

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

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In the Matter of

**ROCKVILLE CENTRE TEACHERS ASSOCIATION,  
NYSUT, AFT, AFL-CIO,**

Charging Party,

- and -

**CASE NO. U-19447**

**ROCKVILLE CENTRE UNION FREE SCHOOL  
DISTRICT,**

Respondent.

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**CLAUDIA SCHACHTER-DeCHABERT, for Charging Party**

**INGERMAN SMITH, L.L.P. (JOHN H. GROSS of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Rockville Centre Union Free School District (District) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Rockville Centre Teachers Association, NYSUT, UFT, AFL-CIO (Association). The ALJ held that the District violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it terminated the probationary employment of a teacher assistant, Cathlyn Rooney, because she exercised rights protected by the Act.

The ALJ determined that Rooney was terminated August 1, 1997, at the end of her second year as a teacher assistant, because of her protected activities during the

1996-1997 school year related to her membership on the Association's negotiating team. Although the District's earlier evaluations of Rooney were very positive, she received an evaluation for the 1996-1997 school year that listed several incidents upon which her supervisor, Principal Joanne Spencer, based her decision to recommend that Rooney be terminated. The ALJ determined that the timing of the events was suspect and, based upon her credibility resolutions, that the District's stated reasons for terminating Rooney were pretextual. The ALJ decided that Rooney had been terminated because of her actions on behalf of the Association. The District was ordered to offer reinstatement to Rooney, to make her whole for any lost wages or benefits and to cease and desist from any interference with Rooney's exercise of protected rights.

The District excepts to the ALJ's decision, arguing that her credibility resolutions are in error and her decision is based upon timing and conjecture, insufficient bases for the finding of a discriminatory discharge in violation of §209-a.1(a) and (c) of the Act. The Association supports the ALJ's decision.

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

In May 1997, at the end of her second year as a teacher assistant employed by the District at Hewitt Elementary School, (hereafter Hewitt), Rooney received an evaluation from Spencer rating her as "outstanding" in two categories, "satisfactory" in eight categories, "needs improvement" in two areas and "unsatisfactory" in two. Spencer told Rooney that she was going to recommend to William Johnson, the

Superintendent of Schools, that Rooney be terminated. On June 20, 1997, Rooney received a letter from Johnson informing her that, based on the information he had received from Spencer, he would recommend termination of her probationary appointment to the Board of Education. Thereafter, Rooney received a letter dated July 9, 1997, terminating her appointment effective August 31, 1997.

In *Town of Independence*,<sup>1</sup> the standard of proof in cases alleging a violation of §209-a.1(a) and (c) of the Act was clearly stated:

It is well settled that the elements necessary to prove a case of discrimination for union activity under the Act are that the affected individual was engaged in protected activity, that such activity was known to the person(s) making the adverse employment decision, and that the action would not have been taken but for the protected activity. The existence of anti-union animus may be established by statements or by circumstantial evidence, which may be rebutted by presentation of legitimate business reasons for the action taken, unless found to be pretextual. (Footnote omitted)

As to the first prong of the test, there is no dispute that Rooney was engaged in protected activity during the 1996-1997 school year. She became a member of the Association's negotiating team in late June 1996. On September 11, 1996, she circulated a questionnaire to other teacher assistants, returnable to her mailbox at Hewitt, soliciting information to be used for negotiations proposals, she wore a "unity" button,<sup>2</sup> and was active at Association meetings held at Hewitt. At the beginning of the

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<sup>1</sup>23 PERB ¶3020, at 3038 (1990).

<sup>2</sup>The Association was beginning negotiations with the District for the teacher assistants' first contract.

1996-1997 school year, she wrote to Rooney asking if the teacher assistants would be able to utilize Friday hours on half days as had been done in the past. Spencer declined her request.

Turning to the second prong of the test, it must be determined when Spencer became aware of Rooney's activities on behalf of the Association. The District in its exceptions argues that the ALJ erred in finding that Spencer knew about Rooney's union activities in September 1996. It is undisputed that at least by November 1996, Spencer was shown the September 11 letter to Association members authored by Rooney, soliciting information about working conditions.<sup>3</sup> Spencer admitted that at that time she concluded that Rooney was involved in the Association, but it was not until August 1997, when she saw Rooney at a negotiations session, that she learned that Rooney was on the negotiating team. However, the document that Rooney was shown in November 1996 begins with the statement: "I volunteered to represent the elementary teacher assistants during our contract negotiations...." From that, the ALJ concluded that from November 1996, Spencer knew that Rooney was involved in Association activities. The ALJ further concluded that Spencer probably knew that Rooney had become actively involved in the Association even earlier.

There is insufficient evidence in the record to support this conclusion and we hereby reject it. It is sufficient for the purposes of our decision to find that Spencer was

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<sup>3</sup>The document was shown to Spencer by another elementary school principal.

aware of Rooney's activities in May 1997, when Rooney was evaluated by Spencer and when Spencer recommended that Rooney be terminated.

Having found that Rooney was engaged in protected activity and that Spencer had knowledge of Rooney's activities, the ALJ determined that Rooney would not have been terminated "but for" her union involvement. We disagree.

Rooney's termination was based upon Spencer's evaluation and her recommendation to the Superintendent of Schools. If Rooney would not have received her negative evaluation "but for" her Association activities, then the evaluation would have been improper and the subsequent termination that was based upon that evaluation would likewise have been improper.<sup>4</sup> We find that Spencer's negative evaluation of Rooney was reflective of Spencer's honest evaluation of her work. As the ALJ found, we too find that the record is devoid of overt acts or statements of anti-union animus.<sup>5</sup> While in cases alleging discriminatory treatment there are rarely open

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<sup>4</sup> See *Croton-Harmon Union Free Sch. Dist.*, 31 PERB ¶3086 (1998), where we 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. See also *Town of Gates*, 15 PERB ¶3079 (1982); *Elmira City Sch. Dist.*, 14 PERB ¶3015 (1981).

<sup>5</sup>The ALJ relied, in part, on the testimony of Gloria Pinella, the former vice-president of the Association, who was assigned to Hewitt and was supervised by Spencer. Pinella testified that both before and after her tenure as vice-president, her relationship with Spencer was cordial and friendly. During the time she held the position of vice-president of the Association, Spencer's attitude toward her was cool and polite. Pinella stated that she was too afraid of Spencer to testify without a subpoena, even though she no longer worked for the District. Pinella offered no reasons for her "fear". We place no weight on the witness' conclusory "fear" statement and, even accepting her statement as to her perception of the change in Spencer's attitude towards her, we do not find it inappropriate given the change in their professional relationship, and certainly no evidence of animus.

statements against a union or the exercise of protected rights or specific threats of retaliation,<sup>6</sup> even considering the timing of the alleged retaliatory action, there is insufficient evidence to establish a violation.

Rooney's termination was based upon Spencer's 1996-1997 evaluation, which relied upon several incidents involving Rooney that occurred during the course of the 1996-1997 school year. The first incident happened on the first day of school when Spencer told Rooney to pack up some books and leave them for the school custodian to move. At the suggestion of the custodian, Rooney instead put the books on a cart and moved them to the storage area. As Rooney pushed the cart through the halls, it made some noise. Spencer chastised Rooney for being disruptive and for disregarding her instructions. She informed Rooney in writing that this was unacceptable behavior. Rooney responded that she and a teacher chose to follow the custodian's suggestion instead.

The second incident involved several of the teacher assistants assigned to Hewitt. All were scheduled to attend a meeting to be conducted by Spencer on October 1, 1996, a Teacher Conference Day. After waiting for Spencer to arrive, the teacher assistants left. Two who left after one hour signed out. Rooney and two others, who left much later, did not sign out but notified Spencer's secretary that they were leaving. At the direction of the Superintendent, those who left without signing out were spoken to by Spencer the next day. In Rooney's evaluation, Spencer outlined this

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<sup>6</sup>*City of Utica*, 24 PERB ¶3044 (1991); *City of Utica*, 21 PERB ¶3066, *aff'g* 21 PERB ¶4580 (1988).

incident and referred to a second incident where she felt it was necessary to counsel Rooney about signing out.

This second incident involved a situation in October when Rooney needed to leave early for a medical appointment of a family member. She went to speak to Spencer. Being informed that Spencer was in a meeting, she left the message with Spencer's secretary that she needed to leave early. Spencer later that day spoke to Rooney, questioning her need to leave, her lack of notice, and her failure to make coverage arrangements for her students. Both testified that Spencer did not deny permission to Rooney to leave early. James Pepe, the Association President, testified that shortly after this incident, he received a telephone call from Joseph Dragone, the Assistant Superintendent of Schools, advising him that Spencer was upset with Rooney for asking for emergency leave with insufficient notice. Dragone assured Pepe that Spencer's behavior had nothing to do with Rooney's participation in negotiations. Dragone's comments to Pepe that Spencer's upset was not union related evidences only that Dragone was aware that Rooney was involved in negotiations. Dragone credibly testified that he did not mean to infer that Spencer held any union animus.

The third incident involves a student accident in March 1997. Rooney and a student were sitting on a stair landing when another student came down the stairs. About half way down the flight of stairs, the student fell. Rooney went to the student to ascertain her condition. She asked another teacher to get help. The ALJ found that Rooney told the student not to sit up, but when the student persisted with her request to do so, Rooney allowed it. The teacher-in-charge and the Head Custodian arrived and, after checking the student's condition, had the student walk to the office, where ice was

applied to the injury. At Spencer's request, Rooney prepared a written statement in which she was extremely brief and recited very few facts. Spencer also had the teacher, custodian and school nurse prepare reports. Their reports differ from Rooney's in that they refer to the child telling them that she was attempting to "climb over" Rooney and the other student when she fell. They also mention that the student told them that Rooney had instructed her to sit up. Spencer wrote Rooney a memorandum advising her to stop working in the stair wells with students and to never attempt to move a student who had been injured. Rooney did not produce any statements from the child she was working with, nor did she dispute that the child who fell gave the statements that were attributed to her. In Rooney's evaluation, Spencer characterizes the incident as being a matter of grave concern, illustrating Rooney's inability "to adapt her behaviors to meet expected standards." Contrary to the opinion of the ALJ, we find that the District conducted an investigation of the incident sufficient for Spencer to conclude that Rooney was not completely honest with her about it. The actions of the District were reasonable, if not all that could have been done, and Spencer's conclusions were those that a reasonable person in her situation could fairly reach, without any discriminatory motive or intent.

The final criticism by Spencer in Rooney's evaluation is Rooney's need to maintain order when working with small groups of children or when supervising children during bus duty. As noted by the ALJ, in the same evaluation for 1996-1997, Spencer rated Rooney as "satisfactory" in working well with students on a one-to-one basis and in small groups. Even if we were inclined to disregard this one of the several reasons

given for Rooney's discharge, the others would certainly form sufficient basis for the discharge of a probationary employee.

Rooney responded in writing to Spencer's evaluation. Those comments were not forwarded to Johnson by Spencer when she sent Rooney's evaluation and her recommendation that Rooney be terminated. In his June 20, 1997 letter to Rooney explaining the reasons why her probationary appointment was to be terminated, Johnson responded by listing the book cart incident, "several" occasions when Rooney left school without signing out, and the repeated counseling sessions conducted by Spencer concerning procedures for maintaining order among students under her supervision. Rooney responded to Johnson, suggesting for the first time that Spencer's recommendation might be based upon Rooney's union activities. Rooney testified that it never occurred to her that Spencer might have been motivated by union animus until a fellow employee suggested it to her after her discharge. The fact that no union animus was apparent to the alleged victim, or, for that matter, to her unit president, through the counseling sessions, memos and recommendation for discharge, supports the conclusion that none existed and that the issue was raised only after the discharge in an attempt to have Rooney reinstated.

The ALJ found that the reasons offered by the District in support of its decision to terminate Rooney's probationary appointment were pretextual and that the actual reason was her union activities. We disagree. The record does not support the ALJ's

determination in this regard. Although the agency may choose to do so, it need not defer to either the factual or legal determinations of its ALJs.<sup>7</sup>

“To establish the improper motivation necessary for a finding that section 209-a. 1(a) and (c) of the Act have been violated, the charging party has the burden of proving engagement in protected activities, that the employer had knowledge of the activities and that it acted because of those activities.”<sup>8</sup> Here, the ALJ summarized the charge as an allegation that the District had violated the Act “by terminating the employment of probationary teacher assistant Cathlyn Rooney *in retaliation* for her union activity.” (emphasis added). No connection was established in this case between Rooney’s union activity and the principal’s evaluation and recommendation for termination of her probationary employment. Thus, the Association failed to establish the third necessary element of proof to sustain the charge, even assuming the other two had been met. It is only when the charging party meets its burden on each of the three elements of proof that the respondent must then rebut that proof and demonstrate that its conduct was for proper business reasons.<sup>9</sup>

The ALJ recognized that, “[a]s before PERB, ‘bad faith’ is that which violates the Act or, stated otherwise, is that taken in retaliation for protected activity”, citing to Board of Education of the City School District of the City of New York, 26 PERB ¶4555, *aff’d* 26 PERB ¶3082 (1993). The cited case also stands for the proposition that the ultimate

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<sup>7</sup>See e.g., *Simpson v. Wolansky*, 38 N.Y.2d 391, 380 N.Y.S.2d 630, 343 N.E.2d 274 (1975).

<sup>8</sup>*Convention Ctr. Operating Corp.*, 29 PERB ¶3022, at 3051-52, citing to *City of Salamanca*, 18 PERB ¶3012 (1985).

<sup>9</sup>*Town of Independence*, *supra* note 1, at 3038 (1990).

burden of persuasion is always with the charging party to establish that the respondent would not have taken the adverse action in the absence of protected activity.

This record shows that there were several incidents involving Rooney which subjected her to Spencer's criticism during the 1996-1997 school year. Spencer used those incidents as the basis of her evaluation and her recommendation that Rooney be terminated. The ALJ concludes that except for the student accident in March 1997, the incidents cited by Spencer were of relatively minor significance (the book cart incident), involved other employees who were not cited for the same conduct in their evaluations (the failure to sign-out on Teacher Conference Day) or have no documentary support (the counseling sessions on maintaining order). We are not willing to draw the same conclusions. Insubordination and failure to comply with mandatory time-keeping requirements are not trivial matters and certainly the principal could reasonably conclude, as did the Association's own witness, that arranging to leave the school during the workday without sufficient advance notice and without providing for substitute coverage was unprofessional. To the extent that other employees were involved in similar activities, they were treated similarly.

While the March 1997 student accident was not one of the reasons given by Johnson for Rooney's termination, the District's explanation for that omission was reasonable and credible. As stated earlier, we find Spencer's conclusion that Rooney had lied to her about the incident to be reasonable based on the disinterested reports of Rooney's co-workers.

Finally, there was another teacher assistant at Hewitt, who was not active in the Association, whose 1996-1997 evaluation appeared to be worse than Rooney's and

she was not terminated.<sup>10</sup> Closer examination reveals no incidents similar to Rooney's reported in that evaluation. Given such, the two employees cannot be said to be similarly situated.

The ALJ's conclusions from the evidence are just that: conclusions. Rather than credibility determinations, the ALJ's decision is based chiefly on the ALJ's subjective evaluation of the seriousness of the District's reasons for discharge. Although the ALJ acknowledged the wide latitude the courts have granted municipal employers with respect to termination of probationary employees, her conclusion that the conduct alleged herein "should" not form the basis for discharge is a personal, rather than legal, conclusion. The charges proven in this case would clearly survive legal challenge for sufficiency as a basis for discharging a probationary employee.<sup>11</sup> In rejecting the ALJ's conclusion about the sufficiency of the conduct, the argument that the "minor" nature of those charges supports a conclusion that the charges were pretextual must also fail. We find, and conclude, were we compelled to reach the issue, that there were legitimate business reasons for the charges against Rooney. There is little dispute that the incidents occurred, that they were recorded contemporaneously with the events and that they were, for the most part, the subject of written or verbal counseling.

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<sup>10</sup>That teacher was marked "unsatisfactory" in two categories and "needs improvement" in three categories. Rooney was "unsatisfactory" in two categories and "needs improvement" in two categories.

<sup>11</sup>See *Education Law* §2573 and cases arising thereunder which provide that a probationary teacher may be terminated at will and for no reason. *Pascal v. Bd. of Educ. of the City of New York*, 100 A.D.2d 622 (2<sup>nd</sup> Dep't 1984). See also *Bd. of Educ. Cent. Sch. Dist. No.1 of the Town of Grand Island*, 37 A.D.2d 493 (4<sup>th</sup> Dep't 1971).

Based on the foregoing, the District's exceptions are granted, the decision of the ALJ is reversed, and the charge is dismissed. So ordered.

DATED: September 16, 1999  
Albany, New York



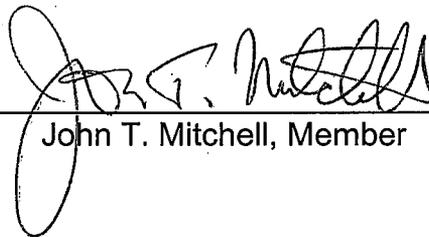
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Michael R. Cuevas, Chairman



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Marc A. Abbott, Member



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John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**LOCAL 891, INTERNATIONAL UNION OF  
OPERATING ENGINEERS, AFL-CIO,**

Charging Party,

- and -

**CASE NO. U-19515**

**BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF NEW YORK,**

Respondent.

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**SPIVAK, LIPTON, WATANABE, SPIVAK & MOSS L.L.P. (ADRIENNE L.  
SALDANA and NEIL LIPTON of counsel), for Charging Party**

**DALE C. KUTZBACH, DIRECTOR OF LABOR RELATIONS (ROBERT E.  
WATERS of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Board of Education of the City School District of the City of New York (District) to a decision of an Administrative Law Judge (ALJ) finding that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it imposed a condition precedent upon the commencement of negotiations for a successor agreement to its 1990-1994 contract with Local 891, International Union of Operating Engineers (Union). The Union has filed cross-

exceptions to the ALJ's dismissal of its allegation that the District had intentionally delayed the start of negotiations by failing to agree to dates for negotiations.

The ALJ found that the District had impermissibly conditioned negotiations for a successor contract upon the settlement of a dispute between the parties on the amount of funds to be contributed by the District to an equity fund established pursuant to the parties' 1990-1994 collective bargaining agreement (equity fund). The ALJ dismissed an allegation that the District had intentionally delayed and impeded the start of negotiations by not agreeing to dates proposed by the Union. The ALJ found that most of the allegation was untimely and as to those requests for dates that fell within four months of the filing of the improper practice charge, the record was unclear as to whether it was the District or the Union that was responsible for any delays.

The District excepts to the ALJ's determination that it refused to commence negotiations for the successor to the 1990-1994 contract. The District argues that the condition it sought to impose - agreement on the amount of the District's payment to the equity fund - did not evidence a failure to negotiate in good faith in violation of §209-a.1(d) of the Act. The District further argues that the Union refused to negotiate in good faith about the equity fund and that the ALJ erred in not considering this affirmative defense. In all other respects, the District supports the ALJ's decision.

The Union excepts to the ALJ's finding that its allegation that the District intentionally delayed negotiations was, in most respects, untimely and that, as to the timely allegations that the District intentionally delayed negotiations, the Union excepts

to the ALJ's finding that the District and the Union were jointly responsible for the delays. The Union supports the other findings of the ALJ.

Based upon our review of the record, we affirm in part and reverse in part the ALJ's decision.

The Union and the District are parties to a collective bargaining agreement for the term July 1, 1990 to December 31, 1994. The parties entered into the agreement on November 1, 1994, which was thereafter ratified by both parties and implemented by the District. The contract establishes an "Equity Fund and Additions to Gross" to which the District contributes two sums of money, one amount to the equity fund and another amount to the additions to gross. These contributions support three programs: an affirmative action program, a peer intervention program and a custodian professional skill program. A labor-management committee determines the distribution of any monies remaining after the designated programs are funded. The committee is comprised of two Union representatives, one representative from the District and one representative from the City of New York (City).

By 1996, the parties were in disagreement about the amount to be contributed by the District. The District claimed that an agreement had been reached in 1995 about the amount to be contributed for 1996, which included an offset to the District's contribution based upon the level of participation by Union members in a retirement incentive program. The Union claimed that no such agreement had been reached.

In 1996 the City scheduled the first date for negotiations for a successor agreement. Sessions scheduled for March 16 and May 7, 1996 were canceled by the City and the District, respectively. No attempts were made thereafter to reschedule any negotiating sessions until October 10, 1996, when Neil Lipton, the Union's attorney wrote to David Bass, then Deputy Executive Director of the District's Division of Labor Relations and Collective Bargaining, requesting that negotiations for a successor to the 1990-1994 contract be scheduled. Thereafter, the Union sought on several occasions through October 1997 to schedule negotiating sessions.<sup>1</sup> From late 1996 through the spring of 1997, the District attempted to schedule sessions with the Union to negotiate the issues in dispute regarding the equity fund. In the spring of 1997, the District also sought to schedule sessions for the negotiation of the successor contract.

Finally, in October 1997, Lipton wrote to Dale Kutzbach, the District's Director of Labor Relations, seeking to schedule bargaining sessions for the successor agreement and sessions to discuss the equity fund. Lipton noted in his letter that the parties needed "to conclude agreement on outstanding issues concerning [the] Equity Fund agreement" and that they should "finish this remaining outstanding item from the negotiations for the 1990-1994 agreement".

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<sup>1</sup>Lipton received an October 25, 1996 response to his inquiry from Simon Gourdine, the District's Chief Executive for Labor Relations, that the District would contact the Union with dates as soon as its proposals were ready. Lipton, having heard nothing, wrote on April 4, 1997, requesting dates. He wrote again on May 5, 1997 requesting the initiation of negotiations. Gourdine replied by letter dated May 7, 1997 that the District would like to have the Union's proposals for review at their initial meeting.

Kutzbach responded by letter dated October 17, 1997, that he needed to look into the equity fund issue and that he was not aware that there was any outstanding issue from the 1990-1994 contract negotiations. He advised Lipton that that issue should be resolved before negotiations for a successor agreement commenced.

The parties met on November 17, 1997 to discuss equity fund issues. At the end of the meeting, Lipton inquired about setting a date for contract negotiations. Kutzbach responded that the District would not agree to commence negotiations for the successor agreement until negotiations for the 1990-1994 contract were completed, referring to the issues in dispute between the parties about the amount of the District's contribution to the equity fund and how any remaining funds would be allocated.

The ALJ determined that the District had violated §209-a.1(d) of the Act by improperly conditioning negotiations for a successor contract upon resolution of the equity fund issues that had arisen in 1996, finding that to so condition negotiations upon a condition precedent violated its duty to negotiate in good faith. The District argues that the ALJ erred by not looking at the "totality of conduct" of the parties and by not addressing its affirmative defense that the Union's own conduct with respect to the equity fund left the matter unresolved.

It is well-settled that parties must approach negotiations with "a sincere desire to reach an agreement".<sup>2</sup> A party violates the Act when it conditions the commencement

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<sup>2</sup>*Deposit Cent. Sch. Dist.*, 27 PERB ¶3020, at 3049 (1994); *Town of Southampton*, 2 PERB ¶3011, at 3274 (1969).

of negotiations upon agreement on other issues, such as ground rules,<sup>3</sup> or the resolution of other issues, such as funding<sup>4</sup> or finalization of a prior agreement.<sup>5</sup> Here, it is undisputed that the parties had agreed to all the terms of the 1990-1994 contract, it had been ratified and it had been implemented. The District's argument that the 1990-1994 contract had not been settled is not supported by the record and cannot provide a defense to its refusal to agree to commence negotiations for a successor agreement.

The District's defense that the Union is at fault for delaying agreement on the issues in dispute regarding the equity fund is likewise without merit. The Union attempted to schedule meetings with the District to resolve the amount to be contributed by the District and the distribution of any remaining funds and, in fact, the parties did meet on several occasions. That the parties had not reached agreement on these issues is no defense to the District's refusal to even commence negotiations for a successor agreement. While a respondent is free to raise any affirmative defense in its answer, we cannot find on the facts of this case that the Union's actions provide a viable defense to the District's refusal to negotiate.<sup>6</sup> If, as the District asserts, the Union's actions equal a violation of the Act, it could have filed an improper practice

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<sup>3</sup>*Addison Teachers Ass'n*, 19 PERB ¶3062 (1986).

<sup>4</sup>*Union Free Sch. Dist. No. 11, Town of Greenburgh*, 5 PERB ¶3044 (1972).

<sup>5</sup>*Waverly Cent. Sch. Dist.*, 10 PERB ¶3103 (1977).

<sup>6</sup>See *Bath Cent. Sch. Dist.*, 23 PERB ¶3026 (1990); *Albany Prof'l Permanent Firefighters Ass'n, AFL-CIO*, 4 PERB ¶3071 (1971).

charge making those allegations, as we have previously held that a respondent cannot seek affirmative relief in a pleading other than an improper practice charge.<sup>7</sup>

In its exceptions, the District argues that this Board adopted a "two-way street" approach to bargaining in our decision in *City of Cohoes* (hereafter *Cohoes*),<sup>8</sup> because we there held that

we cannot countenance a negotiations policy which produces or continues a "one-way street" of negotiability under which only one party may force negotiations about any particular subject, whether it be "one-way" for employers or for unions.<sup>9</sup>

The District argues that to require it to negotiate for a successor to the 1990-1994 contract would be to allow one party's bad faith to disadvantage the other party at the bargaining table, in effect allowing one party to force negotiations upon the other party. The District's reliance on *Cohoes* as support for its refusal to negotiate a successor agreement is in error. *Cohoes* dealt with the conversion theory of negotiability; it had nothing to do with bad faith bargaining based upon the conduct of a party. Indeed, the District's insistence that the Union negotiate and resolve all equity fund issues prior to commencing bargaining for a successor agreement is precisely the type of one-sided bargaining, bargaining controlled by one party at the expense of another, that the District claims is improper.

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<sup>7</sup>See *City of Glens Falls*, 30 PERB ¶13047 (1997).

<sup>8</sup>31 PERB ¶13020 (1998).

<sup>9</sup>*Id.*, at 3039.

We find, therefore, that the District violated §209-a.1(d) of the Act when it insisted that there would be no bargaining for a successor contract to the 1990-1994 contract until the issues in dispute arising out of that contract were resolved.

The ALJ dismissed the allegation that the District had intentionally delayed the start of negotiations by failing to respond to the Union's requests to schedule bargaining sessions. As to those allegations which occurred prior to May 30, 1997, the ALJ found them to be untimely, having occurred more than four months prior to the filing of the charge.<sup>10</sup> As to those allegations which occurred within four months of the filing of the charge, the ALJ determined that the record showed that both the District and the Union were responsible for any subsequent delays in scheduling negotiations. The Union argues that the ALJ erred in dismissing as untimely certain of these allegations because the District did not plead timeliness as an affirmative defense to the charge and the untimeliness of this aspect of the charge did not first become apparent at the hearing.

The charge was initially processed by the Director of Public Employment Practices and Representation (Director).<sup>11</sup> The District did not raise timeliness in its answer as required by §204.3(c)(2) of the Rules. Therefore, the ALJ could dismiss the charge as untimely only if the untimeliness of the charge was revealed to the ALJ for

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<sup>10</sup>Section 204.1(a) of our Rules of Procedure (Rules) requires that an improper practice charge be filed within four months of the occurrence of the act alleged to be improper.

<sup>11</sup>Under §204.2(a) of the Rules, the Director is to review and dismiss a charge if he concludes that the violation alleged occurred more than four months before the charge was filed.

the first time at the hearing.<sup>12</sup> The dates alleged by the Union to have been the dates when it attempted to schedule negotiations with the District are set forth on the face of the charge. No other evidence was presented at the hearing to reveal the untimeliness of the charge. The ALJ was not, therefore, permitted under the Rules to raise timeliness on her own motion.<sup>13</sup>

It is clear from the record that, as to the dates alleged prior to May 30, 1997, there is no support for a finding of a violation by the District in delaying the start of negotiations.<sup>14</sup> Both the Union and the District let time elapse in the communications with each other. On only one occasion did the District fail to respond to a letter of inquiry by Lipton.<sup>15</sup> While we do not countenance a delay of over five months in responding to correspondence requesting the initiation of negotiations, based on the totality of the circumstances of this case, we do not find that the District's delay in responding to Lipton's October 10, 1996 letter violates the Act.<sup>16</sup>

For the reasons set forth above, the ALJ's decision regarding the District's insistence that the equity fund issues be negotiated before it would agree to schedule negotiations for a successor agreement to the 1990-1994 contract is affirmed to the

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<sup>12</sup> Section 212.4(l) (formerly §204.7(l) of our Rules), which was amended effective July 21, 1999.

<sup>13</sup> See *County of Westchester*, 29 PERB ¶3003 (1996).

<sup>14</sup> See *Greenburgh No.11 Union Free Sch. Dist.*, 32 PERB ¶3035 (1999).

<sup>15</sup> There was a delay of approximately six months between Lipton's letter of October 10, 1996, and Gourdine's reply to Lipton's April 4 and May 5, 1997 follow-up letters.

<sup>16</sup> See *City of Dunkirk*, 25 PERB ¶3029 (1992).

extent it is consistent with our holding. The decision of the ALJ, dismissing as untimely the allegations in the charge related to the Union's attempts, before May 30, 1997, to schedule negotiations for a successor to the 1990-1994 contract, is reversed. The ALJ's decision dismissing the Union's allegation that the District delayed bargaining is affirmed for the reasons set forth above.

IT IS THEREFORE ORDERED that the District:

1. Negotiate in good faith with the Union for a successor collective bargaining agreement without first requiring the parties to resolve their dispute concerning the equity fund.
2. Sign and post the attached notice at all locations normally used to communicate with unit employees.

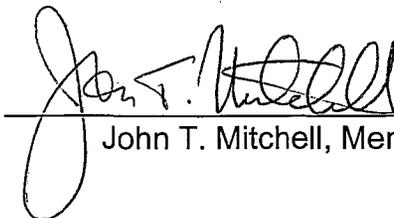
DATED: September 16, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, 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 Board of Education of the City School District of the City of New York (District) in the unit represented by Local 891, International Union of Operating Engineers, AFL-CIO (Union) that the District will forthwith negotiate in good faith with the Union for a successor to the 1990-1994 collective bargaining agreement without first requiring the parties to resolve their dispute concerning the equity fund.

Dated .....

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

Board of Education of the City School  
District of the City of New York

.....

*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**

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In the Matter of

**NASSAU SHERIFF'S OFFICERS  
ASSOCIATION, INC.,**

Charging Party,

- and -

**CASE NO. U-19797**

**COUNTY OF NASSAU,**

Respondent.

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**CERTILMAN, BALIN, ADLER & HYMAN (MICHAEL C. AXELROD of counsel),  
for Charging Party**

**BEE, EISMAN & READY (PETER BEE and PETER FISHBEIN of counsel), for  
Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Nassau Sheriff's Officers Association, Inc. (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge. The charge was filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), the bargaining representative at that time for the unit including the at-issue employees. After the ALJ issued the decision, CSEA was decertified as the representative of the corporals and the Association was certified as their representative.

The charge alleges that the County of Nassau (County) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused to negotiate the

impact of an order by the Nassau County Sheriff (Sheriff) changing shift starting and ending times and restricting the number of corporals who may be granted vacation leave on the same day. The Association excepts to the decision of the ALJ, arguing that there has been no waiver of the Association's right to negotiate the impact of the County's change in shift schedules. The County has filed cross-exceptions to the ALJ's decision finding that the County violated the Act when the Sheriff issued an order restricting the number of corporals who may be granted nonvacation leave on the same day.

The Sheriff issued a departmental order on December 5, 1997, effective January 1, 1998, changing the starting and ending times for both shifts of corporals assigned to the security platoon division of the County Department of Correction.<sup>1</sup> In addition, under the order, after January 1, 1998, no more than two corporals could be out on vacation leave at the same time and only one corporal at any time could be out on nonvacation leave.<sup>2</sup> CSEA demanded to negotiate the impact of the changes made by the Sheriff's order. The County refused CSEA's demands.<sup>3</sup>

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<sup>1</sup>Prior to January 1, 1998, the morning shift began at 8:30 a.m. and ended at 4:00 p.m. and the afternoon shift started at 3:30 p.m. and ended at 12:00 a.m. Since January 1, 1998, the morning shift is 6:00 a.m. to 2:30 p.m. and the afternoon shift is 2:00 p.m. to 10:30 p.m.

<sup>2</sup>Under the prior practice, a certain percentage of corporals and corrections officers could be on leave at the same time. This practice allowed as many as seven or eight corporals to be granted leave status on the same day.

<sup>3</sup>The County raised timeliness as a defense to the charge. The ALJ determined that the charge was timely filed and the County has not excepted to this aspect of the ALJ's decision.

The ALJ held that the CSEA-County 1995-1997 contract granted to the County the right to regulate work schedules and to grant vacation leave at its administrative convenience. Relying on our decision in *County of Nassau (Police Department)* (hereafter *County of Nassau*),<sup>4</sup> the ALJ concluded that CSEA had agreed that the County could implement changes in schedules and vacation leave and that an agreement on the foreseeable impact of such changes was implicit in the contract.<sup>5</sup> However, the ALJ determined that the contract was silent as to the manner in which other leave was to be granted, and that the County, therefore, had not satisfied its duty to negotiate the impact of changes in the manner in which it grants corporals the right to use nonvacation leave.

Based on a review of the record and consideration of the parties' arguments, we affirm the decision of the ALJ, in part, and reverse in part.

The 1995-1997 contract between the County and CSEA contains several provisions that are relevant to this charge:

Section 4. **MANAGEMENT RIGHTS.** Except as validly limited by this Agreement, the County reserves the right to determine the standards of service to be offered by its various agencies; to set the standards of selection for employment; to direct its employees; to regulate work schedules; to take disciplinary action; to relieve its employees from duty because of lack of work or for

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<sup>4</sup>31 PERB ¶3064 (1998).

<sup>5</sup>The ALJ pointed to the contractual provisions that limited the County's discretion in changing shifts (Section 18), provided that vacation would be granted in accordance with the administrative needs of the department (Section 42-4[a]), and established payment for unused vacation leave (Section 42-4[b]).

other legitimate reasons; to maintain the efficiency of governmental operations; to determine the methods, means and personnel by which governmental operations are to be conducted; to determine the content of job classifications; to take all necessary actions to carry out its mission in emergencies; and to exercise complete control and discretion over its organization and the technology of performing its work.

Section 5. **WAIVER - ZIPPER.** The County and the Union, for the life of this Agreement, each voluntarily and unconditionally agree that the other shall not be obligated to negotiate collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement. This shall not be construed to apply to negotiations for future collectively negotiated agreements between the parties, or to re-negotiations of health or dental benefits in the event that another County negotiating unit improves its health or dental benefits, or re-negotiation of amendments to Section 2-5.2 of this Agreement.

Section 9. **ADMINISTRATION OF AGREEMENT.**

9-2.2 Department heads may promulgate departmental practices, procedures, rules and regulations. However, pursuant to Section 5 of the Agreement, said practices, procedures, rules and regulations shall not conflict with, exceed nor supersede this Agreement.

Section 42 **LEAVE WITH PAY.**

42-4 **GRANTING OF, OR CHARGING TO, VACATION TIME.**

(a) Vacation time may be granted in consecutive days, single days, or minimum units of one-quarter (1/4) days. However, vacation time shall be granted only in accordance with the administrative needs of the department.

(b) An employee who has accumulated the maximum vacation time of eighty (80) days and is prevented by the administrative needs of the department from using the employee's yearly vacation entitlements, as accrued prior to the employee's anniversary date, shall be paid straight time for the vacation time over eighty (80) days, so lost, and, in addition, straight time for the time period.

The ALJ determined that the above provisions gave the County the right to change shifts and grant vacation leave time consistent with its administrative needs. The ALJ also found that these sections of the contract addressed the impact on employees of a change of shift or the denial of a vacation leave request. Thus, the ALJ found that the County had satisfied its duty to negotiate any reasonably foreseeable impact of these changes. The ALJ's decision in this regard is consistent with our decision in *County of Nassau*, where we held:

Like all bargaining obligations, however, an employer's duty to negotiate the mandatorily negotiable effects of its managerial decisions can be satisfied. (at 3142)

Here, the County has negotiated for the right to set work schedules and to set the conditions for the use of vacation leave. Any impact issues arising from the exercise of the County's contractually recognized rights in this regard have been settled "upon the totality of the terms and conditions, financial and otherwise, contained within the parties' collective bargaining agreement."<sup>6</sup> This is not an issue of waiver, as characterized by the Association, but an issue of duty satisfaction.

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<sup>6</sup>*Supra*, at 3142-43.

Although waiver may accurately describe a loss of right such as one relinquished by silence, inaction, or certain other types of conduct the defense as described is not one under which a respondent is claiming that the charging party has suffered or should be made to suffer a loss of right. Under this particular defense, a respondent is claiming affirmatively that it and the charging party have already negotiated the subject(s) at issue and have reached an agreement as to how the subject(s) is to be treated, at least for the duration of the parties' agreement. By expressing this particular defense as duty satisfaction, we give a better recognition to the factual circumstances actually giving rise to it and expect to avoid the confusion and imprecision in analysis which have sometimes been caused by the other noted characterizations of this defense.<sup>7</sup>

The ALJ, however, did not reach the same conclusion with respect to the impact of the change in the conditions for the use of nonvacation leave. The ALJ found that the contract did not address the manner in which nonvacation leave is granted. Thus, the ALJ found that the County had not satisfied its duty to bargain the impact of any change in the manner in which it grants non-vacation leave.

The County argues, however, that the Management Rights clause (Section 4), the Waiver-Zipper clause (Section 5) and the Administration of the Agreement clause (Section 9-2.2) allow it to set schedules and to determine how many employees are to be on duty and how many may use leave of any kind at any time. It argues that these provisions must be read together with the several clauses in the contract dealing with nonvacation leave - including sick leave, personal leave, supplemental leave and authorized leave with pay - and the related contractual provisions about abuse of such leave, accruals of unused leave and pay for unused leave. When these provisions are read together, the contract evidences that the County has also satisfied its duty to

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<sup>7</sup>*Id.* At 3142.

bargain the impact of any changes in the way in which nonvacation leave may be requested and used. We agree.

Several sections of the contract, over nine pages, address, both explicitly and implicitly, the manner in which nonvacation leave is earned, accrued, granted, used and charged.<sup>8</sup> The contract also embodies the parties' agreement as to payment for unused leave or its conversion into other types of leave. Thus, it is difficult to imagine any issues regarding the impact of a change in the use of nonvacation leave that the contract does not address. CSEA agreed by entering into the contract that issues related to the use of nonvacation leave impacted by a change in the number of staff on duty at a given time were satisfied, given all the considerations in the contract.

Therefore, we affirm the ALJ's decision as it relates to the impact of the change in shifts and restricts the number of corporals who may use vacation leave at the same time. We reverse the ALJ's decision as it relates to the impact of the County's change in the number of corporals who may use nonvacation leave at the same time.

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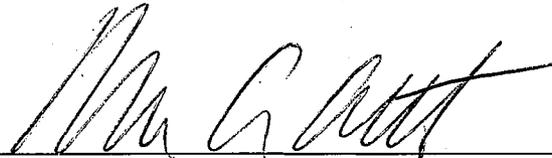
<sup>8</sup>Sections 42-5 through 43-2 of the 1995-1997 contract deal with sick leave, sick leave abuse, excess sick leave accrual, charges against sick leave, supplemental leave at half pay, termination day, authorized absence with pay, jury duty leave, military leave, absences for extraordinary circumstances, child care leave, bereavement leave, blood days and leave without pay.

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

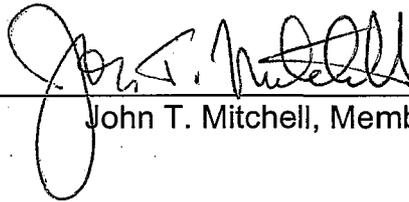
DATED: September 16, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

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In the Matter of

**ANTHONY FARELLA, SR.,**

Charging Party,

- and -

**CASE NO. U-20450**

**AMALGAMATED TRANSIT UNION,  
DIVISION 580, AFL-CIO and  
CENTRAL NEW YORK REGIONAL  
TRANSPORTATION AUTHORITY,**

Respondents.

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**YUSUF J. NURALDIN, for Charging Party**

**BLITMAN & KING, LLP (CHARLES E. BLITMAN of counsel) , for  
Respondent Amalgamated Transit Union, Division 580, AFL-CIO**

**FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C. (CRAIG M.  
ATLAS of counsel), for Respondent Central New York Regional  
Transportation Authority**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Anthony Farella, Sr. to a decision of an Administrative Law Judge (ALJ) dismissing his charge which alleges that the Central New York Regional Transportation Authority (CENTRO) violated §209-a.1(a), (b), (c), (d) and (e) of the Public Employees' Fair Employment Act (Act) and that the Amalgamated Transit Union, Division 580, AFL-CIO (Union) violated §209-a.2(a), (b)

and (c) of the Act in their handling of a seniority grievance he filed.<sup>1</sup> Both the Union and CENTRO filed answers denying the material allegations of the charge and raising several affirmative defenses. Farella's motion for particularization of the Union's and CENTRO's answers was denied by the ALJ as being untimely filed.

After a pre-hearing conference, at which all parties were present and represented, the ALJ directed Farella to file an offer of proof by March 2, 1999, as to the evidence he would present in support of his charge. Instead, Farella filed another motion for particularization of both the Union's and CENTRO's answers. Because that motion might have caused some confusion about the time for filing the offer of proof, the ALJ extended Farella's time to file until March 25, 1999.

On April 25, 1999, the ALJ received a letter from Nuraldin, Farella's representative, in which he refused to file the offer of proof, questioned the ALJ's authority to direct him to do so, and reiterated his procedural and constitutional objections to the manner in which the charge was being processed. CENTRO thereafter moved to have the charge dismissed for failure to prosecute. The ALJ then dismissed the charge for failure to prosecute, citing Nuraldin's refusal to submit an offer of proof.

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<sup>1</sup>Upon his initial review of the charge, pursuant to §204.2(a) of the Rules of Procedure (Rules), the Director of Public Employment Practices and Representation (Director) informed the parties that "the facts as alleged appear only to support the Section 209-a.2(c) charge against the union, and only that part of the overall charge will be processed".

Farella excepts to the ALJ's decision, arguing that the charge was improperly limited to the alleged §209-a.2(c) violation against the Union, that the ALJ engaged in *ex parte* communications at the pre-hearing conference, that the pre-hearing conference was improperly conducted, that the ALJ did not have the authority to require an offer of proof, that the ALJ was prejudiced against Farella's representative, and that the manner in which the charge was processed violated Farella's state and federal constitutional rights. CENTRO filed a response, supporting the ALJ's decision and arguing that the processing of the charge had been fair and proper. The Union did not file a response to the exceptions. Farella then filed a "reply brief to respondent's cross-exceptions".<sup>2</sup>

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

The issue before us initially is only whether the ALJ's dismissal of the charge for failure to prosecute was an abuse of discretion. If the charge was properly dismissed for failure to prosecute, Farella's other objections become moot. On the basis of the record before us, we conclude that the ALJ's dismissal of the charge was not an abuse of discretion.

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<sup>2</sup>CENTRO filed only a response to Farella's exceptions to the ALJ's decision, not cross-exceptions. Section 213.3 of our Rules, as amended in July 1999 (previously §204.11), provides that only exceptions, a response to exceptions, cross-exceptions or a response to cross-exceptions will be accepted unless we authorize another pleading. As there were no cross-exceptions filed, and as we did not request or authorize a reply to CENTRO's brief, Farella's reply will not be considered.

It is well-settled that an ALJ has the discretion while processing an improper practice charge, either at a pre-hearing conference, after the conference, during the hearing or at any other appropriate juncture, to require a party to submit an offer of proof in support of the allegations being processed.<sup>3</sup>

It became clear to the ALJ at the pre-hearing conference that Farella and the Union had a difference of opinion about the meaning of the contractual provisions and the practices of the Union in determining seniority for bidding purposes. Farella had filed a grievance when he was not allowed to bid in accordance with what he believed was his seniority date. His grievance was denied by CENTRO and the Union furnished him with an explanation of its interpretation of the contractual provisions and the practices regarding seniority dates.

As a mere difference of opinion between an employee and an employee organization about the interpretation of a contractual provision or a practice is not sufficient to establish a breach of the duty of fair representation in violation of §209-a.2(c) of the Act,<sup>4</sup> the ALJ appropriately directed Farella to file an offer of proof as to what other facts he would offer in support of the alleged violation of the Act. Even though Farella's representative instead filed a second motion for particularization of the answers, the ALJ afforded him another opportunity to comply with the directive to file an

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<sup>3</sup>*New York State Security and Law Enforcement Employees Council 82, AFSCME*, 29 PERB ¶13015 (1996); *Nanuet Union Free Sch. Dist.*, 17 PERB ¶13005 (1984); *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 16 PERB ¶13067 (1983); *Village of Spring Valley Policemen's Benevolent Ass'n*, 14 PERB ¶13010 (1981).

<sup>4</sup>*Dist. Council 37, AFSCME*, 28 PERB ¶13062 (1995).

offer of proof. Rather than follow the ALJ's directive, Farella's representative responded that there was no authority in PERB's Rules for an ALJ to require an offer of proof.

The Notice of Conference sent to all parties to an improper practice charge alerts the parties that one of the ALJ's roles at the pre-hearing conference is to "attempt to assist the parties in resolving the matter or in entering into a stipulation of facts which may eliminate or limit the need for a formal hearing."<sup>5</sup> In furtherance of this purpose, the ALJ has the discretion to direct one or more of the parties to file an offer of proof to enable the ALJ to determine whether the facts to be presented are legally sufficient to support the allegations made by a party. Inherent in this discretion is the ability of the ALJ to dismiss a pleading before or during the hearing based upon what is included in the offer of proof<sup>6</sup>, or to dismiss a pleading because of a refusal or a failure to file an offer of proof.<sup>7</sup>

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<sup>5</sup>The former Rules, §204.6, in effect at the time this charge was being processed by the ALJ, also stresses that one of the purpose of a conference is to clarify the issues. As amended in July 1999, this section is now §212.2. Any reference to the purposes of a conference was eliminated from the new Rule because of the potential of it being seen as a possible limitation on the purposes of a pre-hearing conference. Clarification of the issues is a purpose of the pre-hearing conference, but it is only one of the many reasons for the conference, which include, for example, settlement of the dispute, narrowing the issues in dispute, and discussions pertaining to the scheduling and conduct of the hearing.

<sup>6</sup>See *New York City Transit Auth.*, 30 PERB ¶3004 (1997), where the Board affirmed the ALJ's dismissal of a defense raised by the Authority based upon its offer of proof in support of the defense.

<sup>7</sup>See *City of Niagara Falls*, 23 PERB ¶3039 (1990), where the Board affirmed the ALJ's decision to close the record and issue a decision upon the charge alone when the City failed to file an offer of proof setting forth the facts it would introduce to establish its defense to the improper practice charge after the ALJ had directed it to do so.

As we noted in *United Federation of Teachers (Armatas)*:<sup>8</sup>

A charging party who takes it upon himself or herself to refuse to participate in a PERB proceeding because of an adverse ruling does so at his or her peril because such a refusal constitutes a failure to prosecute the charge and may result in the dismissal of the charge.

Here, it is Farella's refusal to file an offer of proof after specifically being directed to do so by the ALJ that constitutes the failure to prosecute warranting the dismissal of the charge.<sup>9</sup>

Farella makes several allegations against the ALJ in the processing of the charge and the conduct of the pre-hearing conference. Although these are serious allegations, they do not excuse his refusal to prosecute the charge. Farella had several avenues open to him to raise his objections to the processing of his charge. He could have made a motion to have the ALJ recuse himself,<sup>10</sup> he could have raised his objections to either the Director or to this Board or he could have raised his objections in exceptions after the ALJ issued a final decision pursuant to the offer of proof and/or a hearing.<sup>11</sup> By refusing to comply with the ALJ's directive, Farella forfeited the opportunity to have his charge heard on the merits.

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<sup>8</sup>31 PERB ¶3042, at 3092 (1998).

<sup>9</sup>See *Civil Serv. Employees Ass'n, Inc., Local 1000 (Konopka)*, 27 PERB ¶3032 (1994).

<sup>10</sup>A motion to have an ALJ recuse himself/herself is made pursuant to §212.4(g) of our Rules, as amended in July 1999. (Formerly §204.7(h)(1)).

<sup>11</sup>See *City of Rye*, 13 PERB ¶3039, *conf'd sub nom. Banahan v. PERB*, 13 PERB ¶7012 (Sup. Ct. Albany County. 1980). See also *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 15 PERB ¶3042 (1982).

Based on the foregoing, Farella's exceptions are denied and the ALJ's decision is affirmed.

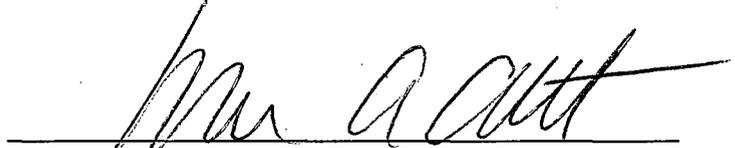
IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, dismissed.

DATED: September 16, 1999  
Albany, New York



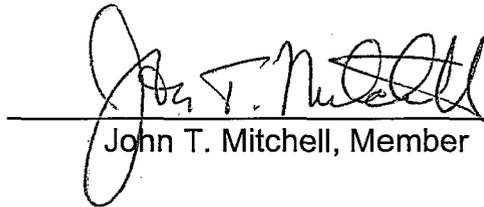
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Michael R. Cuevas, Chairman



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Marc A. Abbott, Member



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John T. Mitchell, Member

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

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In the Matter of

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

Petitioner,

-and-

**CASE NO. C-4871**

**TOWN OF SOMERS,**

Employer.

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**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 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 agreed upon by the parties and described below, as their

exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: General Foreman, Mechanics Helper, Heavy Motor Equipment Operator, Motor Equipment Operator, Laborer, Road Maintainer, and all blue collar employees of the Town of Somers Highway Department.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with 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.

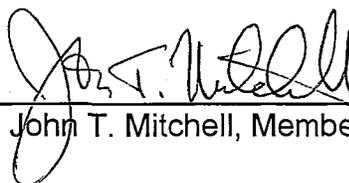
DATED: September 16, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TEAMSTERS LOCAL 264, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,**

Petitioner,

-and-

**CASE NO. C-4879**

**TOWN OF ELMA,**

Employer.

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**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 Teamsters Local 264, International Brotherhood of Teamsters 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 regular part-time employees who work a minimum of 20 hours per week in the Departments of Highway, Water, Waste Water and Transfer Station, employed in the following titles: Water Maintenance Worker, Sewer Maintenance Worker, Motor Equipment Operator, Laborer, Caretaker.

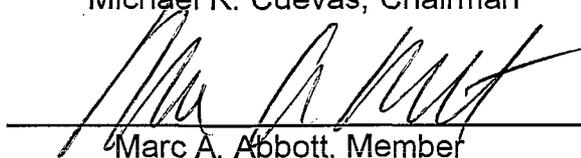
Excluded: Water Superintendent, Highway Superintendent, Water Crew Chief, Seasonal Employees, Casual and Temporary Employees, Part-timers employed less than 20 hours per week, and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 264, International Brotherhood of Teamsters. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

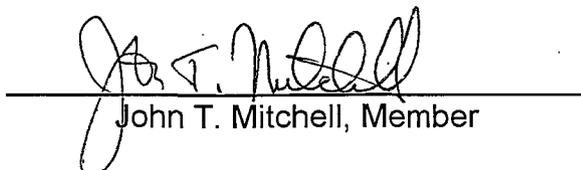
DATED: September 16, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**ORANGE COUNTY DEPUTY SHERIFFS' POLICE  
BENEVOLENT ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-4884**

**COUNTY OF ORANGE,**

Employer,

-and-

**ORANGE COUNTY CORRECTION OFFICERS  
BENEVOLENT ASSOCIATION,**

Intervenor.

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**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 Orange County Deputy Sheriffs' Police Benevolent Association 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: Deputy Sheriff, Deputy Sheriff and Recruit, Deputy Sheriff and Sergeant, Deputy Sheriff Investigator, Deputy Sheriff Sergeant Investigator and Warrant Officer.

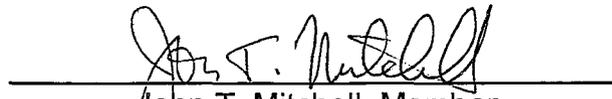
Excluded: All others.

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

DATED: September 16, 1999  
Albany, New York

  
Michael R. Cuevas, Chairman

  
Marc A. Abbott, Member

  
John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**SENECA COUNTY DEPUTY SHERIFF'S POLICE  
BENEVOLENT ASSOCIATION**

Petitioner,

-and-

**CASE NO. C- 4886**

**COUNTY OF SENECA,**

Employer,

-and-

**SENECA COUNTY SHERIFF'S EMPLOYEES  
ASSOCIATION,**

Intervenor.

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**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 Seneca County Deputy Sheriff's Police Benevolent Association 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.<sup>1</sup>

Included: All full-time employees in the position of deputy sheriff and sergeant.

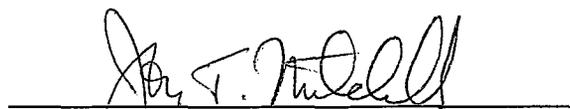
Excluded: Sheriff, undersheriff, correction officer, senior correction officer, dispatcher, civil deputy, cook, all clerical positions, and all others.

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

DATED: September 16, 1999  
Albany, New York

  
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Michael R. Cuevas, Chairman

  
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Marc A. Abbott, Member

  
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John T. Mitchell, Member

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<sup>1</sup>During the processing of the petition, the Intervenor disclaimed any interest in appearing on a ballot or otherwise participating in the matter.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**LABORERS INTERNATIONAL UNION OF  
NORTH AMERICA, LOCAL 17,**

Petitioner,

-and-

**CASE NO. C-4900**

**COUNTY OF SULLIVAN,**

Employer,

-and-

**SULLIVAN COUNTY EMPLOYEES  
ASSOCIATION, INC.,**

Intervenor.

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**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 Laborers International Union of North America, Local 17, 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 part-time employees who work more than 20 hours per week and four months per year or four consecutive months, or earn at least 50% of the annual salaries of their regular job classification, in the following titles: Account Clerk, Account Clerk (Licensed Weighmaster), Account Clerk-Typist, Airport Attendant, Assistant Sign Installer, Auto Body Repairer, Automotive Equipment Attendant, Blaster, Bridge Carpenter, Bridge Maintainer I, Bridge Maintainer II, Building Maintenance Mechanic, Building Technician, Carpenter, Clerk, Construction Equipment Operator I, Construction Equipment Operator II, Construction Equipment Operator III, Crane Operator, Custodial Worker, Custodian, Electrician, Electronic Technician, Engineering Aide, Engineering Technician, Equipment Painter, Grounds Maintenance Worker I, Grounds Maintenance Worker II, Hydraulic Excavation Equipment Operator, Junior Civil Engineer, Laborer I, Laborer II, Laborer III, Land and Claims Adjuster, Maintenance Assistant, Mason, Master Mechanic, Mechanic, Mechanic's Helper, Motor Equipment Operator, Municipal Director of Weights and Measures, Payroll Clerk, Principal Account Clerk, Principal Payroll Clerk, Recycling Coordinator, Senior Account Clerk, Senior Account Clerk-Typist, Senior Master Mechanic, Senior Payroll Clerk, Senior Stockkeeper, Senior Typist, Senior Weather Observer, Sign Installer, Sign Shop Painter I, Sign Shop Painter II, Stockkeeper, Tire Changer, Traffic Safety Technician, Transfer Station Attendant, Transfer Station Operator, Typist, Weather Observer, Welder I, Welder II.

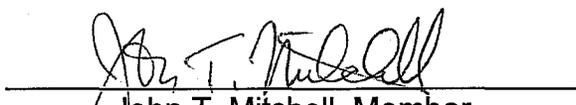
Excluded: Temporary, seasonal and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Laborers International Union of North America, Local 17. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 16, 1999  
Albany, New York

  
\_\_\_\_\_  
Michael R. Cuevas, Chairman

  
\_\_\_\_\_  
Marc A. Abbott, Member

  
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John T. Mitchell, Member

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-4908**

**MONROE #2-ORLEANS BOCES,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union 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: Maintenance Mechanic (all series), Custodian (all series), Cleaner (all series), Groundsmen (all series).

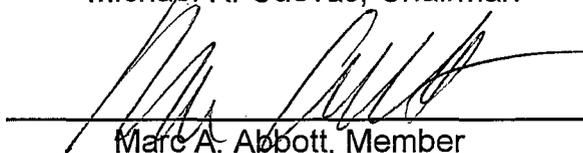
Excluded: All other employees.

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

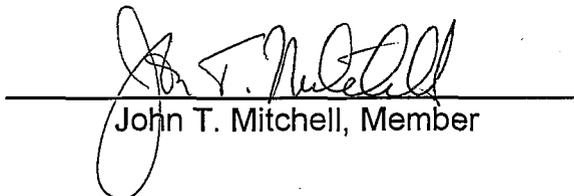
DATED: September 16, 1999  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member