STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RYE PROFESSIONAL FIRE FIGHTERS ASSOCIATION, LOCAL 2029, IAFF, AFL-CIO,

Petitioner,

- and -

CASE NO. CP-610

CITY OF RYE,

Employer.

DUNCAN MACRAE, for Petitioner

VINCENT TOOMEY, ESQ., for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Rye Professional Fire Fighters Association, Local 2029, IAFF, AFL-CIO (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its unit placement petition, which sought to place the title of Fire Lieutenant/Inspector in its unit of fire fighters employed by the City of Rye (City). The ALJ determined that the Fire Lieutenant/Inspector is a high level supervisor and as such it was inappropriate to place the title into a unit of employees supervised by the Fire Lieutenant/Inspector.

The Association argues in its exceptions to the ALJ's decision that there is a discrepancy between the ALJ's findings as to the duties the Fire Lieutenant/Inspector

performs and the record. Consequently, the Association asserts, the ALJ erred in his factual and legal analysis. The City has not responded to the exceptions.[1]

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

FACTS

A full exposition of the facts is recited in the ALJ's decision; thus, we will confine ourselves to the salient facts relevant to the exceptions raised by the Association.

In September 1985, the City of Rye created the title of Fire Lieutenant/Inspector. James W. Dianni was appointed provisionally to the position. On February 24, 1986, Dianni's appointment became permanent. At that time, neither party sought to declare the position as management or to place the position within the existing bargaining unit. In fact, the title of Fire Inspector had been removed from the Association's bargaining unit prior to Mr. Dianni's appointment in 1985. Subsequent collective bargaining agreements did not include the title of Fire Lieutenant/Inspector in the Association's recognition clause.

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[1]The City filed its brief in response to the Association's exceptions on June 26, 2000. Our Rules of Procedure, §213.3, provide that a response may be filed within seven working days of receipt of the exceptions. The Association's exceptions were filed on May 12, 2000. Even allowing for mail, the City's response is not timely filed and it has not, therefore, been considered.

On July 10, 2000, the Association filed a reply to the City's response to the exceptions. Section 213.3 of the Rules also provides that no pleading other than exceptions, cross-exceptions or a response thereto will be accepted or considered by the Board unless it is requested or authorized by the Board. As we neither requested nor authorized the Association's reply, it, too, has not been considered.

The City's fire department consists of both volunteer and paid fire fighters. The Chief is an unpaid volunteer. The paid staff consists of fifteen fire fighters and the Fire Lieutenant/Inspector. In his capacity as Fire Lieutenant/Inspector, Dianni's basic function is to supervise the paid staff.

On June 10, 1999, the Association filed this unit placement petition. The Association sought to include the Fire Lieutenant/Inspector title in the bargaining unit of fifteen paid fire fighters. The Association alleged that the duties of the Fire Lieutenant/Inspector position had evolved so as to have a community of interest with the fire fighters. In addition, the Association alleged that the Fire Lieutenant/Inspector has no managerial or confidential duties or authority affecting the mission of the City's Fire Department.

The City's response to the petition generally denied these allegations.

DISCUSSION

The Association argues in its exceptions, *inter alia*, that the policy of the Act favors placement of fire officers in bargaining units of rank-and-file fire fighters.

We have said that in cases involving employees of police or fire departments, both the officers and the rank-and-file members share the same mission: to prevent or control and extinguish fires.[2] This, however, is usually where any similarity ends.

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[2]See *Greenville Fire Dist.*, 6 PERB ¶4041 (1973).

A unit placement petition seeks to add an unrepresented position to an existing unit pursuant to the criteria established in §207 of the Act. It is within this proceeding that the appropriateness of the unit is examined.

While §§207.1(a) and (c) of the Act require that both the community of interest and the employer's convenience be considered in determining unit appropriateness, we have given the community of interest criteria the most importance of the criteria set forth in §207.[3] Since the position of Fire Lieutenant/Inspector has been unrepresented, we need only concern ourselves with whether this position shares a community of interest with the rank-and-file fire fighters. But, in the case of previously unrepresented supervisory employees, it is community/conflict of interest and the employer's administrative convenience standard which determine the appropriate uniting.[4]

When examining community of interest in cases involving uniformed supervisors and rank-and-file employees, we look to, among other things, whether there exists a real or potential conflict of interest.[5]

The Association argues in its exceptions that the Fire Lieutenant/Inspector does not have sufficient supervisory authority to justify excluding the position from the existing rank-and-file unit of fire fighters. This argument would be relevant if the petition

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[3]*Board of Educ. of the City Sch. Dist. of the City of Buffalo*, 14 PERB ¶3051 (1981).

[4]*County of Genesee*, 29 PERB ¶3068 (1996); *Uniondale Union Free Sch. Dist.*, 21 PERB ¶3060 (1988).

[5]*New York State Div. of State Police*, 1 PERB ¶399.32 (1968).

before us were one to determine the managerial status of the Fire Lieutenant/Inspector position. It carries little weight, however, when the issue is the placement of the position into an existing unit of rank-and-file fire fighters.[6]

What is material is whether the supervisory functions may indicate a conflict of interest.[7] In this regard, we have looked at responsibility for the imposition of discipline, evaluation of subordinates, training, work assignments, and other related personnel issues.[8]

Based on the record before us, it appears that Dianni, in his position of Fire Lieutenant/Inspector, is responsible for evaluating the fire fighters' performance, is the first step in the grievance procedure, and has authority to institute disciplinary proceedings against a fire fighter under his supervision. He is responsible for work assignments, overtime and supervises the day-to-day operations of the paid staff. These duties indicate sufficient command responsibilities to make it inappropriate to place him in the same unit as those who are subject to his authority.[9]

Consequently, since the City has objected to the inclusion of the Fire Lieutenant/Inspector position in the Association's unit, we are constrained by precedent against the inclusion of a supervisor in a unit with rank-and-file employees over the objection of a party in interest, if the degree and nature of the supervisory

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[6]*Hartsdale Fire Dist.*, 10 PERB ¶3032 (1977).

[7]See *supra*, note 3 at 3156.

[8]See *supra*, note 2 at 4072.

[9]*Town of Carmel*, 31 PERB ¶3047 (1998).

responsibilities indicate a conflict of interest.[10] The Association's exceptions are, therefore, dismissed in their entirety.

We accordingly affirm the decision of the ALJ that the title Fire Lieutenant/Inspector is not appropriately included in the petitioner's unit.

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

DATED: August 7, 2000
New York, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[10]*Clinton Community College*, 31 PERB ¶3070, at 3155 (1998); *see also East Ramapo Cent. Sch. Dist.*, 11 PERB ¶3075 (1978); *City Sch. Dist. of the City of Binghamton*, 10 PERB ¶3062 (1977); *New York State Div. of State Police*, *supra.*

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HAMMONDSPORT NON-TEACHING PERSONNEL ORGANIZATION,

Petitioner,

- and -

CASE NO. CP-628

HAMMONDSPORT CENTRAL SCHOOL DISTRICT,

Employer.

JOHN B. SCHAMEL, for Petitioner

MURRY F. SOLOMON, for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Hammondsport Central School District (District) to a decision of an Administrative Law Judge (ALJ) granting a unit placement petition filed by the Hammondsport Non-Teaching Personnel Organization (Organization) seeking to add the positions of teacher aide, typist/account clerk and nurse to its bargaining unit of noninstructional employees of the District. The ALJ determined that because the positions sought to be added were not in excess of thirty percent of the existing unit, that the unit placement petition was appropriate and that no election was required. The positions were, therefore, placed in the Organization's bargaining unit.

The District argues that the ALJ should have dismissed the petition because the number of positions added to the unit are in excess of thirty percent of the existing unit. The Organization has responded that the ALJ's decision is correct and should be affirmed.[1]

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

FACTS

The parties submitted the matter for decision on the basis of the pleadings, correspondence between the parties and the ALJ, and their legal briefs.

The Organization petitioned to add three unrepresented titles - nurse, teacher aide and typist/account clerk - to the existing bargaining unit.[2] The positions, at the time of the petition, were held by ten employees. At the time the ALJ issued her

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[1]The Organization filed a document entitled "cross-exceptions". The Organization does not take any exceptions to the ALJ's decision but in fact is responding to the District's exceptions.

[2]The existing unit is defined in the parties' collective bargaining agreement as follows:

> ...all regularly employed bus drivers, bus mechanics, maintenance personnel (building maintenance mechanics, groundskeepers), cafeteria personnel, cleaners, and substitute personnel who are appointed for or who work for ninety (90) consecutive days or more....Excluded from the bargaining unit are seasonal and temporary workers, substitute personnel who are appointed for or who work less than ninety (90) consecutive days, retired workers, secretaries, teaching personnel in the teachers' bargaining unit, teaching assistants, teacher aides, supervisory personnel, management personnel and all other personnel....

decision, there were nine persons holding the petitioned-for positions.[3] The Organization claimed that the existing unit at the time the petition was filed was comprised of thirty-six employees. That count included three substitute employees who the Organization claimed were members of the bargaining unit because they were long-term substitutes.[4] The number also included one employee, Joy Martinez, who is a part-time bus driver for the District and, therefore, included in the bargaining unit, and who is also a part-time teacher aide, a position sought to be added to the unit.

The District claimed that there were ten employees in the positions covered by the petition because Joy Martinez must be counted even though she is already a member of the bargaining unit by virtue of her employment as a part-time bus driver. The District, pointing to the recognition clause in the parties' collective bargaining agreement, also argued that there were only thirty-one employees in the existing bargaining unit because neither Slayton nor Button could be counted as Slayton had not worked ninety consecutive days for the District and Button had resigned and his position remained unfilled.

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[3]One employee, Jan Harrington, had resigned from her position as typist/account clerk effective November 23, 1999. Although it appears that that position has been filled, the incumbent had not yet worked ninety consecutive days and was not included.

[4]Gerald Slayton, a substitute cleaner, has worked for the District for four years and has received a letter of reasonable assurance of continued employment which would disqualify him from receiving unemployment benefits pursuant to New York State Labor Law, §590. Winston Button was a part-time substitute cleaner for the District until his resignation on December 21, 1999.

The ALJ counted Martinez as a member of the existing unit but did not count her as one of the petitioned-for individuals. The ALJ further concluded that Slayton was a member of the bargaining unit because, although he had not worked ninety consecutive days in any of the four years of his employment with the District, he had been regularly employed as a substitute cleaner for four years.[5]

DISCUSSION

The District argues that Martinez must be included in the number of the individuals in titles sought to be added to the bargaining unit and that Slayton may not be considered to be in the bargaining unit because he is excluded by virtue of the language in the recognition clause. If Martinez is included and Slayton is excluded, the District argues that the petitioned-for employees comprise more than thirty percent of the existing unit and the unit placement petition must be dismissed.

In *Ogdensburg City School District* (hereafter *Ogdensburg*),[6] we addressed the issues involved when a unit placement petition sought to add such a number of positions to an existing unit that the bargaining agent's majority status might be called into question.

> Our unit placement rules are intended to permit relatively minor adjustments to the composition of an existing negotiating unit. That intent

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[5]The ALJ also decided that certain employees of the District who had previously retired but were employed by the District as part-time bus drivers, were included in the bargaining unit by virtue of a memorandum of understanding between the District and the Organization. No exceptions have been taken to this aspect of the ALJ's decision. We, therefore, do not reach it.

[6]31 PERB ¶3060, at 3131-32 (1998).

> was manifest when the rule applied only to newly created or substantially altered positions. Although the rule has been amended to open the unit placement process to "a position," without qualification by type, the intent was only to allow for the placement into the appropriate unit of established, unchanged positions which had been excluded historically from representation. The rule change was not intended to make a unit placement petition a substitute for a certification/decertification proceeding, which is the only appropriate mechanism for the resolution of questions concerning a union's majority support. When majority status questions are presented, the policies of the Act mandate that the representation questions be channeled for decision under a petition for certification/decertification. Only the rules applicable to the filing and processing of a petition for certification/decertification, which incorporate fixed filing periods and showing of interest requirements, protect the multiple interests at stake when a question as to an incumbent union's continuing majority status is raised.
>
> Although our unit placement rules cannot be used when the number of positions sought to be added to a unit is large enough to put the incumbent union's majority status reasonably in dispute, we do not have any decisions at any level as to when a majority status question is raised for purposes of a unit placement petition. (footnote omitted) For purposes of a unit placement petition, we hold that a majority status question is presented if the number of employees proposed to be added to a unit is thirty percent or more of the number of employees in the existing unit. This number's comparison gives, we believe, the fairest indication as to whether an incumbent union's majority status has been placed in issue and the one which is best suited to the limited purposes of a unit placement petition.

The focus of our inquiry is whether a sufficient number of employees are being added to an existing bargaining unit so as to call into question the bargaining agent's majority status. Here, Martinez is already a member of the bargaining unit as a part-time bus driver. The addition of the teacher aide title, which she also holds, does not add an additional employee to the existing bargaining unit. Martinez may hold two titles in the District, but she is only one employee. We, therefore, find that the ALJ correctly counted Martinez as being part of the existing unit but not as an additional employee to

be added to the bargaining unit by virtue of the Organization's petition. As a result, as the ALJ found, the Organization is seeking to add only nine employees to the existing unit.

However, we do not agree with the ALJ's conclusion with respect to Slayton. Slayton has been employed by the District for four years as a substitute cleaner. He received a letter of reasonable assurance for the 1999-2000 school year and continues to be employed by the District as a substitute cleaner. However, this record does not establish that Slayton has ever been employed by the District for ninety consecutive days. The recognition clause in the parties' collective bargaining agreement clearly includes only those substitutes "who are appointed for or who work ninety (90) consecutive days or more."

While Slayton may be considered to be a public employee of the District by virtue of his regularity of employment[7] and his receipt of the letter of reasonable assurance of continued employment for the 1999-2000 school year,[8] he is not a member of the bargaining unit. He is specifically excluded by the language of the recognition clause.[9] The ALJ, therefore, erred by including Slayton in the Organization's bargaining unit for purposes of computing the number of employees in the unit.

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[7]*See Village of Dryden*, 22 PERB ¶3035 (1989).

[8]See Public Employees' Fair Employment Act, §201.7(d).

[9]*See Monroe-Woodbury Cent. Sch. Dist.*, 33 PERB ¶3007 (2000).

However, even with the exclusion of Slayton, the bargaining unit is made up of thirty-two employees. As nine employees is less than thirty percent of the existing bargaining unit, the ALJ correctly granted the Organization's petition for unit placement and placed the titles of teacher aide, nurse and typist/account clerk in the bargaining unit represented by the Organization.

Based on the foregoing, the ALJ's decision is affirmed, in part, and reversed, in part, and the petition of the Organization is granted.[10] SO ORDERED.

DATED: August 7, 2000
New York, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[10]Inasmuch as the addition of the nurse, teacher aide and typist/account clerk to the Organization'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

RONALD GRASSEL,

Charging Party,

- and - **CASE NO. U-20569**

UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT, AFL-CIO

Respondent.

GENTILE, BROTMAN, & BENJAMIN (SUSAN BROTMAN of counsel), for Charging Party

CHARLES D. MAURER, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Ronald Grassel to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge. Grassel had charged that the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT), and the New York State United Teachers (NYSUT)[1], had violated §§209-a.2 (a) and (c) of the

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[1]On July 6, 1999, NYSUT moved that the charge against it be dismissed. The ALJ granted the motion because NYSUT is not the bargaining agent. *See Greece Cent. Sch. Dist. (Lanzillo)*, 28 PERB ¶3048 (1995), *conf'd*, 29 PERB ¶7003 (Sup. Ct. Albany County 1996). Grassel sought a review of the ALJ's decision but we denied his motion as an interlocutory appeal. *United Fed'n of Teachers, Local 2, and New York State United Teachers*, 32 PERB ¶3071 (1999). No exceptions to the ALJ's final decision have been taken with respect to the dismissal of the charge against NYSUT. We, therefore, do not reach it.

Public Employees' Fair Employment Act (Act) when NYSUT terminated its legal representation of Grassel in a proceeding pursuant to §3020-a of the New York State Education Law brought against Grassel by his employer, the Board of Education of the City School District of the City of New York (District).[2]

Grassel filed an offer of proof setting forth the facts he would prove at a hearing to sustain the improper practice charge against UFT and to respond to UFT's motion to dismiss the charge. UFT's motion was granted by the ALJ, who found that the allegations against UFT made by Grassel in his improper practice charge were unsupported by the offer of proof and that Grassel had failed to show that UFT's actions were arbitrary, discriminatory or taken in bad faith.

Grassel excepts to the ALJ's decision arguing that the ALJ had the obligation in deciding the motion to dismiss to accept as true all of the allegations made by Grassel in the offer of proof and to dismiss the improper practice charge only if all the reasonable inferences therefrom are legally insufficient to sustain the charge. The response filed by UFT supports the ALJ's decision.

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[2]The District was named as a party by virtue of §209-a.3 of the Act, which makes the public employer a statutory party to any improper practice charge which alleges that the bargaining agent has breached its duty of fair representation by failing to process, or by its manner of processing, a grievance brought pursuant to the collective bargaining agreement between it and the public employer. On June 24, 1999, the District moved that it be removed from the charge because the conduct of the bargaining agent in-issue did not involve a contractual grievance. The conferencing ALJ granted the District's motion. No exceptions have been taken to that determination and, therefore, we do not reach it.

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

FACTS

In December 1997, Grassel received a notice of termination from the District pursuant to §3020-a. He sought representation at the §3020-a hearing from UFT. Pursuant to an agreement between UFT and NYSUT, Grassel was notified in late December 1997, that counsel from NYSUT, Mitchell Rubenstein, would represent him in the §3020-a proceeding. Grassel was represented by Rubenstein through 1998, until September 10, 1998, when the NYSUT General Counsel advised Grassel by letter that, because of his failure to cooperate in the preparation of his case, NYSUT was withdrawing as counsel.

Grassel alleged in his offer of proof that NYSUT's decision to withdraw was motivated by Rubenstein's disapproval of a prior claim brought by Grassel against NYSUT. Grassel alleges that Rubenstein made remarks to that effect to him in January 1998, and Grassel's offer of proof alleges a connection between the alleged remarks in January 1998 and NYSUT's decision to withdraw as his counsel in September 1998.

NYSUT alleges, and Grassel concurs, that from January 1998 through June 1998, Grassel and Rubenstein were in frequent contact, exchanged letters, telephone calls, and had several meetings. As a result of their last meeting on June 29, 1998, Grassel was to provide Rubenstein with certain information by July 1, 1998.[3]

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[3]Grassel alleges that he had already provided all the information in his possession to Rubenstein.

Rubenstein received no information from Grassel, which prompted him to send an August 7, 1998 letter to Grassel outlining the progress of the case preparation up to that point and reiterating the need for the information requested, as the first day of the §3020-a hearing was scheduled for September 14, 1998. Receiving no response to the August 7 letter, Rubenstein wrote to Grassel on August 13, August 25, September 2, and September 8, 1998, requesting that Grassel contact him and advising him, in the last two letters, that his failure to timely contact NYSUT would result in Rubenstein recommending that NYSUT withdraw as counsel because of lack of cooperation. Finally, as Grassel had not contacted Rubenstein by September 10, 1998, as specified in the September 8, 1998 letter, on September 11, 1998, the NYSUT General Counsel wrote to Grassel informing him that NYSUT was withdrawing as his counsel. All but the first letter from NYSUT to Grassel were sent certified mail and the last letter was also sent by Express Mail. Grassel faxed a letter to Rubenstein on September 11, 1998, offering no explanation for his failure to respond to the August and September letters and criticizing Rubenstein's representation.

In his offer of proof, Grassel alleges that he was on vacation during the four weeks prior to the September 14 hearing date and that he so advised the §3020-a hearing panel of that fact in a September 14, 1998 letter to them asking that the panel refuse to accept Rubenstein's withdrawal as counsel.[4]

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[4]Rubenstein was not copied on the letter.

DISCUSSION

> In order to establish a claim for breach of the duty of fair representation against a union, there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith.[5]

We have held, in deciding a motion to dismiss, that an ALJ is to assume the truth of all of the charging party's evidence and to give the charging party the benefit of all reasonable inferences that may be drawn from that evidence.[6] Grassel mistakenly argues that the ALJ should have accepted as true all the allegations in his offer of proof. By evidence, we mean facts and not allegations. The facts may be ascertained by the ALJ from an offer of proof or evidence adduced at a hearing or both.[7]

The facts in this case establish that UFT properly represented Grassel. The withdrawal of UFT as Grassel's counsel days before the scheduled §3020-a hearing was a result of Grassel's failure to respond to several letters from his counsel, Rubenstein, who was attempting to prepare for the §3020-a hearing. Grassel points out in his offer that he was on vacation during the weeks preceding his hearing date and that he responded as soon as he returned from vacation. However, Grassel's response to Rubenstein's letters, three days before the hearing, offered Rubenstein no explanation for his failure to respond to the letters, provided none of the information that

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[5]*Civil Service Employees Ass'n v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024, at 7039 (3d Dep't 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

[6]*See State of New York (Dep't of Correctional Servs.)*, 29 PERB ¶3015 (1996); *County of Nassau (Police Dep't)*, 17 PERB ¶3013 (1984).

[7]*See United Fed'n of Teachers (Ayazi)*, 32 PERB ¶3069 (1999).

Rubenstein had requested or even indicated that Grassel was prepared to assist NYSUT in his defense if Rubenstein remained as counsel. His letter instead complained about Rubenstein's representation.

Rubenstein withdrew as Grassel's counsel after trying to contact him for over six weeks with no response from Grassel. It was not unreasonable in those circumstances for Rubenstein to assume that Grassel was unwilling to cooperate in his own defense. As Rubenstein's response to Grassel's failure to respond to his numerous inquiries was not unreasonable, it cannot be said to be discriminatory or arbitrary.[8] As to Grassel's allegation that Rubenstein's decision was improperly motivated, there is nothing in Grassel's offer of proof to support such an allegation. Even assuming, as Grassel alleges, that Rubenstein was critical of Grassel when they first met in January 1998 because Grassel had previously filed charges against NYSUT, the record shows that Rubenstein undertook to represent Grassel and that Grassel had no complaints about his representation until after Rubenstein withdrew as counsel.

The offer of proof submitted by Grassel simply does not allege sufficient facts to support a finding of a breach of the duty of fair representation.[9] As the ALJ found, the case presented here is simply one of a union attorney who, having received no response, despite repeated requests, from an employee with an imminently scheduled §3020-a hearing, determines that the employee is no longer participating in his own

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[8]There is no evidence that any other bargaining unit member in a similar situation has been treated differently by UFT or NYSUT.

[9]*See United Univ. Professions, Inc. (Garvin)*, 21 PERB ¶3052 (1988).

defense. On the facts of this case, as presented by Grassel, it cannot be said that UFT's decision was arbitrary, discriminatory or made in bad faith.

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

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

DATED: August 7, 2000
New York, 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

UTICA PROFESSIONAL FIRE FIGHTERS ASSOCIATION, LOCAL 32, IAFF, AFL-CIO,

Charging Party,

- and -

CASE NO. U-20924

CITY OF UTICA,

Respondent.

GRASSO & GRASSO (PATRICK J. CREMO of counsel), for Charging Party

ROEMER WALLENS & MINEAUX LLP (MARY M. ROACH of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the City of Utica (City) to an Administrative Law Judge's (ALJ) decision which found a violation of §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when the City imposed disciplinary charges against Anthony Zumpano, the then President of the Utica Professional Fire Fighters Association, Local 32, IAFF, AFL-CIO (Association).

The City excepts to the ALJ's decision, arguing that the conduct Zumpano engaged in was not protected under the Act. He was disciplined for his insubordinate behavior in the Mayor's office and, therefore, the ALJ's determination that Zumpano would not have been disciplined "but for" his protected activity was incorrect. The

Association has filed a response to the exceptions, arguing, *inter alia*, that Zumpano's conduct was protected under the Act.

FACTS

We will confine our review to the salient facts relevant to the exceptions filed by the City.

On or about April 23, 1999, Arbitrator Jeffrey M. Selchick mailed to the City and the Association the majority opinion and award of the interest arbitration panel in accordance with §209.4 of the Act.[1] Aside from the salary award, the panel deleted the minimum manning provision contained in the parties' collective bargaining agreement. On April 22, 1999, counsel for the Association, who was aware of the forthcoming award, had attempted to withdraw from the arbitration process.

By letter to the Mayor dated April 28, 1999, Zumpano objected to the City's action in the form of a directive issued by the Fire Department which informed the Association that the City intended to cease compliance with the minimum manning provision in the collective bargaining contract. Zumpano arrived at the Mayor's office at about 4:30 in the afternoon of April 28, 2000, intending to personally deliver his letter to the Mayor. However, upon his arrival, he observed that the Mayor was on the telephone. While in the Mayor's office, Zumpano was confronted by Cornell Maye, the City's Public Safety Commissioner, who was also waiting for the Mayor.

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[1]The award was for the period April 1, 1996 to March 31, 1998. The parties' last collective bargaining agreement expired in 1992.

Maye asked Zumpano why he was in the Mayor's office. Zumpano explained to Maye that he was off duty and that he intended to personally serve the Mayor with his letter. At that point, Maye directed Zumpano to give him the letter and said he would deliver it to the Mayor. This fact is clearly established in Zumpano's testimony on cross-examination.

Q. Excuse me. He did tell you he was giving you a directive?

A. Yes, he did.[2]

Redirect Examination

Q. On your cross-examination you said you understood that Cornell Maye gave a directive to give him the letter that you were holding?

A. Yes.

Q. And upon understanding that you were receiving a directive, what did you say to Mr. Maye?

A. I told him that I was acting in my capacity as President of Local 32 and that I wasn't taking orders from him because I wasn't on duty and I was acting in that capacity. I didn't feel a directive at that point from him giving me an order to hand me this or do this or do that I thought was out of line.[3]

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[2]Transcript p. 45.

[3]Transcript pp. 50-51.

The events that followed the Commissioner's directive are the subject of much conflicting testimony as to the heightened emotional level of the discourse between Zumpano and Maye.

On April 29, 1999, Zumpano was served with disciplinary charges pursuant to §75 of the Civil Service Law accusing him of conduct unbecoming an officer, misconduct and insubordination, and seeking the penalty of a three-day suspension without pay.[4]

DISCUSSION

In *City of Salamanca*,[5] we outlined the respective burdens in cases involving allegedly improperly motivated actions:

> In order to establish such improper motivation, a charging party must prove that he had been engaged in protected activities, and that the respondent had knowledge of and acted because of those activities. [Footnote omitted] If the charging party proves a *prima facie* case of improper motivation, the burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons. [Footnote omitted]

The Association meets the first two prongs of the test because Zumpano was acting in his capacity as the Association's President at the time of the confrontation with Maye and Maye was aware of his union status and the purpose of his presence at the

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[4]Hearings in the instant case took place on November 17, 1999, December 28, 1999 and December 29, 1999. On December 27, 1999, the parties stipulated to withdraw the Association's demand for grievance arbitration, to restore one-half (thirty-six hours) of pay resulting from a three-day suspension and to rely upon the ALJ's determination as to whether §§209-a.1(a) and (c) had been violated and as to whether the remaining thirty-six hours of the suspension would be restored.

[5]18 PERB ¶3012, at 3027 (1985).

Mayor's office. However, there is in the record no evidence of any improper motivation on Maye's part with respect to the §75 disciplinary charges filed against Zumpano.

The ALJ relies upon our decision in *Village of Scotia*[6] to support his determination. We disagree.

In *Scotia*, we determined that the police officer's letter to the Town Board, which was highly critical of the Police Chief, was protected speech under the Act. However, the facts and circumstances surrounding the officer's protected speech were vastly different from the instant case. Here, it is not Zumpano's protected speech, in the form of his letter, that is in issue. It is his conduct, which the ALJ failed to address.

We said in *Scotia* that "[w]e are also cognizant of the need to consider the context and the recipients of the words and the message conveyed to them in determining whether statements are protected by the Act."[7] The Appellate Division, in confirming our determination, illustrated this principle with an analogous principle found in the National Labor Relations Act:

> Whether conduct transcends the bounds of protected activity greatly depends upon the context in which it occurs. [citation omitted] Thus, offensive conduct may not lose its protected status if it occurred during a closed meeting, but may not be protected if it took place in public in defiance of the employer's authority . [8]

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[6]29 PERB ¶3071 (1996), *conf'd in pertinent part*, 241 AD2d 29, 31 PERB ¶7008 (3d Dep't 1998).

[7]Note 5, *supra*, at 3170.

[8]*Supra*, note 6, at 7013-14.

We have consistently in the past balanced the fundamental right of an employee to participate in the activities of the employee organization of his choosing with the employer's right to maintain order and respect.[9] "On occasion, a [union] representative may engage in impulsive behavior that an employer would not have to tolerate from an employee who is engaged in his normal tasks. Although an employer may not ordinarily discipline the employee representative for such behavior, there are circumstances in which overzealous behavior on his part may constitute misconduct."[10] Consequently, inappropriate conduct, even for part of a union activity which is protected, will not shield an employee from justifiable discipline.[11]

It is axiomatic that the organizational structure of the fire department, a quasi-military organization, would be irreparably harmed and its orderly operation substantially impaired if, during the day-to-day performance of duties, the order of a superior officer can simply be disobeyed whenever a subordinate concludes that it is unreasonable.[12]

The Association argues in its memorandum of law that "[t]he City offered no explanation for disciplining Zumpano for his activities in delivering the letter, beyond his

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[9]*State of New York (Ben Aaman)*, 11 PERB ¶3084 (1978).

[10]*Id.*, at 3137. *See also NLRB v. Thor Power Tool Co.*, 351 F2d 584 (7th Cir. 1965).

[11]*Nelson v. City of Buffalo Fire Dep't*, 254 AD2d 761 (4th Dep't 1998); *New York City Transit Auth. (Toussaint)*, 25 PERB ¶3076 (1992); *Island Trees Public Schools*, 14 PERB ¶3020 (1981); *See also Earle Industries v. NLRB*, 75 F3d 400 (8th Cir. 1996).

[12]*Rivera v. Beekman*, 86 AD2d 1 (1st Dep't 1982).

failure (while off-duty and acting on behalf of the union) to obey Commissioner Maye's order to hand the letter to him."[13]

Upon our review of the record, we find that this argument ignores the excerpt of the City's Rules and Regulations of the Bureau of Fire[14] which states at Section 93: "All laws, ordinances, rules, regulations and orders will be cheerfully and promptly obeyed by all members." The parties' collective bargaining agreement incorporates, by reference, at Article V, the contents of the Rules.[15]

The Association offers no explanation for Zumpano's insubordinate conduct other than he was off duty and was not required to obey orders. In fact, as Zumpano walked out of the Mayor's office, he chose to deliver the letter to a young man whom he did not know rather than hand it to Maye.[16] We reject this justification defense.[17] Zumpano's appropriate recourse was to comply with Maye's order and seek redress through available legal channels.[18] By refusing a direct order and engaging in loud and opprobrious conduct, Zumpano removed himself from the Act's protection.

We further dismiss the charge because the record is devoid of any evidence that the City's action in disciplining Zumpano was improperly motivated. The Association's

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[13]Association's memorandum of law, p. 12.

[14]City Exhibit 4.

[15]ALJ Exhibit 1 and Joint Exhibit 5.

[16]Transcript p. 46.

[17]*See Nelson v. City of Buffalo Fire Dep't*, *supra*, note 11.

[18]*See Farmingdale Union Free Sch. Dist.*, 11 PERB ¶3055 (1978).

only evidence of anti-union animus is the parties' contentious labor history. We note, however, that proof of a contentious labor history is not conclusive evidence that all acts taken within the context of that relationship are always, or even necessarily, improperly motivated.[19]

Based upon the record before us and our consideration of the parties' arguments, we reverse the determination of the ALJ.

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

DATED: August 7, 2000
New York, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[19]*See Town of Henrietta*, 28 PERB ¶3079 (1995).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DAVID ROEMER,

Charging Party,

- and - **CASE NO. U-21634**

UNITED FEDERATION OF TEACHERS,

Respondent,

- and -

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

Employer.

DAVID ROEMER, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by David Roemer to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge, which alleged that the United Federation of Teachers (UFT) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it failed to properly represent him in a disciplinary grievance, failed to reimburse him for attorney's fees when he retained private counsel and failed to compensate him for damages he had suffered because of UFT's failure to properly represent him.[1]

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[1]Roemer's employer, the Board of Education of the City School District of the City of New York (District), is made a statutory party to the charge pursuant to §209-a.3 of the Act, as the charge alleges that UFT failed to properly process his grievances. *See United Fed'n of Teachers*, 33 PERB ¶3004 (2000).

FACTS

Roemer's charge was filed on April 13, 2000. The charge alleges that Roemer, a science teacher, was subjected to unsatisfactory evaluations in 1994 and 1995 due to a difference of opinion with his supervisors about teaching methodology. On November 3, 1994, UFT filed a request for conciliation, pursuant to Article 24 of the UFT-District collective bargaining agreement. Thereafter, Roemer filed a grievance alleging that he was still being subjected to unsatisfactory evaluations and that the teaching methodology issue had not yet been resolved through the conciliation process. Initially, UFT represented Roemer at Step 1 and Step 2 of the grievance procedure, but declined to further represent him at Step 3. In February 1996, at Roemer's request, UFT reconsidered its position and remanded Roemer's grievance on the evaluations to the contractual conciliation process.

Roemer further alleged in his charge that the District removed him from the classroom in May 1996 and served him with disciplinary charges in November 1996. UFT represented Roemer in the disciplinary grievance until Roemer retained private counsel, who represented him at the disciplinary grievance hearing. Sometime in 1997 or 1998, Roemer was found innocent of the charge of incompetence but guilty of insubordination for failing to heed his supervisors' instructions as to teaching methodology. Roemer sent letters to UFT in 1998 and 1999, complaining about UFT's representation of him and seeking attorney's fees. On January 9, 2000, Roemer's request for reimbursement for legal expenses was denied by UFT. Apparently, Roemer also pursued his claims to the New York Court of Appeals.

Roemer was advised that his improper practice charge was deficient in that almost all of the allegations were untimely and, as to his allegation that UFT had refused to reimburse him for his legal expenses, he had not pled any facts which, if proven, would establish that UFT acted in an arbitrary or discriminatory manner or in bad faith. Roemer was given until May 10, 2000, to correct the deficiencies in his charge, amend it, withdraw it or object to the deficiency determination.

Roemer responded with two letters, objecting to the deficiency determination and attempting to further explain his charge. The Director dismissed his charge by decision dated May 1, 2000, finding that the charge was largely untimely and, as to the one timely allegation, that no facts had been pled which would establish the violation alleged. On May 4, 2000, Roemer filed an amendment to the charge alleging that UFT, in the January 9, 2000 letter sent to him, contrived to cover up its improper practices.

Roemer alleges in his exceptions that the Director erred by characterizing his two letters as objections to the determination that his charge was deficient and not as clarifications, by finding that Roemer had pled no facts to support his allegations and by issuing his decision before he had received Roemer's May 4 amendment. Neither UFT nor the District has responded.

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

DISCUSSION

The Director's timeliness determination was correct. Section 204.1(a)(1) of our Rules of Procedure requires that a charge be filed within four months of the alleged violative act. All but one of the acts complained of by Roemer in his charge occurred

between 1994 and 1999. With the exception of UFT's letter of January 9, 2000, all of the allegations related to incidents which occurred well beyond the time for filing an improper practice charge. We have also previously determined that the filing period is not tolled while ancillary proceedings are being pursued by or on behalf of a charging party, even when those proceedings have the potential to effectively moot the improper practice alleged.[2] Roemer's charge, filed years after the actions alleged to violate the Act is, therefore, untimely.[3]

As to Roemer's sole timely allegation, that on January 9, 2000, UFT refused to reimburse him for his private attorney's fees, Roemer pled no facts that would support a finding that UFT had provided that benefit to other unit members or that its refusal to reimburse Roemer was arbitrary, discriminatory or made in bad faith.[4] Therefore, the allegation was also properly dismissed by the Director.[5]

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[2]*See Orange County Correction Officers Benevolent Ass'n*, 28 PERB ¶3081 (1995).

[3]*See Transport Workers Union, Local 100 (Hokai)*, 32 PERB ¶3019 (1999).

[4]*See New York City Transit Auth. and TWU, Local 100 (Clark)*, 32 PERB ¶3031 (1999).

[5]Roemer alleges that the Director improperly failed to consider the facts set forth in his May 4, 2000 amendment to the charge. He argues that the deficiency letter he received gave him until May 10, 2000 to clarify, amend or withdraw his charge or object to the deficiency determination. The Director, having received two letters from Roemer objecting to the deficiency determination and no indication from him that more documentation was forthcoming, did not wait until May 10 but dismissed the charge by decision dated May 1, 2000. Roemer alleges in his exceptions that he had not yet received the Director's decision on May 4, 2000, when he filed his amendment. That the Director issued his decision without consideration of the May 4, 2000 amendment does not warrant a contrary conclusion in this matter because there were no new facts pled in the amendment.

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

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

DATED: August 7, 2000
New York, 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

JOHN THOMAS MCANDREW,

Charging Party,

- and -

CASE NO. U-21286

PORT JERVIS CITY SCHOOL DISTRICT,

Respondent.

JOHN THOMAS MCANDREW, *pro se*

CUDDEBACK & ONOFRY (ROBERT A. ONOFRY of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by John Thomas McAndrew to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge, which alleged that the Port Jervis City School District (District) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when its Superintendent of Schools and its attorney made certain oral and written statements to him.

At the hearing in this matter, the Director asked McAndrew for an offer of proof as to the evidence McAndrew would proffer in support of his charge. Based upon McAndrew's offer, the Director closed the hearing and accepted post-hearing briefs

from both parties. The Director thereafter dismissed the charge, finding that McAndrew had offered no proof that the District was improperly motivated in its actions.

McAndrew excepts to the Director's decision, arguing that the District's acts discriminate against him and that the Director erred in dismissing his charge. The District has not responded to McAndrew's exceptions.

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

It is well established that in order to prove a violation of §§209-a.1 (a) and (c) of the Act, a charging party must demonstrate that he or she has been engaged in protected activity, that the respondent has knowledge of the protected activity and acted because of that activity.[1] McAndrew has filed several improper practice charges and grievances and otherwise availed himself of the protections of the Act, all with the knowledge of the District and its agents.[2]

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[1]*City of Salamanca*, 18 PERB ¶3012 (1985). *See also Town of Ramapo*, 32 PERB ¶3077 (1999); *City of Rye*, 28 PERB ¶3067 (1995); *Town of Independence*, 23 PERB ¶3020 (1990).

[2]*See Port Jervis City Sch. Dist.*, 32 PERB ¶4545 (1999); *Port Jervis Teachers Ass'n and Port Jervis City Sch. Dist.*, 28 PERB ¶4673 (1995); *Port Jervis City Sch. Dist.*, 24 PERB ¶3031 (1991), where McAndrew's charges were sustained. *See also Port Jervis City Sch. Dist.*, 33 PERB ¶3027 (2000); *Port Jervis Teachers Ass'n*, 22 PERB ¶3021, *conf'd*, 22 PERB ¶7021 (Sup. Ct. Orange County 1989); *Port Jervis City Sch. Dist.*, 22 PERB ¶3022 (1989); *Port Jervis Teachers Ass'n*, 19 PERB ¶3038 (1986); *Port Jervis Teachers Ass'n*, 18 PERB ¶3044 (1988); *Port Jervis City Sch. Dist.*, 18 PERB ¶4561 (1988); *Port Jervis City Sch. Dist.*, 18 PERB ¶4560 (1988), where McAndrew's improper practice charges against the District and/or the Port Jervis Teachers Association were dismissed.

At least partially as a result of his activism, McAndrew and the District share a contentious labor history. As we noted in an earlier case involving McAndrew and the District:

> Although the parties' labor relations history, including evidence of an employer's animus, is properly considered as a factor in determining whether an action was improperly motivated, such evidence is merely one factor among several that must be considered. Proof of a contentious labor history is not conclusive evidence that all actions taken within the context of that relationship are always, or even necessarily, improperly motivated.[3]

Beyond McAndrew's allegations, there is no evidence in the record of improper motivation on the part of the District which would support the finding of a violation. The written and oral statements made to McAndrew by the Superintendent and the District attorney were not in and of themselves improper and, given the context in which they were made - during discussions pertaining to the settlement of improper practice charges and other actions taken by McAndrew against the District - there is simply no coercion or threat of retaliation. The statements reflect the District's position with respect to the terms of the settlement of all matters pertaining to McAndrew and the District's ongoing relationship with McAndrew. That the District was seeking concessions or imposing conditions upon the settlement proposed by McAndrew evidences no impropriety.

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[3]*Port Jervis City Sch. Dist.*, 33 PERB ¶3027, at 3073 (2000), citing *Town of Henrietta*, 28 PERB ¶3079 (1995); *see also Erie County Water Auth.*, 27 PERB ¶3010 (1995).

Based on the foregoing, McAndrew's exceptions are denied and the Director's decision is affirmed.

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

DATED: August 7, 2000
New York, 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

KEVIN C. KULESA,

Charging Party,

- and -

CASE NO. U-19225

ONEIDA COUNTY DEPUTY SHERIFF'S BENEVOLENT ASSOCIATION,

Respondent,

- and -

COUNTY OF ONEIDA,

Intervenor.

NORMAN P. DEEP, ESQ., for Charging Party

HITE & CASEY, P.C. (MARIA B. MORRIS of counsel), for Respondent

ROBERT CALLI, ESQ., for Intervenor

BOARD DECISION AND ORDER

This matter comes to us on exceptions to an Administrative Law Judge's (ALJ) determination dismissing an improper practice charge filed by Kevin C. Kulesa alleging, as amended, that the Oneida County Deputy Sheriff's Benevolent Association (Association) violated §§209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) by withdrawing its demand for arbitration of Kulesa's grievance on the grounds

that such withdrawal was a breach of the Association's bylaws regarding arbitration of grievances and that the decision to withdraw the grievance was based on Kulesa's heart condition.

The County of Oneida (County) appeared as a party pursuant to §209-a.3 of the Act.[1] It filed no response to the charge and offered no proof at the hearing.

FACTS[2]

A hearing took place on April 21, 1998, at which time Kulesa presented his direct case. At the conclusion of his direct case, the Association moved to dismiss the improper practice charge. The ALJ dismissed so much of the charge that alleged the Association violated its bylaws by withdrawing Kulesa's grievance from arbitration.

Subsequently, hearings on the remaining issue[3] took place on December 16, 1998, and July 8, 1999, at which time the Association presented evidence in support of its defense and Kulesa presented rebuttal evidence. The hearings closed on July 8, 1999, and the parties submitted briefs.

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[1]Section 209-a.3 makes the public employer a statutory party to certain charges filed under §209-a.2 (c).

[2]We will confine our analysis to the salient facts relevant to our resolution of the issues. A detailed description of the facts is set forth in the ALJ's decision.

[3]The allegation that Kulesa's heart condition was the reason the Association withdrew his grievance from arbitration.

DISCUSSION

A. Bylaws Violation:

The ALJ disposed of this issue on the Association's motion to dismiss. There appears only to be a disagreement between the Association and one of its members. Since this is an internal disagreement, it is outside of our jurisdiction. We adopt the ALJ's findings and conclusions and affirm. Kulesa's exceptions (a) through (g) and (j) are, therefore, denied.

B. Withdrawal of Grievance Based on Heart Condition:

We have consistently held that the duty of fair representation is breached only by conduct which is arbitrary, discriminatory or in bad faith.[4] In the judicial forum, in order "to sustain a cause of action for breach of the duty of fair representation there must be substantial evidence of fraud, deceitful action, or dishonest conduct, or evidence of discrimination that is intentional, severe and unrelated to legitimate union objectives."[5]

We, as well as the courts, have held that allegations that a union has been careless, inept, ineffective or negligent in the investigation and presentation of a grievance do not evidence a breach of the union's duty of fair representation.[6]

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[4]*See CSEA, Local 1000 (Heffelfinger)*, 32 PERB ¶3044 (1999) and case cited therein.

[5]*Mellon v. Benker*, 186 AD2d 1020, 25 PERB ¶7534, at 7578 (4th Dep't 1992).

[6]*See CSEA, Local 1000 (Heffelfinger), supra* note 4. *See also* text accompanying note 5.

We have also found consensus with the courts whenever the charge involves the internal affairs of a union, such as a violation of its bylaws or constitution. We have held that "the deprivation of membership rights and privileges of union members are internal union affairs which lie outside our jurisdiction."[7]

In light of the foregoing, it is axiomatic that a union has discretion with respect to processing grievances and the mere failure on the part of the union to process a grievance is not a violation of its duty of fair representation.[8]

Kulesa argues in his exceptions (h) and (i) that there was sufficient testimony to demonstrate his health problems were common knowledge and, therefore, it was reasonable to infer that false information about Kulesa's health given by Liddy to the Association's Executive Board influenced the Board to withdraw the grievance from arbitration.

Kulesa fails, however, to specifically cite the testimony to which these exceptions refer. Our Rules of Procedure[9] require that the issues to be reviewed be set forth specifically and designate by page citation the portions of the record relied upon.

Upon our review of the record, there does not exist any evidence of bad faith in the Association's decision to withdraw Kulesa's grievance. Based upon the foregoing, we affirm the ALJ's dismissal of the improper practice charge and deny Kulesa's exceptions in their entirety.

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[7]*See Westchester County Dep't of Correction Superior Officers' Ass'n, Inc.*, 26 PERB ¶3077, at 3149 (1993); *Cove Neck PBA*, 24 PERB ¶3028 (1991).

[8]*See Mellon v. Benker, supra* note 5.

[9]Part 213 - Exceptions to the Board, §213(b)(1) through (4).

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

DATED: August 7, 2000
New York, 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

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-4983

EAST QUOGUE SCHOOL DISTRICT,

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 United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time custodial, grounds and maintenance employees.

Excluded: The maintenance crew leader, assistant plant facilities manager, plant facilities manager and all other employees.

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

DATED: August 7, 2000
New York, 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

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL #264,

Petitioner,

-and-

CASE NO. C-4991

TOWN OF LEWISTON,

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 International Brotherhood of Teamsters, Local #264, has been designated and selected by a majority of the employees of the above-named public employer, in the unit and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All regular full-time and regular part-time Water Department employees.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Local #264. 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: August 7, 2000
New York, 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

LOCAL 200-D, SEIU, AFL-CIO,

Petitioner,

-and-

CASE NO. C-5006

TOWN OF COLONIE,

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 Local 200-D, SEIU, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time paramedics who have worked on average at least 24 hours per month over the past 6 months.

Excluded: All other employees

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 200-D, SEIU, 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: August 7, 2000
New York, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

Emergency Consensus Rule-Making

WHEREAS, the Legislature has found and declared the necessity of enhancing protection against strikes and disruption of vital public services by public safety employees throughout the state; and

WHEREAS, the Legislature has further found that the orderly resolution of such disputes is necessary to enhance public safety and prevent the loss or interruption of vital public services; and

WHEREAS, based on the above findings and declarations, the Legislature has extended the impasse resolution procedures of section 209 of the Act to disputes in the course of collective negotiations between local governments and police and fire bargaining units, and

WHEREAS, the Legislature has extended the impasse resolution procedures of section 209 of the Act to disputes between certified or recognized employee organizations and the public employer as to the conditions of employment of members of any organized unit of troopers, commissioned or noncommissioned officers of the division of state police or as to the conditions of employment of members of any organized unit of investigators, senior investigators and investigator specialists of the division of state police, and

WHEREAS, because disputes in the course of collective negotiations between local governments and police and fire bargaining units, and between organized units of the division of state police and their public employer may arise at any time, the Rules of

Procedure of the New York State Public Employment Relations Board must be amended on an emergency basis to effect the Legislature's will, and

WHEREAS, the emergency adoption of such amendments is necessary for the preservation of the public safety and welfare pursuant to State Administrative Procedure Act sections 202 (6) and 203,

BE IT HEREBY RESOLVED that the New York State Public Employment Relations Board hereby adopts, effective immediately, the following amendments to 4 NYCRR Part 205 on an emergency basis pursuant to sections 202 (6) and 203 of the State Administrative Procedure Act, and Article 14, Sections 205 (5) and 209, of the Civil Service Law:

1. 4 NYCRR 205.3 is amended to read as follows:

§205.3 Compulsory interest arbitration pursuant to section 209.4 of the act; scope.

The following relates to impasses in collective negotiations between a public employer and [a] recognized or certified employee organizations covered by the provisions of section 209.4 of the act [that represents officers or members of an organized fire department or an organized police force or police department of any county, city (except the City of New York, town, village, fire district or a police district and the employing county, city (except the City of New York), town, village, fire district or police district].

2. 4 NYCRR 205.5 (b) is amended as follows:

(b) *Contents.* Such response shall contain respondent's position specifying the terms and conditions of employment that were resolved by agreement, and as to those that were not

agreed upon, respondent shall set forth its position. Proposed contract language may be attached. If the respondent has filed an improper practice charge or declaratory ruling petition related to compulsory interest arbitration or other objections to arbitrability under section 205.6 of this Part, the response shall contain a reference to such charge, [or] petition, or objections. The response must include proof of service upon the petitioning party.

3. 4 NYCRR 205.6(a) is amended to read as follows:

(a) *Objections to arbitrability.* Objections to the arbitrability of any matter set forth in the petition or response may only be raised by the filing of an improper practice charge under Part 204 of this Chapter or a declaratory ruling under Part 210 of this Chapter pursuant to the requirements of this section, except, as to impasses in collective negotiations between the City of New York and recognized or certified employee organizations covered by the provisions of section 209.4 of the act, objections to the arbitrability of any matter set forth in the petition or response may only be raised as authorized by local charter, code, ordinance, or rule. As limited by the provisions of section 209.4(e) of the act, [O]objections as to arbitrability may include, but not be limited to, the following circumstances:

(1) a matter proposed is not a mandatory subject of negotiations;

(2) a matter proposed was not the subject of negotiations prior to the petition;

(3) a matter proposed had been resolved by agreement during the course of negotiations.

4. 4 NYCRR 205.6(d) is amended to read as follows:

(d) The public arbitration panel shall not make any award on issues, the arbitrability of which is the subject of an improper practice charge or a declaratory ruling petition pursuant

to the requirements of this section, until the final determination thereof by the board or withdrawal of such charge or petition, except, as to impasses in collective negotiations between the City of New York and recognized or certified employee organizations covered by the provisions of section 209.4 of the act, where objections to the arbitrability of any matter are raised as authorized by local charter, code, ordinance, or rule, the public arbitration panel shall not make any award on issues raised by such objections to arbitrability until the final determination of those objections by the agency, board, panel, or arbitrator having jurisdiction over those objections or withdrawal of such objections; the public arbitration panel may make an award on other issues.

AND BE IT HEREBY FURTHER RESOLVED that Counsel is directed to take forthwith the necessary steps to give notice of and publish these emergency rules, and to give notice of these amendments as Consensus Rule-Making.

DATED: AUGUST 7, 2000
NEW YORK, NEW YORK

MICHAEL R. CUEVAS, CHAIRMAN

MARC A. ABBOTT, MEMBER

JOHN T. MITCHELL, MEMBER

EXPLANATION: Matter in *ITALICS* (underscored) is new; matter in brackets [ ] is old rule language to be omitted.