

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**WESTBURY ASSOCIATION OF
ADMINISTRATORS AND SUPERVISORS,**

Charging Party,

- and -

CASE NO. U-19101

WESTBURY UNION FREE SCHOOL DISTRICT,

Respondent.

ROBERT SAPERSTEIN, ESQ., for Charging Party

**JASPMAN SCHLESINGER SILVERMAN & HOFFMAN, LLP (LAWRENCE J.
TENENBAUM and JAY S. HELLMAN of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Westbury Association of Administrators and Supervisors (Association) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed the Association's charge against the Westbury Union Free School District (District) in which the Association alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed its past practice concerning the reappointment of unit employees to positions held the year prior. Specifically, the Association alleges that the District improperly failed to reappoint its Director of Pupil Services, Dr. Mariann Berliner, as the principal for a 1997 summer school program for children with disabilities.

The ALJ held that the Association had not proven that the District had a practice of automatically reappointing unit employees to stipend positions if their prior year's service in that position was satisfactory.

The Association argues that the ALJ's decision is not supported by the record and is contrary to established case law. The District argues in response that the ALJ's decision is correct as a matter of fact and law and should be affirmed.

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

The ALJ did not decide whether the subject of the District's alleged change is mandatorily negotiable because he held that there was no proven change in a past practice. Although each party has presented arguments as to the negotiability of job retention rights, there is no need for us to decide that question. Even assuming that an employee's rights to reappointment to a position are mandatorily negotiable in any respect, the record does not establish that the District changed its practice when it did not reappoint Dr. Berliner as a principal in 1997.

The entirety of the Association's argument that the District changed its practice rests on the proposition that a unit administrator holds an absolute right to reappointment to a stipend position automatically upon the employee's request, provided only that the employee has performed satisfactorily in that position. The ALJ found, however, that there was never a practice under which reappointment was automatic at the employee's demand. Rather, the ALJ found that the District's practice was to make appointments for one year at a time, with reappointment expressly conditioned upon the recommendation of the Superintendent of Schools

(Superintendent). The Superintendent did not recommend Dr. Berliner for reappointment to the principal's position. Instead, the Superintendent recommended another person, who was appointed.

Although the Association argues that the ALJ's findings are not supported by the record, we conclude upon our review that the ALJ's material findings of fact are consistent with the record. There is nothing in the record, whether considered separately or collectively, to establish that the District's administrators, unlike the District's instructional staff, who have contractual reappointment rights, hold an absolute entitlement by practice to reappointment to stipend positions if their services are objectively satisfactory. All of the evidence relied upon by the Association, including a leave of absence granted Dr. Berliner from the principal's position, is fully consistent with a right of reappointment conditioned upon the Superintendent's affirmative recommendation, which cannot be regarded as meaningless or ministerial. The ALJ's legal conclusion that a practice conditional from inception cannot ripen into an unconditional practice simply by actions taken consistently with the condition is correct.¹

In dismissing this charge, we do not express any opinion as to Dr. Berliner's qualifications *vis a vis* any other employee or whether she was fairly considered for reappointment. Those are issues not relevant to our disposition of this charge.

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

¹*E.g., Public Employees Fed'n v. PERB*, 195 A.D.2d 930, 26 PERB ¶7008 (3d Dep't 1993); *Schalmont Cent. Sch. Dist.*, 29 PERB ¶3036 (1996).

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

DATED: December 10, 1998
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**BINGHAMTON FIREFIGHTERS, LOCAL 729,
AFL-CIO, I.A.F.F.,**

Charging Party,

- and -

CASE NO. U-19364

CITY OF BINGHAMTON,

Respondent.

**BALL, McDONOUGH, ARTZ & FARNETI (PHILIP J. ARTZ of counsel), for
Charging Party**

**O'CONNOR, GACIOCH, POPE & TAIT, LLP (ROBERT C. MURPHY of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Binghamton Firefighters, Local 729, AFL-CIO, I.A.F.F. (Local) to a decision by an Administrative Law Judge (ALJ). As relevant to the exceptions, the Local alleges in this charge against the City of Binghamton (City) that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the procedures under which it makes determinations regarding an employee's initial and continuing eligibility for benefits afforded sick and disabled fire fighters under General Municipal Law (GML) §207-a. The ALJ dismissed the charge as untimely filed upon his own motion after a hearing.

The Local argues in its exceptions that the ALJ should not have questioned the timeliness of the charge because the City had not raised that issue as a defense in its answer. Assuming the ALJ was privileged to raise a timeliness issue, the Local argues that its charge was timely filed because the four-month filing period¹ should be calculated from June 4, 1997, when the hearing officer presiding at a GML §207-a hearing informed the Local that the "new" procedures would govern that hearing.

The City argues in response that the ALJ's decision is correct and should be affirmed.

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

Section 204.7(l) of our Rules allows an ALJ to dismiss a charge as untimely filed without that issue having been previously raised, but only if the failure of timeliness is first revealed at a hearing. This section of the Rules is intended to preserve, to a limited degree, the agency's own interest in avoiding the litigation and merits disposition of charges which are filed more than four months after the alleged impropriety. A failure of timeliness is not simply an affirmative defense even under the current Rules. At certain points, and in certain circumstances, a failure of timeliness retains its former jurisdictional or quasi-jurisdictional characteristic. Therefore, that the Director of Public Employment Practices and Representation processed the charge and that the City did not raise timeliness as an affirmative defense to this charge are immaterial considerations if the failure of timeliness was first revealed to the ALJ at the hearing. In

¹Rules of Procedure (Rules) §204.1(a)(1).

that regard, the hearing in this case consisted of the submission of many documents accompanied by argument from the attorneys for the parties. It was not until those documents were received into evidence and reviewed by the ALJ that the ALJ first realized that this charge likely suffered from a failure of timeliness. Therefore, the ALJ was permitted under the Rules to raise that issue on his own motion.

The remaining question is whether the ALJ correctly dismissed the unilateral change aspect of the charge as untimely.

This charge arose in the context of a GML §207-a hearing involving one unit employee, Thomas Giorgio. As the ALJ's decision reflects, the circumstances involving Giorgio's effort to retain GML §207-a benefits are somewhat complicated involving, as they did, multiple administrative and judicial proceedings. Nonetheless, what clearly emerges from this fact pattern is that on October 16, 1996, the City informed the Local that although Giorgio's next administrative review hearing, scheduled for October 22, 1996, would be under the "old" procedures, the "new" procedures would be effective January 1, 1997. This announcement of a change in GML §207-a procedures to be implemented January 1, 1997 required a charge objecting to the change to be filed within four months of January 1, 1997, at the latest.²

Although recognizing that January 1, 1997 would ordinarily mark the start of its filing period, the Local argues that this is not the date from which to calculate the filing period for this charge because the City agreed, after its October 16 announcement, to negotiate the GML §207-a procedures pursuant to the Local's demand. One

²City of Oswego, 23 PERB ¶3007 (1990).

negotiating session was held on January 14, 1997 with the promise of additional meetings thereafter.

The City's willingness to negotiate the "new" procedures does not establish, however, that the changes it had made to the "old" procedures had been rescinded or placed on hold pending those negotiations. We are often presented with unilateral change cases in which an employer has not negotiated the change prior to its implementation, but remains willing to negotiate a possible modification or rescission of the change thereafter pursuant to demand. Those after-the-fact negotiations do not excuse the refusal to negotiate which exists inherently in unilateral action with respect to a noncontractual term and condition of employment.³ As an employer's post-change willingness to negotiate is legally unrelated to the refusal to bargain inherent in unilateral action itself, such willingness to negotiate after-the-fact cannot enlarge or toll the time period allowed for filing charges objecting to the unilateral change. Any bargaining upon demand which occurs after an alleged unilateral change in a mandatory subject of negotiation has been made simply has no bearing upon whether the change itself has been implemented. Phrased differently, being in negotiations about a change in terms and conditions of employment does not, by itself, establish that the change being negotiated has been rescinded or stayed.

Although the City had rescinded an earlier announced change in GML §207-a procedures, the City never rescinded its October 16, 1996 announced intention to implement changes in the "old" GML §207-a hearing procedures on January 1, 1997.

³*Roma v. Ruffo*, ___ N.Y.2d ___, 31 PERB ¶7504 (Nov. 18, 1998).

The City also never took any actions inconsistent with a January 1, 1997 implementation of the "new" procedures. Therefore, a charge objecting to changes in GML §207-a hearing procedures had to be filed at least within four months of January 1, 1997. As the charge was not filed until October 1, 1997, the ALJ correctly dismissed it as untimely filed.

For the reasons set forth above, the Local'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: December 10, 1998
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORGANIZATION OF STAFF ANALYSTS,

Petitioner,

- and -

**CASE NOS. C-4605, C-4634,
C-4637 and C-4655**

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

Employers.

JOAN STERN KIOK, ESQ., for Petitioner

**MARTIN B. SCHNABEL, VICE PRESIDENT AND GENERAL COUNSEL
(EVELYN JONAS of counsel), for Employers**

BOARD DECISION AND ORDER

The New York City Transit Authority (NYCTA) and the Manhattan and Bronx Surface Transit Operating Authority (MBSTOA) move to appeal a ruling made by the Director of Public Employment Practices and Representation (Director) during the processing of certification petitions filed by the Organization of Staff Analysts (OSA). OSA seeks to represent approximately 400 employees of the NYCTA or MBSTOA in the titles of staff analyst and associate staff analyst. The Director has ordered an election by mail ballot to determine whether OSA has majority status in any of the four units the parties have stipulated to be appropriate.

By letter dated November 2, 1998, the parties were informed by the Administrative Law Judge assigned to these cases that the Director would release to OSA copies of the mailing labels that had been provided to the Director by NYCTA and MBSTOA. The mailing labels identify the names and home addresses of the employees in the four units.

NYCTA and MBSTOA argue that the home address of an employee is personal information which the Director cannot release to OSA because disclosure is prohibited by the State's Personal Privacy Protection Law (PPPL).¹ OSA argues in response that NYCTA and MBSTOA do not have standing to contest the Director's disclosure of home addresses. On the merits, OSA argues that disclosure of this information is a common practice among labor relations agencies, one not prohibited by law and one fully consistent with the policies of the Public Employees' Fair Employment Act (Act).

Having considered the parties' arguments, we affirm the Director's ruling disclosing the home addresses of unit employees to OSA with the conditions and restrictions discussed herein.

Appeal from the Director's ruling at this stage of the representation proceedings is with our permission only pursuant to §201.9(c)(4) of our Rules of Procedure (Rules). This is the first time an argument has been presented to the agency that the release of the home addresses of unit employees to a union participating in a mail ballot election

¹Public Officers' Law §§91-99.

is prohibited by law.² This novel question cannot be reviewed meaningfully after an election because the home addresses would by then have been disclosed, arguably in violation of the PPPL. Permission to appeal is, therefore, appropriately granted.³

Two other preliminary issues must be addressed before turning to the merits of the parties' arguments.

OSA argues first that we may not consider whether the PPPL permits us to disclose the home addresses of unit employees because NYCTA and MBSTOA do not have standing to raise that issue as they are not "data subjects".⁴ A party's status as a data subject has relevance to proceedings brought under the PPPL. We are asked to review a ruling by the Director which is alleged to be in violation of controlling law. As the Director's ruling ordered the disclosure of a list of the home addresses NYCTA and MBSTOA prepared and submitted to the Director pursuant to an earlier order, they have standing to question before us the Director's subsequent release of the information they gave him. Apart from these considerations, our review of questions

²NYCTA and MBSTOA concede that their release of the home addresses of unit employees to the Director is not prohibited by the PPPL. Public Officers' Law §96(d). Application of Public Officers' Law §96(d) defeats application of the routine use exception to the ban on disclosure. Public Officers' Law §96(d) and the routine use exception under Public Officers' Law §96(e) are mutually exclusive. The definition of routine use in Public Officers' Law §92(10) incorporates a condition which is the opposite of the condition in Public Officers' Law §96(d). If PERB's disclosure of home addresses to OSA were permitted as a routine use, NYCTA's and MBSTOA's disclosure of home addresses to the Director would not be authorized by Public Officers' Law §96(d).

³*State of New York*, 31 PERB ¶3058 (1998).

⁴See *Building A Better New York Comm. v. New York State Comm'n on Gov't Integrity*, 138 Misc.2d 829 (Sup. Ct. Alb. County 1988).

affecting the processing of representation petitions is simply not dependent upon notions of standing applicable in a judicial proceeding.⁵ It matters not who alerts us to a possibility that a Director's ruling should be reversed or modified because it is allegedly in excess of his power under law.

Similarly immaterial are arguments as to NYCTA's and MBSTOA's motives for not wanting the home addresses of its employees disclosed. OSA argues that NYCTA and MBSTOA are not concerned about their employees' privacy, only that their organization under OSA be prevented or frustrated. Motive, however, has no bearing upon the disposition of the question presented to us for disclosure is either prohibited by the terms of the PPPL or authorized by that statute.

Turning to the merits, we have always required the employer party to a mail ballot election to provide the agency and the participating unions with a list containing the home addresses of unit employees. The home address is needed in a mail ballot election because it aids voter identification should there be questions concerning eligibility raised upon the return of the ballots by mail. The home address of a public employee is clearly, however, personal information within the meaning of the PPPL.⁶ The PPPL prohibits the disclosure of personal information except as the PPPL authorizes that disclosure. PERB is an agency fully subject to the provisions of the PPPL as to personal information in its possession. Therefore, PERB's disclosure of

⁵*State of New York, supra* note 3.

⁶Public Officers' Law §92(7).

that information to OSA is prohibited by the PPPL unless that disclosure is otherwise authorized.

Section 96(c) of the PPPL allows disclosure of personal information if the information is "subject to disclosure under [the Freedom of Information Law (FOIL)]"⁷ unless the disclosure of such information would constitute an unwarranted invasion of personal privacy as defined in [FOIL §89(2)(a)]."

The State's FOIL generally subjects all records of any type to disclosure except, as relevant here, records which would constitute an unwarranted invasion of personal privacy if disclosed. Therefore, a record containing the home addresses of unit employees is one "subject to disclosure" under FOIL, unless that disclosure would constitute an unwarranted invasion of personal privacy within the meaning of FOIL.

Several provisions of FOIL and the PPPL are relevant when assessing whether disclosure of home addresses in the circumstances presented by these cases would be an unwarranted invasion of an employee's personal privacy.

FOIL §89(2)(b)(iii) provides that a government's sale or release of lists of names and addresses is an unwarranted invasion of personal privacy if the lists are to be used for commercial or fund-raising purposes. It arguably follows from this section of FOIL that the Director's disclosure of employees' home addresses to a union participating in a mail ballot election is not an unwarranted invasion of privacy because the information is not being used for the purposes specified in FOIL §89(2)(b)(iii). The several examples of unwarranted invasions of privacy in FOIL §89(2) are, however, illustrative

⁷Public Officers' Law §§84-90.

only. Therefore, FOIL §89(2)(b)(iii), although relevant, cannot be dispositive of the question before us.

Section 89(7) of FOIL provides that disclosure of the home address of a public employee is not required by FOIL except, perhaps, to a union already certified or recognized as a unit representative under the Act. As OSA observes, however, that section of FOIL does not prohibit the release of home addresses to entities other than a bargaining agent, it simply provides that a government is not required to release that information upon demand.⁸ Although §89(7) of FOIL is not the source of an express prohibition on the disclosure of home addresses, it is minimally a recognition by the Legislature that employees have a privacy interest in their home address worthy of some protection.⁹ Like FOIL §89(2)(b)(iii), FOIL §89(7) is relevant, but not dispositive.

Other parts of the PPPL clearly reflect the Legislature's recognition that certain information, even of a personal nature, can be and must be disclosed to the extent necessary to enable government to carry out its statutory mandates and programs.¹⁰

Reading all relevant sections of the PPPL and FOIL together persuades us that the Legislature intended to permit the disclosure of home addresses as necessary to

⁸*Buffalo Teachers Fed'n, Inc. v. Buffalo Bd. of Educ.*, 156 A.D.2d 1027 (4th Dep't 1989), *appeal denied*, 75 N.Y.2d 708 (1990).

⁹*Accord Department of Defense v. FLRA*, 510 U.S. 487, 145 LRRM 2513 (1994) (disclosure of the home addresses of federal civil service employees to facilitate negotiations held an unwarranted invasion of personal privacy under federal privacy law).

¹⁰*E.g., Public Officers Law §§96(b), (d) & (e).*

enable the Director to determine a union's majority status as required by the Act.¹¹

Although the disclosure of home address information is an invasion of personal privacy, that is not the controlling inquiry. The controlling question under the PPPL is whether that disclosure would constitute an "unwarranted" invasion of personal privacy. In making that determination, we may consider the policies of the Act regarding the conduct of an election and balance those statutory interests along with all other interests, whether favoring or disfavoring disclosure.¹² In our opinion, a restricted disclosure to a union of the home addresses of employees in negotiating units for use in an election by mail ballot ordered by the Director is not an "unwarranted" invasion of personal privacy.

NYCTA and MBSTOA recognize that the Director needs the home addresses of unit employees to hold a mail ballot election. They also concede that a mail ballot is the only feasible means by which to hold an election in these cases given the conditions of the unit employees' employment. As the ballots are mailed to employees at their home, no election could be held by mail ballot without home address information. Just as the Director needs this information, so, too, does OSA. The parties participating in a mail ballot election appoint observers to assist the Director in ascertaining the identity of the voters and their eligibility to vote. Without the home addresses, all parties to a mail ballot election would be less able to make intelligent decisions regarding a voter's eligibility to vote and less able to assist the Director in making those determinations.

¹¹Act §207.2.

¹²*Empire Realty Corp. v. New York State Div. of the Lottery*, 230 A.D.2d 270 (3d Dep't 1997); *Smigel v. Power Auth.*, 54 A.D.2d 668 (1st Dep't 1976).

Moreover, as an employer has in its possession the home addresses of its employees, its election observers would have an advantage over unions in questioning and verifying voter eligibility if unions were deprived of the same information. A disclosure of home addresses to enable a union to assist the Director in verifying voter eligibility in a mail ballot election and to ensure that all parties to the election are treated equally in this regard is not one which constitutes an "unwarranted" invasion of the privacy rights of employees.

We are and must be sensitive, however, to the Legislature's stated recognition that individuals have privacy rights in their home address which should be protected against unnecessary disclosure. Any disclosure of this information beyond that required to enable the parties to assist the Director in the actual conduct of the election is prohibited by the PPPL as an unwarranted invasion of personal privacy.

Notwithstanding OSA's argument, it is clear that the home addresses are not provided to the participants in a mail ballot election to assist the union with its election campaign or to inform the electorate because we have not required a list of home addresses to be provided in an on-site, in-person election.¹³ The private sector precedent OSA relies upon, which rests in part on these purposes, is, therefore, not persuasive. Although a union party to a mail ballot election may be disadvantaged in its ability to contact potential voters without home address information, and the electorate may be less informed as a result, the disadvantages are no greater than those presently facing a

¹³*E.g., County of Ulster*, 7 PERB ¶3044 (1974).

union in an on-site election. For that reason, those disadvantages are not factors in assessing whether the disclosure of that information is permitted under the PPPL.

To guard against any unwarranted invasion of privacy, the Director should disclose the home addresses of unit employees in a mail ballot election at a date which will best ensure that there will be no use of the information for purposes unrelated to assisting the Director with the conduct of the election. Unauthorized use can be prevented if the Director's disclosure of home addresses is not made until after the due date for the agency's receipt of the ballots. The Director should routinely schedule the ballot count in mail ballot elections a few days after the home addresses have been disclosed to all parties to enable them to review that list for purposes of identifying voter eligibility issues or other issues related to the Director's conduct of the election.

We emphasize that the restricted disclosure ordered in these cases arises in a context in which no other party to the election has made any partisan use of the home address information which might be in its possession. Whether and to what extent a disclosure of home addresses to a participant in a mail ballot election would change were another party to the election to use any home addresses of unit employees which it might have in its possession for purposes other than assisting the Director with the conduct of the election are issues not before us and about which we do not express any opinion. We also do not express any opinion as to whether home address information would be available to a union in a context other than a mail ballot election, e.g., as part of a remedial order in an improper practice proceeding.

For the reasons set forth above, the Director's ruling ordering disclosure of the home addresses of unit employees to OSA is affirmed upon the conditions and restrictions set forth in this decision. SO ORDERED.

DATED: December 10, 1998

Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HERBERT L. LEVY,

Charging Party,

- and -

CASE NO. U-20184

PUBLIC EMPLOYEES FEDERATION,

Respondent.

HERBERT L. LEVY, *pro se*

**WILLIAM P. SEAMON, ESQ. (DIONNE A. WHEATLEY of counsel), for
Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Herbert L. Levy to a decision by the Director of Public Employment Practices and Representation (Director) on Levy's charge against the Public Employees Federation (PEF). Levy alleges that PEF breached its duty of fair representation in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by misrepresenting him in conjunction with disciplinary charges filed against him by his employer and by refusing to reimburse him for the fees he paid a private attorney who represented him on the disciplinary charges after he dismissed his PEF representative.

The Director dismissed the first allegation as untimely filed because the alleged misrepresentation by PEF's representative had occurred no later than October 22, 1997.

The charge was not filed until July 28, 1998, more than four months after the acts of misrepresentation constituting the alleged improper practice.¹

PEF's refusal to reimburse Levy for the legal expenses he incurred was dismissed on the merits because Levy's charge did not evidence that the refusal was arbitrary, discriminatory or in bad faith.

Levy argues in his exceptions that the charge is timely filed and that the Director's decision to the contrary misapprehends and misapplies controlling law and precedent. On the merits of the second allegation, Levy argues that PEF was duty bound to pay for his private attorney because its agent totally failed to defend him against the disciplinary charges. PEF argues in response that the Director correctly dismissed the charge both as untimely and on the merits.

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

This charge alleges two legally distinct improper practices which Levy's arguments fail to recognize.

There is an arguable improper practice in the PEF representative's alleged insistence that Levy plead guilty to the disciplinary charges with an explanation. To the extent that constitutes a wholesale abandonment of representation, as Levy alleges, the facts constituting that improper practice were known to Levy in October 1997, when he terminated the services of the PEF representative precisely because Levy believed the nonattorney representative to be incompetent to handle the particular disciplinary

¹Our Rules of Procedure §204.1(a)(1) requires charges be filed within four months of the act constituting the alleged improper practice.

charges which were pending against him. Everything that happened thereafter, whether it be Levy's election to retain a private attorney, the arbitrator's dismissal of the disciplinary charges, or PEF's rejection of Levy's demand for reimbursement of legal expenses, has no legal relationship to the earlier alleged misconduct by PEF's agent. The misrepresentation was a separate act of alleged impropriety fully announced and implemented at the date the advice was given. To the extent that advice was improper, Levy's rights were then harmed within the meaning of *Middle Country Teachers Association*² and Civil Practice Law and Rules (CPLR) 217.2(a),³ which merely codifies our timeliness principles for application in civil judicial actions and proceedings. Contrary to Levy's arguments, a dismissal of the disciplinary charges was not a condition precedent to a statutory cause of action grounded upon misrepresentation by PEF's agents. A finding that a union has breached its duty of fair representation is a precondition to a cause of action against an employer for breach of contract, but success on a grievance is not a condition precedent to the filing of an improper practice charge against a union for breach of duty grounded upon alleged inadequate representation during the processing of the grievance. PEF's rejection of Levy's demand for reimbursement of the legal fees he paid is a separate act of alleged impropriety. As such, PEF's rejection of his demand for the payment of legal expenses could not mark the date of the harm for the alleged improper representation which occurred months earlier. Therefore, the Director correctly dismissed as untimely those

²21 PERB ¶3012 (1988).

³The CPLR is not applicable to an administrative proceeding. We comment on the CPLR only because Levy has relied upon it in his argument.

aspects of the charge alleging that PEF violated the Act by its agent's inadequate grievance representation.

The Director dismissed the aspect of the charge concerning nonpayment of Levy's legal expenses on the merits because PEF explained why it was denying the payment and its denial was fully consistent with its existing policy and practice.

Levy argues that PEF is required to pay his attorney fees because its agent's misrepresentation of his interests forced him to retain an attorney who could understand the legal arguments underlying his defense. Even were we to conclude that PEF's representation was inadequate during the grievance processing, it would not follow that PEF is required by its duty of fair representation under the Act to pay Levy's legal fees.

PEF's policy and practice is never to provide an attorney to defend disciplinary charges which do not expose an employee to discharge. The disciplinary charges against Levy did not involve a possible discharge, only a suspension. Although Levy considered those disciplinary charges to be very serious, he cannot use a duty of fair representation principle to exact a payment from PEF for legal services PEF never provides or reimburses.

If Levy was dissatisfied with his representation, he had several options. He could have tried to persuade PEF to appoint a different representative for him. He could have tried, as he apparently did, to convince the PEF representative of the merits of his defense strategy. He could have continued with his representative and charged PEF, in a timely fashion, with a breach of duty grounded upon that agent's alleged

misrepresentation with appropriate remedies against both PEF and his employer⁴ if a violation of the Act had been found. Finally, he could have retained outside representation, as he did, but at his own expense. What is not among his options, however, is legal representation at PEF's expense. To hold otherwise and require PEF to pay Levy's legal expenses would place Levy in a better position than other unit employees who do not have the benefit of paid legal representation for discipline short of discharge.⁵

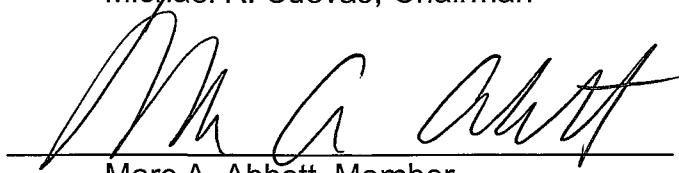
For the reasons set forth above, Levy's exceptions are denied and the Director's decision is affirmed.

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

DATED: December 10, 1998
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

⁴Act §205.5(d) permits for remedial orders against an employer if there has been a breach of duty in conjunction with grievance processing.

⁵*Transport Workers Union, Local 100*, 31 PERB ¶3010 (1998) (union's refusal to pay for expert witnesses no violation as the refusal was consistent with the union's grievance representation policy).

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-18174

BUFFALO SEWER AUTHORITY,

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL ORTIZ of counsel),
for Charging Party**

DAMON & MOREY LLP (JAMES N. SCHMIT 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 a charge filed against the Buffalo Sewer Authority (Authority).

CSEA alleges in this charge, as amended, that the Authority violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it eliminated three shift superintendent positions and discharged unit employee Kevin Gemerek because CSEA had filed and pursued an improper practice charge and a contract grievance.¹

¹Under the earlier charge, the Authority was held in violation of the Act for assigning nonunit employees to cover shifts left vacant due to the unanticipated absence of a shift superintendent. Allegations that assistant shift superintendents were improperly assigned to cover for shift superintendents were dismissed. *Buffalo Sewer Auth.*, 30 PERB ¶3018 (1997), rev'd in part 29 PERB ¶4639 (1996). The grievance sought out-of-title pay for assistant shift superintendents placed in charge of shifts.

After a six-day hearing, the ALJ dismissed the charge. The ALJ found upon credibility resolutions, some favorable to CSEA and others favorable to the Authority, that neither of the Authority's actions were caused by any exercise of rights protected by the Act.

CSEA argues in its exceptions that the ALJ's decision is factually and legally incorrect and should be reversed. The Authority argues in response that the ALJ's credibility resolutions are correct, but in any event not reversible, that any inferences drawn by the ALJ are supported by the record, and that all material findings of fact are consistent with the record.

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

The ALJ's finding, dispositive of the allegation concerning the elimination of the three shift superintendent positions in May 1996, was that the Authority had decided to reduce the number of shift superintendents from eight to five before the improper practice charge and the grievance were filed in August 1995. CSEA argues, however, that any decision in this regard was tentative and not finalized until the Authority first suspected that the affected employees may have been in contact with CSEA and then learned that a charge and a grievance had been filed, which CSEA would not withdraw despite the Authority's threat of adverse consequence.

The record in this regard establishes that the Authority had been concerned about an overstaffing in the shift superintendent position and had been discussing staff reductions long before any charge or grievance were filed. Even if we were to conclude that a decision to reduce the staffing of this position had not been finalized by August

1995, CSEA still cannot prevail on this aspect of the charge unless it is concluded that the decision to reduce staff would not have been implemented if CSEA had capitulated to the Authority's demands to withdraw the improper practice charge. But there is no reasonable basis in the record to support a conclusion that, but for either the filing or prosecution of the earlier improper practice charge or the grievance, the Authority would have refrained from reducing its staffing levels. CSEA's arguments that the ALJ misread and misinterpreted the record to reach an erroneous conclusion themselves rest on descriptions of the record which are inaccurate or misleading.

The ALJ credited witnesses for CSEA regarding statements made by Anthony Hazzan, Acting General Manager of the Authority, as to certain adverse consequences if the improper practice charge were not withdrawn, and other statements arguably threatening employees for having contacted CSEA. The ALJ concluded, nonetheless, that the shift superintendents' positions were abolished for reasons unrelated to any protected activity or those alleged threats. These credibility determinations and the dismissal of this aspect of the charge are not inconsistent. Just because there has been an exercise of a protected right does not mean that the protected activity is the cause for an employer's action. As the ALJ's findings regarding the Authority's business reasons for its elimination of certain superintendent positions rest ultimately on credibility resolutions, and as those credibility resolutions are fully consistent with the record, there is no basis to reverse the ALJ's decision.

The same rationale requires affirmation of the ALJ's dismissal of the charge concerning the Authority's discharge of Gemerek. Indeed, the record evidence supporting any improper motivation for Gemerek's discharge is less than that

supporting the allegedly improper position abolition. CSEA takes no exception, for example, to the ALJ's finding that Gemerek was not involved with either the improper practice charge or the grievance, which were originally alleged to be the bases for his discharge.

CSEA alleges in its exceptions that Gemerek was discharged because he was a vocal critic of the Authority's plan for abolition of the shift superintendent positions and because he had participated in a local labor rally in July 1996. Even if we were to consider these new allegations, and even assuming Gemerek's conduct in these respects was protected under the Act, there is still no basis for a reversal of the ALJ's decision.

It is clear from the ALJ's decision that the ALJ was aware of Gemerek's conduct in these particular regards. The ALJ determined, nonetheless, again on credibility resolutions, that the Authority's motive for Gemerek's discharge was not an exercise of any protected activity. Rather, the ALJ concluded that Gemerek, by his conduct during these allegedly protected activities, revealed that he did not have the traits necessary to continue in employment with the Authority. An employee's behavior during engagement in a protected activity may be considered by an employer in shaping its decisions when that behavior has a bearing on the employee's continuing ability to perform his or her job.² Gemerek was no more a critic of the staff reductions than others who were retained in the Authority's employ. Nor was Gemerek discharged because he participated in a labor rally. Rather, the vulgarities which he directed over a

²*State of New York (Employee Health Servs. Dep't of Transp.),* 26 PERB ¶3056 (1993).

bullhorn to Hazzan and Pamela DiPalma, the Authority's Director of Labor Relations, at the rally persuaded the Authority that Gemerek, given other on-going, job-related problems, had become an unreliable, confrontational employee who frightened other employees by angry outbursts and one who lacked the judgment needed to hold a supervisory position.

The ALJ was also aware of what CSEA alleges to be a discrepancy in the reasons given by the Authority for discharging Gemerek. The Authority informed the Unemployment Insurance Division of the State Department of Labor that Gemerek was terminated without cause due to his temporary employee status. Even if these reasons are conflicting, the discrepancy has an evidentiary use only and does not compel the conclusion that the real reason for the Authority's action is one unlawful under the Act.³ Notwithstanding any discrepancy in the stated reasons, the ALJ found the evidence that the Authority's discharge of Gemerek was not improperly motivated to be "overwhelming" and the record affords us no basis to reverse that determination. Whether Gemerek's discharge violated his rights under the parties' collective bargaining agreement or his rights under other statutes are not issues for us to decide and we express no opinion in those respects.

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

³State of New York (Dep't of Labor), 30 PERB ¶3045 (1997).

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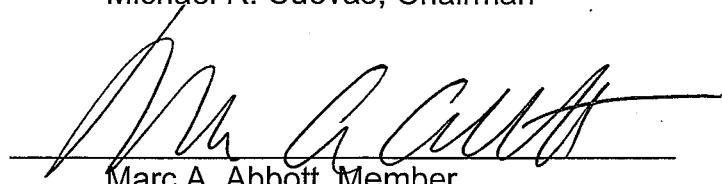
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IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is,
dismissed.

DATED: December 10, 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, HOLBROOK FIRE
DISTRICT UNIT,**

Charging Party,

- and -

CASE NO. U-18646

HOLBROOK FIRE DISTRICT,

Respondent.

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

**INGERMAN, SMITH, L.L.P. (CHRISTOPHER VENATOR of counsel), for
Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Holbrook Fire District (District) to a decision of an Administrative Law Judge (ALJ) finding that it violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it brought disciplinary charges against one of its employees, Jason Feinberg, in retaliation for his efforts in attempting to organize District employees for representation by the Civil Service

Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Holbrook Fire District Unit (CSEA).¹

The ALJ found that Feinberg had been charged with eight counts of misconduct from March 1996 through September 1996, the time during which he was actively organizing support among his fellow employees for an employee organization, that the District Manager, Deborah Knopfke, knew he was engaged in that organizational activity and that the business reasons given by the District for preferring charges against Feinberg were pretextual. Determining that Feinberg had been subjected to disparate and retaliatory treatment by the District in that others who had committed the same or similar offenses as Feinberg had not been disciplined and that some of the offenses attributed to Feinberg involved duties that were ancillary to his job of fire dispatcher and did not warrant the penalty of discharge, the ALJ held that the District had violated §209-a.1(a) and (c) of the Act.

The District excepts to the ALJ's decision, arguing that it is not supported by the record. CSEA has filed cross-exceptions, arguing that the remedy should be modified. In all other respects, CSEA concurs with the ALJ's decision.

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

¹On March 11, 1996, the Holbrook Fire District Association filed a petition seeking to represent a unit of employees of the District. On June 17, 1996, the Association withdrew its petition. On September 3, 1996, CSEA filed a petition seeking to represent a unit of firehouse attendant, custodian, watchman, mechanic, district secretary and HVAC mechanic. That petition was dismissed pursuant to the employees' vote against representation. *Holbrook Fire Dist.*, 30 PERB ¶3035 (1997).

The parties submitted the case to the ALJ for decision based upon a stipulated record consisting of the appellate return in a proceeding brought pursuant to Civil Practice Law and Rules (CPLR) Article 78 to review the decision of the Civil Service Law (CSL) §75 hearing officer on the disciplinary charges that were brought against Feinberg by the District. The hearing officer sustained six of eight charges against Feinberg and recommended his discharge. The return includes the disciplinary charges against Feinberg, the CSL §75 hearing transcript, the exhibits and the hearing officer's report and recommendations. Both parties also submitted briefs to the ALJ.

The CSL §75 charges were filed on October 10, 1996 by the District and alleged that on March 18, 1996, Feinberg had allowed unauthorized personnel in the radio room; that on March 18, he engaged in a prank in the radio room; that he failed to timely complete an assignment given to him on May 13, 1996; that he failed to follow proper procedures for requesting time off on three occasions in June 1996; that he failed to complete the printing and filing of eight monthly reports for the State of New York; and that he failed to maintain a New York State Commodities Contract book.² The hearing officer sustained all of these charges and recommended that Feinberg be discharged. In addition to issues as to Feinberg's guilt or innocence and the appropriate remedy for any wrongdoing, retaliation was raised as a defense to the disciplinary charges. As to that, the hearing officer held:

²Two other charges, alleging that Feinberg failed to properly sign in and out of work on several occasions and failed to follow proper procedures related to cleaning gear, were not sustained by the CSL §75 hearing officer.

The Respondent (Feinberg) claims that Knopfke preferred the charges against him in retaliation for his efforts to organize the employees of the District. However, most of the acts complained of, while occurring after Knopfke became aware of the Respondent's efforts to organize, are the result of the Respondent's affirmative acts. This supports the District's argument that the Respondent adopted a recalcitrant attitude after his efforts to organize, secure in his belief that his efforts to organize and the filing of the Improper Labor Practice charges would insulate him from action by the District. (emphasis in original)

Based on the stipulated record, the ALJ determined that the hearing officer's conclusion that Feinberg was guilty of six of the eight acts of misconduct or incompetence was controlling. However, the ALJ then went on to decide that the CSL §75 hearing officer's findings were of no relevance to the issues before her because PERB has exclusive and nondelegable jurisdiction over §209-a.1(a) and (c) allegations. The ALJ found that while Feinberg had committed the acts complained of, other employees had been involved in the same or similar acts of misconduct and had not had charges filed against them. As to the hearing officer's findings as to union animus, the ALJ found them to be "cursory and superficial" and decided the charge without relying on the hearing officer's finding that there was no retaliation. We do not agree with the ALJ's analysis of the preclusive effect of the hearing officer's finding regarding the District's motivation for seeking to discharge Feinberg.

The ALJ correctly determined that the CSL §75 hearing officer's decision could not be given collateral estoppel effect because the District did not raise collateral

estoppel as an affirmative defense and, thus, waived it.³ However, we find that the ALJ should have deferred to the findings of the hearing officer that the charges against Feinberg were brought by the District for proper business reasons and not to retaliate against him for his organizing activities.

In *New York City Transit Authority (Bordansky)* (hereafter *Bordansky*),⁴ it was determined that the factual conclusions in an arbitration proceeding could be accepted in an improper practice proceeding if three standards are met: the issues raised by the improper practice charge were fully litigated in the arbitral proceeding; the arbitral proceeding was not tainted by unfairness or serious procedural irregularities; and the determination of the arbitrator was not clearly repugnant to the purposes or policies of the Taylor Law.⁵ PERB decisions have held that the doctrine is applicable in improper practice charges alleging violations of §209-a.1(a) and (c).⁶ The same deferral policy is applicable to determinations by a CSL §75 hearing officer where there is a requisite identity of issues. We find that the policies of the Act are best effectuated when parties are precluded from relitigating before the agency issues they have raised in a CSL §75 proceeding, especially where, as here, the parties make the CSL §75 record the record for purposes of deciding the improper practice charge. When the parties themselves exhibit their mutual intent to have a charge decided on the record made in another

³*Kaufman v. Eli Lily & Co.*, 65 N.Y.2d 449 (1985); *Matter of Ranni*, 58 N.Y.2d 715 (1982); *Schwartz v. Public Administrator*, 24 N.Y.2d 65, 71 (1969).

⁴4 PERB ¶3031 (1971).

⁵See *State of New York (Dep't of Mental Hygiene)*, 11 PERB ¶3084 (1978).

⁶Id.

forum, they are bound by the factual findings made by the trier of fact in the earlier proceeding. Where, as here, the parties have raised the same legal issues in the earlier proceeding, and the proceeding meets the requirements of *Bordansky*, it is appropriate to defer to the CSL §75 hearing officer's findings insofar as it relates to conclusions of improper motivation.⁷

Here, the hearing officer weighed the testimony of all the witnesses at the CSL §75 hearing, including Feinberg and Knopfke. He determined that Feinberg had deliberately committed six of the eight offenses he had been charged with and that the District had legitimate business reasons for seeking his discharge. The allegations at the CSL §75 hearing included the retaliation claim at issue here. In finding that Feinberg's discharge was warranted, the hearing officer rejected the claim of improper motivation. The parties themselves stipulated that the hearing officer's decision and the record before him would form the record in the case before the ALJ. Having so stipulated, the parties are bound by that record and the ALJ was likewise bound to accept the hearing officer's conclusion as to union animus, at the very least a mixed question of fact and law.⁸ It was the CSL §75 hearing officer who had the opportunity to assess the witnesses' credibility, not the ALJ. The CSL §75 hearing officer expressly considered the claim of retaliation and determined that the District acted based on valid business reasons, not because of Feinberg's protected activity. Such findings clearly

⁷See *Matter of Lester (Ilion Water Comm'n-Hartnett)*, 149 A.D.2d 800 (3d Dep't 1989). See also *Odessa-Montour Cent. Sch. Dist.*, 30 PERB ¶4676 (1997), where the ALJ gave preclusive effect to an arbitrator's award finding lack of discriminatory motive.

⁸See *Matter of Guimaraes (New York City Bd. of Educ.-Roberts)*, 68 N.Y.2d 989 (1986).

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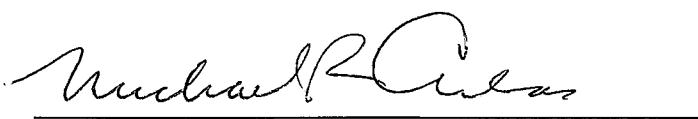
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decide CSEA's claim and, under the standards of our deferral policy, precluded the ALJ from concluding that Feinberg's discharge was improperly motivated.⁹

Based on the foregoing, we reverse the decision of the ALJ.

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

DATED: December 10, 1998
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

⁹See *County of Cattaraugus*, 24 PERB ¶3001 (1991).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO, CROTON
SCHOOL DISTRICT-LOCAL 860-UNIT 9159,**

Charging Party,

- and -

CASE NO. U-19091

**CROTON-HARMON UNION FREE SCHOOL
DISTRICT,**

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL ORTIZ of counsel), for
Charging Party**

PLUNKETT & JAFFE, P.C. (ROBERT L. BYRNE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Croton-Harmon Union Free School District (District) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Croton School District-Local 860-Unit 9159 (CSEA). The charge, as amended, alleges that the District violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when, in retaliation for the exercise of protected rights, it levied disciplinary charges against three unit employees resulting in their termination.

The Assistant Director found that the District instituted an investigation into claims for overtime payment in an effort to retaliate against two employees: Aaron Garner, CSEA custodial unit president, and Peter Diorio, the vice-president. As a result of the investigation, it was discovered that Garner and Diorio had received payment for overtime that they had not worked. The investigation was thereafter expanded and it was discovered that another unit employee, William Hobby, had submitted similar claims and that Garner and Diorio had made additional claims for payment for overtime. Disciplinary charges were filed by the District against the three and they were thereafter terminated pursuant to the report and findings of a Civil Service Law (CSL) §75 hearing officer.

The Assistant Director adopted the factual findings of the CSL §75 hearing officer that the three employees had sought and received payment for overtime hours that they had not worked, but determined that the investigation into overtime was commenced by Frank Raposeiro, the District's Superintendent of Buildings and Grounds, in retaliation for Garner's and Diorio's exercise of protected rights. Finding that the investigation was improperly motivated, the Assistant Director held that the disciplinary charges and the resulting termination of all three employees violated §209-a.1(a) and (c) of the Act as they resulted from the improperly motivated investigation. The District was ordered to reinstate all three employees, make them whole for any lost wages or benefits, remove from their records all references to the

disciplinary charges and cease and desist from taking disciplinary actions against these employees in retaliation for the exercise of rights protected by the Act.¹

The District excepts to the Assistant Director's decision, arguing that merely reporting misconduct does not constitute an improper recommendation or request, that there was an independent, legitimate business reason for terminating the affected employees, and that no violation can be found as to Hobby because he was not engaged in protected activity.

CSEA has filed cross-exceptions claiming that the record establishes that the actions of both the Superintendent of Schools, Marjorie Castro, who brought the charges against the three employees, and the District's Business Manager, Alan Berkow, who had presented to Castro the investigation results received from Raposeiro, were improperly motivated. In all other respects, CSEA supports the Assistant Director's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the Assistant Director, but reverse as to remedy.

Until their discharge, Garner and Diorio had been night custodians at the District's high school. Their regular hours of work were from 3:00 p.m. to 11:30 p.m. They became, respectively, the president and vice-president of the CSEA custodial unit

¹The Assistant Director dismissed the allegation that §209-a.1(d) of the Act had been violated. Based on the CSL §75 hearing officer's finding that there had been no agreement between the District and the three affected employees that allowed them to receive overtime pay for hours not worked, the Assistant Director found that there had been no agreement and no practice which had been altered. No exceptions have been taken to this part of the Assistant Director's decision.

in mid-1995.² It is undisputed that they were engaged in protected activities, such as filing grievances and raising safety concerns, from the time they became CSEA officers to the time they were suspended pending the outcome of the February 25, 1997 disciplinary charges filed against them.³ Raposeiro was the recipient of their memoranda, letters and grievances. Castro was copied on every letter and memorandum sent by either Garner or Diorio to Raposeiro. Relations between Raposeiro and Garner and Diorio deteriorated steadily through 1995, 1996, and early 1997. Larry Sparber, the CSEA Labor Relations Specialist assigned to the District, testified that, in July 1996, Raposeiro stated that Garner and Diorio "were stirring up a problem, and that if any of the other employees got involved...there would be repercussions." In the fall of 1996, Raposeiro told Frank Baglieri, a former Local president: "Them guys [Garner and Diorio] think they're pretty funny and smart. They better watch it, because I have ways of getting even."

In late February 1997, Raposeiro requested that the Scarsdale Security Systems, Inc., the operator of the District's security system, give him records of when the alarm system at the District's high school had been turned on and off during the previous few weeks.⁴ While Raposeiro originally testified that such a check was

²Hobby is also a night custodian. He holds no office in CSEA.

³On August 26, 1996, Garner, Diorio, Hobby and another custodian grieved an order received from Raposeiro.

⁴The alarm system is off while employees are in the school. At the time that the last custodian leaves, the alarm system is reactivated and the time is recorded. Anyone moving about in the school after that will set off the alarms at the Security Systems' Control Center.

"routine", he later conceded that he had never made such a request before, but that "something" told him he should check at that time.

The investigation revealed that on several occasions, Garner and Diorio had put in for overtime, indicating that they had worked until 2:30 a.m., when the alarm system had actually been activated at 11:30 p.m. Raposeiro brought the information to Berkow, who in turn informed Castro. Castro brought disciplinary charges against Garner and Diorio on February 25, 1997, for claiming overtime on three occasions for hours not worked. Castro then directed that the time sheets for all custodians be checked back to September 1996. The results showed that Garner had claimed overtime on two other occasions, Diorio on seven other occasions, and that Hobby had claimed overtime for time not actually worked on seven occasions.⁵ On March 4, 1997, additional disciplinary charges were filed against Garner and Diorio and charges were filed against Hobby.

It is undisputed that Garner and Diorio were engaged in protected activities and that the District was aware of their activities. The record shows that while Castro made the decision to file the disciplinary charges against the three employees, it was Raposeiro who initiated the investigation that led to those charges being brought.⁶ The

⁵None of the employees denied that they had put in for three hours of overtime on certain evenings when they had left at 11:30 p.m. They claimed that they did so pursuant to an agreement with their supervisors permitting them to do so in a "man out" situation, which is when one of the three-person evening custodial crew was absent. The two remaining employees had to complete the third employee's work and, if it was completed during their regular shift, they alleged that they were entitled to claim three hours of overtime. As noted earlier, the CSL §75 hearing officer found that no such agreement existed.

⁶Berkow merely transmitted the information to Castro.

Assistant Director found that the record did not support a finding that Castro was motivated by anti-union animus in making the decision to file the disciplinary charges. But he found that Raposeiro would not have initiated his investigation but for Garner's and Diorio's exercise of protected rights.⁷

In *Elmira City School District*⁸ (hereafter *Elmira*) and *Town of Gates*⁹ (hereafter *Gates*), it was held that where there is an improperly motivated request for employment action, or an employment action that is based upon information gleaned from an improperly motivated investigation, the action itself may be found to be violative of the Act, even if that request or information is acted upon by an individual or body without improper motivation. Here, the Assistant Director found that the charges would not have been filed against Garner, Diorio and Hobby but for the information obtained by Raposeiro's improperly motivated investigation. The filing of the disciplinary charges, the suspension, the subsequent disciplinary charges which encompassed Hobby, and the termination of all three employees all flow from Raposeiro's tainted investigation and are, therefore, violative of §209-a.1(a) and (c) of the Act.¹⁰

⁷*City of Salamanca*, 18 PERB ¶3012 (1985).

⁸14 PERB ¶3015 (1981).

⁹15 PERB ¶3079 (1982).

¹⁰Hobby's suspension and discharge violate the Act even though it was found that he engaged in no protected activities at a time proximate to the time that charges were filed against him. A public employer may not take an adverse employment action against a represented employee because of the activities of that employee's bargaining agents or the officers of that employee organization. See *City of Buffalo*, 30 PERB ¶3021 (1997).

We must now address the appropriate remedy. The Assistant Director ordered the reinstatement of all three employees. Their intentional misconduct, however, is sufficient to deny them reinstatement.

In this case, it is only the initial investigation which was improperly motivated. The Assistant Director found that the actions based upon the receipt of the information obtained from the investigation were not improperly motivated and there is no basis in the record to reverse that finding. In neither *Gates* nor *Elmira* were the employees found guilty of an act of intentional misconduct. Therefore, neither of those cases is controlling as to the question of remedy. Similarly, *City of Albany v. PERB*¹¹ is distinguishable both because the discharge itself was improperly motivated in that case and the employee had only been negligent in the operation of a piece of equipment. The remedial issue is, therefore, largely an open issue.

Here, Garner, Diorio and Hobby committed a serious, intentional offense and were found to have done so by the CSL §75 hearing officer. The three would most certainly have been the recipients of disciplinary charges resulting in their discharge if their wrongdoing had been discovered independently by Berkow or Castro, who harbored no union animus. The nature of their wrongdoing, a deliberate theft of overtime money, does not easily lend itself to an order to restore them to their positions, even though the Assistant Director found that the "system" which allowed their misconduct to take place no longer exists. These employees are members of the evening custodial crew, they are alone in the school building and are entrusted to turn

¹¹57 A.D.2d 374, 10 PERB ¶7012 (3d Dep't 1977), aff'd, 43 N.Y.2d 954, 11 PERB ¶7007 (1978).

on the security system and lock the building when they leave, as well as maintaining the security of all areas while they are in the building.

In determining the appropriate remedial action, we must balance competing yet compelling rights and interests. The District has a legitimate concern with having reinstated employees who have proven themselves to be untrustworthy and who have been found guilty of serious acts of intentional misconduct. At the same time, Raposeiro's investigation was grounded upon Garner's and Diorio's exercise of the fundamental rights they have under the Act both as employees and as officers of CSEA.

In striking the appropriate balance, we are guided by our own case law and that arising under other labor and employment legislation which we find to be equally applicable to the remedial question before us. In *City of Olean*,¹² an employee was terminated because he lied on his job application about prior felony convictions. It was there found that the employer had commenced its investigation of the employee because of his exercise of protected rights. However, because it would not effectuate the purposes of the Taylor Law and because the employer had a policy of not employing convicted felons, the employee was not ordered reinstated. Several cases have arisen under the National Labor Relations Act (NLRA) with facts similar to the

¹² 2 PERB ¶3069 (1968).

case before us.¹³ In *NLRB v. Magnusen*,¹⁴ the Ninth Circuit Court of Appeals determined that an employee who had been unlawfully discharged because of his union activities was not properly reinstated because he had admitted to padding his hours on an occasion when he was not working. The Court likened the padding of hours to theft of money from the employer. To require the reinstatement of an employee who stole from his employer would not, the Court found, effectuate the policies of the NLRA and would "reward conduct both reprehensible in quality and egregious in scope."¹⁵ In *NLRB v. Big Three Welding Equipment Co.*,¹⁶ the Fifth Circuit Court of Appeals held that employees who had been unlawfully discharged because of their unionizing efforts should not be reinstated because of their serious misconduct in pilfering the employer's property. Noting that "such distasteful misconduct is sufficient reason for refusing reinstatement", the Court decided :

[w]e are firmly convinced that the purposes and policies of the [NLRA] would not be effectuated by the reinstatement of these two employees with an admitted record of highly objectionable misconduct in a relatively small company where relationships are close and conduct of the type here involved is inevitably known to other employees as well as management.¹⁷

¹³See, e.g., *NLRB v. Apico Inns of California, Inc.*, 512 F.2d 1171, 88 LRRM 3283 (9th Cir. 1975); *NLRB v. Commonwealth Foods, Inc.*, 506 F.2d 1065, 87 LRRM 2609 (4th Cir. 1974); *NLRB v. Breitling*, 378 F.2d 663, 65 LRRM 2477 (10th Cir. 1967).

¹⁴523 F.2d 643, 90 LRRM 3330 (9th Cir. 1975).

¹⁵90 LRRM at 3332.

¹⁶359 F.2d 77, 62 LRRM 2058 (5th Cir. 1966)

¹⁷62 LRRM at 2063.

The Supreme Court's decision in *McKennon v. Nashville Banner Publishing Company*¹⁸ is particularly instructive. There, McKennon, a sixty-two year-old employee alleged that she was terminated by her employer because of her age in violation of the federal Age Discrimination in Employment Act (ADEA). While being deposed by her employer in the course of her lawsuit, McKennon admitted to copying and taking home certain confidential documents, an offense which would have warranted her discharge. Her employer then terminated her for removing company documents from the office. The Supreme Court held that, although the wrongdoing by McKennon did not totally bar her from recovery in her age-discrimination suit, McKennon was entitled to back pay only from the date of her wrongful termination to the date that her employer discovered her wrongdoing. The Court specifically held that an order of reinstatement would not be appropriate. In declining to reinstate, the Court observed:

In determining appropriate remedial action, the employee's wrongdoing becomes relevant not to punish the employee, or out of concern "for the relative moral worth of the parties" (footnote omitted), but to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing.

The rationale articulated in these federal cases is applicable here. All of these cases reflect a very clear and consistent belief that labor and employment policies are not effectuated by an order reinstating employees who have committed intentional acts of flagrant misconduct even if their employers have violated those labor and employment laws. In the final analysis, it was not these employees' exercise of

¹⁸513 U.S. 353 (1995).

statutorily protected rights which caused them to lose their jobs. They lost their jobs because they were in a position of trust and stole from their employer. They cannot look to the Act for insulation from their willful misconduct. In this case, the policies of the Act are fully effectuated by a posting informing unit employees that there has been a violation of the Act in the improperly motivated investigation and the actions based thereon. No other order is necessary or appropriate.

We find that the District violated §209-a.1(a) and (c) of the Act when it commenced its investigation of Garner and Diorio and disciplined them and Hobby pursuant to information revealed during that investigation and that it must post a notice to that effect in all locations ordinarily used to communicate with unit employees.

Based on the foregoing, the District's exceptions as to remedy are granted and CSEA's cross-exceptions are denied. The Assistant Director's decision is affirmed, except as to remedy.

IT IS, THEREFORE, ORDERED that the District:

Sign and post the attached notice at all locations normally used to post notices of information to employees in the CSEA custodial unit.

DATED: December 10, 1998
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

NOTICE TO ALL EMPLOYEES

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

and in order to effectuate the policies of the

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

we hereby notify all employees of the Croton-Harmon Union Free School District in the unit represented by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Croton School District-Local 869-Unit 9159 (CSEA) that the Croton-Harmon Union Free School District violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when Frank Raposeiro initiated an investigation of the overtime claimed by Aaron Garner and Peter Diorio in retaliation for their exercise of rights protected by the Act and when Aaron Garner, Peter Diorio and William Hobby were subjected to disciplinary charges and discharged upon information discovered as a result of the unlawful investigation into their overtime claims.

Dated

By
(Representative)
(Title)

Croton-Harmon Union Free School District
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This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**UTICA PROFESSIONAL FIREFIGHTERS
ASSOCIATION, LOCAL 32, IAFF, AFL-CIO,**

Charging Party,

- and -

CASE NO. U-19829

CITY OF UTICA,

Respondent.

GRASSO & GRASSO (JANE K. FININ of counsel), for Charging Party

**ROEMER WALLENS & MINEAUX LLP (JAMES W. ROEMER, JR., and
JEFFREY S. HARTNETT of counsel), for Respondent**

BOARD DECISION AND ORDER

By decision dated November 23, 1998,¹ we held that all but one of the City of Utica's (City) demands submitted to an interest arbitration panel are terms and conditions of employment within the meaning of the Public Employees' Fair Employment Act (Act). No determination was made as to the negotiability of City demand number 66 calling for employees who are represented by the Utica Professional Firefighters Association Local 32, IAFF, AFL-CIO (Association) to undergo periodic random drug testing because we lacked the factual record necessary for

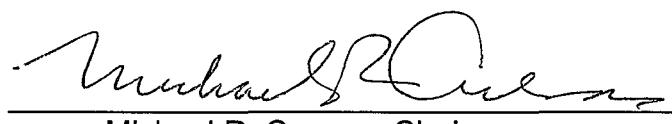
¹31 PERB ¶3075 (1998).

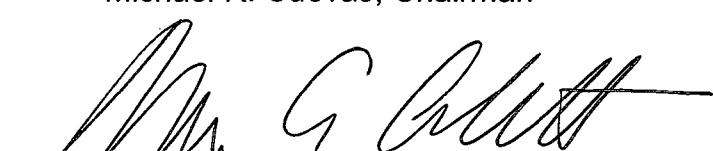
making that determination. Accordingly, the charge was remanded to the Assistant Director of Public Employment Practices and Representation for further proceedings as to demand 66.

By letter dated December 3, 1998, the City has withdrawn its demand for random drug testing from consideration by the interest arbitration panel.

All issues in the charge now having been resolved, and on the basis of our earlier decision, the Association's charge against the City is hereby dismissed. SO ORDERED.

DATED: December 10, 1998
Albany, New York


Michael R. Cuevas, Chairman


Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**UNITED STEELWORKERS OF AMERICA,
LOCAL UNION NO. 15315,**

Charging Party,

- and -

CASE NO. U-18931

CITY OF NIAGARA FALLS,

Respondent.

E. JOSEPH GIROUX, JR., ESQ., for Charging Party

ROBERT P. MERINO, ESQ. (TIMOTHY G. BAX of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the City of Niagara Falls (City) to a decision and recommended order of an Administrative Law Judge (ALJ). The ALJ held that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally subcontracting certain work that had been exclusively performed by employees in a bargaining unit represented by the United Steel Workers of America, Local Union No. 15315 (USWA) to a private firm.

The City argues that it had no duty to negotiate with USWA concerning its decision to subcontract the work, that USWA waived whatever bargaining rights it may have had to negotiate concerning the decision, and, in any event, that it satisfied

whatever statutory bargaining obligations it may have had to negotiate with USWA. USWA argues that the ALJ should be affirmed.

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

USWA represents a unit of blue-collar employees in the City's Division of Sanitation of the Department of Public Works (sanitation workers). Until January 2, 1997, sanitation workers exclusively collected all municipal, residential and commercial garbage throughout the City, including bulk trash, white goods and recyclable tires. Recyclable paper, plastic and glass were sorted and deposited in appropriate dumpsters at a central location by City residents themselves. However, the sanitation workers evacuated the refrigerant from refrigerators prior to recycling. The sanitation workers brought all of the garbage that they collected to a landfill operated by BFI, Inc. under a twenty-year-old contractual arrangement between BFI and the City. That contract expired on July 31, 1996.

In late June or early July 1996, City Administrator Anthony Restaino advised USWA president John Soro that the City was considering a plan to privatize its sanitation services. Restaino told Soro that a draft of the City's request for proposals under General Municipal Law §120-w was available from the City's purchasing agent. Restaino invited Soro to comment on the draft during the public comment period "to show us where they [unit employees] could remain competitive." USWA did not comment on the City's draft request for proposals during the public comment period. The City published a formal request for proposals from private firms in September, and

bids were opened on October 15. The low bid was submitted by Modern Disposal Services, Inc.

In an October 22 letter to Soro, David Fabrizio, the City's Director of Human Resources and chief negotiator, observed that USWA had not commented on the draft request for proposals and that the contemplated privatization would seriously impact unit employees.¹ Therefore, he invited USWA to negotiate concerning the impact of the City's intentions.

On October 30, Soro met with Restaino and Fabrizio. Although Restaino and Fabrizio wanted to discuss the impact of the City's desire to privatize its sanitation services, Soro wanted to discuss the decision itself. Soro opined that the cost of using unit employees was competitive with Modern Disposal, but wanted additional time to compile his figures. On November 1, the Mayor submitted his budget to the City's Common Council. The Mayor's budget provided that the City's sanitation services would not be performed by City employees. At a November 6 meeting with Restaino, Soro reiterated his belief that unit employees could perform the work competitively. Restaino responded that the decision was now a budgetary issue for the Common Council. Therefore, Soro submitted a cost analysis to the Common Council in an attempt to show that using unit employees was cost effective. On December 2, the Council adopted a budget restoring City sanitation workers. On December 3, the Mayor met with Soro and said that USWA's figures were not persuasive, and that he was

¹The text of the letter is set forth in the ALJ's decision.

going to privatize the work. Thereafter, the Mayor vetoed the Council's amendment and on December 13, 1996, the Council's veto override resolution failed.

On December 31, 1996, the Mayor executed a contract with Modern Disposal.² Under that contract, effective January 2, 1997, Modern Disposal collects and disposes all municipal, residential and commercial garbage. Modern Disposal disposes the garbage that it collects at a landfill that it operates. The contract also requires Modern Disposal to undertake a new curbside recycling program. Under that program, City residents and businesses place their recyclable material in bins that Modern Disposal provides. They place the bins at the curb where Modern Disposal's employees sort and collect the material. Modern Disposal brings the recyclables to its headquarters in Model City, New York.

After entering its contract with Modern Disposal, the City transferred some of the sanitation workers to the City's Street Construction Division, and it discharged approximately thirty-eight others. Under its arrangement with Modern Disposal, the City obtains a savings of approximately one million dollars annually, offering some relief to its fiscal distress.³

²The execution of the contract was subsequently challenged by the unsuccessful bidder and was held void unless properly ratified by the Common Council. By resolution dated April 14, 1997, the Council ratified the contract retroactively to December 31, 1996.

³In January, 1996, when the current administration took office, the City was faced with an operating deficit of approximately five million dollars. Its taxes were rising, and its bonds were rated one step above junk grade.

The ALJ held that the City had a statutory duty to negotiate with USWA concerning its decision to subcontract its existing sanitation services to Modern Disposal. Concluding that the City had not satisfied that duty, the ALJ held that it violated §209-a.1(d) of the Act. The ALJ held, however, that the City was under no obligation to negotiate with USWA concerning its decision to subcontract the curbside collection of recyclable paper, plastic and glass because that work had never been performed by unit employees. To that limited extent, therefore, the ALJ dismissed USWA's improper practice charge.

As a general rule, a public employer violates §209-a.1(d) of the Act by unilaterally subcontracting work that has been exclusively performed by unit employees where the subcontracted work is substantially similar to the unit work, unless the qualifications for the tasks have been changed significantly.⁴ In analyzing whether the work performed by a subcontractor is substantially similar to the work previously performed by unit employees, we look to the nature of the work itself.⁵ The fiscal or operational wisdom of a decision to subcontract unit work is immaterial to the negotiability of the subject.⁶

⁴*Niagara Frontier Transp. Auth.*, 18 PERB ¶3083 (1985).

⁵See *State of New York (Dep't of Correctional Servs.)*, 27 PERB ¶3055 (1994), *conf'd sub nom. State of New York (Dep't of Correctional Servs.) v. PERB*, 220 A.D.2d 19, 29 PERB ¶7008 (3d Dep't 1996).

⁶See *City of Poughkeepsie v. Newman*, 95 A.D.2d 101, 16 PERB ¶7021 (3d Dep't 1983), *appeal dismissed*, 60 N.Y.2d 859, 16 PERB ¶7027 (1983), *leave to appeal denied*, 62 N.Y.2d 608, 17 PERB ¶7009 (1984).

Here, there is no dispute that unit employees exclusively collected and disposed all of the City's municipal, residential and commercial trash, including bulk trash and white goods, until the City entered its contract with Modern Disposal. There is no evidence that the City altered the qualifications necessary to perform those tasks, and there is no evidence that USWA ever consented to the City's decision to privatize the work.

The City's argument that it had no duty to negotiate with USWA concerning its decision to privatize its sanitation services is grounded on two theories. First, the City argues that it ceased to provide sanitation services once the work was undertaken by Modern Disposal. Noting that a public employer's decision to abolish or curtail its services is not mandatorily negotiable,⁷ the City contends that it was not required to negotiate with USWA concerning its decision to subcontract the work. Moreover, relying on our decision in *Town of Brookhaven*,⁸ the City argues that to the extent it retains any control over Modern Disposal's day-to-day operations, that control is *de minimis*.

The City's argument does not accurately characterize the effect of its contractual relationship with Modern Disposal. All garbage collection performed by Modern Disposal, as well as Modern Disposal's recycling tasks, are being done at the City's behest under contract. Thus, it is an irrefutable fact that the City is still providing sanitation services to its constituents. The City has simply changed the personnel who

⁷*City Sch. Dist. of the City of New Rochelle*, 4 PERB ¶3060 (1971).

⁸28 PERB ¶3010 (1995).

perform the work. *Town of Brookhaven* is inapposite. In that case, the vestiges of control retained by the Town over work once performed by unit employees was not sufficient to defeat the Town's claim that it ceased to provide the in-issue service.

Here, whether the City has extensive control, or no control at all, over Modern Disposal's day-to-day operations is immaterial. The City simply has not abolished its sanitation services.⁹

The City's second argument that it had no duty to negotiate with USWA is that the service it now provides through Modern Disposal is not substantially similar to the work previously performed by unit employees. In support, the City emphasizes that Modern Disposal must weigh and ticket each truckload of garbage so that it can bill the City, that Modern Disposal is responsible for disposing of all of the trash and recyclable material that it collects at its facility in Model City, New York, that Modern Disposal picks up one bulk item per week, per household, in addition to the two yearly pick-ups that unit employees used to perform, and that Modern Disposal now sorts and collects recyclable material at the curbside.

The differences stressed by the City are insignificant and mostly immaterial. What Modern Disposal does to bill the City is not relevant to the nature of the service that it provides. Similarly, the fact that Modern Disposal takes the garbage it collects to its own landfill does not constitute a change in the work performed. Unit employees

⁹A different analysis would be warranted if, for example, the City simply ceased to provide sanitation services, requiring City residents and businesses to arrange for their own garbage disposal by whatever means necessary. But, that is clearly not what the City did here.

also took the garbage they collected to a landfill. Likewise, it is immaterial that Modern Disposal collects bulk trash more frequently than did unit employees. The frequency of the work performed does not affect the nature of the work itself.¹⁰

As for the new curbside recycling program, the City argues that it is an inseparable element of its current sanitation services and that this new program, in conjunction with the work previously performed by unit employees, constitutes an entirely new service. Indeed, without elaboration, the City contends that "privatization could not have taken place without curbside recycling." Thus, according to the City, while the ALJ correctly held that its decision to subcontract the recycling program is not mandatorily negotiable, she erred in treating that program as a separate function when comparing the work once performed by unit employees and those performed by Modern Disposal.

However, we see no basis in law or fact to conclude that the City's recycling program is an inseparable element of the City's sanitation services. Recyclables are not collected in the same trucks as trash, and they are treated differently after they are collected. Indeed, recycling had historically been independent of the City's garbage collection. Under the City's theory, the City could provide no sanitation services unless the same group of people who collect garbage also sort and collect recyclables. We find no merit in that theory. We hold, therefore, that the new recycling program does not substantially alter the collection of residential, municipal and commercial garbage that was previously performed by unit employees.

¹⁰See *Union-Endicott Cent. Sch. Dist.*, 29 PERB ¶3056 (1996) rev'd on other grounds, ___ A.D.2d ___, 31 PERB ¶7016 (3d Dep't 1998).

In reaching that conclusion, we also note that the City's argument is essentially the converse of our analysis in *County of Westchester*.¹¹ There, although unit employees exclusively performed some of the tasks that were unilaterally transferred to nonunit personnel, they had not exclusively performed the core components of that work. Therefore, we concluded that the County was under no duty to negotiate concerning its decision to transfer all of the work to nonunit personnel. Here, the core component of the work now performed by Modern Disposal is municipal, residential and commercial garbage collection and disposal. That unit employees cannot claim exclusivity over the new recycling tasks does not defeat their claim of exclusivity over the core component of the City's sanitation services--garbage collection.¹² Therefore, the fact that the City was under no duty to negotiate with USWA concerning its decision to privatize its recycling program does not mean that it had no obligation to negotiate concerning its decision to privatize the rest of the work.

Accordingly, we reject the City's arguments that it had no statutory duty to negotiate with USWA concerning its decision to subcontract the work of collecting and dumping all municipal, residential and commercial garbage.

The City's claim that USWA waived its right to negotiate concerning the City's decision to subcontract the work is also grounded on two theories. Each turns on a single proposition of law: that a public employer is free to alter existing terms and conditions of employment, absent a union's demand to negotiate.

¹¹31 PERB ¶3034 (1998).

¹²See *County of Westchester*, 31 PERB ¶3035 (1998).

First, the City argues that a demand to negotiate is a condition precedent to an unlawful refusal to negotiate under §209-a.1(d). Because USWA did not affirmatively seek to negotiate concerning the City's decision to privatize the in-issue work, the City contends that it had no duty to bargain. However, that argument overlooks the difference between improper practice charges that are premised on a refusal to negotiate on demand and those that are premised on a unilateral change in existing terms and conditions of employment. As we held in *Germantown Central School District*,¹³ a unilateral subcontract of unit work

is itself a per se rejection of the bargaining process and a refusal to bargain. No demand to bargain is necessary in such circumstance. A demand to bargain is necessary only to those §209-a.1(d) allegations which are grounded upon a refusal to bargain pursuant to a specific demand. A refusal to bargain premised upon a unilateral change in a mandatory subject of negotiation is a violation of the Act separate from a refusal to bargain pursuant to demand.
[footnote omitted]

Here, the alleged violation of §209-a.1(d) is also premised on a unilateral decision to subcontract unit work, not a refusal to negotiate on demand. Therefore, a demand to negotiate is not a condition precedent to the violation found.¹⁴

¹³26 PERB ¶3003, at 3007 (1993), rev'd on other grounds, sub nom. *Germantown Cent. Sch. Dist. v. PERB*, 205 A.D.2d 961, 27 PERB ¶7009 (3d Dep't 1994).

¹⁴*Roma v. Ruffo*, __ N.Y.2d__, 1998 WL 796862 (Nov. 18, 1998). See also *Odessa-Montour Cent. Sch. Dist.*, 28 PERB ¶3013 (1995), rev'd on other grounds, sub nom. *Odessa-Montour Cent. Sch. Dist. v. PERB*, 228 A.D.2d 892, 29 PERB ¶7009 (3d Dep't 1996).

PERB v. City of Buffalo,¹⁵ upon which the City relies, does not warrant a contrary conclusion. There, Supreme Court denied PERB's application for injunctive relief under §209-a.4 of the Act. Perceiving the alleged violation to be a refusal to negotiate on demand, and finding neither a demand by the union nor an unwillingness to negotiate by the City, the Court held that there was no reasonable cause to believe that the City violated §209-a.1(d). Here, there is no question that the charge is premised only on a unilateral change in existing terms and conditions of employment, not a refusal to negotiate on demand.

The other cases on which the City relies are also inapposite.¹⁶ Each involves the duty to negotiate concerning the impact that a nonmandatory decision has on terms and conditions of employment. Although we have held that the duty to negotiate impact arises only on demand, here, the City's decision to subcontract is itself mandatorily negotiable.

The City's second waiver argument is a hybrid of its first. According to the City, USWA waived its bargaining rights because it did not seek to negotiate concerning the City's decision to subcontract the work after learning of its plans in June or early July 1996. Again, the City misunderstands its statutory bargaining obligations.

The party to a bargaining relationship that seeks to change existing terms and conditions of employment must obtain that change through collective negotiations.

¹⁵30 PERB ¶7005 (Sup. Ct. Albany Co. 1997).

¹⁶*North Babylon Union Free Sch. Dist.*, 7 PERB ¶3027 (1974); *County of Chemung*, 18 PERB ¶4568 (1986); *Town of Oyster Bay*, 12 PERB ¶4510, aff'd, 12 PERB 3086(1979).

Therefore, just as an employee organization must affirmatively seek to negotiate to obtain the change that it desires, so too must a public employer affirmatively seek to negotiate to obtain the change that it desires. If either party refuses to negotiate on the other's demand, it violates the duty to negotiate under the Act. However, a public employer's duty to seek to negotiate concerning a change that it desires is not shifted to the employee organization simply by announcing that it is going to implement the change.

In *CSEA v. Newman*,¹⁷ the Appellate Division held (citations omitted):

A waiver is 'the intentional relinquishment of a known right with both knowledge of its existence and an intention to relinquish it. [Citation omitted] Such a waiver must be clear, unmistakable and without ambiguity [The charging party's] failure to demand negotiations may have been inexplicable, but it should not be construed as a waiver.

Simply put, mere inexplicable silence or inaction by an employee organization that has been notified of an impending change in terms and conditions of employment does not establish a waiver of its bargaining rights. Thus, in *Germantown Central School District, supra*, we held that our prior decisions concerning waiver by silence or inaction remain persuasive only to the extent that they are consistent with *CSEA v. Newman*.¹⁸

¹⁷88 A.D.2d 685, 686, 15 PERB ¶7011, at 7021-22 (3d Dep't 1982).

¹⁸See *Onteora Cent. Sch. Dist.*, 16 PERB ¶3098, at 3164, n. 4 (1983); *City of White Plains*, 13 PERB ¶3059 (1980); *State of New York (State Univ. of New York at Albany)*, 13 PERB ¶3044 (1980), *conf'd in part, annulled in part, sub nom. CSEA v. Newman*, 88 A.D.2d 685, 15 PERB ¶7011 (3d Dep't 1982), *appeal dismissed*, 57 N.Y.2d 775, 15 PERB ¶7020 (1982); *County of Rensselaer*, 8 PERB ¶3039 (1975); *Schenectady County Community College*, 6 PERB ¶3027 (1973); *State of New York*, 6 PERB ¶3005 (1973).

Here, as in *CSEA v. Newman*, the City argues only that USWA was aware of its intentions and that it did not seek to negotiate concerning the decision. At best, such circumstances show only an inexplicable failure to demand negotiations. But they do not clearly and unambiguously establish that USWA intentionally relinquished its bargaining rights regarding the decision to subcontract its exclusive unit work.¹⁹

Therefore, as in *Germantown, supra*, the City's reliance on *County of Rensselaer*,²⁰ *City of White Plains*,²¹ and *Onteora Central School District*,²² is unpersuasive. Indeed, the undisputed facts as found by the ALJ establish that USWA opposed the City's plans to privatize the work, and that it consistently tried to convince the City to continue using unit employees. Such circumstances are entirely inconsistent with a waiver of bargaining rights.²³ Therefore, we reject the City's claim that USWA waived its bargaining rights.

Finally, the City claims that it satisfied whatever obligation that it may have had to negotiate with USWA concerning its decision to privatize the work. Its argument is based on discussions and correspondence between USWA president Soro and various City officials. Characterizing those discussions and correspondence as negotiations

¹⁹In any event, the record does not establish that the City notified USWA that it was definitively going to subcontract the work until December 3. Until then, the City's communications with USWA express only that it was contemplating such action.

²⁰*Supra* note 18.

²¹*Supra* note 18.

²²*Supra* note 18.

²³See *Odessa-Montour Cent. Sch. Dist.*, *supra* note 14.

and invitations to negotiate, the City claims that it satisfied its bargaining obligations under the Act. We disagree.

The ALJ correctly held that the relevant discussions and invitations between the City and USWA did not constitute negotiations under the Act. Indeed, the record shows that the City merely solicited USWA's comments, along with those of the general public, concerning its draft request for proposals, that it solicited bargaining over only the impact of its decision to subcontract the work, and that it analyzed USWA's assessment of the relative costs of privatizing the work as compared to keeping it in house. These events do not constitute collective bargaining. That USWA advocated in favor of continuing to use unit employees at meetings of the Common Council while City officials advocated for privatization also does not constitute negotiations under the Act.²⁴ At best, these events show that the City simply afforded USWA an opportunity to dissuade it from privatizing the work and that it was willing to negotiate concerning the impact of its decision. Even if we were to assume that these events constituted collective bargaining, the City was still not free to act unilaterally under the circumstances presented here.²⁵ There is no evidence that the City bargained to impasse, that there was a compelling operational need to privatize the work and that it was willing to continue bargaining after privatizing the work.

²⁴See *City of Poughkeepsie v. Newman*, 95 A.D.2d 101, 16 PERB ¶7021 (3d Dep't 1983), *appeal dismissed*, 60 N.Y.2d 859, 16 PERB ¶7027 (1983), *leave to appeal denied*, 62 N.Y.2d 608, 17 PERB ¶7009 (1984); *Saratoga Springs Sch. Dist.*, 11 PERB ¶3037 (1978), *conf'd sub nom. Saratoga Springs City Sch. Dist. v. PERB*, 68 A.D.2d 202, 12 PERB ¶7008 (3d Dep't 1979), *leave to appeal denied*, 47 N.Y.2d 711, 12 PERB ¶7012 (1979).

²⁵See *Wappingers Cent. Sch. Dist.*, 5 PERB ¶3074 (1972) and 19 PERB ¶3037 (1986); *Cohoes City Sch. Dist.*, 12 PERB ¶3113 (1979).

We note that the City took exception to the ALJ's determination that Article 3.1 of the City/USWA collective bargaining agreement establishes a contractual waiver.²⁶ However, the City offers no arguments in support. Nevertheless, whether asserted as a waiver, or as evidence that the City satisfied its duty to negotiate under the Act,²⁷ we find, as did the ALJ, that the contractual language does not give the City the right to privatize unit work.²⁸

Therefore, we reject the City's argument that it satisfied its duty to negotiate under the Act.

We now turn to the remedy. We find that it is appropriate to modify the ALJ's remedial order. First, the ALJ's order did not address the employees who were transferred to the City's Street Construction Division as a result of the subcontract with Modern Disposal. We order that they be offered reinstatement to their former positions under the same terms applicable to the employees who were terminated. Second, the ALJ directed the City to restore the prevailing terms and conditions of employment for the reinstated employees. We find it appropriate to clarify that the prevailing terms and conditions of employment that must be restored are those that existed at the time the City transferred or terminated the employees, except to the extent that those terms and conditions of employment may have been modified in subsequent negotiations with USWA. In all other respects, we adopt the order of the ALJ with the understanding that

²⁶The text of Article 3.1 is set forth in the ALJ's decision.

²⁷See *County of Nassau (Police Dep't)*, 31 PERB ¶3064 (1998).

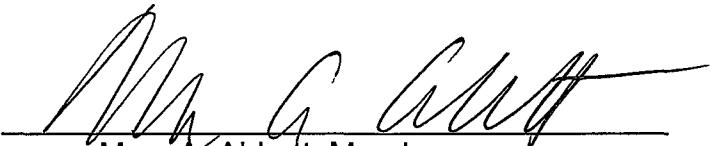
²⁸Compare *County of Livingston*, 26 PERB ¶3074 (1993); *Town of Greece*, 26 PERB ¶3032 (1993); *Sachem Cent. Sch. Dist.*, 21 PERB ¶3021 (1988).

the make-whole order encompasses such offsets for earnings denied as a result of the employees' loss of employment or unemployment insurance benefits received, as appropriate. As modified, we direct the City to sign and post the attached notice at all locations customarily used to post notices of information to unit employees.

SO ORDERED.

DATED: December 10, 1998
Albany, New York


Michael R. Cuevas, Chairman


Marc A. Abbott, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees represented by the United Steelworkers of America, Local Union 15315 (USWA) that the City of Niagara Falls will:

1. Restore the work of the collection and disposal of residential and commercial garbage and bulk refuse to the employees in the unit represented by USWA.
2. Offer all employees who were terminated or transferred as a result of the City's subcontract with Modern Disposal Services, Inc. reinstatement to their former positions under the prevailing terms and conditions of employment as they existed when the subcontract was entered, except to the extent those prevailing terms and conditions of employment may have been modified in subsequent negotiations with USWA.
3. Make each such employee whole for any wages and benefits lost as a result of the subcontract with Modern Disposal Services, Inc. from the date of termination or transfer to the effective date of their reinstatement, with interest at the currently prevailing, maximum legal rate.

Dated

By
(Representative) (Title)

CITY OF NIAGARA FALLS

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

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 545, AFL-CIO,**

Petitioner,

- and -

CASE NO. C-4642

COUNTY OF ONEIDA,

Employer,

- and -

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

Intervenor.

**BLITMAN & KING LLP (CHARLES E. BLITMAN and CHARLES C. SPAGNOLI
of counsel), for Petitioner**

**HANCOCK & ESTABROOK, LLP (JOHN F. CORCORAN of counsel), for
Employer**

**RICHARD M. GREENSPAN, P.C. (RICHARD M. GREENSPAN of counsel)
for Intervenor**

BOARD DECISION AND ORDER

This case is before us pursuant to exceptions filed by the International Union of Operating Engineers, Local 545, AFL-CIO (Local 545) to a decision by the Director of

Public Employment Practices and Representation (Director). Local 545 has petitioned to represent a unit of County of Oneida (County) employees currently represented by the United Public Service Employees Union Local 424, A Division of United Industry Workers District Council 424 (UPSEU).

In response to the petition, UPSEU alleged that Local 545 is not an employee organization within the meaning of §201.5 of the Public Employees' Fair Employment Act (Act). The County has not taken any position on that issue. After a hearing, the Director held that Local 545 is not an employee organization as defined because its by-laws and the International's constitution denied County employees an "assurance" that they alone would control their contract negotiations and ratification. In dicta, the Director also suggested that provisions in the International's constitution, which binds Local 545, might prevent Local 545 from having the autonomy needed to function as a certified bargaining agent.¹

By letter dated December 8, 1998, Local 545 has requested that we not hear argument or decide its exceptions at this date. Local 545 represents that there have been material changes in its by-laws sufficient to remove any question as to its status as employee organization. Moreover, it requests that it be afforded an opportunity to submit evidence relating to the Director's articulated concerns regarding its relationship with the International. UPSEU and the County have consented to the request made by Local 545.

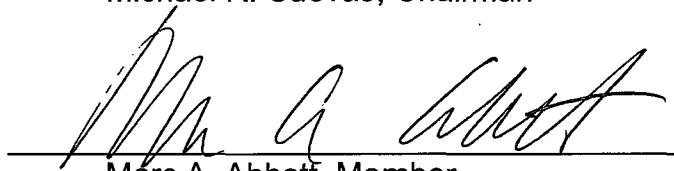
¹*United Public Service Employees Union Local 424*, 27 PERB ¶3053 (1995).

The case is, accordingly, remanded to the Director for further investigation, including the receipt of new or additional evidence relevant to Local 545's status as an employee organization. SO ORDERED.

DATED: December 10, 1998
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**ELLICOTTVILLE SCHOOL-RELATED PERSONNEL
UNITED, NYSUT,**

Petitioner,

- and -

CASE NO. C-4812

ELLICOTTVILLE CENTRAL SCHOOL DISTRICT,

Employer.

ERNEST HAND, JR., for Petitioner

LINDA QUICK, ESQ., for Employer

BOARD DECISION AND ORDER

On September 10, 1998, the Ellicottville School-Related Personnel United, NYSUT (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Ellicottville Central School District (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: All support personnel including but not limited to:

Teacher aide, typist, library aide, aide (special education), office worker, office clerk, receptionist, cook manager, food service helper, school lunch cook, cashier, bus driver, school bus mechanic, auto mechanic, cleaner, building & grounds, maintenance worker, substitute cleaner.

Excluded: Teaching assistants, school nurse, superintendent's secretary.

Pursuant to that agreement, a secret-ballot election was held on November 13, 1998, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: December 10, 1998
Albany, New York


Michael R. Cuevas
Michael R. Cuevas, Chairman


Marc A. Abbott
Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**OFFICE AND PROFESSIONAL EMPLOYEES
INTERNATIONAL UNION, LOCAL 212,**

Petitioner,

-and-

CASE NO. C-4744

CITY OF NORTH TONAWANDA,

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 Office and Professional Employees International Union, Local 212, 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: City Accountant, Assessor, Building Inspector, Code Enforcement/Plumbing Inspector, Public Works Superintendent, Assistant Public Works Superintendent, Waste Water Treatment Plant Superintendent, Director of Youth, Recreation and Parks, City Clerk, City Engineer, Director of Emergency services (Civil Defense Director), Water Treatment Plant Superintendent.

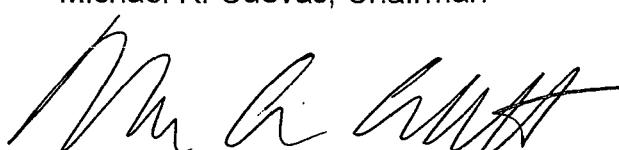
Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Office and Professional Employees International Union, Local 212. 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: December 10, 1998
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member