

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

In the Matter of

**WATERTOWN EDUCATION ASSOCIATION,
NYSUT/AFT #3091,**

Charging Party,

- and -

CASE NO. U-18413

WATERTOWN CITY SCHOOL DISTRICT,

Respondent.

TIMOTHY FAY, for Charging Party

ALFRED T. RICCIO, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Watertown Education Association, NYSUT/AFT #3091 (Association) to an "interim" decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director) on a charge against the Watertown City School District (District).¹ The Association alleges in this charge that the District violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when, on August 15, 1996, and again on September 11, 1996, it

¹Another charge (U-18414) filed by the Watertown Instructional Teacher Assistants Association, NYSUT/AFT #3937 was consolidated with this charge for decision. No exceptions have been taken to the Assistant Director's dismissal of that part of U-18414 relating to the September 11, 1996 change in health benefits.

unilaterally changed the health benefits of employees in the unit which the Association represents.

The Assistant Director dismissed that part of the charge concerning the alleged September 11, 1996 change in health benefits because the Association had not filed the notice of claim required by Education Law §3813 and the District had not received the charge until one day after the three-month notice of claim period in Education Law §3813 had elapsed. The Assistant Director ordered the charge processed as to the alleged change in benefits made on August 15, 1996 because the Association had filed a timely notice of claim as to that alleged change.² The Assistant Director rejected the Association's argument that its notice of claim filed regarding the August 15, 1996 change in benefits should satisfy its notice of claim obligation regarding the September 11, 1996 change in benefits because the latter change was merely a continuation of the earlier unlawful change.

The Association argues in its exceptions that the Assistant Director was incorrect in treating the August 15 and September 11 changes in health benefits as separate claims of impropriety for notice of claim purposes.

The District argues that the exceptions should not be considered because they were filed too late, but that the Assistant Director's decision is correct in any event and should be affirmed.

²No exceptions have been taken to this aspect of the Assistant Director's decision.

Having reviewed the record and considered the parties' arguments, we dismiss the exceptions as premature.

The parties have proceeded upon an assumption that the exceptions to the Assistant Director's "interim" decision are filed as of right. They are not. The Assistant Director's decision merely reduced to writing a ruling regarding which parts of the charge would be processed. That ruling is no different in character than the great many other formal and informal rulings made during the processing of an improper practice charge. None of these preliminary rulings is subject to our review as of right until a decision on the charge is final. When, as here, proceedings are still pending before the Director, the Assistant Director or an Administrative Law Judge, appeal from a ruling adversely affecting a party is by permission only pursuant to §204.7(h)(2) of our Rules of Procedure (Rules).

Our consistent interpretation of that rule, and its corollary pertaining to the processing of representation petitions,³ has been that permission to appeal from a ruling made incidental to the processing of a case will not be granted unless there are extraordinary circumstances warranting that review.⁴ No extraordinary circumstances are presented in a routine claim that a presiding officer's ruling is incorrect. Exceptions

³Rules §201.9(c)(4).

⁴*United Transp. Union, Local 1440 (LoBianco)*, 31 PERB ¶3027 (1998); *Town of Shawangunk*, 29 PERB ¶3050 (1996); *State of New York (Goonewardena)*, 28 PERB ¶3052 (1995).

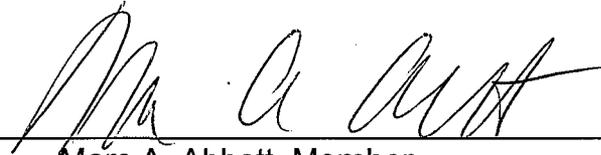
taken to the Assistant Director's ruling will be as of right upon his final disposition of the charge, if those exceptions comply with the applicable provisions of our Rules.

For the reasons set forth above, the exceptions are dismissed as premature without reaching the merits of any of the parties' arguments. SO ORDERED.

DATED: March 23, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

POLICE ASSOCIATION OF GREENBURGH, INC.,

Charging Party,

- and -

CASE NO. U-20350

TOWN OF GREENBURGH,

Respondent.

THOMAS J. TROETTI, ESQ., for Charging Party

VINCENT TOOMEY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Police Association of Greenburgh, Inc. (Association) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing, as deficient, a charge against the Town of Greenburgh (Town). The Association alleges in the charge, as twice amended, that the Town violated §209-a.1(a), (b), (c) and (d) of the Public Employees' Fair Employment Act (Act) when the Town's Chief of Police, John Kapica, distributed to all employees in the Association's unit a June 16, 1998 memorandum he wrote in response to comments attributed to him by the Association's president, John Dee. At a meeting of the Association on May 14, 1998, Dee told the membership that Kapica had

referred to Dee and the Association's attorney as "sleazebags and shysters", a remark Dee characterized as "unprofessional". In his June 16 memorandum, Kapica gave his explanation of the circumstances for the comment he essentially admits having made. According to his memorandum, Kapica made the comment during a discussion about an Association grievance concerning the vacation leave entitlements of retired Detective Kevin Morgan. Kapica expressed an opinion that Dee violated the confidentiality of meetings between labor and management by revealing Kapica's comment to the membership. Kapica also explained in the memorandum why he thought the Morgan grievance had no merit and why it was a "contemptible 'act' rooted not in a deprivation of rights but of greed".

The Director dismissed the alleged violations of §209-a.1(a), (b) and (c) of the Act upon his conclusion that Kapica's memorandum was not threatening or coercive in tone or content despite it being "to some extent vitriolic in nature". The Director did not address, however, the alleged §209-a.1(d) allegation raised under the second amendment to the charge filed in November 1998.

The Association argues in its exceptions that the Director erred in accepting as true the assertion in Kapica's memorandum that his remark about Dee and the Association's attorney was made at a meeting about the Morgan grievance. The Association reasserts that Kapica's remark was made at a meeting involving disciplinary charges at which the Morgan grievance was not even discussed. The Association argues that Kapica used Dee's revelation to the membership about the remark Kapica had made about him and the Association's attorney as an excuse to

threaten unit employees about pursuing or supporting the Morgan grievance or bringing other similar grievances and to deal directly with them on those subjects.

The Town, which represents that Kapica did make his remark about Dee and the Association's attorney during a discussion about the Morgan grievance, argues that the Director was correct in dismissing the charge because Kapica's memorandum does not set forth any violation of the Act as a matter of law.

Having reviewed the record and considered the parties' arguments, we affirm the Director's decision and also dismiss the §209-a.1(d) allegation which was not decided by the Director.

It appears from the Director's decision that he believed that Kapica's remarks about Dee and the Association's attorney were made during a discussion about the Morgan grievance. That conclusion, however, is contrary to the Association's allegation, which must be assumed to be true for purposes of the Director's initial review of the charge.¹ Assuming that Kapica's remarks about Dee and the Association's attorney were made during a meeting on disciplinary charges, as the Association alleges, and not during a discussion about the Morgan grievance, the charge still fails to set forth a violation of the Act.

The Association's §209-a.1(a), (b) and (c) allegations are grounded upon a claim that Kapica's June 16 memorandum was an effort to dissuade Morgan from pursuing his grievance and to dissuade others in the unit from supporting that grievance and

¹*Jacob Javits Convention Ctr. of New York*, 20 PERB ¶3030 (1987), *aff'g* 19 PERB ¶4626 (1986).

from filing similar grievances by "poisoning" the membership's support for those grievances and "assaulting" the legitimacy of those grievances and the integrity of the Association's representatives. We do not agree with the Association's characterization of Kapica's memorandum.

~~Kapica's comments about Dee and the Association's attorney are not alleged by~~ the Association to be improper. Even if those comments were not made during a discussion of the Morgan grievance, Kapica was still privileged to express his opinion about the Morgan grievance in his June 16 memorandum. The issue is whether Kapica's statements in the June 16 memorandum about the Morgan grievance were threatening or otherwise unlawful, not when or why he made the remark about Dee and the Association's attorney.

Both parties to a bargaining relationship have substantial privileges under the Act to communicate their opinions regarding employment issues to persons outside of that immediate bargaining relationship, including unit employees. The "labor relations process must tolerate robust debate of employment issues, even if occasionally intemperate."² Specifically with respect to employer speech, we have held that an employer may communicate directly with unit employees about employment issues so long as the communication does not contain threats of reprisal for their exercise of

²*Village of Scotia*, 29 PERB ¶13071, at 3170 (1996) (protecting employee speech against disciplinary consequence).

protected rights and does not promise them benefits for refraining from exercising those rights.³

In assessing whether any speech violates the Act, we reject the Association's argument that the speaker's subjective intent or the recipient's subjective reaction to it is relevant. The test for whether speech violates the Act is a purely objective one. With employer speech, we examine only whether a reasonable employee would view the speech as threatening or coercive in the context in which the speech is delivered. To hold otherwise would make a party's right to speak dependent upon the reaction of the most sensitive person in the group to whom the speech is addressed, an obviously unsatisfactory standard producing results inconsistent with the policies of the Act favoring "robust debate" of employment issues.

Kapica's June 16 memorandum could not be threatening or coercive to a reasonable employee reading it. The memorandum repeatedly makes it clear that Kapica's remarks reflect only his personal opinion about what he considers to be a meritless grievance. He refers to the Association's right to bring grievances for its members and he states specifically that he "recognize[s] and fully support[s] the Association's right to bring a grievance when they suspect a violation of the contract has occurred" Kapica's memorandum further makes it clear that the disparaging remarks attributed to him by Dee "were not meant to describe either President Dee or the PBA's counsel personally but rather their tactics in this particular situation." No

³*E.g., City of Yonkers*, 23 PERB ¶13055 (1990).

reasonable employee reading Kapica's memorandum would believe that they were being threatened should the Morgan grievance proceed or should other grievances like it be filed in the future. The unit employees surely understood after reading the memorandum that Kapica thought the Morgan grievance had no merit, that he questioned the motives of the persons responsible for that grievance, and that he was both angered and disappointed by what he considered to have been Dee's breach of trust. That, however, does not make the memorandum even arguably improper.

The expression of opinion alone is not unlawful even if the effect of that expression is to cause a grievance to be dropped or others never to be filed.⁴ If the Association believed that Kapica's comments about the Morgan grievance were inaccurate or out of context, it could have responded to his memorandum. To make unlawful employer speech which is not accompanied by improper threats or promises would raise serious constitutional issues and would be inconsistent with the policies of the Act. In the latter regard, we have protected a wide variety of speech by employees and union officers.⁵ Employer speech which is devoid of threat or promise deserves similar protection lest we unbalance the parties' bargaining and grievance relationships.

The Director did not address the direct dealing allegation raised by the second amendment to the charge. No point is served by remanding this refusal to bargain

⁴*City of Albany*, 17 PERB ¶13068, *aff'g* 17 PERB ¶14525 (1984).

⁵*State of New York (Dep't of Correctional Servs.)*, 31 PERB ¶13072 (1998); *Plainedge Union Free Sch. Dist.*, 31 PERB ¶13063 (1998); *Village of Scotia*, *supra* note 2, *conf'd*, 241 A.D.2d 29, 31 PERB ¶17008 (3d Dep't 1998); *Binghamton City Sch. Dist.*, 22 PERB ¶13034 (1998); *Plainedge Pub. Sch.*, 13 PERB ¶13037 (1980).

allegation to the Director at this time, however, because that allegation is now before us and it is deficient as a matter of law upon the facts as presented.

Kapica's memorandum contains nothing even suggesting that grievances would be adjusted in any way other than through the Association. Indeed, the text of the memorandum is to the contrary. Moreover, Kapica made a settlement proposal to Dee affecting the Morgan grievance on June 17, 1998, a fact completely inconsistent with any direct dealing violation. As the charge does not contain any facts evidencing a refusal to negotiate on a direct dealing theory, or any other, that aspect of the charge is also properly dismissed.

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

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

DATED: March 23, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

In the Matter of

DORIS TOSHUNBE,

Charging Party,

- and -

CASE NO. U-20529

BUFFALO BOARD OF EDUCATION,

Respondent.

DORIS TOSHUNBE, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Doris Toshunbe to a decision by the Director of Public Employment Practices and Representation (Director) dismissing her charge which alleges that the Buffalo Board of Education (District) violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) by instituting disciplinary charges against her which resulted in a two-week suspension. Toshunbe was notified that the charge, as filed and as amended, was deficient. She declined to withdraw the charge and it was dismissed by the Director as untimely, as failing to set forth any facts upon which a finding of improper motivation by the District could be based and as beyond PERB's jurisdiction for those allegations concerning the arbitrator's conduct at her disciplinary arbitration hearing.

Toshunbe argues in her exceptions that the Director erred factually and legally in his decision. The District supports the Director's decision.

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

Toshunbe, a typist employed by the District, alleges in her charge that she was served with disciplinary charges by the District on February 10, 1998. The District sought her termination and alleged 21 counts of incompetence, 12 counts of insubordination, and 11 counts of misconduct. Toshunbe was represented by an attorney at the arbitration hearing on the disciplinary charges held on June 29 and 30, 1998. Toshunbe further alleges that the arbitrator, in his October 16, 1998 decision, dismissed the charges, despite there being no evidence that the District had ever issued any warnings or disciplinary notices to Toshunbe. Apparently, though, based on the disciplinary charges before him, the arbitrator found that Toshunbe was "stubborn, abstinent (sic) and lack (sic) respect for authority," and he ordered a two-week suspension without pay for Toshunbe, noting that the District could consider it a progressive disciplinary action.

The disciplinary charges were brought in February 1998, more than four months before the improper practice charge was filed. These allegations are clearly untimely.¹ Those allegations in the charge relating to the conduct of the arbitration hearing are

¹Section 204.1(a)(1) of our Rules of Procedure requires improper practice charges to be filed within four months of the acts alleged to violate the Act.

also untimely as the hearing was held on June 29 and 30, 1998, and the charge was not filed until December 11, 1998.

The allegations related to the arbitration award itself, received by Toshunbe on October 16, 1998, are timely. However, as the Director determined, review of an arbitrator's award is not available in an improper practice proceeding against an employer. Review of that award is available under Civil Practice Law and Rules (CPLR) Article 75. "To avoid our becoming a substitute for or an alternative to the statutory review procedures, a CPLR proceeding should be the preferred mechanism for the review, modification or vacatur of disciplinary arbitration awards, absent extraordinary circumstances."²

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

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

DATED: March 23, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

²See *Arlington Cent. Sch. Dist.*, 26 PERB ¶3053, at 3092 (1993).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BREWSTER PHILLIPS,

Charging Party,

- and -

CASE NO. U-20535

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Respondent,

-and-

HAUPPAUGE UNION FREE SCHOOL DISTRICT,

Employer.

BREWSTER PHILLIPS, *pro se*

**RICHARD M. GREENSPAN, ESQ. (ERIC J. LaRUFFA of counsel), for
Respondent**

LAMB & BARNOSKY, LLP (ROBERT H. COHEN of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Brewster Phillips to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his charge that the United Public Service Employees Union (Union) violated §209-a.1(c) and (d) and §209-a.2(c) of the Public Employees' Fair Employment Act (Act) in its handling of a grievance on his behalf. Phillips' employer, the Hauppauge Union Free

School District (District), was not a named respondent in the original improper practice charge. The District is, nevertheless, a statutory party pursuant to §209-a.3 of the Act.

Phillips' charge consists of a brief statement under the "Details of Charge" section of the improper practice charge form in which Phillips alleges that another employee, with less seniority than he, had been appointed to a position sought by Phillips. Phillips further alleges that he was represented at a Step 2 grievance proceeding by the Union and that certain documents that were to have been produced by the District at the proceeding were not provided. The charge is continued in a voluminous packet of over one hundred pages of attachments to the charge, consisting of letters by Phillips, the Union or District representatives, memoranda relating to Phillips' employment and other miscellaneous documents.

Phillips was notified that the charge was deficient in that the District was not named as a respondent, that an individual lacked standing to allege a violation of §209-a.1(d) of the Act, no facts were pled which would support a finding of a violation of §209-a.1(c) of the Act and that the charge, while having numerous attachments, did not specify what conduct by the Union was alleged to violate §209-a.2(c) of the Act. Phillips filed an amendment to the charge. The Director, finding that the charge remained deficient, dismissed it.

In his exceptions, Phillips alleges that the Director erred, arguing that his amendment corrected the noted deficiencies with the charge. Both the District and the Union support the Director's decision.

Based upon our review of the record and our consideration of the parties' arguments, the decision of the Director is affirmed.

Phillips is employed by the District as a custodian, on the second, or night, shift. The allegations in the charge stem from Phillips' desire to be appointed to a position on the day shift to which another, less senior, employee had been appointed. With the Union's assistance, Phillips grieved the appointment. At the second step hearing on the grievance, at which Phillips was represented by the Union, the District representative stated that it had the option to appoint the candidate who, in its opinion, was best for the position. Shortly thereafter, the Union advised Phillips that it was not going to pursue the grievance to the third and final step of the grievance procedure, nonbinding arbitration. Phillips alleges that the Union's stated position was that it had previously lost a similar grievance and that it felt further pursuit of the grievance might jeopardize Phillips' chances for a promotion or another position in the future.

Phillips argues throughout the documents attached to his charge that he is qualified for the position, that he disagrees with the District's definition of "opinion" and that his grievance was meritorious and should have been pursued by the Union.¹

¹Phillips also alleges that the amount of time that elapsed between the second step hearing and the date the Union notified him that it was not pursuing the grievance -- twelve days -- is itself violative of the Act. A lapse of seven working days is not the type of delay that we have previously found to be violative of the duty of fair representation. See *Nassau Educ. Chapter of the Syosset Cent. Sch. Dist. Unit, Civil Serv. Employees Ass'n, Inc. (Marinoff)*, 11 PERB ¶3010, at 3020 (1978), where the union's 13-month delay in responding to a grievance was found to be "grossly irresponsible conduct."

Phillips' charge against the District, assuming there is any given that the District was not named as a respondent, was properly dismissed by the Director. An individual employee has no standing to allege a violation of §209-a.1(d) of the Act.²

As to the alleged violation of §209-a.1(c), Phillips alleges no activities or actions on his part which involve the exercise of protected rights. Also, there are no facts pled which would support a finding that the District's failure to appoint Phillips to the day shift vacancy was improperly motivated. As the elements necessary to sustain the finding of a violation of §209-a.1(c) of the Act are absent from Phillips' pleadings, the charge against the District was properly dismissed.³

As against the Union, we have continuously held that an employee organization does not have the duty to take every grievance presented to it or to process every grievance through the grievance procedure as long as its decision is promptly communicated to the employee and is not arbitrary, discriminatory or made in bad faith.⁴ Here, the Union took Phillips' grievance through two steps of the grievance

² See, e.g., *City Sch. Dist. of the City of New York and United Fed'n of Teachers*, 27 PERB ¶¶3072 (1994); *Local 100, Transport Workers Union of America*, 27 PERB ¶¶3008 (1994); *City Sch. Dist. of the City of New York*, 22 PERB ¶¶3012 (1989).

³ See, e.g., *Green Chimneys Children's Servs.*, 31 PERB ¶¶3014 (1998); *New Paltz Cent. Sch. Dist. and New Paltz United Teachers*, 31 PERB ¶¶3013 (1998); *State of New York (OMH)*, 24 PERB ¶¶3032 (1991); *County of Cattaraugus and Sheriff of Cattaraugus County*, 24 PERB ¶¶3001 (1991); *County of Erie Bd. of Elections*, 19 PERB ¶¶3069 (1986); *City of Salamanca*, 18 PERB ¶¶3012 (1985).

⁴ *Nassau Educational Chapter of the Syosset Cent. Sch. Dist. Unit, Civil Serv. Employees Ass'n, Inc.*, *supra* note 1; *Faculty Ass'n of Hudson Valley Community College*, 15 PERB ¶¶3080 (1982).

procedure, made a reasoned decision not to pursue the grievance any further and communicated its decision to Phillips in a timely fashion. While Phillips disagrees with the Union's assessment of the potential merit of his grievance, he has pled no facts which would establish that the Union violated its duty of fair representation in the handling and disposition of his grievance.

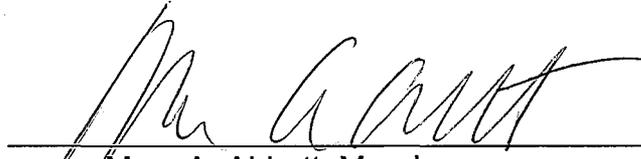
Based on the foregoing, the exceptions are denied and the decision of the Director is affirmed.

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

DATED: March 23, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

In the Matter of

**GREENBURGH NO. 11 FEDERATION OF
TEACHERS,**

Charging Party,

- and -

CASE NO. U-20047

**GREENBURGH NO. 11 UNION FREE SCHOOL
DISTRICT,**

Respondent.

JEFFREY R. CASSIDY, for Charging Party

**SHAW & PERELSON, LLP (DAVID S. SHAW and SUSAN G. WHITELEY of
counsel), for Respondent**

**MURRY F. SOLOMON, for NEW YORK STATE ASSOCIATION OF
MANAGEMENT ADVOCATES FOR SCHOOL LABOR AFFAIRS, *AMICUS
CURIAE***

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Greenburgh No. 11 Federation of Teachers (Federation) to a decision by an Administrative Law Judge (ALJ) on a charge filed against the Greenburgh No. 11 Union Free School District (District). The Federation alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it submitted to fact-finding a demand to delete the class

size provision¹ in these parties' long expired agreement² from any successor collective bargaining agreement they may reach.

On a stipulated record, the ALJ dismissed the charge, holding that the conversion theory of negotiability under our decision in *City of Cohoes*³ (hereafter *Cohoes*) is appropriately extended to negotiations involving school districts. In *Cohoes*, we held that all legal terms in a collective bargaining agreement between a union representing police officers or fire fighters and their employer⁴ are mandatorily negotiable "terms and conditions of employment" within the meaning of the Act⁵ by virtue of the incorporation of those terms into the parties' agreement, regardless of the subject nature of those contract terms.

¹The District is a "special act" school district serving emotionally disturbed students. The contract term restricts classes to no more than eleven students unless the parties agree otherwise.

²The parties' last agreement expired on June 30, 1993, and there is still an impasse over a salary allocation for the 1992-93 school year.

³31 PERB ¶3020, *appeal dismissed as premature*, 31 PERB ¶7017 (Sup. Ct. Albany County 1998) (appeal pending). We applied the *Cohoes* conversion theory of negotiability in *City of Utica*, 31 PERB ¶3075 (1998). Our decision in *City of Utica* was recently confirmed. *Utica Professional Firefighters Ass'n, Local 32 v. Cuevas*, 32 PERB ¶7005 (Sup. Ct. Albany County 1999). In confirming, the Court approved our application of *Cohoes* as a "legitimate exercise by the Board in defining the scope of mandatory negotiations."

⁴We left open in *Cohoes* the question whether the supplemental theory of negotiability should be extended to negotiations involving any other types of employers and employees.

⁵Act §201.4.

Although noting that class size by its subject nature is not a mandatory subject of negotiation,⁶ the ALJ held that class size became a mandatorily negotiable subject for these parties under *Cohoes*. Therefore, the District's insistence at fact-finding upon its demand to delete the existing contractual class size provision was not a refusal to negotiate.

The Federation argues in its exceptions that *Cohoes* should not be extended to negotiations involving school district personnel. In response, the District argues that we should adopt a substantially restricted version of *Cohoes* for negotiations involving school districts, one it has labeled a "removal conversion" theory of negotiability, the details of which are discussed *infra*. As this removal conversion argument was first made in the District's response to the Federation's exceptions, the Federation filed a reply with our permission.⁷ The Federation urges us to reject the District's removal conversion theory of negotiability in favor of a straightforward extension of *Cohoes* if we reject its basic argument that *Cohoes* should not be extended to school district negotiations at all. An *amicus curiae* brief has been filed by the New York State Management Advocates for School Labor Affairs.

Having reviewed the record and considered the parties' and *amicus* arguments, we affirm the ALJ's decision. In affirming, we reject as unpersuasive the arguments

⁶E.g., *West Irondequoit Bd. of Educ.*, 4 PERB ¶3070 (1971), *aff'd sub nom. West Irondequoit Teachers' Ass'n v. Helsby*, 35 N.Y.2d 46, 7 PERB ¶7014 (1974).

⁷Rules of Procedure §204.11.

opposing an extension of *Cohoes* to negotiations involving school district personnel and the District's arguments urging adoption of a removal conversion theory of negotiability.

The Federation advances the following as its basic reasons for not extending *Cohoes* to negotiations involving school districts:

1. ~~The impasse procedures for school districts are materially different from~~ those for public safety personnel and expanding the scope of negotiations in school districts will make it more difficult for the parties to reach agreement because those school district impasse procedures lack finality;

2. An extension of *Cohoes* to school districts will cause litigation to clarify the inherent ambiguity in the *Cohoes* conversion theory of negotiability;

3. Changes in negotiability analysis should be done legislatively.

We address each of these arguments in the order listed.

The parties to negotiations involving school district personnel and those to negotiations involving police and fire officers have identical collective bargaining rights and obligations in all relevant respects except as to the statutory system which becomes applicable if they reach an impasse in their negotiations. Although all public employers and public employees have mediation available to them,⁸ impasses involving police and fire personnel are subject to resolution by compulsory binding interest arbitration.⁹ School district negotiations are not subject to resolution by compulsory

⁸Act §209.3(a).

⁹Act §§209.2 & 209.4.

interest arbitration. If post-mediation fact-finding¹⁰ does not result in a settlement of the impasse, the parties themselves must resolve the impasse by reaching a new collective bargaining agreement.¹¹ PERB may continue to render third-party assistance to help the parties reach an agreement,¹² but an impasse in school district negotiations continues for however long it takes the parties to reach a collective bargaining agreement.

We do not agree with the Federation's argument that this difference in impasse procedures is persuasive reason not to apply *Cohoes* to school district negotiations. There are at least as many of the same reasons to apply a *Cohoes* supplemental theory of negotiability to school district negotiations as there are in police or fire negotiations. Indeed, there is arguably more reason to apply *Cohoes* in negotiations involving school district personnel precisely because the parties' themselves must effect the finality to negotiations in school districts.

Although we detail the analysis hereafter, our core rationale is simple. As the terms of a collective bargaining agreement define the employment-related rights and obligations of the parties to that contract, those contract provisions are terms and conditions of employment. Those terms are naturally the ones most likely to be the focus of the parties' efforts to reach a successor collective bargaining agreement. The

¹⁰Act §209.3(b)-(d).

¹¹Act §209.3(f).

¹²*Id.*

harmonious and cooperative labor relations which the Legislature sees as a means to ensure that there is no disruption of public services¹³ is best achieved by requiring the parties to a contract to negotiate about the deletion, modification or continuation of any legal term they have already agreed to and incorporated into their contract. That proposition being as true for negotiations involving school district personnel as it is for negotiations involving public safety personnel, *Cohoes* is properly applied to both groups of employers and employees. To extend *Cohoes* to negotiations involving school district personnel will better the bargaining and impasse processes. Alternatively, to not extend *Cohoes* would produce results inconsistent with the policies of the Act because it would deny the parties a legal means to compel a discussion about all of the currently prevailing employment terms, a circumstance destined to lead to protracted impasses and a possible interruption in the operations and functions of government.

In beginning our discussion of the first of the Federation's grounds in opposition to an extension of *Cohoes* to negotiations involving school district personnel, it bears emphasis that the impasse procedures applicable in school districts do not lack "finality". It is true that finality to negotiations in school districts is obtained only by the parties themselves by their reaching a collective bargaining agreement and not, as with police or fire negotiations, by an award issued by a third-party panel. Finality exists in either circumstance, only the agents of that finality and the means by which that finality

¹³Act §200.

is achieved differ. But just as an arbitration panel needs the parties' positions with respect to the full range of any disputes between them which involve the terms of their existing collective bargaining agreement, so, too, do the parties themselves, who are the agents of finality for purposes of school district negotiations. These parties should have the legal right to insist upon the negotiation of all of the terms of their collective bargaining agreements, whether or not those terms are mandatorily negotiable under traditional scope of bargaining analysis. To deny parties the legal right to insist upon demands for the deletion, modification or continuation of all the terms of their current agreement only increases the likelihood of their resort to destabilizing and disruptive self-help measures, whether unilateral action by employers or strikes by public employees.

Moreover, should the parties to school district negotiations reach an impasse in their negotiations, the fact finder, just like an interest arbitration panel, should be permitted to hear the parties' positions on all of the issues involving the terms of their existing collective bargaining agreement and to render recommendations on all of those issues as appropriate. Were we to not extend *Cohoes* to school district negotiations, the statutory impasse processes would be prevented from working to maximum advantage, thereby inviting impasses of prolonged duration over items in an agreement forced off the table upon objection by one of the parties to the bargaining relationship.

Both the Federation and the District are mistaken in their assertion that *Cohoes* rests only on the availability of interest arbitration for public safety personnel. Those just happened to be the type of employees who were involved with *Cohoes* and the two

prior cases where a request for the adoption of a supplemental theory of negotiability was made.¹⁴ What drives *Cohoes* fundamentally is the unfairness, both to the parties and the statutory system of collective bargaining itself, of maintaining a strict subject matter negotiability analysis when §209-a.1(e) of the Act continues as a matter of law all terms of an agreement upon expiration of that agreement, regardless of the subject matter addressed by those contract terms. The same bargaining dilemma we discussed in *Cohoes*, which previously faced the parties to police/fire negotiations, faces school district negotiators now. If *Cohoes* is not extended to school district negotiations, the parties to those negotiations would be presented with the full range of the same problems which finally persuaded us in *Cohoes* to expand the scope of mandatory negotiation to include all legal terms of a collective bargaining agreement.

The Federation also argues that the nonbinding nature of a fact-finding report makes an extension of *Cohoes* to school districts inadvisable. The operative theory of fact-finding, however, is that a recommendation by a fact finder on a given issue or set of issues may assist the parties in reaching an agreement. We do not have to know that a fact finder's recommendation will be accepted to find purpose in the recommendation itself. Were we to not extend *Cohoes* to school district negotiations, we would deprive the parties of the value of a neutral's perspective on the issues in the parties' current agreement which may be keeping them from reaching a successor agreement. By permitting that recommendation to be given, whether or not it is

¹⁴*City of Glens Falls*, 30 PERB ¶¶3047 (1997); *Johnstown Police Benevolent Ass'n*, 25 PERB ¶¶3085 (1992).

ultimately accepted by the parties, the reasons which persuaded the Legislature to impose a fact-finding requirement in the first place are clearly given effect.

The Federation next argues that because *Cohoes* makes more subjects mandatorily negotiable, closure by agreement will become more difficult for the parties. We do not, however, share the Federation's view that the parties' right to negotiate about all legal terms in their agreement is undesirable or will have the negative effect the Federation predicts. We have long encouraged parties to negotiate all matters in dispute in recognition that this advances the policies of the Act. To the extent the parties to school district negotiations have accepted our encouragement, an extension of *Cohoes* to school districts merely makes *de jure* what is already *de facto*. To the extent those parties have resisted our encouragement, we now find compelling reasons to grant them the legal right, and to expose them to the legal duty, to bargain subjects in their contracts which they cannot bargain now over objection under traditional negotiability analysis. We simply do not agree with the Federation that an extension of *Cohoes* will make it any more difficult than it already is for the parties to reach an agreement in school district negotiations. Rather, we believe that the body of our law which prevents the parties from negotiating, as of right, all of the terms of their existing agreement, the very terms which may be keeping them from reaching a successor agreement, makes no sense as a matter of logic or policy. Forced nonbargaining does not make the contract issues in dispute disappear, nor does it render them any less important to the parties in the course of their deliberations for a new contract.

We also do not agree with the Federation's assertion that *Cohoes* is ambiguous. Although we recognized that there may be refinements needed to the *Cohoes* conversion theory of negotiability, *Cohoes'* basic construct, covering the vast majority of bargaining situations, is without any ambiguity at all. If the term of an agreement is legal, it is a term and condition of employment which either party may negotiate and insist upon at and after fact-finding. *Cohoes* makes scope of bargaining analysis far easier and it creates far more predictable negotiability outcomes than does traditional subject matter negotiability analysis. Any litigation needed to refine *Cohoes* will be much less than that we have had for many years, and continue to have to date, involving disputes as to whether a given demand is or is not mandatorily negotiable under subject matter analysis.

The Federation also claims that *Cohoes* should not be extended to school district negotiations because there is no reason to believe that traditionally nonmandatory subjects, such as class size, which have not been settled before fact-finding, will be settled after fact-finding. We consider the Federation's argument in this regard to be entirely speculative, contrary to the common-sense and labor relations truism that the passage of time itself brings increased pressure upon the parties to settle, and one in conflict with the policies of the Act underlying the fact-finding and conciliation impasse resolution processes.

The Federation's contention that any change in traditional negotiability analysis should be done legislatively was addressed by us and rejected in *Cohoes*. Although a legislative resolution of the bargaining dilemma we discussed in *Cohoes* may have

been preferable to some, the absence of legislation to deal with this observed dilemma existing since 1982 does not deny us the right nor exempt us from the duty to determine what are "terms and conditions of employment" for purposes of the Act. The Legislature intentionally eschewed specificity in defining the quoted phrase in favor of vesting the power to make negotiability determinations with PERB so that we could make adjustments in negotiability analysis as time and circumstances made necessary and appropriate.¹⁵ "Inherent in this delegation is the power to interpret and construe the statutory scheme."¹⁶

Such opposition as there is by the District and the *amicus* to an extension of an unmodified *Cohoes* theory of negotiability to school district negotiations is as unpersuasive as the Federation's opposition.

The District argues that *Cohoes* conflicts with decisions by the Court of Appeals holding that employers do not have a statutory duty to negotiate "nonmandatory" subjects. *Cohoes*, however, is entirely consistent with those decisions. *Cohoes* makes the legal terms of an agreement "terms and conditions of employment" within the meaning of the Act as a matter of law. It is those "terms and conditions of employment" to which the parties' statutory bargaining rights and obligations attach.¹⁷ Phrased

¹⁵See Joint Legislative Committee on the Taylor Law, 1971-72 Report, State of New York Legislative Document No. 25 (1972) at 33-4.

¹⁶*West Irondequoit Cent. Sch. Dist. v. Helsby*, 35 N.Y.2d 46, 51, 7 PERB ¶7014, at 7029 (1974).

¹⁷Act §§204.2 & 204.3.

differently, that which is "nonmandatory" under one theory of negotiability has become mandatory under another, supplemental theory. All *Cohoes* requires is that unions and employers bargain on demand "terms and conditions of employment," a result precisely in keeping with the Act and the decisions relied upon by the District.

There is also an argument raised by the *amicus* that an extension of *Cohoes* will deprive school districts of their "right" not to carry over a nonmandatory subject of negotiation into a new agreement. Extending *Cohoes* to school districts, however, does not prevent a school district from taking a position that any term of an agreement will not be continued in a new agreement. The carry over into a successor contract of any term in the parties' current contract was by agreement before *Cohoes* and it will still be by agreement after *Cohoes* is extended to school district negotiations. That position declaration, however, if raised at or after fact-finding, subjects a school district to a refusal to bargain charge under current law because the statement is arguably a proposal by the employer to delete that term from the next agreement or a statement conditioning the next collective bargaining agreement upon the union's agreement to discontinue that term. Only by extending *Cohoes* to school district negotiations can a school district, or a union making the same declaration, be ensured of the legal right to state and insist that the next contract will not contain the objectionable clause. The example actually used by the *amicus* participant will illustrate the inaccuracy of its belief that *Cohoes* extended to school districts will be detrimental to a school district's interests.

A school district has agreed to a no layoff, no position abolition clause in an agreement. Subject to a public policy argument, unlikely to find judicial acceptance,¹⁸ §209-a.1(e) of the Act will require the continuation of that clause after the contract expires until a new agreement is negotiated. The clause would not become unenforceable upon a declaration that it will not be continued in the next contract. Moreover, a successful scope of negotiation charge by an employer against a union only prevents the union from negotiating the subject at or after fact-finding. Such charge does not result in the union's agreement to eliminate the clause nor does it permit the employer to discontinue that clause upon expiration of the agreement containing the clause. Although the clause must be continued until a new agreement is reached, existing law does not afford either party, over the objection of the other, any right to negotiate demands regarding the elimination, continuation or modification of that clause at or after fact-finding. If the *amicus'* objection is simply to the imposition of a bargaining obligation to subjects in a contract previously exempt from such obligation under traditional negotiability analysis, we find no persuasive reason to deny the parties to school district negotiations the legal right to negotiate about any legal term of their agreement. The result of a contrary decision, which would force discussion of a contract term off the table upon objection once fact-finding is reached, is potentially

¹⁸The courts have upheld the obligations imposed upon employers under §209-a.1(e) of the Act as against all public policy arguments raised to date. *City of Utica v. Zumpano*, 91 N.Y.2d 964, 31 PERB ¶7501 (1998); *Maplewood-Colonie Common Sch. Dist. v. Maplewood Teachers Ass'n*, 57 N.Y.2d 1025, 15 PERB ¶7538 (1982).

years of intractable impasse. By extending *Cohoes* to school district negotiations we at least afford the parties a forum for the negotiation as of right about the subjects most likely to be the source of the division between them, an end fully in keeping with the policies of the Act.

~~Just as we find no merit in the opposition to an extension of *Cohoes* to~~
negotiations involving school district personnel, we find no merit in the District's argument for adoption of a "removal conversion" theory of negotiability. Under the District's theory, only demands to delete existing contract terms which are nonmandatory under traditional negotiability analysis would be converted into mandatorily negotiable terms and conditions of employment. Demands to delete could be met only by agreement, silence or a counterproposal itself mandatorily negotiable by its inherent subject nature. Counterproposals to continue the existing terms and ones to modify the existing term would be unlawful upon objection. Similarly, a fact finder would not be permitted to recommend anything other than deletion as proposed or a recommendation itself mandatorily negotiable under traditional subject matter negotiability analysis.

We reject this theory because it conflicts with every principle underlying *Cohoes*.

The District's argument effects the very one-way street of negotiability we rejected in *Cohoes* as flatly contrary to the policies of the Act. Although "removal conversion" could, in theory, be invoked by both unions and employers, demands to delete would come overwhelmingly from employers seeking release from existing contractual restrictions upon what are by nature their managerial prerogatives. It is

difficult for us to even envision demands by unions to delete traditionally nonmandatory subjects from agreements because whatever restrictions upon managerial prerogatives there may be in an agreement will most likely be ones to the union's and the unit employees' advantage. Unions would most likely be seeking to at least continue if not expand upon the terms of the agreement which employers would be proposing for deletion. Thus, the reality of our adopting a removal conversion theory of negotiability would be a radical distortion of the balanced rights and obligations fashioned by the Legislature for bargaining relationships existing under the Act, a balance *Cohoes* underscores and strives to maintain. But even if the reality of opportunity to bargain matched the theory, we would reject the District's removal conversion theory of negotiability because it creates a wholly artificial restraint on the bargaining and impasse processes.

As *Cohoes* stresses, we cannot create a negotiability system that allows a party to negotiate exemptions from existing contractual obligations, but disallows the other party from making proposals and arguments in opposition to that demand. We have never placed limits on the merits of proposals involving subjects mandatorily negotiable under traditional subject matter negotiability analysis. There is simply no reason to place those merits limits on subjects which are no less "terms and conditions of employment", albeit under a different theory of negotiability. Bargaining under the Act as to all terms and conditions of employment is and must be mutual and reciprocal along a continuous two-way street. Bargaining under a removal conversion theory of negotiability is neither. It is, instead, a one-way street to a dead end.

The District's removal conversion theory is also fairly rejected because it denies the parties themselves and third-party neutrals any legal ability to address the full scope of the problems stemming from current contractual provisions which may be actually dividing the parties. Consider the class size demand in issue. If the District's restricted theory of negotiability were adopted, its demand to delete this class size provision will be met only by silence from the Federation because it does not agree to its removal from the next contract and it could not make a counterproposal to that demand, even one just to continue the existing contract term. Without an agreement to delete the class size provision, the District would not, however, be privileged to discontinue that term of the expired agreement until a new collective bargaining agreement were reached, unless the Federation were to earlier strike in violation of the Act.

By preventing the Federation from responding to the merits of the District's demand to delete the class size provision, "removal conversion" only ensures that the dispute between these parties over class size will remain undiscussed and unresolved. Without full bargaining over the merits of class size, the subject will likely be ignored on and after fact-finding. If the subject were not ignored, such discussions as were attempted about class size over objection would be off the record or conducted in other ways designed to avoid the Federation being charged with insisting upon the negotiation of a nonmandatory subject. None of these alternative outcomes positions the parties to reach an agreement. Parties should be entitled to and required to negotiate about the terms in their agreement that may be dividing them, not given incentives to manufacture mandatorily negotiable demands they have no real interest in

securing just to disguise their true desire to negotiate the traditionally nonmandatory subjects in their agreement or reasons to resort to *sub rosa* discussions. An extension of *Cohoes* to school district negotiations will focus the parties' efforts above board on what in their current agreement is actually keeping them from reaching a successor agreement. The result may not be a quicker or better agreement, but it is surely a means to that end, one not available under traditional subject matter negotiability analysis.

"Removal conversion" also does not sit at all well within the context of the statutory impasse procedures for school districts. As the District itself recognizes, a fact finder's purpose is to recommend a basis for the parties to settle their dispute. By denying a fact finder the full picture with respect to the parties' dispute over existing contract terms, removal conversion prevents a fact finder from "finishing the job", a result the District itself realizes must be avoided.

There is one last reason to reject the District's removal conversion theory of negotiability but one no less persuasive than the several others we have already discussed. The Act contemplates a uniformity of bargaining rights and obligations. A removal conversion theory of negotiability would create a special set of bargaining rules for school district negotiations only, for no persuasive reason, a result again contrary to the terms and policies of the Act.

Having determined there to be compelling reasons for an extension of *Cohoes* to school district negotiations, and none favoring its nonextension, or the District's removal conversion theory of negotiability, we hold that the District's demand is one embracing a term and condition of employment within the meaning of the Act. The District's

submission of the class size demand for consideration by the fact finder was, therefore, not an improper refusal to negotiate.

For the reasons set forth above, the Federation'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: March 23, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

In the Matter of

PATRICIA BEATTIE,

Charging Party,

- and -

CASE NO. U-19044

**GUILDERLAND TEACHERS AIDE ASSOCIATION,
NEA,**

Respondent,

-and-

GUILDERLAND CENTRAL SCHOOL DISTRICT,

Employer.

**CUSICK, HACKER & MURPHY (JOHN E. HIGGINS of counsel), for Charging
Party**

**ROWLEY, FORREST, O'DONNELL & BEAUMONT (RICHARD R. ROWLEY of
counsel), for Respondent**

HANCOCK & ESTABROOK (RENEE L. JONES of counsel), for Employer.

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Patricia Beattie to a decision of an Administrative Law Judge (ALJ) dismissing her charge that the Guilderland Teachers Aide Association, NEA (Association) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) in the processing and handling of a sexual harassment complaint against Roger Levinthal, a teacher and acting principal employed by the Guilderland

Central School District (District). The District is made a statutory party to this proceeding pursuant to §209-a.3 of the Act.

The ALJ held several days of hearing, during which Beattie, who was represented by counsel, presented her direct case. At the close of Beattie's case, the Association and the District moved to dismiss the charge. The record was closed at that point. After the receipt of briefs, the ALJ granted the motion in a very detailed decision.

Beattie has filed several exceptions to the ALJ's decision, arguing that the ALJ made both factual and legal errors. The Association supports the ALJ's decision. The District has not responded to the exceptions.¹

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

A multi-page charge, amendments and clarification of the pleadings by the conferencing ALJ preceded seven days of hearing during which numerous exhibits, including the depositions taken by the District's representative during its investigation of the complaints of sexual harassment, were introduced into the record. Beattie testified and called Harold Beyer, an Association attorney, Rex Trobridge, an Association

¹As noted by the ALJ, the District raised timeliness as an affirmative defense in its answer. While the ALJ addressed events occurring more than four months prior to the filing of the charge as background to the charge, any allegations relating to those events were ruled by the ALJ at the hearing to be untimely and those rulings were confirmed in his decision. No exceptions have been taken to those rulings.

representative, and Barbara Coogan, the Association president, to testify as part of her direct case.

The ALJ's decision details the processing of the improper practice charge and sets forth in detail Beattie's allegations and the defenses of the Association and the District. The ALJ granted the Association's and the District's motions to dismiss. He found that the evidence in the record, even given a reading most favorable to Beattie, was insufficient to support a finding that the Association breached its duty of fair representation. In reaching his decision, the ALJ credited the testimony of Beyer, Trobridge and Coogan where it differed from Beattie's testimony.

The charge, filed on June 5, 1997, may be distilled into two allegations against the Association: that Beyer refused to file or process a complaint of sexual harassment against Levinthal when requested to do so by Beattie in a letter received by Beyer on February 5, 1997, and that Coogan told Beattie, later in February 1997, that she would lose her job because she had retained private counsel to represent her in the sexual harassment complaint.²

In June 1996, after Coogan commented to Beattie that she seemed troubled, Beattie told Coogan that she was upset about Levinthal. Coogan advised her to call Trobridge. After Beattie and Trobridge spoke, Trobridge, having determined that Beattie might have a complaint of sexual harassment, set up a meeting with William

²In both pre-hearing correspondence and in opening statements at the hearing, Beattie's counsel reiterated that the charge was about these two allegations.

Adams, the District's Director of Human Resources. At the meeting a few days later,³ Trobridge learned for the first time that Levinthal had complained in January 1996 to Marcil that Beattie was sexually harassing him. Hearing that Beattie also had a complaint, Adams turned the investigation of the entire matter over to a private attorney, Thomas Kenney, who interviewed many employees, including those named by Beattie as witnesses to the alleged acts of harassment by Levinthal.⁴ Prior to the interview, Beattie met with Trobridge and Beyer. She was advised that the Association would represent her in any proceedings pursuant to the District's sexual harassment policy and/or any proceedings before the New York State Division of Human Rights. Beattie reiterated that she just wanted Levinthal to leave her alone. Beyer then sent a letter to the District's attorney, David Garvey, informing him that the Association was representing Beattie in both her complaint against Levinthal and in Levinthal's complaint against Beattie.

In early September 1996, Beyer conveyed to Beattie an offer from Adams that Beattie could be reassigned to another building. Beattie declined, noting that she was not having any more problems with Levinthal. In October 1996, Beyer forwarded to Beattie copies of the transcripts of her interviews. Beyer received the remainder of the

³At the meeting with Trobridge and Adams, were Beattie, her adult son, and Deborah Marcil, principal of Farnsworth Middle School, where Beattie and Levinthal are employed.

⁴Beattie was twice interviewed by Kenney, once in September 1996 and again in October 1996. Beyer was present with Beattie at both of her interviews, as was her husband.

interview transcripts in November or December 1996. Without exception, each interviewee with knowledge of the events covered by the complaints corroborated Levinthal's claims and offered no support for Beattie's claims. Beyer did not send Beattie copies of those transcripts.⁵

In early February 1997, Beyer received a letter from Beattie, dated February 2, 1996, stating:

Enclosed you will find a letter I have written to Mr. Adams regarding Mr. Levinthal's recent behavior towards me. If you think that it is complete, please forward the letter to Mr. Adams.

Attached to the letter was a handwritten letter from Beattie to Adams, detailing several incidents when Levinthal allegedly was staring at Beattie, following her around the cafeteria and standing close to her or staring at her in the Principal's office as she distributed the mail. Beattie noted in the letter that this behavior made her uncomfortable and that she wanted her letter treated as a formal complaint against Levinthal.

Through Trobridge, Beyer requested that Beattie call him to discuss the letters. Beyer testified that he was confused because of the dates on the letters and because the allegations were similar to ones made by Beattie in 1996. Further, Beattie had told Beyer in the fall of 1996 that Levinthal was no longer bothering her and finally, the

⁵Beyer had been informed by Trobridge that Coogan believed that Beattie was a victim of spousal abuse. Given that assertion, Beyer and Trobridge decided to be "careful" in their handling of the case. As the deposed witnesses supported Levinthal's complaint that Beattie had pursued him, Beyer decided not to mail the transcripts of the depositions to Beattie's home where they might be read by Beattie's husband.

District was at that time still conducting its investigation of the complaints of sexual harassment made in January and June 1996 by Levinthal and Beattie, respectively.

Beyer and Beattie spoke the next day and Beyer suggested to Beattie that she wait until she had attended, accompanied by Trobridge, a meeting set for February 24, 1997, with the District where the sexual harassment complaints might be resolved. He advised her to rewrite her letter of complaint to set forth only the facts and not her feelings, and told her that if she was not satisfied with the results of the February 24 meeting, he would file a formal complaint for her.⁶

The February 24 meeting was rescheduled to March 18, 1997, after the District received notification that Beattie had retained private counsel on February 21, 1997. At the March 18 meeting, the District advised Beattie that her complaint against Levinthal had not been substantiated by any witnesses called by Kenney in his investigation but that those witnesses had corroborated Levinthal's complaint. Beattie was, therefore, formally reprimanded by the Superintendent.

In late February 1997, Beattie was approached by Coogan, who told her that she thought that Beattie was crazy to retain private counsel when she had a union lawyer to represent her and that she would probably lose her house.

⁶Beyer testified that he intended to pursue her complaint with the Division of Human Rights, as the District's procedure would be concluded with the February 24 meeting. He did not understand Beattie's letter to be a request that he file a grievance because a grievance had never been discussed. Beyer thought that Beattie wanted the matter pursued through the District's sexual harassment procedure and, if not resolved, then as a complaint to the Division of Human Rights.

Initially, we find, as did the ALJ, that the only timely allegations in the charge concern Beyer's failure to process Beattie's February 2 letter and Coogan's remarks to Beattie in late February 1997. Section 204.1(a) of our Rules of Procedure provides that an improper practice charge must be filed within four months of the acts alleged to be improper. Here, Beattie's charge was filed on June 5, 1997. Therefore, only the allegations relating to events occurring on or after February 5, 1997 are timely.

Beattie argues in her exceptions that the ALJ failed to apply the proper motion to dismiss standards. We held in *County of Nassau (Police Department)*,⁷ that a charging party will be given the benefit of all reasonable inferences derived from the record in considering a motion to dismiss. Utilizing that standard, the ALJ reviewed the totality of the evidence introduced by Beattie, including her testimony and the testimony of the three witnesses called as part of her direct case: Beyer, Trobridge and Coogan. The ALJ credited the testimony of Beyer, Trobridge and Coogan, where there were differences, over the testimony of Beattie. His decision to do so was based upon their testimony and their demeanor as witnesses. There was a direct conflict between Beattie's testimony and the testimony offered by her other witnesses. As we stated in *City of Lockport and AFSCME, Council 66 (Herberger)*,⁸ in circumstances in which there is

a direct conflict in the charging party's evidence ... the making of a credibility determination necessary to decide the motion at the close of the charging party's case [is] appropriate.

⁷17 PERB ¶3013 (1984).

⁸22 PERB ¶3059, at 3135 (1989).

The credibility resolution made by the ALJ against Beattie and in favor of the other witnesses should be affirmed. Our determination in this regard is in keeping with the weight appropriately accorded to such credibility determinations by the trier of fact who had the opportunity to observe and evaluate the demeanor of all the witnesses.⁹

Beattie also argues that the ALJ failed to apply proper substantive law and failed to properly credit evidence of perfunctoriness, bad faith and hostility by Beyer and Coogan. Beattie's use of these words is just another way of stating a union's duty; they do not enlarge the Association's duty. It is well-settled that a union breaches its duty of fair representation only when its conduct toward a member of the bargaining unit is arbitrary, discriminatory or in bad faith.¹⁰ The ALJ found that the Association had fairly represented Beattie throughout the District's investigation of the sexual harassment complaints. We find that Beyer's response to Beattie's February 2 letter was not improper. He made clear that the Association was prepared to represent her at the meeting with the Superintendent where the results of the investigation were to be made known and to then file Beattie's complaint with the Division of Human Rights if she was dissatisfied with the outcome. Beattie took it upon herself to retain private counsel

⁹*State of New York - Unified Court Sys.*, 28 PERB ¶3004 (1995); *City of Rochester*, 23 PERB ¶3049 (1990); *United Fed'n of Teachers (Casid)*, 19 PERB ¶3061 (1986); *Hempstead Housing Auth.*, 12 PERB ¶3054 (1979); *Captain's Endowment Ass'n*, 10 PERB ¶3034 (1977). See also *Fashion Institute of Technology v. Helsby*, 44 A.D.2d 550, 7 PERB ¶7005 (1st Dep't 1974).

¹⁰See *Civil Serv. Employees Ass'n, Local 1000 v. PERB and Diaz*, 132 A.D.2d 430, 20 PERB ¶7024 (3d Dep't 1987), *aff'd on other grounds*, 73 N.Y.2d 796, 21 PERB ¶7017 (1988).

before either of the latter two events could occur. At the time Beattie hired a private attorney, the Association's duty to represent her in any further pursuit of her claims of sexual harassment or in defense of Levinthal's complaint against her ceased.¹¹

Beattie's claim that her complaint was handled in a perfunctory manner by Beyer is not supported by the record.¹² While the processing of a meritorious grievance in a perfunctory manner may evidence arbitrariness by a union representative,¹³ perfunctoriness, itself, is not, as argued by Beattie, a separate and distinct basis for finding that the duty of fair representation has been breached.

As to Coogan's remark that Beattie was crazy to hire a private attorney and that she could lose her house, there is simply nothing improper in either the timing or content of those statements. They did not affect the Association's representation of Beattie because Beattie had already retained private counsel. We do not read these statements as an attempt to intimidate or coerce Beattie, but merely as an expression of Coogan's incredulity that a union member would choose not to utilize the counsel

¹¹See *Public Employees Fed'n (Levy)*, 31 PERB ¶3090 (1998).

¹²The ALJ made certain findings in his decision in support of his determination that Beyer's handling of Beattie's complaint was not perfunctory but was "careful, caring and considerate," finding that Beyer believed that Beattie was a victim of spousal abuse and was acting accordingly. Beattie argues in her exceptions that these assumptions are baseless. Given the basis of our dismissal of the charge, it is not necessary for us to discuss this exception. By not discussing this exception, however, we do not suggest that there was any error by the ALJ in crediting the testimony of Beyer, Trobridge and Coogan on this point and in his findings in this regard.

¹³See *Jacobs v. Board of Educ. of E. Meadow Union Free Sch. Dist. and Dreska*, 64 A.D.2d 148 (2nd Dep't 1978).

provided by the union, at no charge, and instead choose to pay a private attorney. The statement in no way violates the Act; it was merely the expression of an opinion by Coogan, which is not actionable.

We hold, therefore, that the Association did not violate §209-a.2(c) of the Act.

Based on the foregoing, we deny the exceptions and we affirm the decision of the ALJ.

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

DATED: March 23, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

In the Matter of

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
LOCAL 317,**

Petitioner,

- and -

CASE NO. C-4740

TOWN OF DRYDEN,

Employer.

JAMES N. McCAULEY, ESQ., for Petitioner

**TWINING, NEMIA & STEFLIK (JOSEPH J. STEFLIK, JR., ESQ., of counsel),
for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Dryden (Town) to a decision by the Director of Public Employment Practices and Representation (Director) on a petition filed by the International Brotherhood of Teamsters, Local 317 (Teamsters). The Teamsters seeks to represent a unit of all employees, except casual employees, of the Town Highway Department (Highway) and the Town Department of Public Works (DPW), including drivers, laborers, mechanics, maintenance employees, MEOs, heavy equipment operators and all other employees who regularly perform such work. The Town contended that this unit was not the most appropriate because the

DPW employees do not share a community of interest with the Highway employees. Pursuant to a stipulated record, the Director determined that the unit sought by the Teamsters was the most appropriate unit because the employees share common working rules, personnel practices, work environment, and salary and benefit structure.

The Town excepts to the Director's decision, arguing that the Highway and DPW employees do not have the same salary or supervisors and do not perform the same job duties. The Teamsters argues that the Town's exceptions must be dismissed as they are untimely filed.

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

We treat first with the Teamsters' argument that the Town's exceptions are untimely filed. The Town filed its exceptions within the time frame set forth in our Rules of Procedure (Rules); however, the exceptions were not mailed to the Board but to the Director. It is the Teamsters' argument, therefore, that the Town never properly filed exceptions with the Board and that it should not now be given leave to correctly file exceptions because the Board must strictly construe its Rules.

The Teamsters' motion to dismiss the Town's exceptions is denied. Although §201.12 of the Rules specifies that exceptions to a decision of the Director are to be filed with the Board, they do not designate any specific agent for service. The Director is the Board's agent and may accept service of exceptions on the Board's behalf. As

the Town's exceptions were timely filed, albeit with the Director, and are in correct form, they are properly before the Board.¹

Turning to the merits of the exceptions, we find that they must be denied. As the Director found in his decision, the Highway employees earn between \$12.90 and \$13.40 per hour. The DPW employees² earn approximately \$1.00 more per hour, except when they are performing Highway Department work, when they earn \$1.00 less an hour than they do when performing DPW work. The Highway and DPW employees are subject to the same work rules, receive a clothing allowance and report to the Highway Department building. While the Town argues in its exceptions that the Departments have separate supervisors, who set the salaries for their employees, the record shows that the Town's Highway Department Superintendent has, for at least the last few years, been designated annually as the DPW Superintendent. The same is true of the Deputy Highway Superintendent, who is designated as the Deputy DPW Superintendent. These unrepresented Highway and DPW employees, therefore, share the same supervisors, report to the same building, use some of the same equipment, and share, at least occasionally, the work of the Highway and DPW Departments. All the employees are blue-collar employees and have been classified by Civil Service as noncompetitive, except for the laborers, who are in the labor class. Additionally, these

¹*But cf. CSEA, Inc.(Juszczak)*, 22 PERB ¶3020 (1989), where it was held that the filing of exceptions with the Director and not with the Board, when coupled with the other deficiencies in the exceptions, warranted the dismissal of the exceptions.

²As of the date of the stipulation, there were two positions in the DPW; however, only one position was filled.

employees are subject to the same drug-testing policy and share the same opportunities for extra work and promotions.

While there are some disparities in salary and specific work assignments, none of them are of the nature that would deny either party the opportunity for effective and meaningful negotiations or would hinder representation of the two groups of employees were they joined in one unit. Any potential conflicts are clearly outweighed by the employees' community of interest.

It has long been our policy to find that the most appropriate unit is the largest one which will permit for effective and meaningful negotiations.³ "Only diverse employee interests, either actual or potential, warrant the establishment of smaller units."⁴ Any differences in this case are minimal, at best. If there is a general community of interest, joinder is allowable for those having different occupational concerns and terms and conditions of employment so long as the potential for an actual conflict of interest is unlikely, as is the circumstance here.⁵ Moreover, the unit found by the Director to be most appropriate avoids a multiplicity of units and also avoids a possibility that the one remaining DPW employee would be left without representation.⁶

³*State of New York*, 1 PERB ¶399.85 (1968).

⁴*Somers Cent. Sch. Dist.*, 12 PERB ¶4016, at 4025, *aff'd*, 12 PERB ¶3068 (1979).

⁵*Village of Skaneateles*, 16 PERB ¶3070 (1983).

⁶*Town of Carmel*, 31 PERB ¶3047 (1998); *Auburn Ind. Dev. Auth.*, 15 PERB ¶3139 (1982).

Based on the foregoing, the Town's exceptions are denied, the Teamsters' motion to dismiss is denied, and the decision of the Director is affirmed.

IT IS, THEREFORE, ORDERED that there be a unit established of Town Highway Department and Department of Public Works employees as follows:

Included: All employees, except casual employees, of the Town of Dryden's Highway Department and Department of Public Works, including drivers, laborers, mechanics, maintenance employees, MEOs, heavy equipment operators and all other employees who regularly perform such work.

Excluded: All other employees.

IT IS FURTHER ORDERED that an election by secret ballot shall be held under the direction of the Director among the employees in the unit determined herein to be appropriate and who were employed on the payroll date immediately preceding the date of this decision and order, unless the Teamsters submits to the Director within fifteen (15) working days from the date of receipt of this decision and order, evidence to satisfy the requirements of §201.9(g)(1) of the Rules of Procedure for certification without an election.

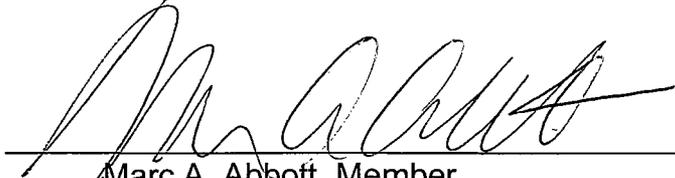
IT IS FURTHER ORDERED that the Town shall submit to the Director and the Teamsters within fifteen (15) working days from receipt of this decision and order, an alphabetized list of the names of all employees within the unit determined herein to be

appropriate who were employed on the payroll date immediately preceding the date of this decision and order.

DATED: March 23, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member

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

In the Matter of

**LOCAL 456, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN
AND HELPERS OF AMERICA, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-4742

TOWN OF DOVER,

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 Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen And Helpers of America, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Deputy town clerk, clerk, assessor's aide, and secretary of the zoning board of appeals.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 456, International Brotherhood of Teamsters, Chauffeurs, Warehousemen And Helpers of America, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 23, 1999
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,**

Petitioner,

-and-

CASE NO. C-4840

CLYDE-SAVANNAH CENTRAL SCHOOL DISTRICT,

Employer,

-and-

**CLYDE-SAVANNAH CENTRAL SCHOOL CIVIL
SERVICE ORGANIZATION (CSO),**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding¹ having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc.,

¹The petition filed was for an overall unit of non-instructional employees. The parties, thereafter, stipulated to the appropriateness of two units.

Local 1000, AFSCME, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regularly scheduled part-time employees employed in the following titles: teacher aide, food service helper, head cook, cleaner, custodian, store clerk, senior typist, receptionist.

Excluded: Per-diem substitutes, secretary to superintendent, business office personnel and all other employees.

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

DATED: March 23, 1999
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,**

Petitioner,

-and-

CASE NO. C-4840

CLYDE-SAVANNAH CENTRAL SCHOOL DISTRICT,

Employer,

-and-

**CLYDE-SAVANNAH CENTRAL SCHOOL
TRANSPORTATION EMPLOYEES
ORGANIZATION (TEO),**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding^{1/} 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,

^{1/}The petition sought to decertify the intervenor and was for an overall unit of non-instructional employees. The parties, thereafter, stipulated to the appropriateness of two units.

IT IS HEREBY CERTIFIED that the Clyde-Savannah Central School Transportation Employees Organization has been designated and selected by a majority of the employees of the above named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All bus drivers, bus monitors and bus mechanics.

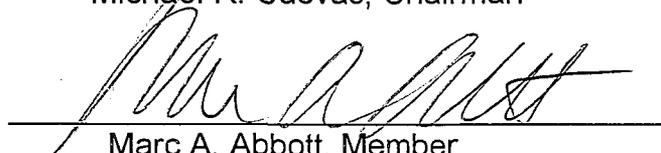
Excluded: Per-diem substitutes and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Clyde-Savannah Central School Transportation Employees Organization. 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: March 23, 1999
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member