

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

- and -

CASE NO. U-20803

**STATE OF NEW YORK (GOVERNOR'S OFFICE
OF EMPLOYEE RELATIONS),**

Respondent.

JAMES P. KEMENASH, for Charging Party

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

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Public Employees Federation, AFL-CIO (PEF), to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) dismissing its improper practice charge alleging that the State of New York (Governor's Office of Employee Relations) (State) violated §§209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it denied an out-of-title work grievance by unilaterally applying a standard not provided in

the parties' collective bargaining agreement (CBA).¹ The parties entered into a Stipulation of Facts. The factual record was then reviewed by the Assistant Director who dismissed the charge on the grounds that PERB lacked jurisdiction over the charge. He found that the parties' CBA, Article 17, was PEF's arguable source of right which was supported by PEF's own conduct.

PEF excepts to the Assistant Director's decision that the charge is a breach of contract claim which was made evident by its own conduct.

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

The Act does not alter principles of contract law regarding the finality and binding effect of terms and conditions upon which full agreement was achieved merely because the contract in dispute is a collective bargaining agreement.² "Once the parties have performed their obligation under the [Act] of negotiating to the point of reaching an agreement on the subjects expressly covered by the CBA, that exhausts their statutory duty to bargain as to those subjects."³ We have expressed this concept as duty

¹There were no exceptions filed as to the dismissal of the §209-a.1(e) violation. (See Exhibit 10 of parties' Stipulation of Facts). Therefore, we need not reach that issue.

²*Roma v. Ruffo*, 92 N.Y.2d 489, 31 PERB ¶¶7504 (1998), rev'g 246 A.D.2d 714 (3d Dep't 1998).

³*Id.* at 7507. See also *County of Nassau*, 32 PERB ¶¶3052 (1999); *County of Nassau*, 31 PERB ¶¶3074 (1998); *County of Nassau (Police Dep't)*, 31 PERB ¶¶3064 (1998).

satisfaction.⁴ Consequently, "when the dispute between the public employer and the employee's representative arises during the term of an existing CBA, the statutory duty to bargain collectively [§204 of the Act] and the improper practice of failing to do so in good faith [§209-a.1(d) of the Act] apply only when the parties' dispute is outside the terms of the CBA, but *not* when the condition of employment in question is expressly provided for in the parties' agreement."⁵ (emphasis in the original)

Our jurisdiction is constrained by §205.5(d) of the Act which prohibits us from exercising jurisdiction over an alleged violation of a CBA. It should be noted that, even before this statutory restriction was enacted, we concluded that we should no longer treat unilateral changes in the terms and conditions of employment contained in a CBA as a violation of the statutory duty to bargain.⁶

In light of our statutory constraint, we have articulated criteria to determine whether we have jurisdiction. For instance, we have held that §205.5(d) divests us of jurisdiction in a failure to bargain charge where, as here, the parties' CBA provides the charging party with a reasonably arguable source of right with respect to the subject matter of the charge.⁷ "[T]he contours of the charging party's contract rights and the

⁴*State of New York (Dep't of Health)*, 32 PERB ¶¶3067 (1999).

⁵*Roma v. Ruffo, supra* at 7508. See also *New York City Transit Auth.*, 25 PERB ¶¶3080 (1992); *County of Nassau*, 25 PERB ¶¶3071 (1992).

⁶*St. Lawrence County*, 10 PERB ¶¶3058 (1977). The Board there overruled *Town of Orangetown*, 8 PERB ¶¶3042 (1975), which favored the exercise of jurisdiction over contract breaches affecting terms and conditions of employment.

⁷*County of Nassau, supra*, n. 5.

respondent's corresponding obligations need not be laid out in any detail to trigger the jurisdictional limitation in §205.5(d).⁸

After reviewing the stipulated record, we agree with the decision of the Assistant Director. The record included the completed grievance form. This form included two boxes which required the grievant to select the type of grievance alleged, i.e., a contract grievance or noncontract grievance. The aggrieved employee selected the box for a contract grievance and further indicated Article 17 as the relevant contract provision in dispute. The Step 3 grievance appeal was duly authorized by the PEF field representative.⁹

Article 17 of the parties' CBA clearly discusses the parties' negotiated rights and obligations regarding out-of-title work. Albeit that Article 17 does not specifically address the particular allegation made in PEF's charge, it is nevertheless apparent that PEF's actions in the grievance process were an acknowledgment that the CBA provided PEF with a reasonably arguable source of right with respect to the subject matter of the charge. As such, the State has satisfied its duty under the Act to bargain regarding out-of-title work. This charge merely presents a dispute over the interpretation of Article 17 and is, therefore, beyond this Board's jurisdiction and must be dismissed.

⁸*City of Troy*, 28 PERB ¶13057, at 3131 (1995).

⁹Exhibit #2 of the Stipulation of Facts.

Based on the foregoing, we deny PEF's exception and affirm the decision of the Assistant Director.

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

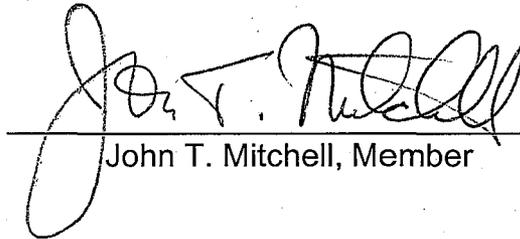
DATED: February 29, 2000
Albany, New York



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,**

Petitioner,

- and -

CASE NO. CP-462

COUNTY OF MONTGOMERY,

Employer.

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

**ROEMER WALLENS & MINEAUX LLP (WILLIAM M. WALLENS and
JEFFREY S. HARTNETT of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Montgomery (County) to a decision of an Administrative Law Judge (ALJ) placing certain part-time employees of the County into a unit of full-time County employees represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA).

CSEA represents a unit of approximately 513 full-time County employees. By this unit placement petition, CSEA seeks to add to its unit part-time titles which are the same as or similar to the full-time titles in the unit. The parties presented the ALJ with a stipulation of fact in lieu of a hearing. The stipulation set forth each of the titles sought,

the incumbents in the titles, and the hours worked by each in 1997 and from January to October 1998.

There were 67 part-time employees in the at-issue titles working for the County in 1997 and 69 in the relevant time period in 1998.¹ For analysis, the ALJ broke the titles down into three occupational groups: the white-collar group of employees in the titles of account clerk typist, receptionist and dispatcher; the blue-collar group of employees in the titles of cook, food service helper, cleaner, building maintenance worker, automotive mechanic, motor vehicle operator and transport aide; and the professional group of employees in the titles of licensed professional nurse, nursing assistant, leisure time activities aide and physical assistant. The ALJ determined that the at-issue employees had regularity and continuity of employment with the County that warranted coverage by the Act. The petition was, therefore, granted and the titles were placed in the full-time unit represented by CSEA.

The County excepts to the ALJ's decision, arguing that the ALJ erred by utilizing a "recurring need" test and not a "statistical" test in determining that the at-issue employees were not "casual". The County also argues that the ALJ erred by analyzing the employees in "occupational groupings" rather than by "occupational title". CSEA supports the ALJ's decision.

¹The titles sought to be added by the petition, as amended, are the following part-time titles: account clerk typist, receptionist, senior clerk typist, registered professional nurse, licensed practical nurse, nursing assistant, cook, dispatcher, motor vehicle operator, food service helper, cleaner, automotive mechanic, building maintenance worker, physical therapy assistant, leisure time activities aide and transport aide.

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

The ALJ's decision sets forth a detailed analysis of the stipulation of facts.² The number of days worked and the hours per week worked are analyzed by the ALJ within the context of occupational groupings of the at-issue titles. The ALJ also analyzes hours and days worked during the relevant time frame by all the titles in the group. Finally, where relevant, the ALJ assesses the hours and/or days worked by individual titles or employees. The ALJ found that the record established that the employees in the at-issue part-time titles worked for all or most of the years in question and for at least six hours per week in the weeks worked.

As was correctly noted by the ALJ, the controlling factor establishing coverage under the Act is regularity and continuity of the employment relationship.³ We have long made it clear that the mere number of hours worked per week will not determine whether part-time employees are or are not public employees within the meaning of the Act. Part-time employees are covered by the Act if there is a substantial and continuing employment relationship with the employer.⁴ Generally speaking, the test employed by the Board is to determine the regularity of the employment relationship.

²32 PERB ¶4022 (1999).

³*Village of Dryden*, 22 PERB ¶3035 (1989).

⁴ *Somers Cent. Sch. Dist.*, 12 PERB ¶3068 (1979).

Seasonal employees or those who do not work a full year may also have a sufficient relationship with their employer to establish their public employee status. The test we have applied to seasonal employees was first articulated in *State of New York* (hereafter, *State of New York*).⁵ Under *State of New York*, seasonal employment is casual and not covered by the Act, if: 1) the season is shorter than six weeks a year, or 2) the employees are required to work fewer than twenty hours a week during the season, or 3) fewer than 60% of the employees in the title return for at least two successive (consecutive) seasons. In *Town of Brookhaven*⁶ (hereafter, *Town of Brookhaven*), where we considered the coverage to be afforded to a group of seasonal employees, specifically lifeguards, we eliminated the third prong of the test, the rate of return, as we were there “persuaded that the rate of return test is inherently confusing and often incapable of the easy application intended when the test was formulated.”⁷

Here, the County argues that the ALJ was required to utilize the quantitative test of *State of New York* to determine whether the at-issue employees should be afforded coverage by the Act. That decision is not applicable to all-year employees.⁸ Where employees regularly work for all or most of the work year, there is created “a substantial

⁵5 PERB ¶3022 (1972).

⁶30 PERB ¶3040 (1997).

⁷*Id.* at 3090.

⁸See *Amityville Public Schools*, 5 PERB ¶3043 (1972).

interest in terms and conditions of employment warranting coverage under the [Act].⁹ Employees in job titles which are regularly scheduled for employment during all or most of the work year are usually, by that connection alone, removed from the group of employees who work only during a specific "season".¹⁰ Such "seasonal" employees are those to whom the quantitative analysis of *State of New York*, as modified by our decision in *Town of Brookhaven*, must be applied.

That being said, a quantitative or statistical analysis may be helpful in determining whether the employment of part-time employees is regular and continuous and supports their coverage by the Act.¹¹ Obviously, one element of regular and continuous employment is the number of hours worked weekly or monthly, the number of days worked weekly or monthly, the number of months worked in the year and the number of years the occupational title has existed and been filled by members of the employer's work force. Our decision in *Village of Dryden*¹² clearly illustrates the nature of this quantitative analysis and its part in the overall assessment of the employment

⁹See *Somers Cent. Sch. Dist.*, 12 PERB ¶3068, at 3120 (1979), where the Board determined that the 12.5 -17.5 hours per week worked by some part-time employees did not affect their status as covered public employees because, working steadily throughout the work year, they worked "on a regular and substantial basis" and they had a "sufficient employment relationship to be covered employees" (at 3120-21).

¹⁰See *Village of Dryden*, 22 PERB ¶3035, *aff'g* 22 PERB ¶4004 (1989) (hereafter *Village of Dryden*), where we held that the Director correctly declined to apply the seasonal test to part-time employees who work year round and are covered if their employment characteristics evidence regular and continuous employment.

¹¹*Id.*

¹²*Supra* note 1.

relationship between part-time employees and their employer. There, we considered the employment status of a group of part-time police officers employed by the Village. The record evidenced that the part-time officers, when analyzed as a group, averaged 13.3 hours monthly in 1986-87, 21.3 hours monthly in 1987-88 and 35 hours monthly for the first quarter of 1988-89. We found there that the statistics established that the part-time officers, as a group, held regular and continuous employment with the Village. We held that the Director properly recognized that the number of hours worked is but one of several factors to be considered in assessing the regularity and continuity of the employees' employment relationship.

Here, as the ALJ found, employees in the part-time titles work for the County throughout the year and year-to-year. They hold titles the same as or similar to the full-time employees; indeed, several of the part-time employees fill in for full-time employees who are out and some have moved from their part-time titles to full-time employment in the same or similar title with the County. All of the employees, save the registered professional nurse who conducts immunization clinics in the public health department on a regular monthly schedule, are scheduled to work weekly. The employees work from 6 hours per week to over 20 hours per week. Even those working only 6 hours per week work more hours per month than did the part-time police officers in *Village of Dryden*.¹³

¹³However, as in *Village of Dryden*, the seasonal test, the second prong of which requires that an employee work at least 20 hours per week, is clearly inapplicable here.

The County's second exception, that the ALJ erred by considering the employees within three occupational groupings, ie., white-collar, blue-collar and professional, rather than by occupational title must also be denied. The ALJ considered the hours worked, the weeks worked and the years worked by occupational groupings. In *Town of Brookhaven*, we affirmed the Director's uniting determination, utilizing, in part, an analysis on the basis of "occupational grouping". We have previously held that once a nexus of the occupational group to the employer has been found sufficient to award public employee status, such status is accorded to the group as a whole.¹⁴ In any event, the ALJ here also analyzed the group of part-time employees as a whole and to some degree, by individual title, where necessary.

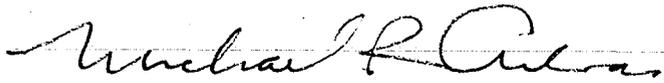
The unit placement sought by the petition is granted and the titles of part-time account clerk typist, receptionist, senior clerk typist, registered professional nurse, licensed practical nurse, nursing assistant, cook, dispatcher, motor vehicle operator, food service helper, cleaner, automotive mechanic, building maintenance worker, physical therapy assistant, leisure time activities aide and transport aide are hereby placed in the unit represented by CSEA.¹⁵

¹⁴*State of New York, supra; BOCES III, Suffolk County*, 15 PERB ¶13015 (1982), *conf'd sub nom. BOCES III Faculty Ass'n v. PERB*, 92 A.D. 2d 937, 16 PERB ¶17015 (2d Dep't 1983).

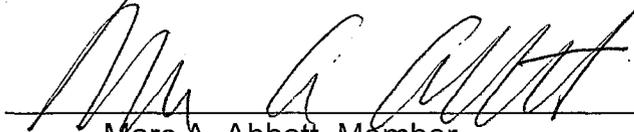
¹⁵Inasmuch as the addition of the part-time employees to CSEA's unit does not bring into question its continuing majority status, no election is ordered. See *New York Convention Ctr. Operating Corp.*, 27 PERB ¶13034 (1994).

IT IS, THEREFORE, ORDERED that the ALJ's decision is affirmed and the County's exceptions are dismissed.

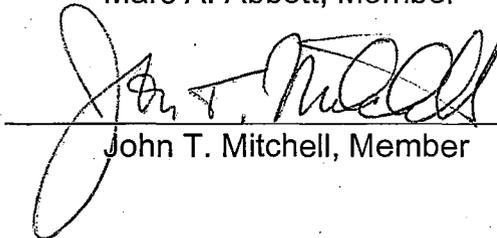
DATED: February 29, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**TOWN OF CRAWFORD POLICE BENEVOLENT
ASSOCIATION,**

Petitioner,

- and -

CASE NO. CP-606

TOWN OF CRAWFORD,

Employer.

JOHN K. GRANT, ESQ., for Petitioner

**JACOBOWITZ & GUBITS, LLP (DONALD G. NICHOL of counsel), for
Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Crawford Police Benevolent Association (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its unit placement petition seeking to add the title of sergeant to its unit of full-time and part-time police officers employed by the Town of Crawford (Town). The Town opposed the petition asserting that the sergeant's supervisory responsibilities made the placement of the sergeant in the rank-and-file unit inappropriate.

The Town employs six full-time and seven part-time police officers, one sergeant and a chief of police in its Police Department. The parties stipulated at the hearing before the ALJ that the only issue to be decided was whether the sergeant's

supervisory responsibilities are sufficient to preclude such accretion of the sergeant's title into the rank-and-file unit.

The ALJ found that the sergeant should be excluded from the unit because he is second-in-command to the chief, assumes the chief's duties when he is absent and performs department-wide supervisory functions with respect to schedules, approval of overtime and shift exchanges, review of reports of subordinate officers, evaluations, recommendations for both discipline and retention of probationary employees, and the handling of major occurrences, such as homicides.

The Association excepts to the ALJ's decision, arguing that there are other employees in the unit who perform the same or similar supervisory responsibilities as the sergeant, that the sergeant's supervisory responsibilities are not of the level to cause a conflict of interest and that to not include the sergeant in the rank-and-file unit is to effectively deny him representation because the Act does not permit for a unit of one employee. The Town supports the ALJ's decision.

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

The record shows that the chief, the sergeant and the senior officer on duty are each responsible for supervising one of the three work shifts of unit employees. Supervision of the midnight to 8:00 a.m. shift is the extent of the supervisory responsibilities of the senior officer on duty. The sergeant, however, has additional, department-wide responsibilities as the second-in-command of the police department.

Whether he is on duty or not, the sergeant is contacted first whenever there is a need for approval of overtime or an exchange of shifts. Likewise, in the event of a "major occurrence" such as a homicide or a fatal accident, the sergeant is the first to be contacted to make command decisions. The sergeant may approve the purchase of equipment and supplies valued up to \$150 and approve the expenditure of travel funds. All evaluations of police officers are completed by the sergeant and then forwarded to the chief. The chief first discusses with the sergeant any discipline issues and the retention of probationary police officers. The sergeant also reviews reports prepared by the police officers and makes special duty assignments. Such responsibilities have historically and consistently formed a sufficient basis for excluding supervisory employees from bargaining units in initial uniting cases.¹

While other police officers are responsible for the midnight to 8:00 a.m. shift when they are the senior officer in charge and may have input into the chief's decision to retain a probationary employee if they have been that probationary employee's training officer, that is really the extent of the supervisory functions performed by police officers other than the sergeant. As found by the ALJ, the sergeant exercises significant supervisory responsibilities on a department-wide basis. We have long held that such

¹See, e.g., *Village of Dryden*, 22 PERB ¶4004, *aff'd on other grounds*, 22 PERB ¶3035 (1989); *State of New York (Div. of Military and Naval Affairs)*, 19 PERB ¶3008 (1986), *aff'g* 18 PERB ¶4075 (1985); *Johnson City Cent. Sch. Dist.*, 1 PERB ¶399.55 (1968). See also *Bd. of Educ. of the City Sch. Dist. of the City of Buffalo*, 14 PERB ¶3051 (1981).

supervisors should be excluded from a unit of rank-and-file employees.² Here, where there is only one level of supervision between the rank-and-file employees and the chief,³ where that level of supervision is significant, and where the Town opposes the inclusion of the sergeant in the unit represented by the Association,⁴ the ALJ correctly determined that the sergeant should not be placed in the rank-and-file unit.

Finally, the Association asserts that dismissal of its petition deprives the sergeant of representation rights because we do not create units of one employee. It argues that deprivation of representation rights warrants placement of the sergeant in the rank-and-file unit. Alternatively, the Association argues that, contrary to current case law, we should create a unit of sergeants even though it would result in a unit of one employee. We long ago held that one-person units are not appropriate in *Auburn Industrial Development Authority*,⁵ where we adopted the reasoning of the National Labor Relations Board that "the principle of collective bargaining presupposes that

²See *State of New York (Div. of State Police)*, 1 PERB ¶399.32 (1968). See also *Town of Carmel*, 31 PERB ¶3047 (1998); *Hyde Park Cent. Sch. Dist.*, 16 PERB ¶3083 (1983); *Bd. of Educ. of the City Sch. Dist. of the City of Buffalo*, 14 PERB ¶3051 (1981) and 16 PERB ¶3084 (1983).

³See *State of New York (Div. of Military and Naval Affairs)*, *supra* note 1.

⁴See *Uniondale Union Free Sch. Dist.*, 21 PERB ¶3060 (1988) (subsequent history omitted).

⁵15 PERB ¶3139 (1982).

there is more than one eligible person who desires to bargain."⁶ That our determination leaves the sergeant unrepresented does not warrant a contrary finding.⁷

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

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

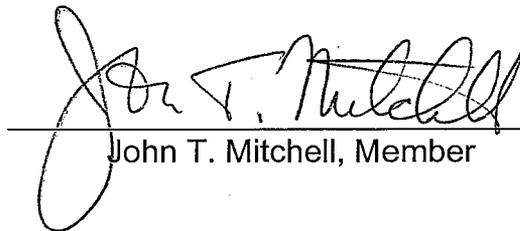
DATED: February 29, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁶*MGM Studios*, 2 LRRM 323, at 327 (1938).

⁷See *Chatauqua County and Chatauqua County Sheriff*, 26 PERB ¶3070 (1993); *Town of Carmel*, *supra* note 2.

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

In the Matter of

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

Charging Party,

- and -

CASE NO. U-20269

TOWN OF MAMARONECK,

Respondent.

**GOODSTEIN & WEST (ROBERT DAVID GOODSTEIN of counsel), for
Charging Party**

RAINS & POGREBIN, P.C. (CRAIG R. BENSON of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Town of Mamaroneck Police Benevolent Association (PBA) to an Administrative Law Judge (ALJ) decision dismissing its improper practice charge alleging, as amended, that the Town of Mamaroneck (Town) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it assigned certain clerical duties performed exclusively by employees in the unit represented by the PBA to a nonunit employee of the Town.

After reviewing the PBA's offer of proof, the ALJ determined that the nonunit employee was a civilian. In light of that revelation, the ALJ concluded that the facts of this charge fell within the parameters of our prior "civilianization" decisions involving unit

work transfer from a unit of uniformed police officers to "civilian" employees. The ALJ dismissed the charge.

The PBA argues in its exceptions that the ALJ misapplied the civilianization precedents. After reviewing the record and considering the parties' arguments, we affirm the ALJ's decision.

Our decision in *Niagara Frontier Transportation Authority*¹ (hereafter *Niagara Frontier*) first articulated the analysis used to evaluate the propriety of a transfer of "unit work" charge. We held that:

[w]ith respect to the unilateral transfer of unit work, the initial essential questions are [1] whether the work had been performed by unit employees exclusively and [2] whether the reassigned tasks are substantially similar to those previously performed by unit employees. If both these questions are answered in the affirmative... [sic] there had been a violation of §209-a.1(d), *unless* the qualifications for the job have been changed significantly. Absent such a change, the loss of unit work to the group is sufficient detriment for the finding of a violation. If, however, there has been a significant change in the job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other.² (emphasis added) (citation omitted)

Niagara Frontier analyzed our earlier civilianization cases where we held that a change from uniformed personnel to civilian personnel resulted in a change in qualifications, and two other decisions in which we held that the employer's decision to

¹18 PERB ¶3083 (1985).

²*Id.* at 3182.

alter the level of service it provided to its constituency by utilizing employees who had higher qualifications was nonmandatory.³

In our decision in *State of New York (Department of Correctional Services)*,⁴ we further clarified the analysis to be utilized in a transfer of unit work case involving a transfer of work performed by uniformed personnel to civilian personnel. We there held that "the reassignment of police duties to civilians was the result of a [realization by the employer of the need to] change the qualifications deemed necessary by the employer to perform the duties, as well as a concomitant change in the level of service to be offered by the employer."⁵

Our recent decision in *Fairview Fire District*⁶ decided the issue presented by the PBA in this charge. In this case, it was not until the PBA made its offer of proof regarding the status, qualifications and duties performed by the civilian that the ALJ learn that the uniformed unit work had been transferred to a civilian. The PBA had

³See *Town of Brookhaven*, 17 PERB ¶¶3087 (1984) [change in qualifications represented employer's decision to alter the level of service]; *Avoca Cent. Sch. Dist.*, 15 PERB ¶¶3128 (1982) [change in qualifications but similar job duties]; *West Hempstead Union Free Sch. Dist.*, 14 PERB ¶¶3096 (1981) [reassignment of duties related to change in level of services was nonmandatory]. See also *City of New Rochelle*, 13 PERB ¶¶3045 (1980) [fundamental management right to determine necessary employment qualifications of personnel performing tasks]; *City of Albany*, 13 PERB ¶¶3011 (1980) [absence of detriment to individual unit employees was significant factor]; *County of Suffolk*, 12 PERB ¶¶3123 (1979) [the employer has the right to change qualifications]

⁴27 PERB ¶¶3055 (1994), *aff'd*, 220 A.D. 2d 19, 29 PERB ¶¶7008 (3d Dep't 1996).

⁵*Id.* at 3125.

⁶29 PERB ¶¶3042 (1996).

argued that there was no need to apply a balancing test because the qualifications for the position had not changed.

The PBA has misinterpreted our decision in *Fairview* wherein we harmonized the essential issues presented in the various civilianization cases. We noted in *Fairview* that we recognize civilians lack the "special employment qualifications"⁷ of uniform officers. However, "the substitution of civilians for police officers or fire fighters to deliver services previously performed by those uniformed personnel necessarily reflects an employer's determination that the specialized training and skills of the uniformed officer are not necessary to the performance of a given set of tasks, e.g., dispatch."⁸ It is the substitution of a civilian for a uniformed officer with "special employment qualifications" that triggers the balancing test.⁹

Lastly, the PBA in its exceptions argues that the duties performed by the civilian nonunit employee have not been permanently civilianized because when the civilian employee is absent from work, the duties may be performed by unit employees. The ALJ's conclusion to the contrary is correct, notwithstanding the ALJ's reference to *Spencer-Van Etten Central School District*.¹⁰ We have held that a union does not

⁷*Id.* at 3098; see also *County of Erie and Sheriff of Erie County*, 29 PERB ¶3031 (1996), [police officers are "fundamentally different from everyone else"].

⁸*Fairview Fire Dist.*, supra at 3098-99.

⁹The ALJ concluded that in balancing the interests of the parties, there was no detriment to the PBA unit because a civilian had been assigned unit work. The PBA took no specific exception to this finding and, therefore, we do not have to reach this issue in our decision.

¹⁰20 PERB ¶4612 (1987), *aff'd on other grounds*, 21 PERB ¶3015 (1988).

reestablish exclusivity over unit work previously performed by thereafter performing on a limited basis the work now performed by nonunit employees.¹¹

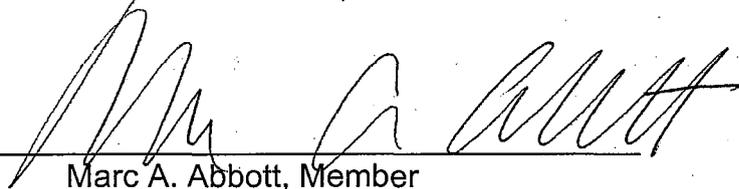
It is for those reasons that we deny the PBA's exceptions and affirm the ALJ's decision.

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

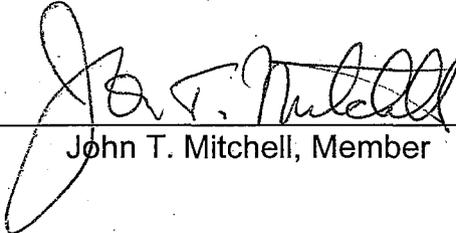
DATED: February 29, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

¹¹*City of Newburgh*, 29 PERB ¶3039 (1996). See also *City of Buffalo*, 24 PERB ¶3043 (1991), citing *New York City Transit Auth.*, 20 PERB ¶3025 (1987).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

FRANCES JENKINS,

Charging Party,

- and -

CASE NO. U-21118

**TRANSPORT WORKERS UNION OF AMERICA,
LOCAL 100,**

Respondent,

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

KEHINDE JOBI, ESQ., for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Frances Jenkins to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her improper practice charge. The charge, sworn to September 10, 1999, alleged that the Transport Workers Union of America, Local 100 (TWU) violated §209-a.2(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) by failing to afford her proper representation at a disciplinary arbitration hearing. Jenkins' employer, the New

York City Transit Authority (TA), is made a party to this proceeding pursuant to §209-a.3 of the Act.¹

Jenkins was employed by the TA as a conductor. On March 2, 1999, she opened the doors on the wrong side of her train. She was suspended pending further disciplinary action which resulted in dismissal from employment. On April 20, 1999, a tripartite arbitration board heard her appeal of the penalty of dismissal. An award issued on that date sustaining the charge to which Jenkins had admitted. However, the board modified the penalty to a demotion to a nonsafety sensitive position. The demotion took effect of May 12, 1999.

On September 16, 1999, the Assistant Director of Public Employment Practices and Representation (Assistant Director) wrote to Jenkins informing her that the charge was deficient and would not be processed. The September 16, 1999 letter included a deficiency notice informing Jenkins of the specific deficiencies with the charge, including, among other things:

[A] charge must be filed within four months of the alleged act(s) of misconduct. This charge was mailed on September 13, which is more than four months after the May 12 date of demotion and the April 20 arbitration hearing.

¹Section 209-a.3 of the Act provides that:

[t]he public employer shall be made a party to any charge filed under [209-a.2] which alleges that the duly recognized or certified employee organization breached its duty of fair representation in the processing of or failure to process a claim that the public employer has breached its agreement with such employee organization.

On October 5, 1999, the Assistant Director received a letter from counsel retained by Jenkins. The Assistant Director gave them until October 20, 1999 to cure the deficiencies. On October 20, 1999, Jenkins submitted an amended charge. On October 25, 1999, the Assistant Director, by letter, informed Jenkins' counsel that the amended charge was deficient. The amended charge had not cured the untimeliness of the charge.

On November 30, 1999, the Director issued his decision dismissing the charge. We agree.

Section 204.1(a)(1) of PERB's Rules of Procedure (Rules) mandates that improper practice charges be filed within four months of the date of the conduct which is the subject of the charge. While the Rules pertaining to the filing of exceptions to the decisions by the Director and Administrative Law Judges provide for extensions of time because of extraordinary circumstances (§213.4),² the Rules do not provide for any extension of time to file an improper practice charge.

²*Auburn Indus. Dev. Auth.*, 15 PERB ¶3075 (1982). For other cases discussing attempts to toll the four-month limitation of time, see *New York City Transit Auth. (Dye)*, 30 PERB ¶3032 (1997) (allegations of misconduct of Transit Authority more than four months after disciplinary hearing); *State of New York (Governor's Office of Employee Relations)*, 22 PERB ¶3009 (1989) (four-month limitation in Rules runs from the date the adverse action took place and not from the date when improper motivation is ascribed to it); *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 19 PERB ¶3066 (1986) (exhaustion of administrative review proceedings); *Transit Workers Union, Local 100, (Connolly)*, 28 PERB ¶4678 (1995) (attempts to resolve dispute through internal union procedure rejected); *Public Employees Fed'n (Reese)*, 26 PERB ¶4589 (1993) (illness preventing timely filing rejected); *Port Jefferson Teachers Ass'n (Handler)*, 20 PERB ¶4508 (1987) (charge alleging union's negligence prevented timely filing rejected).

The Assistant Director's letter of September 16, 1999 informed Jenkins that one of the deficiencies was the untimeliness of the charge. It was filed more than four months after the demotion which occurred on May 12, 1999 and the April 20, 1999 arbitration hearing. Any dispute Jenkins had with the TWU is measured from these dates in order to comply with the four-month limitation of time set forth in the Rules.³

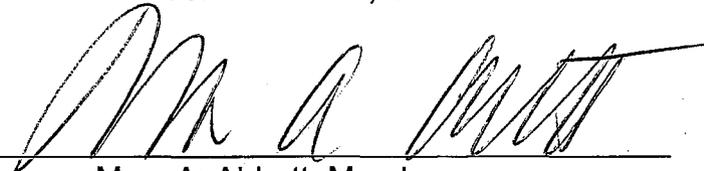
Based on the foregoing, Jenkins' exceptions in the form of an appeal are denied and the decision of the Director is affirmed.

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

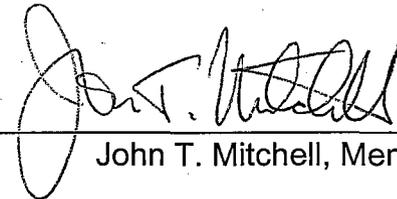
DATED: February 29, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

³Since the Director's dismissal of the charge on the grounds of untimeliness has been upheld, we need not reach any of the other issues raised in Jenkins' appeal.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**GATES HIGHWAY DEPARTMENT FOREMEN'S
ASSOCIATION,**

Charging Party,

- and -

**CASE NOS. U-19513 &
U-20343**

TOWN OF GATES,

Respondent.

**WYSSLING & MONTGOMERY (RICHARD H. WYSSLING of counsel), for
Charging Party**

SHAPIRO & DICARO (JOHN DICARO of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Gates Highway Department Foremen's Association (Association) to a decision of an Administrative Law Judge (ALJ) on improper practice charges alleging that the Town of Gates (Town) had violated §§209-a.1(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) by retaliating against three of its members for engaging in protected activities under the Act.

The ALJ found that Alfred Leone, Jr., Stephen Leone and John DiBietto were engaged in protected activity, at least from March 1997¹ through the conclusion of the certification proceeding. The Town and its officials were clearly aware of this activity. The ALJ, however, found that the disciplinary action taken against the Leones and DiBietto was not causally related to their protected activity. In other words, the "but for" part of the test had not been met.²

The ALJ concluded that the Association failed to prove any nexus between protected activity and the adverse employment actions taken against these individuals by the Town. It appeared from the testimony that a great deal of animosity and antagonism developed between Alfred, Jr., and Stephen Leone, and the Town Supervisor, Ralph D. Esposito, resulting from the suspension and ultimate resignation of Alfred Leone, Sr.,³ and that this relationship degenerated into conflict between these parties. The ALJ's assessment of the parties' demeanor during the hearings supported testimony describing this conflict. Consequently, the ALJ opined that the facts developed at the hearing regarding the parties' conduct do not support a finding that

¹*Town of Gates*, 31 PERB ¶4008 (1998). (On March 14, 1997, the Gates Highway Department Foremen's Association filed a petition seeking to represent foremen employed by the Town of Gates in the highway department. The International Brotherhood of Teamsters, Local 118 (Teamsters), as well as the Town, opposed the petition). See *Town of Gates*, 14 PERB ¶3000.41 (1981). (Teamsters certified as exclusive negotiating representatives for certain titles including foremen).

²See *County of Nassau*, 27 PERB ¶3011 (1994), where we articulated the elements necessary to prove violations of §§209-a.1(a) and (c).

³Alfred Leone, Sr., was the previous Town Highway Superintendent.

the Town's actions were motivated by the filing of the petition for certification. The ALJ dismissed the charges.

The Association excepts to the dismissal of the charges on several grounds: the ALJ's finding that there was no nexus between the protected activity and the action taken against Alfred Leone, Jr., Stephen Leone and John DiBietto; the ALJ's finding of no anti-union animus in the record; the ALJ's finding that the animosity that existed between the parties was the result of the suspension of Alfred Leone, Sr., by Esposito; the ALJ's holding that the facts cannot support a finding that the Town's and Esposito's actions were motivated by the filing of the petition for certification. Lastly, the Association excepts to the ALJ's holding that the Town's reason for the disciplinary actions taken against the Leones and DiBietto was not pretextual. The Town has not responded.

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

The ALJ's findings may be summarized as follows:

On March 3, 1997, Stephen Leone was appointed Acting Superintendent of Highways for the Town by its Supervisor, Esposito. Stephen's father, Alfred A. Leone, Sr., the long-time Highway Superintendent, had been suspended and was under investigation. Leone, Sr. subsequently retired. Stephen Leone and Alfred Leone, Jr. had served under their father's supervision for about twenty years. Leone, Sr.'s disciplinary problem received much media attention.

On March 14, 1997, the Association organized to represent the five foremen employed by the Highway Department. There was a showing of interest by four of the five foremen — Alfred Leone, Jr., Stephen Leone, John R. DiBitetto and Lester A. Beach. Michael Leone chose not to sign the petition.⁴ The petition was opposed by the Town and the Teamsters. The Director of Public Employment Practices and Representation (Director) dismissed the Association's petition and placed the foremen into the unit represented by the Teamsters.⁵

The record demonstrates that, in June 1997, which preceded the hearing on the representation petition (October 3, 1997 and November 10, 1997), Stephen Leone's wife, Elizabeth, began her campaign for Town Supervisor, challenging Esposito.

The election campaign of 1997 for Town Supervisor pitted the Leone family against the incumbent Esposito. Esposito testified unequivocally that he was concerned with the election and his interaction with the Leones. With the election looming in the foreground, Esposito removed Stephen Leone from the Acting Superintendent of Highways position on June 25, 1997.

Esposito testified that he offered the position to DiBitetto as a way of bridging the gap between the Leones and the administration. Esposito, upon offering the job to DiBitetto, reminded him that Elizabeth Leone did not have a prayer of winning the election.

⁴See *supra*, n. 1 and accompanying text.

⁵*Town of Gates*, 31 PERB ¶4008 (1998).

After accepting the offer, DiBitetto called Esposito and declined the position. Esposito at this point had lost confidence in DiBitetto. This loss of confidence was pivotal in Esposito's determination of which foreman was to be demoted after the election. It was Esposito's opinion that the Town had too many foremen and that either DiBitetto or one other foreman would be demoted.

It is against the backdrop of the election campaign, not the petition for certification, that the stage was set for the disciplinary actions that subsequently occurred to the Leone brothers and DiBitetto.⁶

The Act gives public employees the right to form, join or participate in an employee organization of their choosing and to be represented by the employee organization of their choosing with respect to their terms and conditions of employment.⁷ It has been held that any interference and/or discrimination arising out of an employee's participation in organizational activity would invoke the protections of the Act.⁸

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

⁶The ALJ's decision enunciates the various acts of misconduct with which the Leone brothers and DiBitettos were charged.

⁷Act, §202 and §203.

⁸Section 209-a.1(c); see *Rosen v. PERB*, 72 N.Y.2d 42, 21 PERB ¶¶7014 (1988); *Town of Gates*, 15 PERB ¶¶3079 (1982) (Town highway employee, Albert Sava, suspended and thereafter discharged by Alfred Leone, Sr. because of his activities on behalf of the successful organizing efforts of the Teamsters). See *supra* n. 1, *Town of Gates*, 14 PERB ¶¶3000.41 (1981).

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.⁹

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.¹⁰

It is undisputed that the Town knew by March 14, 1997 that Alfred Leone, Jr., Stephen Leone and John DiBitetto had formed the Association to organize and represent the five foremen in the Highway Department. The ALJ then determined that the "but for" part of the test was not satisfied. There was no showing by the Association of a nexus between the representation petition in March 1997 (protected activity) and the subsequent disciplinary actions taken by the Town against these three individuals. Therefore, the ALJ concluded that the charge must be dismissed. We agree.

In reaching his conclusion, the ALJ found the credible evidence supported his findings. The ALJ based his determination on a full examination of the demeanor of the witnesses, especially Michael Leone.¹¹ The record demonstrates that the Leones were

⁹See *Town of North Hempstead*, 32 PERB ¶13006 (1999).

¹⁰*City of Salamanca*, 18 PERB ¶13012 (1985).

¹¹See *Davis v. Alaska*, 415 U.S. 308; *Douglas v. Alabama*, 380 U.S. 415, 418 ([T]he Sixth Amendment guarantees the right of confrontation [cross-examination]; *Pointer v. Texas*, 380 U.S. 400 ([T]he value of cross-examination lies in its use to expose falsehood and bring out the truth); "[T]he opponent demands confrontation, not for the idle purpose of gazing upon the witness, or of being gazed upon by him, but for the purpose of cross-examination," 5 J. Wigmore, *Evidence* §1395, p. 123 (3rd Ed. 1940).

not unfamiliar with disciplinary action as the result of organizing efforts. In 1982, Alfred Leone, Sr. discharged an employee who assisted the Teamsters in organizing the employees of the highway department, which included foremen.

Since the foremen were already represented, the Teamsters joined the Town to oppose the Association's petition, supported by the Leones and others in March 1997.

Esposito testified unequivocally that he was more interested in the outcome of the general election for Town Supervisor. His opponent was none other than Stephen Leone's wife, Elizabeth. It was obvious from Esposito's testimony that the general election, not the representation petition, was the catalyst for conflict between the Leones, DiBitetto and himself.

Therefore, on the record before us, we find no merit to the exceptions as the Association failed to establish a causal nexus between the protected activity and the Town's disciplinary action taken against the Leone brothers and DiBitetto. We have held that every adverse action taken by an employer does not and cannot be said to be transformed into an improperly motivated one as defined by the Act and thereby result in a violation.¹²

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

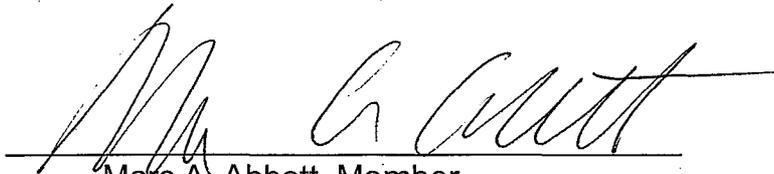
¹²*Erie County Water Auth.*, 26 PERB ¶4604 (1993), *aff'd*, 27 PERB ¶3010 (1994).

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

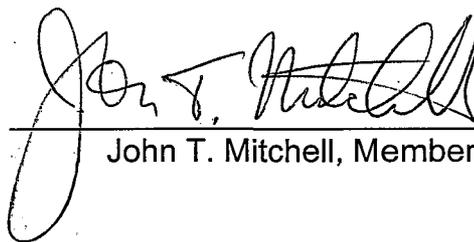
DATED: February 29, 2000
Albany, New York



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,**

Petitioner,

- and -

CASE NO. CP-574

**MONROE-WOODBURY CENTRAL SCHOOL
DISTRICT,**

Employer.

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

**RAINS & POGREBIN, P.C. (ERNEST R. STOLZER AND SASAN MEHRARA
of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing its petition for unit clarification and unit placement. The petition sought a determination that substitute bus drivers employed by the Monroe-Woodbury Central School District (District) are or should be placed in CSEA's existing unit of custodial, maintenance and transportation personnel. The District opposes the petition.

The ALJ held that the substitute bus drivers were not encompassed within the unit recognition clause in the CSEA-District contract and dismissed the unit clarification aspect of the petition. As to unit placement, the ALJ determined that the substitute bus drivers were "casual" employees not entitled to representation under the Act.

Alternatively, he found that even if the substitute bus drivers are covered employees,¹ the disparity in the benefits received by the substitutes as compared with unit employees would likely result in a conflict of interest inimical to collective bargaining.

CSEA has filed exceptions to the ALJ's decision, arguing that the contractual recognition clause encompasses the title of substitute bus driver,² that the substitute bus drivers are not "casual" employees, that the substitute bus drivers have received letters of "reasonable assurance of continued employment" from the District which alone warrants a finding that they are "covered" employees and, finally, that the disparity in benefits received by the substitute bus drivers does not, in and of itself, compel a finding that the substitute bus drivers are not appropriately placed in CSEA's unit. The District supports the ALJ's decision.

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

¹The substitute bus drivers receive a letter of reasonable assurance of continued employment such as to make them ineligible for receipt of unemployment insurance benefits pursuant to Labor Law, §590.10 and may, therefore, be covered employees pursuant to §201.7(d) of the Public Employees' Fair Employment Act (Act).

²Although not listed separately in its exceptions, this argument was raised in CSEA's brief in support of its exceptions, filed simultaneously with its exceptions.

The parties presented the case to the ALJ for decision on stipulations of fact and briefs. The 1996-1999 collective bargaining agreement between CSEA and the District was also made part of the record. In relevant part, it provides as follows:

Article 1. Recognition and Definition of Titles

A. Recognition

The Employer recognizes CSEA as the sole and exclusive representative of all custodial, maintenance, and transportation personnel, excluding the Director of Buildings and Grounds, the Director of Transportation, the Assistant Director of Transportation, the Transportation Dispatcher, the Maintenance Foreman, and the Head Mechanic, for the purpose of collective negotiations for all terms and conditions of employment and the administration of grievances. This recognition shall continue for the maximum period permissible under the Taylor Law.

B. Personnel Defined

1. Full-time custodial and transportation employees shall be defined as those individuals working in excess of twenty (20) hours and five (5) days per week, regardless of on a ten-(10) or twelve-(12) month basis but excluding bus drivers.
2. Part-time custodial personnel shall be defined as those working on a regular daily basis less than twenty (20) hours per week.
3. Permanent drivers are those individuals who are permanently routed.
4. Substitute drivers are defined as those individuals not permanently routed. They are entitled to no seniority or benefits.

Notwithstanding the general, all-inclusive, language of the recognition clause and the more specific language of the personnel definition section set forth above, the

ALJ found that substitute bus drivers were not part of the unit defined in the collective bargaining agreement. The ALJ based his determination that the title of substitute bus driver was not encompassed within the scope of the bargaining unit on the fact that CSEA had never negotiated for the substitute bus drivers nor were there any contract provisions related to them, had filed no grievances on their behalf and had not collected dues or agency fees from the substitute bus drivers at any time since the inception of the unit in 1975.

A unit clarification petition seeks only a factual determination as to whether a job title is actually encompassed within the scope of the petitioner's unit. We have held a unit clarification petitioner to a burden of proof on its petition because that particular type of petition necessarily seeks only a determination of fact. [footnote omitted] A unit clarification petition differs from a unit placement petition.... [O]nly the unit placement petition puts the appropriateness of the unit under §207 of the Act in issue. Moreover, the unit placement petition proceeds from the finding or admission that the position in issue is not in the petitioner's unit, but should be most appropriately placed there. The uniting criteria set forth in §207 of the Act can be material to the disposition of the fact question which underlies the unit clarification petition, but only if and to the extent they evidence the actual scope of the bargaining unit.³

Here, the recognition clause in the parties' collective bargaining agreement defines the unit in general terms of "all ... transportation personnel". Were that the only language referring to the makeup of the bargaining unit, the rationale used by the ALJ would be appropriate. He reviewed the contract for other terms that applied to

³ *State of New York (Dep't of Audit and Control)*, 24 PERB ¶13019, at 3038 (1991).

substitute bus drivers and found none. He, therefore, looked to the treatment of that title by the parties and determined that CSEA had never sought dues or agency fees transmittals for these employees from the District, had never put forth negotiations proposals for these employees and had never filed any grievances on behalf of the substitute bus drivers. Relying on our decision in *County of Niagara*⁴, he determined that because there was no evidence that the parties had ever considered the substitute bus drivers to be encompassed within the scope of the existing unit, the unit clarification aspect of the petition should be dismissed.

CSEA argues in its exceptions that an analysis of whether the parties to a collective bargaining agreement have considered a title to be within the scope of the bargaining unit is appropriate only where the express provisions of the recognition clause are ambiguous and that such is not the case here. We agree.

As was stated in *Orange County and Sheriff of Orange County*⁵, a "unit clarification petition raises only a fact question as to whether [existing] personnel are included in [the] existing unit." Here, there is a general definition of the unit in the recognition clause including "all custodial, maintenance, and transportation personnel", but there also follows a provision defining "personnel". That clause further defines titles which are indisputably within the bargaining unit - full-time custodial employees, part-time custodial employees, and permanent bus drivers. One other group of employees is

⁴21 PERB ¶3030 (1988).

⁵25 PERB ¶3049 at 3104 (1992), *conf'd sub nom. Orange County Deputy Sheriff's Ass'n v. PERB*, 26 PERB ¶7004 (Sup. Ct. Rockland Co. 1993).

included within the definition of personnel and that is the substitute bus drivers at-issue in this proceeding.

A review of the few Board decisions that have addressed unit clarification petitions reveals no cases in which the recognition clause specifically defines the unit by title and the title in issue is included within the recognition clause. Rather, the decisions deal with general recognition clauses, including all employees⁶ or all employees within certain classifications.⁷ As a result, in those cases, the inquiry went beyond the language of the recognition clause to determine whether any other contractual language either covered or specifically excluded the at-issue title. In the absence of any relevant contractual language, the parties' practice with respect to the at-issue title or similar titles was reviewed to ascertain the parties' intent.⁸

Such an inquiry is not necessary nor is it appropriate in this case. Here, the parties have specifically defined the bargaining unit as including substitute bus drivers. No other meaning can be given to the reference to the substitute bus drivers in the definition of personnel. In fact, the definition clause also sets forth the terms of the contract applicable to the substitute bus drivers by stating: "They are entitled to no

⁶See *County of Niagara*, *supra* note 4. See also *General Brown Cent. Sch. Dist.*, 28 PERB ¶3065 (1995).

⁷See *State of New York (Dep't of Audit and Control)*, *supra* note 2.

⁸See *County of Niagara*, *supra* note 4. See also *Clinton Community College*, 31 PERB ¶3070 (1998), where the recognition clause was title specific but the unit clarification petition was dismissed because the titles sought were not listed in the recognition clause.

seniority or benefits." It is, therefore, clear from the recognition clause of the collective bargaining agreement that substitute bus drivers are included in the unit and that the parties have reached an agreement as to the level of benefits to be received by the substitute bus drivers pursuant to the agreement.

We are further persuaded that in a case such as this involving a unit clarification petition, where the at-issue title is so clearly included in the recognition clause of the parties' collective bargaining agreement, the contract itself should be the end of our inquiry.

In *Florida Union Free School District*,⁹ (hereafter *Florida*) we looked to the parties' collective bargaining agreement to set the terms and conditions of employment for the term of the contract. We there held that:

...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.¹⁰

We find that the reasoning underlying the rationale articulated in *Florida* that the parties may set the terms of their contract and that for the duration of the contract those terms will mark the limit of our inquiry into unilateral actions involving those terms, notwithstanding an extra-contractual practice involving a term of the contract, is

⁹31 PERB ¶3056, at 3117 (1998).

¹⁰*Citing Maine-Endwell Cent. Sch. Dist.*, 14 PERB ¶4625, at 4759 (1981), *aff'd*, 15 PERB ¶3025 (1982).

applicable to a recognition clause which details those employees who will be covered by the contract. Just as the employer in a unilateral change case may revert to the language of the contract as setting forth the parties' agreement as to a term or condition of employment notwithstanding a past practice to the contrary, then the parties to a collective bargaining agreement that clearly defines the unit covered by the agreement may revert to that recognition clause as defining the unit, notwithstanding a past practice to the contrary. We reiterate that this decision is limited to a unit clarification petition in which the unit is clearly defined in the parties' collective bargaining agreement and the title or titles in-issue are specifically made part of the recognition clause, even though the parties' practice may have been to exclude the title from subsequent negotiations.¹¹

Finally, we are mindful of the intent of the Legislature that all uncertainties as to representation of employees be resolved in favor of Taylor Law coverage.¹² Our decision here reflects the Board's long-standing policy of resolving representation disputes in favor of coverage, unless exclusion of the at-issue employees is clearly mandated by the Act.¹³

¹¹Given the nature of this proceeding, we need not address any potential issues related to the absence of negotiations on behalf of the substitute bus drivers or the reasons therefor.

¹²See *State of New York*, 5 PERB ¶3001 (1972). See also *County of Rockland*, 28 PERB ¶3063 (1995).

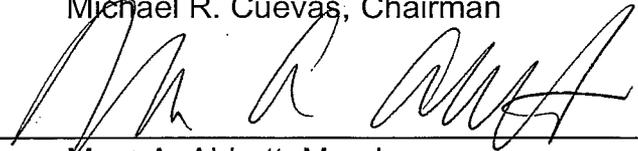
¹³See *State of New York (SUNY)*, 24 PERB ¶3035 (1991).

We, therefore, reverse the decision of the ALJ and grant the unit clarification petition. We find that the title of substitute bus driver is included in the unit represented by CSEA. Because of our determination on the unit clarification aspect of the petition, we need not reach the exceptions taken to the ALJ's determination on the unit placement portion of CSEA's petition.¹⁴

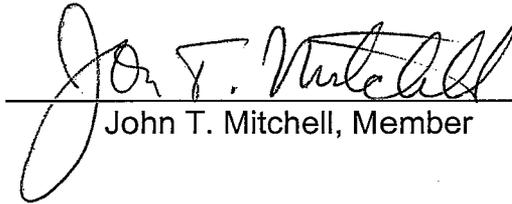
DATED: February 29, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

¹⁴Inasmuch as the addition of the substitute bus drivers to CSEA's unit does not bring into question its continuing majority status, no election is ordered. See *New York Convention Ctr. Operating Corp.*, 27 PERB ¶3034 (1994).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SARA-ANN P. FEARON,

Charging Party,

- and -

CASE NO. U-20760

UNITED FEDERATION OF TEACHERS,

Respondent,

- and -

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

Employer.

SHELLMAN D. JOHNSON, for Charging Party

**JAMES R. SANDNER, GENERAL COUNSEL (MARIA ELENA GONZALEZ of
counsel), for Respondent**

ROBERT E. WATERS, ESQ., for Employer

BOARD DECISION ON MOTION AND ORDER

The charging party, Sara-Ann P. Fearon, has moved this Board to reconsider our decision and order previously issued on January 24, 2000.

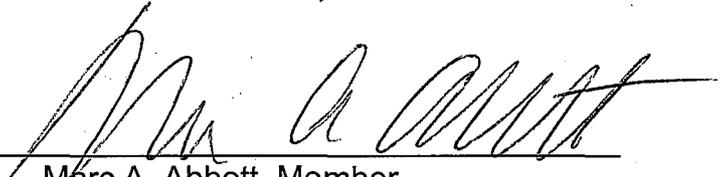
Having reviewed the moving papers, we determine that there is neither such newly discovered material nor overlooked propositions of law as to justify reconsideration of our Decision and Order of January 24, 2000.

ACCORDINGLY, the motion for reconsideration is denied.¹

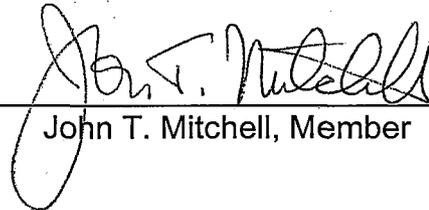
DATED: February 29, 2000
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

¹See *Brentwood Union Free Sch. Dist.*, 25 PERB ¶3027 (1992); *New York City Transit Auth.*, 24 PERB ¶3030 (1991); *Capital Dist. Reg'l. Off-Track Betting Corp.*, 20 PERB ¶3026 (1987); *East Ramapo Cent. Sch. Dist.*, 17 PERB ¶3044 (1984); *Board of Educ. of the City Sch. Dist. of the City of New York*, 7 PERB ¶3039 (1974).