STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Petitioner,

- and -

CASE NO. C-4780

COUNTY OF ROCKLAND,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, and ROCKLAND COUNTY DISTRICT ATTORNEY'S CRIMINAL INVESTIGATOR'S ASSOCIATION, and ROCKLAND COUNTY SHERIFF'S DEPUTIES ASSOCIATION, INC.,

Intervenors.

THOMAS P. HALLEY, ESQ., for Petitioner

PATRICIA ZUGIBE, COUNTY ATTORNEY (JEFFREY J. FORTUNATO of counsel), for Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (WILLIAM A. HERBERT of counsel), for Intervenor Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO

F. HOLLIS GRIFFIN, JR., ESQ., for Intervenor Rockland County District Attorney's Criminal Investigator's Association

RICHARD P. BUNYON, ESQ., for Intervenor Rockland County Sheriff's Deputies Association, Inc.

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United Federation of Police Officers, Inc. (Federation) and cross-exceptions filed by the County of Rockland (County), the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), and the Rockland County District Attorney's Criminal Investigator's Association (Association) to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director).[1] The Assistant Director granted the Federation's petition to be certified as the exclusive bargaining representative for a unit of Investigative Aides I, II and III (Narcotics) (Aides) employed in the County's District Attorney's Office as part of the Rockland County Drug Task Force (Task Force). The Aides are currently in a unit of County employees represented by CSEA.

The Assistant Director found that the Aides, who work primarily as undercover narcotics agents for the Task Force, perform police functions and exercise police powers and, therefore, should not be included in an overall unit that does not include employees who perform law enforcement duties. Finding that the Aides were not covered by the interest arbitration provision of §209.4 of the Public Employees' Fair Employment Act (Act), the Assistant Director determined that the Aides were not appropriately placed in the unit of criminal investigators represented by the Association because criminal investigators employed in a district attorney's office are entitled to

---

[1]The Rockland County Sheriff's Deputies Association, Inc. (Deputies Association) has not filed exceptions, cross-exceptions or a response to the other parties' exceptions and cross-exceptions.

interest arbitration. The Assistant Director also concluded that the Aides were not appropriately placed in the unit of patrol deputy sheriffs represented by the Deputies Association because of the minimal contact between the Aides and the patrol deputy sheriffs and the differing discipline procedures affecting the two groups of employees. He, therefore, determined that a separate unit of Aides was most appropriate.

The Federation excepts only to so much of the Assistant Director's decision that does not find the Aides to be police officers entitled to interest arbitration. The County's cross-exceptions address only the Assistant Director's failure to find that the Aides are police officers within the meaning of Criminal Procedure Law, §1.20(34)(g) (CPL). CSEA's cross-exceptions argue that Aides are not police officers, are not otherwise entitled to interest arbitration and, because there are other titles in the CSEA unit that perform police functions, the Aides should not have been fragmented from the overall CSEA unit. The Association argues in its cross-exceptions that the Aides are not police officers, that the purposes of the Act are not served by a proliferation of bargaining units and that the petition should have been denied.

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

The Aides perform criminal law enforcement duties as part of their assignment to the Task Force, where they work, for the most part, undercover. They make drug buys, and infiltrate drug rings and, to some degree, other organized crime networks. The Aides carry weapons and ammunition and are trained in firearms use; they must be re-qualified each year. They are authorized to use deadly force when required. Their job

responsibilities include applying for and executing warrants, making arrests, wiretapping and collecting and maintaining custody of evidence. The Aides must have a high school or equivalent diploma, attend the municipal police academy, and qualify in firearms use.

It is clear that the Aides perform law enforcement functions and have police powers. The Assistant Director found that the performance of criminal law enforcement functions was enough to warrant fragmentation of the Aides from the overall CSEA unit. As a result, he did not make a specific determination that the Aides are police officers within the meaning of CPL §1.20(34)(g).

Our decision in *County of Erie and Sheriff of Erie County (*hereinafter *County of Erie)*,[2] in which we created a unit of deputy sheriffs-criminal based upon their "providing ancillary services which are directly and predominantly related to criminal law enforcement," was the basis of the Assistant Director's decision. There, the petitioner urged us to use a test which focused solely on the status as "police officers" of the employees sought to be represented in a separate unit. We rejected that "bright line" test because it focused solely on title and not on job functions. Instead, we focused on the primary functions of the in-issue employees in making our determination that a unit of the deputy sheriffs-criminal was the most appropriate unit.

As in *County of Erie*, here the exclusive or primary characteristic of the Aides' duties is to be "responsible for the prevention and detection of crime and the

---

[2]29 PERB ¶3031, at 3069 (1996).

enforcement of the general criminal laws of the state." [3] Given these responsibilities, the Aides are most appropriately placed in a separate unit. That others in the unit represented by CSEA can and do engage in limited criminal law enforcement activities[4] from time to time does not provide a basis to deny fragmentation to the Aides, who are regularly exposed to law enforcement by virtue of their training and job responsibilities.[5]

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

For the reasons set forth above, we find the following unit to be most appropriate:

---

[3]Civil Service Law, §58.3. This section of the CSL defines a "police officer" as one who, as "a member of...[any] other organization of a county... is responsible for the detection and prevention of crime and the enforcement of the general criminal laws of the state...." We need not decide, for the purposes of this decision, whether or not the Aides are "police officers" within the meaning of the CSL or, as urged by the County, whether they are "police officers" within the meaning of the Criminal Procedure Law, §1.20(34)(g).

[4]The Senior Medical investigators, who are in the CSEA unit, are deputized, are assigned weapons and receive weapons training, investigate homicides, suicides and any other suspicious deaths and have some limited interaction with personnel in the District Attorney's office. The probation officers and social services investigators also perform some related law enforcement tasks as part of their jobs. In an earlier case that sought the fragmentation of the criminal investigators from the overall unit, the Director of Public Employment Practices and Representation (Director) determined that these employees in the CSEA unit were not appropriately removed from the overall unit because, even though they occasionally performed police work, "their primary commitment is not to law enforcement even though, at times, they may work with, side by side, or under the temporary supervision of a police officer." *County of Rockland*, 16 PERB ¶4005, at 4011 (1983). There is nothing in this record which warrants disturbing the Director's earlier determination.

[5]*County of Erie*, *supra*, note 2.

Included: Investigative Aide I (Narcotics), Investigative Aide II (Narcotics), Investigative Aide III (Narcotics).

Excluded: All other employees.

IT IS, THEREFORE, ORDERED that the case be remanded to the Director/Assistant Director for further processing consistent with this decision.

DATED: December 20, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

- and -

CASE NOS. U-19029, U-19064 & U-19145

STATE OF NEW YORK (WORKERS' COMPENSATION BOARD),

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK of counsel), for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL VOLFORTE of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions to a decision of the Director of Public Employment Practices and Representation (Director) dismissing three improper practice charges filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), alleging that the State of New York (Workers' Compensation Board) (State) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally ended its practice of allowing employees an additional twenty minutes

beyond their normal lunch period to cash their bi-weekly paychecks without charging the time to leave accruals.[1]

Initially, the Director held that because Article 39 of the parties' 1995-1999 collective bargaining agreements[2] was a reasonably arguable source of right to CSEA with respect to the at-issue practice, the charges should be conditionally dismissed pursuant to PERB's existing deferral policies.[3] CSEA filed exceptions to the Director's decision, arguing to us that the Director's conditional dismissal of the charges was unfair and a denial of its due process rights because the Director did not inform the parties that Article 39 was in issue. CSEA alleged that if it had known that Article 39 was considered to be relevant by the Director, it would have offered into evidence arbitration awards holding that Article 39 is not applicable to unilateral changes in extra-contractual terms and conditions of employment.

---

[1]Case No. U-19029 involves employees at the Albany office of the Workers' Compensation Board (WCB), Case No. U-19064 involves employees at WCB's Long Island office and Case No. U-19145 alleges the same violation at WCB's Buffalo office. The affected employees are in either the Operational Services bargaining unit or the Administrative Services bargaining unit, both of which are represented by CSEA.

[2]Article 39 of the State-CSEA contracts provides:

> With respect to matters not covered by this Agreement, the State will not seek to diminish or impair during the term of this Agreement any benefit or privilege provided by law, rule or regulation for employees without prior notice to CSEA; and, when appropriate, without negotiations with CSEA; provided, however, that this Agreement shall be construed consistent with the free exercise of rights reserved to the State by the Management Rights Article of this Agreement.

[3]*See Town of Carmel*, 29 PERB ¶3073 (1996).

Finding that the Director's inquiry at the hearing regarding the applicability of Article 39 was ambiguous and could have been reasonably misunderstood by CSEA, we remanded the cases to the Director for the receipt of any awards or decisions interpreting Article 39 which either CSEA or the State would offer and such other stipulations or evidence the Director considered relevant.[4]

CSEA thereafter filed with the Director one arbitration award. It deals with the applicability of Article 39 to the probationary periods set forth in the Civil Service Law. The parties also submitted to the Director a Stipulation of Interpretation, wherein they agreed that the rights accorded by §209-a.1 of the Act are not employee benefits provided by law, rule or regulation within the meaning of Article 39. Given the parties' stipulation, the Director determined that it would not effectuate the purposes of the Act to defer the charges and he decided the cases on the merits.

The Director found that there had been a long-standing practice at WCB's Albany, Buffalo and Long Island locations of allowing employees an extra twenty minutes to cash paychecks without charge to leave accruals. On March 14, 1997, WCB issued a memorandum to all employees announcing that paychecks would thereafter be distributed after 3:00 p.m. on the Tuesdays prior to regularly scheduled Wednesday paydays. The memorandum went on to state:

> Supervisors and employees are reminded that the Attendance Rules do not provide for "release time" for employees to cash their paychecks. Employees who choose to be paid by check must conduct their personal banking outside of regular work hours. This means either before or after work hours, or during regularly

---

[4]32 PERB ¶3017 (1999).

> scheduled lunch periods. If circumstances arise where an individual must conduct personal business during working hours, employees must request time off charged to leave accruals (personal, annual or holiday) in the usual manner.

From the time the memorandum was issued, employees have not been allowed to cash paychecks without charging the time to leave accruals.[5]

The Director reviewed in detail the applicable contracts between CSEA and the State and determined that the contracts comprehensively addressed workday, workweek, time and attendance and employee leave. By agreeing to those provisions, the Director found, the parties' had agreed that the subject matter of the charges, which he characterized as the use of leave accruals to conduct personal business, would be governed by their contracts. The Director determined that WCB's issuance of the March 14, 1997 memorandum represented a permissible reversion by WCB to the terms of the contract between the State and CSEA and he, therefore, dismissed the charges in their entirety.

CSEA excepts to the Director's decision, arguing that the Director erred as a matter of fact and law in finding that the State was permitted to revert to the terms of the contracts with respect to the use of leave time for conducting personal business. The State 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.

---

[5]The practice was apparently reinstated at WCB's Long Island office after three pay periods.

There is no dispute that the contracts for the Administrative Services Unit and the Operational Services Unit do not contain any specific reference to leave for check-cashing purposes. The contracts do cover a variety of leave provisions dealing with accrual, use, and notice of use of vacation, sick and personal leave, as well as a number of other types of leave, such as leave for military and jury duty, child care and leave to take examinations. CSEA argues that the reference in the contracts to "other types of leave" available pursuant to "law, rule or policy" reflects the parties' understanding that there are other types of leave not covered by the contracts available to CSEA unit members, including leave to cash paychecks. CSEA argues that, as the parties understood that the contracts were not all inclusive, the Director erred in finding that the State was privileged to end the nonconforming practice of check-cashing leave and to revert to the terms of the State-CSEA contracts.

In *Maine-Endwell Central School District*,[6] we held:

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

---

[6]14 PERB ¶4625, at 4759 (1981), *aff'd*, 15 PERB ¶3025 (1982).

Utilizing this standard, in *Florida Union Free School District*,[7] we determined that even when the parties' contract is silent as to a specific term and condition of employment, where the parties have fully negotiated and reached agreement on a mandatory subject of negotiations which encompasses the specific term and condition in issue, the employer cannot be said to have acted unilaterally when it reverts to the terms of the negotiated agreement. Here, the practice in issue is taking time to cash pay checks or, in a broader sense, time for conducting personal business. The State-CSEA contracts specifically set forth the terms the parties have agreed upon relating to the use of accrued leave for personal business. As our decision in *County of Nassau*[8] makes clear, each term and condition of employment need not be specifically set forth in a collective bargaining agreement for us to conclude that the parties have negotiated to agreement on a general subject matter, which may be found to cover more specific practices which fall within the purview of that which has been negotiated.

> Like waiver by agreement, a contract reversion defense is also appropriately characterized as a duty satisfaction defense. An employer raising a contract reversion defense is claiming that it and the representative of its employees have already bargained and reached agreement on a subject. Having done so, the employer is privileged to act pursuant to that negotiated agreement, notwithstanding a practice to the contrary. The same argument forms the essence of a duty satisfaction defense. An employer, having bargained and reached an agreement with an employee organization as to how a subject is to be treated, cannot be held to have acted unilaterally in violation of the Act when it takes an action allowed by the agreement. Its duty to negotiate has been satisfied. Whether the defense is articulated as waiver by

---

[7]31 PERB ¶ 3056 (1998).

[8]31 PERB ¶3074 (1998).

agreement or contract reversion, they are both differently phrased principles of duty satisfaction.[9]

We find that the State was privileged to revert to the terms of its agreements with CSEA which support the State's position that time off from work for cashing pay checks is personal business which must be charged to personal leave accruals.

Based on the foregoing, we deny CSEA's exceptions and affirm the decision of the Director.

IT IS, THEREFORE, ORDERED that the charges must be, and they hereby are, dismissed.

DATED: December 20, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[9]*Id.* at 3167.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RAMAPO POLICE BENEVOLENT ASSOCIATION,

Charging Party,

- and - **CASE NO. U-19398**

TOWN OF RAMAPO,

Respondent.

SCHLACHTER & MAURO (REYNOLD A. MAURO of counsel), for Charging Party

ALAN M. SIMON, TOWN ATTORNEY (JACK SCHLOSS of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Ramapo Police Benevolent Association (PBA) to an Administrative Law Judge (ALJ) decision which dismissed its charge against the Town of Ramapo (Town).

The PBA had filed a charge alleging violations of §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act), asserting among other things, that the Town, "in direct retaliation for his aggressive pursuit of his duties as PBA president," denied Brian Whitmore "his seniority right, including the right to select a sector" and, further, "denied Whitmore's request to serve on midnights in violation of an agreement

reached in settlement of a prior improper practice charge" relating to sector assignments.

The Town moved to dismiss the charge at the conclusion of the PBA's case and, thereafter, rested its case. After receipt and review of the transcript, the ALJ granted the Town's motion to dismiss. We agree. In *County of Nassau (Police Department)*[1], we held that a motion to dismiss made to a hearing officer at the close of the charging party's evidence should not be granted without careful deliberation. Therefore, the hearing officer must assume the truth of all of the charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts.

The PBA filed exceptions to the ALJ's decision. The PBA generally excepts to the factual determinations made by the ALJ and the conclusions drawn therefrom, although it provided no transcript references.

In order to establish improper motivation under §209-a.1(a) and (c) of the Act, a charging party must prove (a) he/she had been engaged in protected activities, and (b) that respondent had knowledge of and (c) acted because of those activities.[2] If the charging party proves a *prima facie* case of improper motivation, the burden of

---

[1]17 PERB ¶3013 (1994).

[2]*Town of Independence,* 23 PERB ¶3020 (1990). *See also City of Salamanca*, 18 PERB ¶3012 (1985); *City of Corning*, 17 PERB ¶3022 (1984); *City of Albany*, 4 PERB ¶3056 (1971) *Town of Newark Valley*, 16 PERB ¶4621 (1983), *aff'd*, 16 PERB ¶3102 (1983).

persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons.[3]

We have held that the charging party can establish "[t]he existence of anti-union animus . . . by statements or by circumstantial evidence, which may be rebutted by presentation of legitimate business reasons for the actions taken, unless found to be pre-textual."[4] Proof that the employer's stated reasons for its conduct are pretextual may constitute such circumstantial evidence.[5]

Assuming the truth of the charging party's evidence and any reasonable inferences that could be drawn therefrom, we conclude that the PBA has failed to prove the elements of the charge as set forth in our *Salamanca* decision and the charge must be dismissed.

The testimony of Whitmore clearly indicates that he had engaged in protected union activities and the Town was aware of his union activities:[6]

> Q. Have you been precluded serving or since finishing your tenure as PBA president in engaging in any union activity of any kind?

---

[3]*City of Salamanca, supra*; *City of Albany*, 3 PERB ¶4507, *aff'd,* 3 PERB ¶3096 (1970), *conf'd in pertinent part*, 36 A.D.2d 348, 4 PERB ¶7008 (3d Dep't 1971), *aff'd*, 29 NY2d 433, 5 PERB ¶7000 (1972). *See Mount Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977);*Captain's Endowment Ass'n (Mallory)*, 15 PERB ¶3019 (1982).

[4]*See Town of Independence, supra. See also Convention Ctr. Operating Corp.*, 29 PERB ¶3022 (1996); *City of Rye*, 28 PERB ¶3067 (1995), *conf'd* 234 A.D.2d 640, 29 PERB ¶7021 (3d Dep't 1996).

[5]*See City of Utica*, 24 PERB ¶3044 (1991); *Town of Henrietta*, 28 PERB ¶4605, *aff'd*, 28 PERB ¶3079 (1995).

[6]Transcript, p. 131.

A. By who?

Q. By any superior officer or member of the town government.

A. No. They wouldn't . . . they would have no control over that.

Turning to the Town's reaction to Whitmore's protected union activity, the PBA alleged in its charge that the Town denied Whitmore's seniority right to select a sector and to work midnights. However, the evidence failed to support the PBA allegations. PBA President Lawrence Huxley testified that the Town had no contractual obligation to make sector assignments in any particular way.[7] The PBA then called Chief Timothy Ruggiero as a witness, who confirmed that he directed his commanders not to make sector assignments based on seniority.[8] Ruggiero further testified that Whitmore's assignment to sector seven had nothing to do with his PBA activities.[9] Lastly, Whitmore was granted his request to work the midnight shift commencing January 1, 1998.[10] The evidence presented by the PBA therefore fails to meet the "but for" test.[11]

---

[7]Transcript, p. 59.

[8]Transcript, p. 168.

[9]Transcript, p. 171.

[10]Transcript, p. 47.

[11]*County of Nassau v. PERB*, 103 A.D.2d 274, 17 PERB ¶7016, (2d Dep't, 1984); *City of Albany v. PERB*, 57 A.D.2d 374, 10 PERB ¶7012, (3d Dep't 1977). *See also Rockville Centre Union Free Sch. Dist.*, 32 PERB ¶3050 (1999); *City of New Rochelle*, 27 PERB ¶3062 (1994); *County of Nassau*, 27 PERB ¶3011 (1994), *conf'd*, 221 A.D.2d 339, 28 PERB ¶7014 (2d Dep't 1995); *Town of Independence*, *supra*; *City of Salamanca*, *supra*.

We have long held that decisions of a public employer affecting its mission are not mandatory subjects of negotiation.[12] Thus, officer Whitman's work assignment to sector seven was ultimately a management prerogative and his shift request was done in conformity with his union contract.[13]

We hereby deny the PBA's exceptions and affirm the decision of the ALJ.

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

DATED: December 20, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[12]*See City of Albany*, 7 PERB ¶3078 (1974) (subsequent history omitted);*City of Sch. Dist. Of the City of New Rochelle*, 4 PERB ¶3060 (1971).

[13]See testimony of PBA President Lawrence Huxley, transcript, p. 47.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BRIDGE AND TUNNEL OFFICERS BENEVOLENT ASSOCIATION,

Charging Party,

- and -

CASE NO. U-19867

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,

Respondent.

STUART SALLES, ESQ., for Charging Party

CHRISTOPHER M. BEERMANN, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Bridge and Tunnel Officers Benevolent Association (Association) to a decision of the Administrative Law Judge (ALJ) on an improper practice charge filed by the Association. The Association alleges that the Triborough Bridge and Tunnel Authority (Authority) violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it refused to continue the terms of the parties' expired collective bargaining agreement (CBA) by assigning unit members returning from "injury on duty" (IOD) leave to light or restricted duty and when it refused to bargain the impact of the assignment.

The ALJ dismissed the improper practice charge in its entirety.

The Association excepts to the ALJ's decision on substantive grounds, arguing that the ALJ erred as follows:

1. The finding that the Authority did not refuse to continue the terms of the expired Collective Bargaining Agreement of the Association and the Authority, in violation of §209-a.1(e) of the Act.
2. The finding that "light duty", as was unilaterally implemented by the Authority, was not a mandatory subject of bargaining.

On the basis of our review of the record and consideration of the parties' arguments, we affirm the ALJ's decision.

As to the merits of the alleged violations of §209-a.1(d) and (e) of the Act, the record established that the language in the parties' CBA is silent on the subject of assigning disabled employees on IOD leave to light duty.[1]

Where, as here, a contract is silent on a particular subject, we have held that an employer's obligation is to refrain from unilaterally changing any noncontractual terms and conditions of employment. The past practice of the parties may be examined to determine the term and condition.[2] The duty to negotiate in good faith includes an obligation to continue past practices that are mandatory subjects of negotiation.[3]

---

[1]The Association raised the issue that the parties' contract was a source of right which required deferral of the charge. The ALJ found that the charge should not be deferred on either jurisdictional or substantive grounds.

[2]*See Maine-Endwell Cent. Sch. Dist.*, 14 PERB ¶4625 (1981), *aff'd*, 15 PERB ¶3025 (1982). *See also County of Livingston*, 30 PERB ¶3046 (1997); *Town of Greece*, 28 PERB ¶3078 (1995); *State of New York-Unified Court Sys.*, 26 PERB ¶3013 (1993).

[3]*See County of Nassau*, 13 PERB ¶3095 (1980), *conf'd*, 14 PERB ¶7017 (Sup. Ct. Nassau County. 1981), *aff'd*, 87 A.D. 2d 1006, 15 PERB ¶7012 (2d Dep't 1982), *motion for leave to appeal dismissed*, 57 N.Y. 2d 601, 15 PERB ¶7015 (1982).

Here, the charge focused on the assignment of light duty to a Bridge and Tunnel Officer (BTO) on IOD leave[4] and the Authority's failure or refusal to negotiate this issue. The Authority argues that such assignment is a nonmandatory subject and, therefore, it is not obligated to negotiate the assignment of a BTO to light duty as a toll collector because such assignment is an essential aspect of the BTO's basic employment function or of its related incidental tasks.[5] We agree. The job description and typical tasks of a BTO show that collecting tolls is one of the essential functions of a BTO. It is significant that under Medical Standards in the Notice of Examination for the BTO, a candidate would be rejected by the Authority unless he or she could perform the job duties in a reasonable manner. Article XIII 3(E) of the parties' CBA expressly states that "[i]n the case of extended absence for IOD or illness, the Authority's doctor and the employee's doctor will consult where the employee's doctor indicates that a directive to return to work is premature. The Authority's doctor's determination shall be final . . . ." It is, therefore, apparent that an assignment to light duty as a toll collector is not outside of the essential functions of a BTO and a nonmandatory subject of negotiation.[6]

---

[4]See Art. XIII of the parties' CBA.

[5]*See Town of Oyster Bay*, 12 PERB ¶3086 (1979); *Waverly Cent. Sch. Dist.*, 10 PERB ¶3103 (1977).

[6]*See City of Schenectady*, 25 PERB ¶3022 (1992), *rev'd in part sub nom. Schenectady Police Benevolent Ass'n v. PERB*, 25 PERB ¶7009 (Sup. Ct. Albany County 1992), *modified in part*, 196 A.D.2d 171, 27 PERB ¶7001 (3d Dep't 1994), *motion for reargument denied*, 27 PERB ¶7007 (3d Dep't 1994), *motion for leave to appeal granted*, 83 N.Y.2d 760, 27 PERB ¶7015 (1994), *aff'd*, 85 N.Y.2d 480, 28 PERB ¶7005 (1995).

Furthermore, such an assignment is based upon the judgment of the Authority's physician that the disabled BTO can perform the duties in a reasonable manner.

Lastly, we agree with the ALJ's findings that the Association failed to adduce evidence that the Authority refused to negotiate in good faith the Association's impact demand. The record established that the Authority on several occasions offered to negotiate the impact of its decision to assign disabled employees to light duties. These offers were rejected by the Association.[7]

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

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

DATED: December 20, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[7]*See City Sch. Dist. of the City of New Rochelle*, 4 PERB ¶3060 (1971). (PERB first articulated the employer's obligation to negotiate the impact of a decision involving a nonmandatory subject of negotiation.)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CHERYLE HOEY, BRENDA BACH AND ELAINE WALDSCHMIDT,

Charging Parties,

- and -

CAYUGA-ONONDAGA BOARD OF COOPERATIVE EDUCATIONAL SERVICES,

Respondent.

CASE NOS. U-20294, U-20295 & U-20296

MODICA & ASSOCIATES (STEVEN MODICA of counsel), for Charging Parties

RANDY J. RAY, ESQ, for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Cayuga-Onondaga Board of Cooperative Educational Services (BOCES) to a decision of an Administrative Law Judge (ALJ) on improper practice charges filed individually by Cheryle Hoey, Brenda Bach and Elaine Waldschmidt (collectively, charging parties) alleging that the BOCES had violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when the charging parties were terminated for engaging in protected activities. The

ALJ found that the charging parties[1] were engaged in protected activity when they met with their union representative to complain that a Special Education Teacher employed by BOCES[2] had engaged in "bizarre and inappropriate conduct of a sexual nature" towards children under the teacher's supervision, that BOCES administrators knew that the charging parties had sought help from their union[3] and had discussed their concerns with the CSEA representative, and that those administrators had terminated them for being insubordinate because they brought the allegations to the attention of their union representative rather than management.

The ALJ found that BOCES acted with improper motivation because: (1) BOCES terminated the aides less than a month after learning they enlisted CSEA's help; (2) BOCES terminated the aides just a month after offering them reasonable assurance of continued employment and summer work; (3) BOCES gave pretextual reasons for terminating the aides and "revised" its reasons for firing them; (4) BOCES offered to allow Hoey to resign and to arrange employment for her in another school district after finding that she failed to fulfill a moral and ethical obligation to protect the safety of a child. The ALJ concluded that C. Albert Sabin, BOCES' Director, objected to learning

---

[1]The charging parties are employed by the BOCES as Special Education Teacher Aides (aides).

[2]For the purposes of the hearing and decision in this matter the teacher was referred to as "Ellen Smith", a fictitious name.

[3]The aides are in a unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). CSEA is not a party to these proceedings.

about the aides' concerns about Smith from their CSEA representative, and that but for the protected activity of going to their CSEA representative BOCES would not have terminated them. The ALJ ordered the BOCES to offer reinstatement with back pay to the charging parties.

BOCES excepts to the finding of a violation on several grounds: the aides were not engaged in a protected activity; even if an activity is protected, an employer still may consider the employee's conduct during the activity, where the conduct has a bearing on the employee's ability to perform; the ALJ's finding that BOCES revised the reason for the terminations because it originally maintained that the aides failed to report their concerns, and alleged in its answer that they failed to "timely" report their concerns, is arbitrary and capricious; the mere proximity between the alleged protected activity and the terminations does not, in and of itself, give rise to a violation; the ALJ erred in basing a finding of pretext on the fact that BOCES had given aides "reasonable assurance" letters, which school districts provide only to escape liability for unemployment insurance during the summer months; the ALJ's decision found that the aides told BOCES administrators about the aides' concerns about Smith as they arose, but inconsistently also found that the aides did not realize until May 19, 1998 that Smith's behavior was so severe that it had to be addressed; in regard to aides' performance evaluations, the ALJ erred in finding that BOCES' reasons for the terminations were not, in her opinion, strong enough for termination; the ALJ found BOCES' reasons were pretextual despite the fact that before the aides met with their CSEA representative BOCES had threatened aides' jobs on several occasions and

Bach and Waldschmidt had received poor evaluations; the ALJ's finding that BOCES' reliance on Waldschmidt's negative evaluations was "bootstrapping" is not credible; the ALJ cited no evidence to support her finding that what Sabin objected to was learning about the aides' concerns from their CSEA representative; the ALJ cited no evidence to support her finding that BOCES terminated the aides because their allegations "were potentially, if not actually, embarrassing and economically injurious to BOCES"; and the ALJ improperly shifted the burden of proof.[4]

The charging parties argue in response to the exceptions that the ALJ's decision should be sustained in all respects.

Based upon our review of the record and our consideration of the parties' arguments, including those made at oral argument, we reverse the decision of the ALJ.

For the 1997-1998 school year, the three aides were employed by BOCES at the Owasco Elementary School, part of the Auburn City School District, to assist Smith, a first year special education teacher, in a classroom with seven special education students in grades Pre-K, first and second.[5] The record establishes that almost from the beginning of the school year, there were problems in Smith's classroom. Smith, the

---

[4]BOCES also alleges in its exceptions that after the first day of hearing, the ALJ engaged in an improper *ex parte* meeting with the parties; after the hearing closed, the ALJ, over BOCES' objection, accepted in the record a letter from charging parties' attorney that stated the terms of a settlement offer BOCES had rejected; and that the conference ALJ's denial of BOCES' motion for particularization was prejudicial. We have reviewed the record as to these matters and find the allegations to be without merit.

[5]For a more detailed recitation of the facts, see the ALJ's decision at 32 PERB ¶4592 (1999).

aides and other related professionals were to work as a team. By December 1997, at a team meeting, the aides were being counseled by Claire Colella, supervisor of BOCES' Special Education program, about their inability to work with Smith as a team.[6] Hoey, received an excellent recommendation from Smith at this time and Waldschmidt's evaluation was positive. Despite the counseling received at the December 1997 meeting, conditions in Smith's classroom continued to deteriorate throughout the spring of 1998.

On April 1, 1998, Colella, Sabin and Pat Palmer, principal of Owasco, met with the aides to discuss reports of continuing classroom conflict. The meeting was a heated one, with Sabin telling the aides that they had to get their act together or he would separate or terminate them. Sabin told the aides that if they had any problems they were to go to Smith first, then to Colella, Palmer or Sabin, himself, as a last resort. Colella reminded Waldschmidt about her bad evaluations. Thereafter, in May 1998, at a team meeting with Smith and the aides, the conflicts within the team were still apparent. At that meeting, Colella informed the aides that while Smith would have a job in the coming school year, their jobs were in question.

---

[6]Bach was, in fact, advised that if she did not "clean it up", she would be fired. During the 1997-1998 school year, Bach received evaluations noting the need for improvement in certain areas. None of the aides, however, received poor evaluations or counseling in their dealings with the students with whom they worked. Waldschmidt had received evaluations in the 1996-1997 school year that reflected problems with her work. During the 1996-1997 school year, Bach was counseled for her argumentative demeanor.

All three aides testified that during the 1997-1998 school year, Smith had been engaged in bizarre or inappropriate behavior, ranging from yelling at the aides or students in front of other students, confiding her sexual fantasies and dreams to the aides, touching one of the aides (Waldschmidt), and verbally abusing a student in the Special Education class who had soiled himself. At team meetings or in individual meetings with Colella, the aides told her about Smith's erratic behavior. Of most concern to the aides seemed to be Smith's behavior starting in early 1998 toward a young autistic girl in her Special Education class. Smith was toilet-training the girl and was observed on several occasions by Waldschmidt in a bathroom stall with the girl; apparently on at least one occasion in late March 1998, Waldschmidt thought that Smith was urinating in front of the girl. In April 1998, Smith directed Hoey and Bach to check the child's groin with their hands to see if she was wet. These incidents were not related to Colella or Sabin.

The aides talked among themselves after the May 1998 meeting with Colella. They shared the various situations in which they had been involved with Smith and their observations of Smith's behavior. Despite Sabin's instruction at the April 1 meeting that they follow the chain of command with any concerns or complaints they had about the team, the aides decided that they could not go to any of the individuals Sabin identified as supervisory personnel who would address their concerns. Instead, they decided to contact their CSEA representative. Bach made a call to CSEA in early June and all three met with CSEA representatives, Kathy Morrell and Keith Barnes, on or about June 10, 1998. At the meeting, the aides discussed their concerns about their

continued employment by the BOCES and related to Morrell and Barnes their observations about Smith. Barnes advised the aides that their concerns about Smith's conduct, especially the toilet-training of the autistic child, should be related immediately to supervisory staff at BOCES. Bach requested that Barnes not talk to anyone at BOCES until the end of the school year. Barnes reiterated that BOCES should be informed immediately. It was agreed that he would do so; Barnes thereafter contacted Randy Ray, Esq., BOCES' legal representative.

On June 5, 1998, BOCES issued letters of reasonable assurance of continued employment as aides for the 1998-1999 school year to the aides.[7] On June 12, 1998, Ray met with Sabin, Colella and the BOCES' superintendent and related that Barnes had called him and reported that the aides had alleged that Smith had engaged in inappropriate sexual behavior with a child in her classroom and had made inappropriate sexual remarks to Waldschmidt. Sabin directed Ray to conduct an investigation. Smith was to be suspended with pay pending the completion of the investigation. On June 15, 1998, each of the aides was called upon individually to answer questions as part of Ray's investigation. Morrell and Barnes were present for the interviews. The investigation concluded that week with a meeting of Ray, Colella, Sabin and the Superintendent, Dr. Frank Ambroisie, where it was decided that no one other than the

---

[7]The letters of reasonable assurance of continued employment are issued in accordance with §590 of the Labor Law to preclude these employees from eligibility for unemployment insurance benefits during the summer months.

aides had observed allegedly inappropriate or illegal behavior by Smith. The investigation results and discipline of the aides were discussed.

On June 18, 1998, Colella told the aides to gather their things and to leave school at noon the next day. At Sabin's request, Colella and Frederick Bragan, assistant director of BOCES, wrote letters dated July 8, 1998, to Ambroisie recommending the termination of all three aides for ignoring the instructions given to them at the April 1 meeting and for failing to report suspicions of possible child abuse to BOCES or Palmer. Additional grounds of inability to accept constructive criticism or team effectively with other classroom staff were given for Waldschmidt's termination and inability to follow directions or the supervision of the classroom teacher were the additional reasons given for Bach's recommended termination.

The aides met individually with Colella at meetings held on July 8, 1998. Morrell and Barnes were also present. Hoey was given the opportunity to resign by Colella because she had an otherwise unblemished work history.[8] Bach and Waldschmidt were advised that they were being fired. On July 16, 1998, the BOCES Board formally terminated the employment of Hoey, Bach and Waldschmidt. A letter of resignation from Smith was accepted by the BOCES Board at that time.

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

---

[8]Hoey declined the offer to resign.

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.[9]

At the close of the charging parties' case, BOCES made a motion to dismiss the charges on the grounds that the charging parties had failed to establish that they were engaged in a protected activity when they consulted with CSEA. The ALJ reserved on the motion and the BOCES put on its direct case.[10] The ALJ denied the motion in her decision, determining that the aides were engaged in protected activity when they met with their CSEA representative about their concerns in fulfilling their job responsibilities and possible discipline and termination from their jobs. We agree.[11]

The Act gives public employees the right to form, join or participate in an employee organization of their choosing and to be represented by that employee organization with respect to their terms and conditions of employment.[12] The aides sought advice and representation from CSEA during their meeting with Morrell and Barnes. Certainly, consultation with a union representative about terms and conditions

---

[9]*Town of Independence*, 23 PERB ¶3020, at 3038 (1990). *See also State of New York (Div. of Human Rights)*, 22 PERB ¶3036 (1989).

[10]The only witness called by BOCES was Barnes, who appeared pursuant to subpoena. Colella and Sabin were called by the charging parties as part of their direct case.

[11]*See Binghamton City Sch. Dist.*, 22 PERB ¶3034 (1989).

[12]Act, §202 and §203.

of employment falls within the Act's protection.[13] As this was the only basis articulated by BOCES in support of its motion to dismiss, we find that the ALJ correctly denied the motion.

It is undisputed that BOCES knew by June 12, 1998, that the charging parties had consulted with CSEA. The ALJ, therefore, correctly found that the BOCES had knowledge that the charging parties were engaged in protected activity. Having found that the aides had been engaged in protected activity and that the BOCES had knowledge of those activities, the ALJ then determined that the aides would not have been terminated "but for" their union involvement. We disagree with this conclusion of the ALJ.

There was no evidence of overt anti-union animus adduced at the hearing. The ALJ reviewed the record and determined that the timing of the aides' termination was reasonably proximate to their meeting with CSEA, that the reasons given by BOCES for the termination varied, that the aides were offered reasonable assurances of continued employment for the 1998-1999 school year, that the aides properly reported their concerns about Smith and that the areas of concern in the prior performance evaluations of Bach and Waldschmidt had been resolved. Taken together, the ALJ concluded that Sabin had recommended the termination of the charging parties because of their exercise of protected rights. In reaching her conclusions, the ALJ found that the credible evidence supported her findings. She did not, however, credit

---

[13]*See City of Newburgh*, 11 PERB ¶3108 (1978), *conf'd*, 70 A.D. 2d 362, 12 PERB ¶7020 (3d Dep't 1979).

the testimony of any witness over that of others, based upon her observations at the hearing or the demeanor of the witnesses. As there are no credibility resolutions upon which the ALJ relied, we find that the ALJ's decision is based upon her subjective evaluation of the evidence. Therefore, we need not defer to either the ALJ's factual or legal conclusions.[14]

We find that the aides' terminations were based upon their failure to report an alleged instance of child sexual abuse to the proper authorities at BOCES or Owasco, and, in addition, as to Bach and Waldschmidt, their prior poor evaluations and their continuation in the 1997-1998 school year of the attitudes for which they received criticism in those prior evaluations. The record supports our finding that the aides were told directly by Sabin at the April 1 meeting that they were to work as a team and they were report any problems with Smith to Colella, Palmer or, finally, Sabin. A little over a month later, following another session with Colella where the aides were counseled about their ongoing problems in Smith's classroom, the aides decided that rather than go through the procedure outlined by Sabin, they would report their concerns about Smith's behavior with the autistic child to CSEA.

Meanwhile, as early as May 1998, Sabin was considering the termination of Bach and Waldschmidt because of the failure of their team to work effectively in Smith's classroom and Bach's and Waldschmidt's ongoing job performance difficulties.

---

[14]*Rockville Centre Union Free Sch. Dist.*, 32 PERB ¶3050 (1999); *State of New York (Unified Court Sys.)*, 24 PERB ¶3048, *conf'd,* 186 A.D.2d 487, 25 PERB ¶7013 (1st Dep't 1992).

In fact, one of the reasons the aides consulted with CSEA is that they felt their jobs were in jeopardy.

BOCES then learned in mid-June 1998 that the aides had a concern about Smith and the toilet-training techniques she was using with the autistic child. As the allegations as reported by Barnes to Ray could be construed as allegations of child abuse of a sexual nature, an investigation was immediately ordered by Sabin. No independent evidence was found by Ray in his conduct of the investigation to support the allegations made by the aides. After the investigation concluded, Sabin determined that the aides had disregarded his directive, which had carried with it a threat of termination, and had not reported their concerns to Colella, Palmer or Sabin.

We find that the record supports a conclusion that Sabin then recommended the termination of the aides for their failure to report a concern about the possible sexual abuse of a child in their care, for their failure to follow his April 1 directive and because their actions with respect to their concerns about Smith evidenced that at least Bach and Waldschmidt were still employees who were not able to effectively work as part of a team and that Hoey had become embroiled in the conflicts within the team. That slightly different reasons were referred to in the letters to the BOCES Superintendent and to the BOCES Board, in the meetings with the aides and in BOCES' pleadings in these cases is insufficient to warrant a conclusion that any of the reasons given were pretextual.[15] The ultimate determination was that the aides had failed to follow a

---

[15]*See Rockville Centre Union Free Sch. Dist., supra.*

directive by Sabin and had jeopardized the safety of a child under their care by failing to immediately report their concerns about Smith and the autistic child.

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

IT IS, THEREFORE, ORDERED that the charges must be, and they hereby are, dismissed.

DATED: December 20, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LYLE HARTOG,

Charging Party,

- and -

CASE NO. U-20555

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

Respondent.

LYLE HARTOG, *pro se*

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Lyle Hartog (charging party) to a decision of an Administrative Law Judge (ALJ) finding that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) did not violate §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it deducted agency fees from his salary in an amount equal to full union dues without advance notice or financial disclosure.

The ALJ dismissed the improper practice charge on her finding that CSEA segregates 100% of the nonmember fees in a separate interest-bearing account until the period for filing objections and challenges has run, thereby providing CSEA with no

opportunity to make improper use of agency fee payer funds.[1] In addition, the ALJ found that the lag time of three months before financial disclosure is provided to the agency fee objectors was not sufficiently egregious to establish a violation of the Act because the funds are segregated during this period. Lastly, the ALJ rejected charging party's assertion that an advance reduction of nonmember fees is required either under case law or the Act[2], as long as the safeguards set forth in *Chicago Teachers Union v. Hudson (*hereinafter *Hudson)*[3] are met.

The charging party filed exceptions to the ALJ's decision on substantive grounds, arguing that the ALJ erred as follows:

(a) The ALJ found that the union did not violate the Taylor Law and U.S. Constitution by deducting an agency fee without (i) notice and financial disclosure and (ii) an "advance reduction" in the amount of the agency fee deducted; and

(b) The ALJ found that post-collection "escrow" remedies the alleged violations in light of the aforesaid lack of notice and advance reduction of agency fee; and

(c) The ALJ found that a three-month delay in receiving the financial disclosure was lawful.

---

[1]32 PERB ¶4625, at 4931 (1999).

[2]Act, §208.3(a).

[3]475 U.S. 292, 19 PERB ¶7502(1986).

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

The Act authorizes a recognized or certified employee organization (here, CSEA) to have deducted from the wage or salary of the employees within its negotiating unit, who are not members, the amount equivalent to the dues levied by the said employee organization. Since charging party is a State of New York employee, this deduction is made by the State Comptroller and thereafter transmitted to CSEA. The caveat in the Act is that the aforesaid deduction shall only be applicable to an employee organization which has established and maintained a procedure for refunding any part of an agency shop fee deduction to a nonmember which represents the employee's pro rata share of the organization's expenses in support of political or ideological activities or causes only incidentally related to terms and conditions of employment.[4] This principle is not unconstitutional on its face.[5]

This charge is not one of first impression for the Board. The Board's interpretation of §208.3(a) has established agency policy with respect to agency fee refund or rebate procedures.[6] This Board has previously determined that at the time of

---

[4]Act, §208(3)(a). This section was effective until October 1, 1999. By Chapter 502 of the Laws of New York, 1999, enacted September 28, 1999, this section was extended for two additional years.

[5]*See Leemhuis v. New York State Public Employees Fed'n, AFL-CIO*, 121 A.D.2d 796, 19 PERB ¶7512 (3d Dep't 1986), *appeal dismissed*, 68 N.Y.2d 910 (1986).

[6]*See Public Employees Fed'n*, 15 PERB ¶3024 (1982), *conf'd*, 93 A.D.2d 910, 16 PERB ¶7016 (3d Dep't 1983).

making refunds to objectors who make application therefor, an itemized audited statement of the complete receipts and expenditures of a union or any of its affiliates who receive agency shop fee deductions, together with the basis for the determination of the amount of the refund, including identification of those items of expense determined to be refundable, must be furnished.[7] In addition, the failure to furnish full financial disclosure simultaneously with a refund check would be considered a violation of the Act.[8]

In the instant proceeding, the parties stipulated to the facts. The salient portions of the stipulations, as they relate to our prior decisions, are as follows:

(a) An agency fee equivalent to the full amount of CSEA dues was deducted from the compensation of Mr. Hartog, a nonmember CSEA-unit employee by the public employer for whom he works, for the period 10/1/98 through 12/30/98, and received by CSEA.[9]

(b) Commencing October 1, 1998, the full amount of all moneys deducted from the compensation of CSEA-unit employees, but non-CSEA members, and sent to CSEA by public employers, was placed in a separate CSEA-controlled interest-bearing account entitled "CSEA

---

[7]*See United Univ. Professions, Inc. (Barry)*, 13 PERB ¶3090 (1980), *conf'd*, 86 A.D.2d 734, 15 PERB ¶7001 (3d Dep't 1982), *motion for leave to appeal denied*, 56 N.Y.2d 504, 15 PERB ¶7010 (1982).

[8]*Id.*

[9]See ¶3 Stipulation dated April 27, 1999.

Agency Shop Escrow Fund" . . . . hereinafter referred to as "Separate CSEA Account".[10]

(c) CSEA then combined AFSCME's and its own expenditure information, had that information audited, and then printed twenty thousand copies of its report which it then addressed and mailed to agency shop fee payers.[11]

(d) That report entitled, "Agency Shop Notice," (copy attached) was mailed to agency shop fee payers on January 6, 1999.[12]

(e) It provided for objections and challenges to be filed with CSEA by February 15, 1999.[13]

(f) After February 15, 1999, the funds of non-objecting, non-challenging employees were transferred from the "separate CSEA account".[14]

(g) CSEA held the agency fee deductions from non-members in a separate bank account beginning October 1, 1998 and did not use any of the challenger's money from that time through the time when objections and challenges could be filed.[15]

---

[10]See ¶9 Stipulation dated April 27, 1999.

[11]See ¶6 Stipulation dated April 27, 1999.

[12]See ¶7 Stipulation dated April 27, 1999.

[13]See ¶8 Stipulation dated April 27, 1999.

[14]See ¶11 Stipulation dated April 27, 1999.

[15]See ¶14 Stipulation dated April 27, 1999.

(h) The funds withheld from objecting employees were withdrawn from the "separate CSEA account" during the week of April 5, 1999 and distributed to objecting employees and CSEA in proportion to the non-chargeable and chargeable expenditures, as reported to agency shop fee payers on January 6, 1999.[16]

(i) The funds withheld from challenging employees are retained in the "separate CSEA account"; CSEA intends that that account will not be liquidated until the resolution of the challenges, and it will then be distributed in accordance with such resolution.[17]

It is apparent from the stipulated record that CSEA provided to charging party an itemized audited statement of its and AFSCME's expenditures in its notice mailed on January 6, 1999. It is also apparent from the stipulated record that CSEA has satisfied the constitutional procedures set forth in *Hudson* and its progeny by segregating agency fee funds completely so that there is no use by CSEA of the monies collected until the objection procedure is complete.[18] CSEA has established an escrow account for the agency fees deducted from nonmembers, an independent audit of the charges

---

[16]See ¶12 Stipulation dated April 27, 1999.

[17]See ¶13 Stipulation dated April 27, 1999.

[18]*See Hudson, supra; Andrews v. Educ. Ass'n of Cheshire*, 829 F.2d 335 (2d Circ. 1987). *See also Ellis v. Railway Clerks*, 466 U.S. 435, 17 PERB ¶7511 (1984); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 244 (1977), where the Court held that "the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even temporarily, to finance ideological activities unrelated to collective bargaining."

and a refund procedure. The ALJ found, and we concur, that a three-month span of time from the first deposit of agency shop fees into an interest-bearing escrow account until financial disclosure is not violative of the Act because the agency fee funds are segregated during this period.[19]

Based on the foregoing, we deny charging party's exceptions and affirm the ALJ's decision.

IT IS, THEREFORE, ORDERED that the charge is dismissed in its entirety.

DATED: December 20, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[19]*See United Univ. Professions (Barry)*, 22 PERB ¶3003 (1989), where we held that a lapse of ten weeks between the date of an employee's filing of his objection to the union's agency-fee advance-reduction determination and the date of the hearing on that objection, was not excessive or unreasonable.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

YONKERS FEDERATION OF TEACHERS, LOCAL 860, AFT, AFL-CIO,

Respondent **CASE NO. D-0266**

upon the Charge of Violation of § 210.1 of the Civil Service Law.

BOARD DECISION AND ORDER

On November 24 1999, Gary Johnson, this agency's Associate Counsel (Counsel), filed a charge alleging that the Yonkers Federation of Teachers, Local 860, AFT, AFL-CIO, had violated Civil Service Law (CSL) §210.1, in that it caused, instigated, encouraged or condoned a strike against the Yonkers City School District for four workdays from October 1 to October 6, 1999. The charge further alleged that of the approximately 2,100 employees in the negotiating unit, approximately 2,008 of those employees participated in the strike.

After the Respondent answered the charge and a hearing was scheduled, Counsel indicated to the Respondent the penalty he would be willing to recommend to this Board as appropriate for the violation charged. Counsel proposed a penalty of the loss of Respondent's right to have dues and agency shop fee deduction privileges for an indefinite period of time, but not less than eighteen (18) months, with other provisions as reflected in the order below.

Upon the understanding that Counsel would recommend and this Board would accept that penalty, the Respondent withdrew its answer to the charge, thus admitting the factual allegations of the charge. Counsel has so recommended.

We find that the Yonkers Federation of Teachers violated CSL §210.1 in that it engaged in a strike as charged, and we determine that the recommended penalty is a reasonable one and will effectuate the policies of the Act.

WE ORDER that the deduction privileges for dues and agency shop fees, if any, of the Yonkers Federation of Teachers be suspended indefinitely, commencing on the first practicable date, provided that it may apply to the Board at any time after eighteen (18) months after the date of this order for the full restoration of such privileges. Such application shall be on notice to all interested parties and supported by proof of good faith compliance with subdivision one of Section 210 of the Civil Service Law after the violation herein found; such proof may include, for example, the successful negotiation, without a violation of said subdivision, of a contract covering employees in the unit affected by the violation, and shall be accompanied by an affirmation that the Yonkers Federation of Teachers no longer asserts the right to strike against any government, as required by the provisions of Civil Service Law §210.3(g).

DATED: December 20, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PROFESSIONAL AND SUPERVISORY ALLIANCE OF JAMESTOWN COMMUNITY COLLEGE,

Petitioner,

-and-

CASE NO. C-4921

JAMESTOWN COMMUNITY COLLEGE,

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 Professional and Supervisory Alliance of Jamestown Community College 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: See attached list.

Excluded: All other employees.

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

DATED: December 20, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

1. Assistant Director of Buildings and Grounds - Jamestown
2. Assistant Director of Buildings and Grounds - Olean
3. Assistant Director of Buildings and Grounds - Dunkirk
4. Training Coordinator - Jamestown
5. Training Coordinator - Dunkirk
6. Training Coordinator - Olean
7. Community Relations Coordinator
8. Director of Campus Life
9. Assistant Controller
10. Assistant Director of Financial Aid
11. Employment Development Specialist - P.T.
12. Director, Community Cultural Center
13. Athletic Coordinator (11 mo.)
14. Health Center Director
15. JCC Warren Center Director
16. Director, Sponsored Programs/Academic Planning - P.T.
17. Director of Credit Free Programs
18. Coordinator of Recruitment
19. Coordinator of the Scharmann Theatre - P.T.
20. Director of Business Services
21. Children's Center Director - Jamestown
22. Coordinator of Campus Life - P.T.
23. Programmer/Analyst
24. Computer Training Coordinator - Olean
25. Computer Training Coordinator - Jamestown
26. Computer Training Coordinator - Dunkirk
27. Community Relations Assistant
28. Bridge College to Work Director
29. Director of Technical Hardware and Network Services

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNION OF NEEDLETRADES, INDUSTRIAL AND TEXTILE EMPLOYEES, AFL-CIO,

Petitioner,

-and-

CASE NO. C-4929

TOWN OF PARMA,

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 Union of Needletrades, Industrial and Textile Employees, 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 employees of the Town of Parma Highway Department.

Excluded: All clerical employees, managerial and confidential employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Union of Needletrades, Industrial and Textile Employees, 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: December 20, 1999
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member