION UNION, LOCAL 1440,

Respondent,

- and -

**STATEN ISLAND RAPID TRANSIT
OPERATING AUTHORITY,**

Employer.

CHARLES MUNAFO, for Charging Party

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

**MARTIN B. SCHNABEL, GENERAL COUNSEL (EDWARD ZAGAJESKI of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Charles J. Munafo to a decision by an Administrative Law Judge (ALJ) rendered on an improper practice charge filed by Anthony Imbriale against the United Transportation Union, Local 1440 (UTU) and the

Staten Island Rapid Transit Operating Authority (SIRTOA). Munafo appeared as Imbriale's representative at the pre-hearing conference. The parties were thereafter notified by the ALJ that a hearing was scheduled on the charge as limited to an allegation that UTU had improperly denied Imbriale two union representatives in conjunction with a grievance. Without notice, both Imbriale and Munafo failed to appear at the scheduled hearing attended by the other parties and counsel. The ALJ dismissed the charge and ordered Munafo to pay attorney's fees and costs to UTU and SIRTOA and to pay the agency for expenses it incurred as a result of Imbriale's and Munafo's failure to attend the hearing. The ALJ held that Munafo was Imbriale's representative and he was properly held accountable financially for an act that was "part of a willful pattern designed to harass the litigants . . . [demonstrating] contumacious disrespect for the Board."

Munafo appeals from the ALJ's order requiring him to pay the costs and fees because he alleges that he was not serving as Imbriale's representative after the pre-hearing conference. SIRTOA argues that the ALJ's sanctions against Munafo were appropriate for the reasons stated in the ALJ's decision because Munafo never informed the ALJ or the parties that he was no longer Imbriale's representative.

Having considered the arguments raised, we rescind the ALJ's order because the ALJ's order was issued in a manner contrary to our governing statutory and regulatory scheme.¹

¹For purposes of this decision, we assume, without deciding, that Munafo was Imbriale's representative at the date of the hearing.

The order entered by the ALJ was not a remedial order issued under §205.5(d) of the Public Employees' Fair Employment Act (Act). Remedial orders issue to address violations of the Act committed by an "offending party".² Munafo was not a party to this charge, no violation of the Act was found to have been committed and the charge was dismissed. The power to make the order which the ALJ issued against Munafo finds arguable basis, however, in §205.5(l) of the Act, which provides that the agency may "exercise such other powers, as may be appropriate to effectuate the purposes and provisions of this article." We may again assume, without deciding, that this provision of the Act empowers the agency to sanction financially parties or representatives who engage in misconduct. We conclude, however, that the power to sanction is not appropriately exercised through an order issued against a party representative under a dismissed improper practice charge.

Our regulatory scheme permits for an appeal from an ALJ's decision and order by a party only.³ The absence of a right to appeal by party representatives is persuasive evidence that orders of any kind were never intended to be issued as against party representatives in the context of an improper practice charge. Orders in improper practice proceedings are properly entered only against the parties to those proceedings as only parties may appeal from those orders under our Rules.

In the final analysis, the ALJ sanctioned Munafo for willful misconduct. The order entered, however, creates a method for the investigation and punishment of misconduct

²Act §205.5(d).

³Rules of Procedure (Rules) §204.10. We have considered Munafo's "exceptions" in recognition that there must be some means by which Munafo can challenge the ALJ's order.

despite our already having a rule directed specifically to party or representative misconduct.⁴ That rule was recently endorsed by the legislature as the means by which representatives are to be sanctioned for misconduct.⁵ That rule was used to bar Munafo from appearing before the agency in a representative capacity due to his misconduct at and after the conference held in this very case.⁶ We believe that our long-standing misconduct rule is the exclusive means by which sanctions of any type can be imposed against a party representative for misconduct.

An investigation pursuant to existing rule is not only the procedure which must be used to determine whether a party representative has engaged in misconduct of some type and, if so, what the sanction for that misconduct should be, it is the procedure best suited to that end. Improper practice charges are the means by which the agency determines whether a party respondent has violated the Act and the means by which nonpunitive remedies for the violations as committed by those parties are fashioned. The misconduct investigation we would be conducting pursuant to the ALJ's order would have nothing whatever to do with questions concerning alleged violations of law and the appropriate remedies for those violations. In contrast, the very purpose of our misconduct rule is to investigate alleged misconduct by a party or representative during the adjudication of an improper practice charge and to decide upon the appropriate sanction for any misconduct found. That rule is targeted specifically to party

⁴Rules §204.7(j).

⁵Act §205.5(j).

⁶Matter of Munafo, 31 PERB ¶3012 (1998).

representatives and to the type of actions by them which the ALJ in this case held warranted sanction. It is that rule, focused as to person, conduct and result, which must and should be used to investigate allegations of a party representative's misconduct, not improper practice charges.

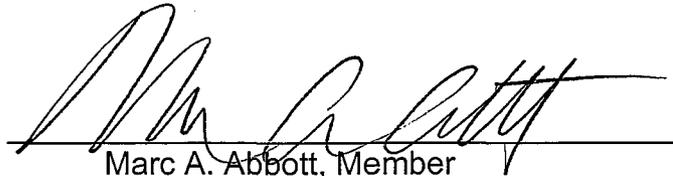
In rescinding the ALJ's order, we do not condone Munafo's conduct. Even if, as Munafo claims, he was not Imbriale's representative after the conference, circumstances warranted that he so notify the parties and the ALJ, all of whom assumed that Munafo was Imbriale's representative. We simply conclude that an improper practice charge cannot and should not serve as the basis to investigate and reach conclusions about a representative's alleged misconduct, nor as the basis to impose an order to remedy or sanction that misconduct, whether directly or indirectly.

For the reasons set forth above, the ALJ's order requiring Munafo to pay costs and fees is rescinded. SO ORDERED.

DATED: September 28, 1998
New York, 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-18437

STATE OF NEW YORK (DIVISION FOR YOUTH),

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (DAREN J. RYLEWICZ of
counsel), for Charging Party**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MAUREEN SEIDEL 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 State of New York (Division for Youth)¹ (DFY) (State). CSEA alleges that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the State stopped permitting DFY employees to serve as foster parents for children placed with DFY. After a hearing, the ALJ dismissed the charge. The ALJ concluded that the State's interest in

¹The Division for Youth has since been restructured and renamed the "Office of Children and Family Services".

avoiding potential conflicts of interest outweighed the employees' interests in serving as foster parents for children placed under DFY's custody and control. The ALJ held, therefore, that the State's admitted unilateral action was an exercise of managerial prerogative affecting a nonmandatory subject of negotiation.

CSEA argues in its exceptions that the ALJ erred in striking a balance of interests exempting the State from a duty to negotiate its decision to prohibit DFY unit employees from serving as foster parents for children under DFY's supervision. CSEA argues that this "work rule" is a mandatorily negotiable subject under established precedent, which the ALJ misapplied.

The State argues in response that CSEA's exceptions are not supported by the record and that the ALJ's findings and conclusions are correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's dismissal of the charge under different analysis.

In our view, the State's decision to disallow DFY employees from serving as foster parents for children placed within DFY's custody and control is not properly characterized as a work rule or any other term or condition of the employees' employment which might be subject to a decisional bargaining obligation under the Act.

A work rule is a determination or pronouncement made by an employer in its employer capacity, directed to employees as employees, which affects the employees' delivery of employment services and carries with it the explicit or implicit threat of discipline or other employment consequence for noncompliance. Similarly, an employer's action other than that which might be considered a work rule must at the least implicate some aspect of the employees' employment relationship before it can be

considered a term and condition of employment within the meaning of the Act. The State's action at issue does not have any of these characteristics.

Determinations regarding the persons who are eligible to be foster parents for children under DFY's supervision are not ones which the State made in its capacity as employer. Rather, they are determinations made by the State in its sovereign capacity as custodian of children who have been determined by the judiciary to be in need of assistance and supervision. The State's disqualification of DFY employees from participation in the foster care program for children placed under DFY's care did not affect a single aspect of any employee's employment relationship. Foster care arrangements are not at all employment related. Nor is the disqualification effected or enforced through any aspect of the employment relationship. Children within DFY's care are simply no longer placed in foster care arrangements with DFY employees.

That unit employees may have derived some tangible or intangible benefit from serving as foster care parents is immaterial to an analysis of the negotiability of the State's decision. Whatever benefits employees derived from their service as foster care parents did not flow to them as an attribute of their employment with the State, even indirectly. The benefits flowed to them only in their capacity as foster care parents and solely from their voluntary participation in a program which was entirely divorced from their employment relationship.

In applying a balancing test, the ALJ relied upon New York State Thruway Authority (hereinafter Thruway Authority).² In that case, the Thruway Authority had

²21 PERB ¶4570, aff'd, 21 PERB ¶3058 (1988).

promulgated an "Executive Instruction" pursuant to which employees in a unit title were not allowed to bid at auction on some of its equipment being sold to the public.

Although the issue was not presented to it directly on exceptions, the Board in its decision appears to have endorsed the ALJ's conclusion that the Thruway Authority's

"rule" involved a "term and condition of employment" because "the prohibition, the

essence of the rule, derives solely from the employment relationship."³ The Thruway

Authority's "rule" does not appear to have had any more relationship to the employees'

employment than the alleged "work rule" in issue here. Our conclusion here is that a

prohibition on the exercise of a privilege is not necessarily a "term and condition of employment" within the meaning of the Act requiring negotiations simply and solely

because it is employees who have been denied access to the privilege. The analysis

must go beyond the identity of the persons to whom the prohibition is directed to

include consideration of such factors as the capacity in which the government has

issued the "rule" and its effect upon and its relationship to the employer-employee

relationship. We reverse Thruway Authority to the extent the rationale in that case is

inconsistent with our decision herein because Thruway Authority incorrectly states how

the negotiability of a given subject is to be analyzed. Therefore, we have no occasion

to consider CSEA's argument that the State's cited conflicts of interest are not

substantial or its claim that the State's concerns could be addressed by alternatives

other than a disqualification of DFY employees from participation in the foster care

program for DFY children. The State's decision to disqualify DFY employees from

³21 PERB ¶4570, at 4680 (1988).

service as foster parents for DFY youth is not a term and condition of employment within the meaning of the Act by its very nature on any theory.

As a second ground for dismissal of this charge, we hold that the State's decision was not a change in practice cognizable under a refusal to bargain charge. All foster care placements are made by the State under the standard of the "best interest of the child". That standard vests foster care placements within the discretion of the State. When the State decided that children in DFY's custody were not best served by having DFY employees be their foster parents and then disqualified DFY employees from participation in the foster care program for that reason, its action was entirely consistent with the State's prevailing policy or practice. Service as a foster parent was not guaranteed to anyone, whether or not an employee. Placements were always conditioned upon the State's initial and continuing determination that the best interests of the child would be thereby served. The State has reassessed its prior placement policy and changed it to coincide with what it now believes to be the children's best interests. Disqualification of DFY employees pursuant to that policy reassessment simply did not change a practice because the practice was conditional from inception and the State's action was taken consistently with that condition.⁴ This charge, therefore, must be dismissed even if the State's decision were held to embrace a mandatory subject of negotiation.

⁴State of New York (Governor's Office of Employee Relations and Dep't of Health), 25 PERB ¶¶3005 (1992), conf'd, 195 A.D.2d 930, 26 PERB ¶¶7008 (3d Dep't 1993).

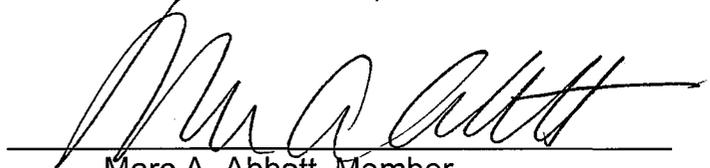
For the reasons set forth above, CSEA's exceptions are denied and the ALJ's decision ordering the charge dismissed is affirmed.

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

UNITED UNIVERSITY PROFESSIONS,

Charging Party,

- and -

CASE NO. U-18503

STATE OF NEW YORK,

Respondent.

GARY D. RUBERTI, for Charging Party

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United University Professions (UUP) and the State of New York (State) to a decision of an Administrative Law Judge (ALJ) dismissing UUP's charge alleging that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally transferring outside the bargaining unit represented by UUP the professorial duties regarding Germanic languages and literature at the State University of New York at Albany (SUNYA). The ALJ determined that there was no violation because SUNYA no longer offered German language and literature courses and that SUNYA had a long-standing practice of allowing its students to take courses at area schools belonging to the Hudson Mohawk

Association of Colleges and Universities (Association),¹ which were not offered at SUNYA.

UUP excepts to the ALJ's decision, arguing that the ALJ erred as a matter of fact and law. The State excepts to the ALJ's declination to determine the import of the parties' stipulation that the State had ceased to offer any degree programs in German or to require students to take German language, but otherwise supports the ALJ's decision.

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

As of May 31, 1997, SUNYA ceased offering German language courses, ceased requiring students to take German language courses and ceased all German language degree programs. Full-time faculty members who taught German language within SUNYA's Department of Germanic and Slavic Languages and Literature were retrenched and part-time faculty members were not renewed. Students at SUNYA who were enrolled as of May 31, 1997 in a German language degree program are allowed to take courses through the Association at member colleges and universities to complete their degree requirements. Although no new majors in German language may be declared, any SUNYA student who meets the Association requirements may take German language courses through the Association.

¹SUNYA is a member of the Association, which was chartered in 1970, and is made up of 16 colleges and universities in the Capital District. The Association permits full-time students who are enrolled in a member school to take courses at another member college or university so long as the course is not available to the students at their own school.

UUP argues that by making German language courses available to SUNYA students through the Association, SUNYA has unilaterally reassigned work performed exclusively by employees in UUP's unit to nonunit personnel. It is SUNYA's position that it has gone out of the business of offering German language courses and that the practice of SUNYA's students taking courses not offered at SUNYA at Association member colleges and universities and receiving credit at SUNYA is long-standing.

A public employer generally violates the Act by unilaterally reassigning unit work to nonunit personnel when the reassigned work has been performed exclusively by unit employees and the reassigned work is substantially similar to the work previously performed by unit employees.² The ALJ did not reach the issue of exclusivity because she found that the long-standing practice of making Association course offerings available to students was dispositive of the charge.³ Because of our findings, *infra*, we agree that we need not reach the issue of UUP's exclusivity.

The analysis of this case begins and ends with our finding that SUNYA has made a managerial decision to abolish or curtail a service which it previously offered. We have long held that it is a managerial prerogative to abolish a service.⁴ Transfer principles have no application to an employer which has gone out of business in whole or part. In considering whether a service has actually been abolished or has merely been transferred for performance by an agent, we look to the level of control exercised

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

³On two or three occasions, visiting professors taught German language courses. Graduate students at SUNYA also taught German language classes to some extent. They are not included in UUP's bargaining unit.

⁴City Sch. Dist. of the City of New Rochelle, 4 PERB ¶3060 (1971).

by the public employer.⁵ If an employer's level of control over the agent is *de minimus*, there is no bargaining obligation.⁶

In this case, we find that SUNYA has ceased offering German language courses to its students. SUNYA's participation in the Association allows SUNYA students to cross-register for courses at member colleges and universities. SUNYA's membership fee in the Association does not pay for the costs of registration or instruction of those students. The courses do not utilize any of SUNYA's equipment or facilities. SUNYA plays no role in the registration procedures, the content of the courses, or the standards applied to students. Finally, SUNYA does not require any students to take German language courses. The only contact SUNYA now has with the teaching of German language courses is its acceptance for credit of course work in German completed at one of the Association college or universities. As SUNYA exercises no control over the provision of this service by the Association, we find that SUNYA has not merely transferred the teaching of German to other colleges and universities. Instead, SUNYA is itself no longer in the business of teaching German. Its decision to do so is not mandatorily negotiable. That the Association offers the same service, through no

⁵See Saratoga Springs Sch. Dist., 11 PERB ¶3037 (1978), *aff'd*, 68 A.D.2d 202, 12 PERB ¶7008 (3d Dep't 1979), *motion for leave to appeal denied*, 47 N.Y.2d 711, 12 PERB ¶7012 (1979). See also County of Erie (Erie County Med. Ctr.), 28 PERB ¶3015 (1995); Bd. of Educ. of the City Sch. Dist. of the City of Long Beach, 26 PERB ¶3065 (1993).

⁶Town of Brookhaven, 28 PERB ¶3010 (1995).

solicitation by SUNYA,⁷ does not warrant a contrary conclusion.⁸ Where a public employer has ceased providing a service or a product, the employer's mere willingness to accept that service or product which it did not solicit from a third party provider over whom it exercises no more than *de minimus* control does not itself reestablish the employer as one in business for purposes of applying case law on transfers of unit work.

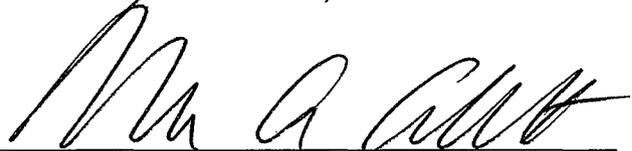
Based on the foregoing, we deny UUP's exceptions and affirm the ALJ's dismissal of the charge.

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

⁷The Association played no role in SUNYA's decision to discontinue its German language courses.

⁸See Niagara Frontier Metro Sys., Inc., 30 PERB ¶3010 (1997); Town of Brookhaven, *supra* note 6.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

WILLIAM W. HINDS II,

Petitioner,

- and -

CASE NO. C-4731

**JAMESVILLE-DEWITT CENTRAL SCHOOL
DISTRICT,**

Employer,

-and-

SEIU, LOCAL 200B,

Intervenor.

WILLIAM W. HINDS II, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by William W. Hinds II to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his petition seeking to decertify SEIU, Local 200B (SEIU) as the bargaining agent for a unit of employees of the Jamesville-DeWitt Central School District.

Hinds filed a petition on November 29, 1997,¹ on his behalf and the behalf of three other employees in the unit represented by SEIU, seeking to decertify SEIU as

¹A similar petition, Case No. C-4717, was filed on November 5, 1997. It was not accompanied by a declaration of authenticity and Hinds was notified that it was deficient. It was deemed withdrawn by the Director on December 17, 1997.

the bargaining agent. The petition was accompanied by a showing of interest but no declaration of authenticity, as required by §201.4(d) of our Rules of Procedure (Rules).² Hinds was notified that the petition was deficient because it lacked a declaration of authenticity. He was further advised that a new petition would be untimely.³ In response to the deficiency notice, Hinds filed a purported declaration of authenticity on December 17, 1997. He was thereafter notified that the declaration could not be

²Section 201.4(d) provides:

A declaration of authenticity, signed and sworn to before any person authorized to administer oaths, shall be filed by the petitioner or movant with the director simultaneously with the filing of the showing of interest or any evidence of majority status for the purpose of certification without an election, pursuant to section 201.9(g)(1) of this Part. Such declaration of authenticity shall contain the following:

(1) the name of the individual executing the declaration, and a statement of the declarant's authority to execute it; if on behalf of an employee organization, the declarant's position with the employee organization, and a statement of the declarant's authority to execute the declaration on its behalf; and

(2) a declaration that, upon the declarant's personal knowledge, or inquiries that the declarant has made, the persons whose names appear upon the evidence submitted have themselves signed such evidences on the dates specified thereon, the persons specified as current members are in fact current members, and, as to any persons whose signatures were solicited on or after March 15, 1996, that inquiry was made regarding their inclusion in any existing negotiating unit which is the subject of the representation petition. If the declaration is upon inquiries the declarant has made, and not upon the declarant's personal knowledge, the declarant shall specify the nature of those inquiries.

³The SEIU-District contract expired on June 30, 1998. Under §201.3(d) of our Rules, the petition could have been filed before expiration of that agreement only during November 1997. If no new agreement has been reached between SEIU and the District after 120 days following expiration of that contract, another petition could be filed, pursuant to §201.3(e) of the Rules.

accepted because it had not been filed simultaneously with the petition and that a petition for decertification would now be untimely. The petition was subsequently dismissed by the Director.

Hinds excepts to the Director's decision, arguing that he did not understand the legal processes involved in the filing of a petition for decertification and that he had requested assistance in the November 26, 1997 cover letter to the instant petition.⁴ The District and SEIU have not responded to either the Director's decision or Hinds' exceptions.

We have consistently held that our Rules regarding the filing of the showing of interest should be strictly applied.⁵ That practice must be followed with regard to the requirement that a declaration of authenticity of the showing of interest be filed simultaneously with the petition. Hinds failed to file any declaration of authenticity with the petition. Such deficiency cannot be cured by a subsequent filing. The dismissal of the petition, therefore, was proper.

That Hinds is inexperienced and unfamiliar with PERB's procedures is not a sufficient basis to accept a fatally defective petition or a petition that is untimely filed.⁶ The requirement that a declaration of authenticity be filed simultaneously with the

⁴Hinds wrote: "If there is a standard form required by PERB to fulfill the declaration of authenticity requirements please let me know." There is no such form as the requirements for a declaration of authenticity are clearly set forth in §201.4(d) of the Rules.

⁵New York Convention Ctr. Operating Corp., 20 PERB ¶3063 (1987). See also Town of Amherst, 13 PERB ¶3074 (1980).

⁶See, e.g., Suffolk County BOCES III, 25 PERB ¶3020 (1992).

showing of interest supporting a petition is not waived by a party's ignorance of it, and this Rule has always been strictly enforced.⁷

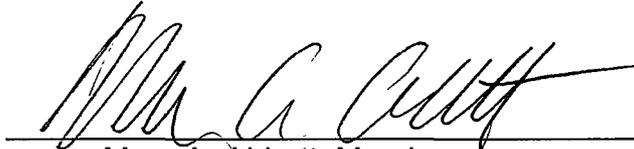
Based on the foregoing, the exceptions are denied and the decision of the Director is affirmed.

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

⁷Enlarged City Sch. Dist. of the City of Amsterdam, 21 PERB ¶4032, aff'd, 21 PERB ¶3042 (1988). See also Baldwinsville Cent. Sch. Dist., 12 PERB ¶3040 (1979).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**TOWN OF CARMEL POLICE BENEVOLENT
ASSOCIATION, INC.,**

Petitioner,

-and-

CASE NO. C-4677

TOWN OF CARMEL,

Employer.

RAYMOND G. KRUSE, ESQ., for Petitioner

**DONOGHUE, THOMAS, AUSLANDER & DROHAN (STUART S. WAXMAN of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision by the Director of Public Employment Practices and Representation (Director) filed, respectively, by the Town of Carmel Police Benevolent Association, Inc. (PBA) and the Town of Carmel (Town). The PBA petitions to include in its unit the title of lieutenant, which is presently included in another unit represented by United Federation of Police (FOP).¹ The Director dismissed the petition on two grounds. First, that the at-issue employee, Bruce Hart, is managerial within the meaning of §201.7(a)(ii) of the Public Employees' Fair

¹FOP declined to intervene in this proceeding, but did not object to the petition.

Employment Act (Act). Second, that "lieutenant" is a supervisory title, not appropriately included in the PBA's unit consisting of the subordinate titles of patrolman, sergeant, detective and detective sergeant. The Director did not consider the Town's alternative argument that Hart is appropriately excluded from the PBA's unit because he is a confidential employee within the meaning of §201.7(a) of the Act.

The PBA excepts to the Director's decision in all material respects, arguing that his findings of fact and the cases relied upon by him are selectively and erroneously described. The Town excepts only to the Director's declination to find Hart to be a confidential employee, ineligible for representation in any unit.

Having reviewed the record and considered the parties' arguments, we affirm the Director's decision on the second stated ground of supervisory conflict. Accordingly, we do not consider whether Hart is either managerial or confidential within the meaning of the Act.

The Town in the past has employed at least two lieutenants who have been excluded from the PBA's unit for years and included in a separate unit represented by FOP, which had a contract with the Town which was current at the date of the PBA's petition. The exclusion of lieutenants from the PBA's unit conforms to and confirms what is, at least, a clear potential for a conflict of interest were the title of lieutenant to be placed into the unit which the PBA represents.

The lieutenant is the second in command of the department, behind the chief of police and, as found and described by the Director, is regularly involved with a wide range of traditional supervisory functions. At a level different from others in the PBA's

unit and with a frequency greater than that required of those others, Hart administers the PBA contract, adjusts grievances arising thereunder, directs and schedules staff, fashions work orders, approves overtime and equipment purchases, and participates in the hiring and disciplinary processes.

The uniting history, the Town's administrative convenience and the breadth of the lieutenant's supervisory functions all militate against the inclusion of the title of lieutenant in the PBA's unit.² The only factor favoring PBA's petition, and the one which may have prompted it, is that Hart may be the only police lieutenant currently employed by the Town. Assuming, contrary to both the Director's finding and the Town's argument, that Hart is a covered employee, he is potentially denied representation rights unless and until there are other persons employed in the same or comparable supervisory or administrative titles. But even if Hart is currently the only person employed in the lieutenant's title, this only means that the Town's bargaining obligation to FOP is suspended until that unit includes two employees.³ The unit itself remains intact and FOP is not rendered defunct simply because only one lieutenant may be currently employed.

We should not disturb an existing unit structure when the uniting requested by a petitioner, as here, hinges on nothing more than the timing of its petition. A uniting that we would deny as inappropriate if there were two lieutenants employed should not

²Bd. of Educ. of the City Sch. Dist. of the City of Buffalo, 14 PERB ¶3051 (1981); New York State Div. of State Police, 1 PERB ¶399.32 (1968); Village of Waverly, 21 PERB ¶4060 (1988).

³See Auburn Indus. Dev. Auth., 15 PERB ¶3139 (1982).

become a uniting request granted simply because there is only one lieutenant employed when the petition is filed or decided. There is an inherent weakness in making uniting determinations hinge on the coincidence of the timing of the petition. What becomes the proper uniting if the Town should hereafter hire additional police supervisory personnel? Would Hart be removed from the PBA's unit for inclusion again in a separate unit of supervisors, or would the subsequently hired supervisors be included in the PBA's unit as was the lieutenant before them? Uniting by timing of the petition does not provide even guidance by which answers to these questions might be formulated.

Before we would consider disestablishing the existing unit consisting of the lieutenant title and place that title within the PBA's unit, the record would have to reveal clearly both that there are no others in the police department with whom the lieutenant might share a community of interest⁴ and, if there are no such others employed at the present time who are eligible for representation, that the Town's intent is to leave any vacancies in the lieutenant's title or comparable supervisory positions permanently unfilled. Only then could it be fairly argued that the lieutenant must be placed into the PBA's unit to enable him to exercise rights granted by the Act. Even in those circumstances, there would still be a substantial question as to whether an otherwise inappropriate unit can become most appropriate if a covered employee were to be denied any realistic possibility for representation if not included in that unit. We do not decide that question because those circumstances are not present on this record.

⁴The PBA argues that the chief of police is not a managerial employee. If the PBA is correct in its claim that the chief and the lieutenant are eligible for representation, then those two titles might constitute the appropriate unit.

Accordingly, the PBA's petition is appropriately dismissed, even if Hart were to be held eligible for representation.

For the reasons set forth above, the Director's decision is affirmed.

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

ODESSA-MONTOUR TEACHERS ASSOCIATION,

Charging Party,

- and -

CASE NO. U-18664

ODESSA-MONTOUR CENTRAL SCHOOL DISTRICT,

Respondent.

JOHN B. SCHAMEL, for Charging Party

**SAYLES, EVANS, BRAYTON, PALMER & TIFFT (JAMES F. YOUNG of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Odessa-Montour Teachers Association (Association) to a decision by an Administrative Law Judge (ALJ) on the Association's charge against the Odessa-Montour Central School District (District). As relevant to the exceptions,¹ the Association alleges that the District violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it refused to sign a collective bargaining agreement covering 1994-1997 as tendered by the Association.

¹The ALJ dismissed a direct dealing allegation and no exceptions have been filed to her decision and order in that respect.

A written memorandum of understanding (MOU) between the parties stated twice their admitted agreement to "no step movement" for salary purposes. However, the formal collective bargaining agreement which the Association submitted to the District for signature did not contain the quoted language, although the contractual salary schedules themselves reflect no movement on step for the years covered by that agreement.

The ALJ held that the District did not violate the Act by refusing to sign the agreement submitted to it by the Association because that document did not contain the language from the MOU stating no step movement. As held by the ALJ:

Where the parties' agreement, when reached, is set forth in words, a party has a right to have incorporated into the formal agreement the language on which any graphs, charts and schedules then created are based. (footnote omitted) Such language will normally define the agreement reached and intended to be reflected in the graphics. At the least, such language aids interpretation of the graphic for the term of the agreement and/or on expiration.

The Association argues in its exceptions that the ALJ erred in finding that there was no agreement between the parties which could be executed. The District argues that the Association's exceptions are misdirected because the ALJ held only, and correctly, that the District was not required to sign the agreement tendered by the Association because it was incomplete, not that there was no agreement between the parties.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision. In affirming, we endorse fully the language from the ALJ's decision previously quoted.

A party to a bargaining relationship is required under the Act to sign a written agreement on demand which accurately reflects the agreements actually reached in negotiations.² A party has no duty to sign an agreement which is inaccurate in material respect. An agreement can be inaccurate for different reasons. For example, it may include matters never negotiated or matters to which no agreement has been reached, or it may omit terms that have been settled. In this case, the agreement tendered to the District for signature is inaccurate because it omits a material term of the parties' mutual exchange of promises regarding step movement on the salary schedules. As the ALJ quite correctly observed, resolution of the dispute between these parties about the meaning and effect of their salary agreements might be aided by the inclusion of the language that the parties specifically agreed to in the MOU stating that there was to be no step movement. As the document which the District was asked to sign did not include this language, it did not reflect the totality of the parties' agreement, and as that omission was a material one, the District was not required to sign the agreement in the form submitted by the Association.

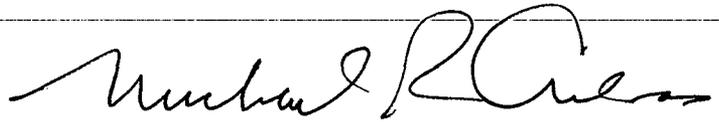
As the only issue before us is whether the District was required to sign the agreement tendered to it by the Association, we express no opinion as to what the parties' salary agreement may require of the District or the Association, either during the term of that agreement or after its expiration. Similarly, given the basis for the ALJ's decision and our affirmance, there is no issue before us as to the parties' differing submissions of language for §33.1(a) of the contractual salary article.

²Act §204.3; Deer Park Teachers Ass'n, 13 PERB ¶3048 (1984).

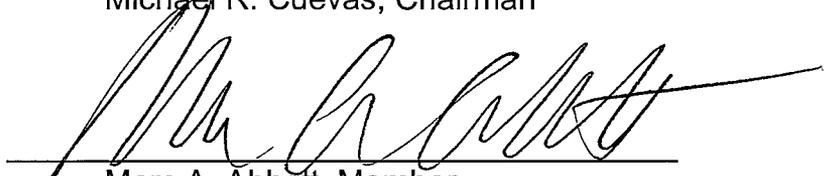
For the reasons set forth above, the Association's exceptions are denied and the ALJ's decision is affirmed.

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**FLORIDA TEACHERS ASSOCIATION,
NYSUT/AFT NO. 2973,**

Charging Party,

- and -

CASE NO. U-19212

FLORIDA UNION FREE SCHOOL DISTRICT,

Respondent.

PATRICK LEONETTI, for Charging Party

SHAW & PERELSON (DAVID S. SHAW of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Florida Union Free School District (District) to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) sustaining a charge filed by the Florida Teachers Association, NYSUT/AFT No. 2973 (Association). The charge alleges that the District had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued coffee breaks for certain unit employees. The Assistant Director rejected the District's defenses that the Association had not demanded negotiations on coffee breaks, that the District was reverting to the terms of the parties' collective bargaining agreement, and that the charge should be deferred to the parties' contractual grievance procedure or dismissed for lack of jurisdiction.

Holding that the District had violated the Act as alleged, the Assistant Director ordered the coffee breaks restored and unit employees made whole for the loss of any pay occasioned by the elimination of the coffee breaks.

The District excepts to the Assistant Director's decision, arguing that no practice of allowing coffee breaks had been established, that it had the right to revert to the terms of the parties' collective bargaining agreement concerning workday and that it was privileged to act pursuant to the language of the contractual management rights clause. The Association supports the Assistant Director's decision.

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

The Association represents a unit of non-teaching employees in the District. The record establishes that clerical employees in the unit have been entitled for many years to a fifteen-minute coffee break every morning and a fifteen-minute coffee break every afternoon.¹ On April 18, 1997, the secretary in the High School Guidance Department, Dorothy Ehlers, was told by her supervisor and the high school principal that she would no longer be allowed to take coffee breaks. No reason was given. Michael Siegel, the president of the Association, discussed the matter on several occasions with the District's Superintendent, Maureen Flaherty, but no agreement was reached. This charge was then filed.

¹The two secretaries in the elementary school, a separate building, are entitled to coffee breaks. One secretary takes advantage of the break time, one secretary does not. It appears they may still be allowed to take coffee breaks. There is no record evidence as to whether the high school principal's secretary, located in the same building as Ehlers, has taken, or still takes, coffee breaks.

The parties' collective bargaining agreement, effective for the term July 1, 1996 - June 30, 1998, provides in relevant part:

Article II--Workday and Work Year

A. Clerical

1. The normal work day will be seven and one-half (7 ½) hours per day (exclusive of lunch), five (5) days per week--Monday through Friday exclusive. The hours are to be established by the Superintendent based on the normal school day.

Clerical employees will be entitled to a one-half (½) hour lunch set by the building supervisor.

2. Guidance Secretary--The normal workday will be seven and one-half hours (7 ½) per day (exclusive of a ½ hour lunch set by the building supervisor).

Paid time off, such as a coffee break, is a mandatory subject of negotiations.²

The District argues that it has reverted to the language of the contract setting forth the workday, which provides only for a ½ hour lunch break for unit employees and does not include additional coffee break time. The District relies upon the decision in Maine-Endwell Central School District, (hereafter Maine-Endwell),³ where the employer eliminated one of the teachers' duty-free periods and increased the length of the remaining periods. Its defense of its action rested upon a contractual provision which set the normal teaching day as "7 ½ hours as assigned by the [employer]". In Maine-Endwell, the Board affirmed the Administrative Law Judge's decision which held:

²Town of Clarence, 30 PERB ¶3011 (1997); Inc. Village of Rockville Centre, 18 PERB ¶3082 (1985).

³15 PERB ¶3025 (1982), *aff'g* 14 PERB ¶4625 (1981).

[T]he employer's obligation,... is to refrain from unilaterally changing not a practice, but a term and condition of employment. Where the contract is silent on a particular item, the past practice of the parties may be examined to determine the term and condition. (Footnote omitted) But when the parties have negotiated and reached an agreement on the item, the contract then defines the term and condition of employment, and actions taken pursuant thereto can no longer be labeled unilateral. In essence, the parties have, for the duration of the contract, waived their right to complain about such actions.⁴

The Assistant Director found the District's reliance on Maine-Endwell to be misplaced, holding that here the relevant contract provision in these parties' contract did not preserve a right of assignment to the District as was the case in Maine-Endwell, and that the record reflected no bargaining history on the provision in issue. The Assistant Director's bases for distinguishing Maine-Endwell are nonpersuasive because neither one formed any part of the rationale which the Board adopted in Maine-Endwell.

Even assuming that there has here been an abolition of a practice generally applicable to all unit employees, or that a change in practice applicable to only one unit employee is subject to redress under a charge alleging a unilateral change in a term and condition of employment, we disagree with the Assistant Director's conclusion that the District violated the Act.

The District-Association contract covers the length of the unit employees' workday and duty-free time. The contract need not have addressed coffee breaks specifically to trigger a reversion defense because coffee breaks are merely a form of

⁴14 PERB ¶4625, at 4759 (1981), *aff'd*, 15 PERB ¶3025 (1982). See also County of Livingston, 30 PERB ¶3046 (1997); Town of Greece, 28 PERB ¶3078 (1995); State of New York-Unified Court Sys., 26 PERB ¶3013 (1991).

break time from work during the workday, a subject already specifically covered by the parties' agreement. Ehlers, and other unit employees, may have received a benefit of break time over and above the benefit defined by the contract language. However, the terms and conditions of the unit employees have been fixed bilaterally through negotiations between the District and the Association. Those terms call for a workday of 7 ½ hours with ½ hour off from work for lunch. The coffee breaks enjoyed by some unit employees afforded them more than the contractually provided break time and effectively reduced their workday to 7 hours. Both "practices" were contrary to the terms of the parties' agreement. The District was, therefore, not required to maintain the coffee break practice and it was privileged to revert to the terms of its collective bargaining agreement with the Association and eliminate the extra-contractual coffee breaks. ⁵

For the reasons set forth above, we grant the District's exceptions in relevant part and reverse the decision of the Assistant Director.

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

⁵We need not reach the question of whether the District would be duty bound to negotiate the issue of coffee breaks upon demand by the Association, as that issue is not before us.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MALONE ADMINISTRATORS ASSOCIATION,

Petitioner,

- and -

CASE NO. CP-444

MALONE CENTRAL SCHOOL DISTRICT,

Employer,

- and -

MALONE FEDERATION OF TEACHERS,

Intervenor.

DOUGLAS S. GERHARDT, ESQ., for Petitioner

ARTHUR F. GRISHAM, for Employer

DEBORAH A. TAYLOR, for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Malone Administrators Association (Association) to a decision by the Director of Public Employment Practices and Representation (Director) on its unit clarification/placement¹ petition, which seeks to determine whether the position of Special Education and Remediation Coordinator

¹A unit clarification petition seeks only a factual determination as to whether a position is already included in a given unit. A unit placement petition seeks a determination as to the most appropriate uniting of a position not already in a unit under the criteria in §207 of the Public Employees' Fair Employment Act (Act).

(SERC) is in or should be placed into the unit of principals, assistant principals and directors the Association represents. The Malone Central School District (District) assigned the SERC position upon its creation to a unit represented by the Malone Federation of Teachers (Federation). The unit which the Federation represents includes teachers, department chairs, subject area coordinators, the assistant athletic director, instructional technology coordinator, school nurses and nurse coordinator.

After a hearing, the Director dismissed the petition. The unit clarification aspect of the petition was dismissed upon the finding that the SERC is not actually encompassed within the Association's unit. The Director dismissed the unit placement aspect of the petition upon a conclusion that the SERC is most appropriately placed within the Federation's unit, where the District had initially assigned it, because the SERC has a much closer community of interest with employees in the Federation's unit than with the administrators in the Association's unit.

The Association argues in its exceptions that the Director's decision rests on a selective and inaccurate statement of the record which caused the Director to reach a legally erroneous decision inconsistent with relevant case law. The Federation argues in response that the Association has distorted the record by its arguments. According to the Federation, the Director's decision accurately reflects the whole record and is consistent with prior decisions of this agency. The District has not filed any exceptions or a response.

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

The Association's contention is quite simple. The SERC, like the director of pupil services (DPS) whom the SERC replaced, is an administrator who belongs with other administrators in the Association's unit. The Director's decision to the contrary allegedly dismisses real conflicts of interest caused by including the SERC in the Federation's unit and ignores the SERC's shared community of interest with administrative personnel. The record, however, is not susceptible to any simplistic conclusions.

The Director's decision accurately reflects in material respects a record which evidences that the several attributes of the SERC's employment resemble those of employees in both the Association's and the Federation's unit in different respects. After correctly concluding that the SERC was not, in fact, already included within the Association's title-specific unit, the Director went on to conclude that the SERC was not most appropriately removed from the Federation's unit and placed into the Association's unit. In reaching this conclusion, the Director did not fail or refuse to give consideration to the interests which the SERC has in common with the administrators in the Association's unit. The Director also observed differences between the SERC and the employees in the Federation's unit which cut against continuing the placement of the SERC in the Federation's unit. The Director nonetheless determined that the SERC, an educational coordinator and a teacher on special assignment, who did not have the same breadth of administrative and supervisory responsibilities as did the DPS, had a greater professional community of interest with the coordinators and other employees in the Federation's unit.

Any questions under a community of interest criterion as to the appropriateness of continuing the District's placement of the SERC in the Federation's unit are removed upon application of the "administrative convenience" uniting criteria in §207.1(c) of the Act. That criterion requires weight be given to an employer's uniting preference. The District's implemented belief that the SERC is most appropriately placed in the

Federation's unit should not be disturbed when that placement is at least as appropriate as would be one placing the SERC in the Association's unit.

The Association's argument that the Director failed to follow or distinguish controlling precedent is rejected. The Association would effectively have us read other Director decisions involving similar positions as creating a rule, or at least a rebuttable presumption, that educational coordinators are most appropriately placed into units of administrators. As the Director correctly observed, however, uniting determinations are uniquely fact specific and they rarely lend themselves to inflexible rules.

The cases relied upon by the Association² were considered by the Director and found not to warrant the result the Association wants. The Director concluded that the positions at issue in those other cases were similar to the SERC's in certain respects, but different in others, and that those differences were substantial enough to distinguish the cases the Association relied upon. Having reviewed those cases, we agree with the Director's assessment.

²Dunkirk City Sch. Dist., 30 PERB ¶4002 (1997); Albany-Schoharie-Schenectady BOCES, 27 PERB ¶4049 (1994); Wayne-Finger Lakes BOCES, 26 PERB ¶4056 (1993).

In summary, this record shows that the SERC has a community of interest with Federation unit employees who are responsible for the coordination of educational programs. There is no likelihood of any conflict of interest arising from continuing the inclusion of that title in the Federation's unit. As that uniting is appropriate and is the one consistent with the District's uniting preference, the Association's petition was properly dismissed by the Director.

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

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

COUNCIL 82, AFSCME, AFL-CIO,

Charging Party,

- and -

CASE NO. U-17355

**STATE OF NEW YORK (OFFICE OF MENTAL
HEALTH-CENTRAL NEW YORK PSYCHIATRIC
CENTER),**

Respondent.

**HITE & CASEY (CHRISTOPHER H. GARDNER of counsel), for Charging
Party**

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Office of Mental Health-Central New York Psychiatric Center) (State) to a decision by an Administrative Law Judge (ALJ) on a charge filed by Council 82, AFSCME, AFL-CIO (Council 82). Council 82's charge alleges that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally issued an interim¹ smoking policy containing a five-step disciplinary component.

¹The smoking bans and restrictions contained within the smoking policy were promulgated by the State in response to observed fire hazards during construction at the psychiatric facility.

After a hearing, the ALJ held that the smoking policy was mandatorily negotiable in its entirety because of its disciplinary component, but not otherwise, and he ordered the smoking policy rescinded.

The State argues that the ALJ erred in finding a violation of its duty to negotiate because the smoking bans and restrictions are not mandatory subjects of negotiation and the disciplinary consequences for noncompliance with that policy were not proven to be changes in existing employment conditions. Council 82 has not filed any exceptions or a response.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision to the extent it concludes that the State violated the Act when it unilaterally promulgated the multi-step disciplinary component of the smoking policy, but reverse the ALJ's decision in other respects, and modify the remedial order.

As the State suggests in its arguments, the negotiability of the disciplinary component of the smoking policy must be analyzed separately from the smoking bans and restrictions contained within the policy because the latter are plainly severable from the former. The smoking bans and restrictions can exist independently from an enforcement mechanism which relies upon employee discipline. More generally, the subject matter of an employer's directive to employees is not made mandatorily negotiable simply because the directive has an explicit or implicit employment sanction for noncompliance with the directive. All employer directives to employees carry with them, at least implicitly, the possibility of an employment consequence for noncompliance. As such, all employer directives to employees would be mandatory

subjects of negotiation as a matter of law if disciplinary consequence were the test of the negotiability of the directive itself. But that has never been the analytical approach this Board has taken. Usually, the negotiability of an employer's directive is to be assessed by its subject matter, separately from the means by which that directive is enforced. There may be times when disciplinary consequence might be a factor to be considered in assessing the negotiability of a given directive to employees, but never is disciplinary consequence the "test" of the negotiability of that directive.

The ALJ concluded that the smoking policy was not mandatorily negotiable but for its disciplinary component and no exceptions were taken to that part of the ALJ's decision. Therefore, there is no issue before us as to whether the ALJ was correct in his assessment that the smoking bans and restrictions by themselves are not mandatorily negotiable. Accordingly, we do not express any opinion as to whether any of the smoking restrictions and bans contained within the State's policy are mandatorily negotiable subjects.

As to the disciplinary component of the smoking policy, the grounds for employee discipline and the system through which discipline is administered are mandatorily negotiable subjects.² The State argues only that its enforcement of the interim smoking policy was not changed from its enforcement of its earlier smoking policies.

²Binghamton Civil Serv. Forum v. City of Binghamton, 44 N.Y.2d 23, 11 PERB ¶7508 (1978).

The State had two smoking policies in place at the facility at different times before it adopted the interim policy at issue. Disciplinary consequence for noncompliance with those earlier policies was clearly implicit, if not explicit, in the statement within those policies that the no smoking rules were to be "strictly enforced by supervisors" Smoking in violation of the prevailing smoking policy was always a disciplinary offense such that promulgation of the 1995 smoking policy did not change the bases for the imposition of discipline.³ The disciplinary component under the new policy, however, still constitutes a clear change from the State's prior disciplinary policy because of the specificity of its system for the administration of penalties for violations of the policy.

Employment consequence for noncompliance with the at-issue smoking policy is now a certainty, not a possibility, however likely, as it was under the prior smoking policies. Specific consequences are stated for violations of the no smoking policy, increasing with each violation from verbal counseling for a "first occurrence" to the issuance of a notice of discipline seeking the employee's termination from service for a "fifth occurrence". Moving from a generalized policy of "strict enforcement" of no smoking rules to a multi-step, nondiscretionary, progressive disciplinary system with automatically applied penalties is a substantive and substantial change in the unit employees' terms and conditions of employment regarding discipline. If the State was to change from an undefined system of enforcement of prior smoking policies to a

³Compare City of Buffalo (Police Dep't), 23 PERB ¶3050 (1990), where the employer's action changed the grounds for the imposition of discipline.

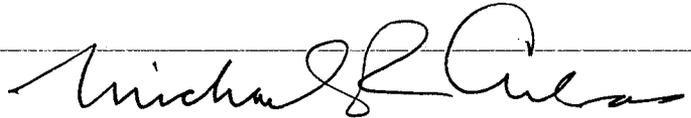
detailed, compulsory system of enforcement, it was required to negotiate that decision. This does not mean that the State cannot warn or discipline employees for noncompliance with the interim smoking policy. Any action taken against an employee, however, must be pursuant to and in accordance with the disciplinary policy and practice as it existed before August 29, 1995, when the smoking policy at issue was promulgated.

For the reasons set forth above, the ALJ's decision is reversed to the extent it holds the promulgation of the smoking restrictions and bans themselves violated the State's duty to negotiate under the Act. The ALJ's decision is affirmed to the extent it holds that the State's promulgation of the disciplinary component of the August 29, 1995 smoking policy violated the Act. Accordingly, the ALJ's remedial order is modified to provide as follows:

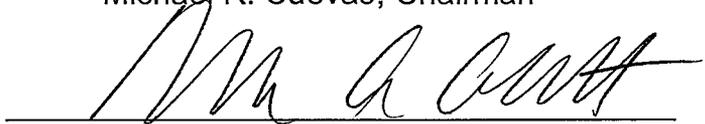
1. Immediately rescind those parts of the interim smoking policy dated August 29, 1995, which list the employment consequences for each of the five enumerated violations of such policy.
2. Immediately rescind any employment actions taken against any unit employee pursuant to the implementation of the August 29, 1995 interim smoking policy, which would not otherwise have been taken against such employee, and make unit employees whole for any employment consequences taken by application of the August 29, 1995 policy, which would not otherwise have been taken, with interest on any sum owing to any unit employee at the currently prevailing maximum legal rate.

3. Post notice in the form attached at all places within the Central New York Psychiatric Center ordinarily used to post notices of information to employees in the unit represented by Council 82.⁴

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

⁴The circumstances prompting the at-issue interim smoking policy do not warrant a unit-wide posting.

NOTICE TO ALL EMPLOYEES

**PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

and in order to effectuate the policies of the

**NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

we hereby notify all employees of the State of New York (Office of Mental Health-Central New York Psychiatric Center) (State) in the unit represented by Council 82, AFSCME, AFL-CIO that the State will:

1. Immediately rescind those parts of the interim smoking policy dated August 29, 1995, which list the employment consequences for each of the five enumerated violations of such policy.
2. Immediately rescind any employment actions taken against any unit employee pursuant to the implementation of the August 29, 1995 interim smoking policy, which would not otherwise have been taken against such employee, and make unit employees whole for any employment consequences taken by application of the August 29, 1995 policy, which would not otherwise have been taken, with interest on any sum owing to any unit employee at the currently prevailing maximum legal rate.

Dated

By
(Representative) (Title)

State of New York (Office of Mental Health-
Central New York Psychiatric Center)

.....

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF CATTARAUGUS,

Petitioner,

- and -

CASE NO. C- 4680

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

Intervenor.

LOUIS C. FULKERSON, for Petitioner

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Cattaraugus (County) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition to fragment the 140 nonsupervisory and support employees of the County's nursing homes from a County-wide unit of 610 employees which is represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), which opposes the petition. In dismissing the petition, the Director determined that there was no persuasive evidence in the parties' stipulated record of a compelling need for fragmentation of a unit existing since 1968.

The County excepts to the Director's decision, arguing that a unit of nursing home employees separate from all others is appropriate in the private sector and that the unique concerns of the health care industry make negotiating with nursing home employees within an overall unit administratively inconvenient. 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.

In support of its petition, the County relies upon the following. In December 1996, after lengthy discussions with CSEA, the County reduced the number of Nurses Aides and Licensed Practical Nurses employed at its nursing homes. Approximately 75% of the grievances CSEA files in the County are on behalf of nursing home employees. The County operates on a different fiscal year than that of the State of New York (State), from which it receives funding for the nursing homes. During 1997, the nursing homes were operating at a deficit until the County received its Inter-Governmental Transfer funds from the State. The County also relies on a report compiled by the Center for Governmental Research entitled: "What Should Be Done With County Nursing Facilities in New York State?". The report sets forth certain challenges facing County-owned nursing homes in New York and proposes changes in nursing home operations.

Initially, we note that the private sector decisions and publications referred to by the County in its exceptions concern the establishment of separate units of health-care

employees in initial uniting cases. This is a petition for fragmentation of a long-standing unit and, as such, the private sector precedent, never binding, has little relevance.¹

This Board has long adhered to two principles in deciding uniting questions.

First, we have held that "[i]t is the policy of the Act to find appropriate the largest unit permitting for effective negotiations." (Footnote omitted) The second long-standing principle to which we have adhered is that fragmentation of existing bargaining units will not be granted in the absence of compelling evidence of the need to do so. (Footnote omitted) We have held that compelling need is generally established by proving the existence of a conflict of interest or inadequate representation. (Footnote omitted) When these principles have been applied in the creation and continuation of appropriate units, they have, at the very least, contributed to stability in public sector labor relations and have focused the parties' attention on substantive negotiations rather than on the process of adding to or subtracting from units.²

Under this petition, the County seeks fragmentation of a long-standing unit without any evidence of either a conflict of interest between the different occupational groups in the existing unit or of inadequate representation of the nursing home employees by CSEA. Absent such evidence, the fragmentation sought by the County is contrary to our policy, in place since at least Town of Smithtown,³ disfavoring the disruption of the *status quo* absent good cause shown.⁴ The County argues, however, that the unit should be fragmented because its administrative convenience would be

¹Whether the standards articulated in those cases for initial uniting of health care employees would be utilized by this Board in an initial uniting case is a question not before us.

²State of New York (Long Island Park, Recreation and Historical Preservation Comm'n), 22 PERB ¶3043, at 3098 (1989).

³8 PERB ¶3015 (1975).

⁴Chautauqua County BOCES, 15 PERB ¶3126 (1982).

better served by negotiating with nursing home employees in a separate unit. In support, the County points to challenges facing County-owned nursing homes, particularly the "economic exigencies", as warranting a deviation from our long-established standards in unit fragmentation cases. In this regard, the County excepts to the Director's reliance on the above-cited decisions and his "rote" application of them to the instant case.

The Director found that the County's administrative convenience argument, while reflecting what, for it, would be easier negotiations, fell far short of the compelling need which would usually justify fragmentation of a long-standing unit. Implicit in the County's argument is the suggestion that while unit fragmentation may be inappropriate absent compelling need if the fragmentation is requested by a union and opposed by the employer, fragmentation is *prima facie* appropriate when requested by an employer and opposed by a union even without compelling need. The identity of the petitioner, however, cannot control the determination of the appropriate unit. Although an employer's administrative convenience is to be considered in resolving a unit question, it is merely one factor to be balanced against all relevant others in the determination of the most appropriate unit.⁵ This record simply does not establish that the problems recited by the County were caused by the existing unit structure or that the continuation of the existing unit would prevent or impede mitigation or resolution of these problems and issues of concern to the County.

⁵City Sch. Dist. of the City of Glen Cove, 19 PERB ¶13017 (1986), aff'g 18 PERB ¶14085 (1985).

There being no demonstrated compelling need to fragment the nursing home employees from the existing unit, the County's exceptions are denied and the decision of the Director is affirmed.

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**NORTH GREECE FIRE FIGHTERS ASSOCIATION,
IAFF, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-4758

NORTH GREECE FIRE DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the North Greece Fire Fighters Association, IAFF, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time fire fighters of the North Greece Fire District holding the Civil Service Classification as Fire Fighter and Lieutenant.

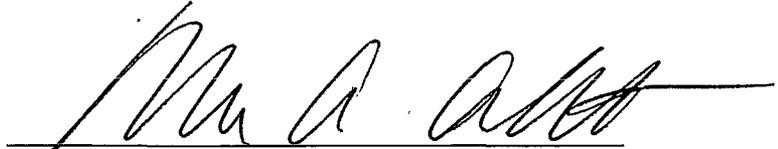
Excluded: Fire District Captain and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the North Greece Fire Fighters Association, IAFF, 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: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

KENNETH SWART,

Petitioner,

-and-

CASE NO. C-4535

TOWN OF SAUGERTIES,

Employer,

-and-

UNITED FEDERATION OF POLICE, INC.,

Intervenor.

**FRANCELLO & VAN BENSCHOTEN (DAVID VAN BENSCHOTEN of counsel),
for Petitioner**

**QUALTERE, GRAHAM & REDDER (GEORGE W. REDDER of counsel), for
Employer**

THOMAS P. HALLEY, ESQ., for Intervenor

BOARD DECISION AND ORDER

On May 1, 1996, Kenneth Swart (petitioner) filed a timely petition for decertification of the United Federation of Police, Inc. (intervenor), the current negotiating representative for employees in the following unit:

Included: Part-time police officers and court officers.

Excluded: Police administrator, secretary and all other police officers.

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

KENNETH SWART,

Petitioner,

-and-

CASE NO. C-4535

TOWN OF SAUGERTIES,

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UNITED FEDERATION OF POLICE, INC.,

Intervenor.

**FRANCELLO & VAN BENSCHOTEN (DAVID VAN BENSCHOTEN of counsel),
for Petitioner**

**QUALTERE, GRAHAM & REDDER (GEORGE W. REDDER of counsel), for
Employer**

THOMAS P. HALLEY, ESQ., for Intervenor

BOARD DECISION AND ORDER

On May 1, 1996, Kenneth Swart (petitioner) filed a timely petition for decertification of the United Federation of Police, Inc. (intervenor), the current negotiating representative for employees in the following unit:

Included: Part-time police officers and court officers.

Excluded: Police administrator, secretary and all other police officers.

Upon consent of the parties, a mail ballot election was held on September 10, 1998. The results of this election show that the majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.^{1/}

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

^{1/} Of the 7 ballots cast, 0 were for representation and 7 against representation. There were no challenged ballots.

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-4765

LIVERPOOL PUBLIC LIBRARY,

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: All regularly scheduled full and part-time employees of the Liverpool Public Library.

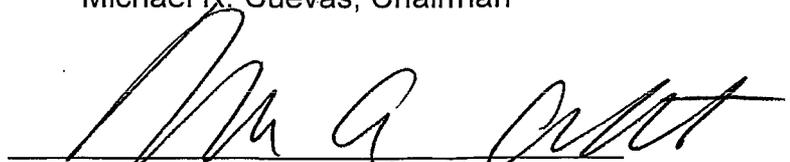
Excluded: Library Director, Assistant Director, Secretary to the Director, Personnel Manager, Business Manager, Administrator of Public Services, Administrator of Support Services and substitutes.

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: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

**STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

TEAMSTERS UNION LOCAL 791,

Petitioner,

-and-

CASE NO. C-4774

GREECE CENTRAL SCHOOL DISTRICT,

Employer,

-and-

**GREECE SUPPORT SERVICES EMPLOYEES ASSOCIATION,
NEA/NY,**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Greece Support Services Employees Association, NEA/NY, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of

grievances.

Unit: Included: All regularly employed Non-Instructional personnel in the following Departments: The Transportation Department, including substitutes therein; the Buildings and Grounds Department, including custodial; the Food Service Department; the Business Office; the Personnel Services Office; the Instructional Services Office; the Information Services Department; Central Stores; Print Shop; the Community Services Offices; and Continuing Education Office.

Excluded: District Administrators, Supervisors and Support Staff, substitutes and also High School Custodial Foreman, Supervisor of Central Stores, Transportation Assistant, Secretary of Support Services Director.

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

DATED: September 28, 1998
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member