

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME,

Petitioner,

- and -

CASE NO. CP-632

RYE CITY SCHOOL DISTRICT,

Employer.

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NANCY E. HOFFMAN, GENERAL COUNSEL (DAREN J. RYLEWICZ of  
counsel), for Petitioner

SHAW & PERELSON, LLP (JAY M. SIEGEL of counsel), for Employer

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the Rye City School District (District) to a decision of an Administrative Law Judge (ALJ) granting the unit clarification portion of a unit clarification/unit placement petition filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA).

**FACTS**

Prior to 1994, the District employed five teacher assistants who were assigned as computer laboratory assistants (hereinafter, lab assistant). The lab assistants were in the unit represented by CSEA, which included teacher aides, academic intervention intern and academic intervention intern coordinator. The District's elementary, middle

and high schools functioned with free-standing computers located in computer laboratories in each school. There was no integrated technology plan until 1994, when the District adopted a two-phase technology plan, at a total cost of about 3.5 million dollars.

The first phase of the plan took place from 1994-1996. The District installed approximately 300 work stations and three file servers into the middle school. Also, three new computer laboratories were developed and computers throughout the classrooms and administrative offices were networked. A local network was constructed in the middle school.

The second phase took place during the period of 1996-1998. Similar improvements were made at the elementary school level. The second phase was completed in the Spring of 1998.

Prior to the technology plan, the District's educational curriculum was not integrated with the stand alone computers. The former lab assistants were not integrating the existing technology with the curriculum, but were merely assisting students with computer use.

It was in the period between 1994 and 1998, during the phase-in of the technology plan, that the job duties of the lab assistant became more complex. The District was not able to train all of its former lab assistants and, as a result, they left the District. There was turnover with the new hires because the District's salary for the position was low, employees in CSEA's unit did not receive health insurance benefits, and employees with computer training were in demand elsewhere.

Because of the difficulty in keeping qualified lab assistants, during negotiations for the 1995-2000 agreement, the District proposed to CSEA that the District provide health insurance benefits for the lab assistants. CSEA declined. During the 1998-1999 school year, the District again raised the issue and CSEA again declined.

On June 14, 1999, the District submitted a New Positions Duties Statement to the Westchester County Personnel Office in accordance with Civil Service Law (CSL) §22. The District sought to reclassify the lab assistants to the newly created title of computer aide. On July 9, 1998, the Westchester County Civil Service adopted the title of computer aide.

The former lab assistants were required to have only a high school diploma. They were paid on an hourly basis and worked a six and one-half or seven-hour day for thirty-six weeks. Their pay ranged from \$11,000 to \$38,000 for the 1999-2000 school year.

The computer aides' salary during the 1999-2000 school year ranged from \$21,000 to \$26,000, depending on years of service and educational level. The computer aide was required to have a Bachelor's degree. They are salaried and work the school year (ten months). Their workday is the same as the teachers. They receive health insurance benefits. The District filled the position and declined CSEA's request that the title be placed in the unit represented by CSEA.

Since the phase-in of technology in 1998, the computer aides have collaborated with the teachers in lesson development. The aides are responsible for instructing the students on the proper use of the computers, as well as demonstrating how to navigate

through the particular software being integrated into the curriculum. The teacher is responsible for curriculum content. The aides also instruct the teachers, administrators and staff personnel on the proper use of the computers and software.

The District argues that the computer aide title should be placed in the unit represented by the Rye Teachers' Association (Association), which includes Secretarial/Clerical and School Nurses because the terms and conditions of their employment are more closely aligned with the employees in the Association's unit than with the employees in CSEA's unit. The Association has taken no position on the petition and has not participated in these proceedings.

#### ALJ DECISION

The ALJ granted CSEA's petition for unit clarification and, as a result, did not reach the merits of the unit placement portion of CSEA's petition.<sup>1</sup>

#### EXCEPTIONS

The District excepted to the ALJ's decision on the grounds that the ALJ erred in granting the clarification aspect of the petition, misapplying the law and the facts. CSEA supports the ALJ's decision.

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

#### DISCUSSION

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<sup>1</sup>The ALJ noted that were she to reach the unit placement issue, she would place the computer aides in the unit represented by CSEA.

The District argues that the ALJ erred when she found that computer aide duties have historically been performed by CSEA unit members who share a significant community of interest with respect to employment conditions, duties and goals; therefore, she found that the computer aide title is encompassed within the CSEA bargaining unit.

We have previously held that “[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.”<sup>2</sup> A unit clarification petition raises only a fact question as to whether the at-issue personnel are included in the existing unit.<sup>3</sup> Where the language in the recognition clause is general and is not title specific, the inquiry goes beyond the language of the recognition clause to determine whether any other contractual language either covers or specifically excludes the at-issue title.<sup>4</sup> Where there is no relevant contractual language, the parties’ practice with respect to the at-issue title or similar titles is reviewed to ascertain the parties’ intent.<sup>5</sup>

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<sup>2</sup>*Monroe-Woodbury Cent. Sch. Dist.*, 33 PERB ¶¶3007, at 3021 (2000), citing *State of New York (Dep’t of Audit and Control)*, 24 PERB ¶¶3019 (1991).

<sup>3</sup>*County of Orange and Sheriff of Orange County*, 25 PERB ¶¶3049 (1992), *confirmed sub nom. Orange County Deputy Sheriff’s Ass’n v. PERB*, 26 PERB ¶¶7004 (Sup. Ct. Rockland County 1993).

<sup>4</sup>*General Brown Cent. Sch. Dist.*, 28 PERB ¶¶3065 (1995); *County of Niagara*, 21 PERB ¶¶3030 (1988).

<sup>5</sup>*County of Niagara, supra*. See also *Clinton Comm. Coll.*, 31 PERB ¶¶3070 (1998).

The ALJ's reliance on *Monroe-Woodbury Central School District*<sup>6</sup> is misplaced. PERB's decision in *Monroe-Woodbury* was "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."<sup>7</sup>

Here, CSEA's recognition clause for the unit representing teacher aides and teacher assistants expressly omits any reference to the former lab assistants and to the new computer aides. Nevertheless, the ALJ used an excerpt from the parties' stipulation, i.e., that "the people who were formerly ... teacher assistants, ... assigned to the computer labs are now in the positions that are in dispute which are called computer aide," to support her conclusion that the lab assistants were one and the same with the computer aides and, therefore, included in the recognition clause of the CSEA agreement and that *Monroe-Woodbury* applied. The stipulation referred to by the ALJ, however, was in response to the ALJ's inquiry to counsel regarding how the transition from teacher assistants to computer aides occurred.<sup>8</sup>

The record reflects that a change in title occurred in the late 1998-1999 school year when the District took the initiative to have Civil Service change the job description. "Shortly after they were designated computer aides the CSEA sought

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<sup>6</sup>*Supra* note 2.

<sup>7</sup>*Id.* at 3022.

<sup>8</sup>Transcript, pp. 40-42.

recognition from the Board [of Education], the Board [of Education] declined and then CSEA filed this petition."<sup>9</sup> Were we to consider the unit clarification petition only from the standpoint of titles, our inquiry would end here. The title computer aide was not, and is not, included in CSEA's title specific recognition clause. That the computer aide replaced the lab assistants is not dispositive.<sup>10</sup>

However, the disposition of a unit clarification petition, such as this one, may not end with a reading of the written definition of the unit. It must take into account the scope of the existing unit, which allows for the consideration of other factors, such as community of interest.<sup>11</sup> We have held that the uniting criteria set forth in §207 of the Public Employees' Fair Employment Act (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.<sup>12</sup>

The ALJ concluded that CSEA unit members share a community of interest with computer aides because CSEA unit members historically performed computer aide duties and because of their common employment conditions, duties and goals. We disagree. The former lab assistant's assignment to a computer laboratory is where the similarity ends. The former lab assistant's role was limited by both education and technology. Their wages were not the same as the computer aides, and they were paid

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<sup>9</sup>Transcript, p. 42

<sup>10</sup>*Malone Cent. Sch. Dist.*, 31 PERB ¶3050 (1998).

<sup>11</sup>See, e.g., *Lawrence Union Free Sch. Dist.*, 20 PERB ¶4010 (1987).

<sup>12</sup>See *State of New York (Dep't of Audit and Control)*, supra note 2.

on a different basis, hourly versus salaried. Their duties were not the same except that both titles work with the classroom teachers, although the computer aides are involved in instructing teachers, and the lab assistants did not. They did not receive health benefits, which the computer aides now receive.

Based upon the foregoing, we reverse the decision of the ALJ on the unit clarification petition. Although the ALJ did not reach the unit placement issue, we note that there is sufficient evidence in the record and in the ALJ's decision for us to decide this issue.

A unit placement petition is a mini-representation proceeding which puts the appropriateness of the unit under §207 of the Act in issue.<sup>13</sup> Community of interest and administrative convenience are relevant to dispose of the placement issue. Based upon the record, the computer aides do not share a community of interest with teacher aides and assistants. The record reflects the computer aides are salaried, not hourly, employees as are the other titles in CSEA's unit and that their salaries are comparable to the school nurses.<sup>14</sup> Computer aides are required by the District to have a Bachelor's Degree, which is a requirement of the School Nurse title in the Association's unit, but is not required of any titles represented by CSEA. The computer aides work on a more

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<sup>13</sup>*Id.*

<sup>14</sup>Note: The record established that the nurses work a seven-hour day with an unpaid lunch hour. Their work week is thirty-five hours and their work year is the same as teachers.

intimate and more equal setting with teachers in integrating curriculum than did the lab assistants.

The other uniting criteria contained in §207 of the Act, administrative convenience, was not considered by the ALJ. We have held that "[t]hat criterion requires weight be given to an employer's uniting preference."<sup>15</sup> In this matter, the record discloses that the District had difficulty retaining computer aides after the phase-in of the new technology in the various schools operated by the District. In an effort to keep computer aides who had been fully trained, the District sought to increase their benefits by providing health insurance. CSEA rejected this proposal. The other unit that provided health insurance and a higher salary scale was the unit represented by the Association. The District's stated unit preference must be given due consideration where the placement of the computer aide title in the Association's unit is at least as appropriate as would be placing the computer aides in CSEA's unit. In this particular case, the District's mission is supported by its placement of the computer aides into the Association's unit.

We find, based upon the record before us, that the Association's unit is the most appropriate unit into which the computer aides should be placed.<sup>16</sup>

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<sup>15</sup>See *Malone Cent. Sch. Dist.*, *supra* note 10.

<sup>16</sup>See *Eastern Suffolk BOCES*, 32 PERB ¶4027 (1999); *Bay Shore Union Free Sch. Dist.*, 27 PERB ¶4075 (1994).

Accordingly, we hereby add the title of computer aide to the Secretarial/Clerical and School Nurse unit represented by the Association.<sup>17</sup>

IT IS, THEREFORE, ORDERED that the petition for unit clarification/unit placement must be, and it hereby is, dismissed.

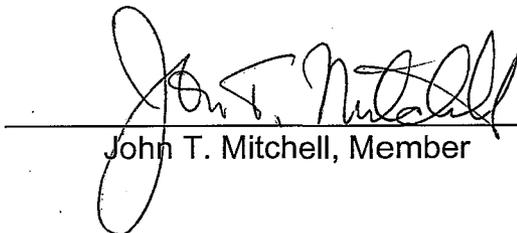
DATED: November 16, 2000  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>17</sup>Inasmuch as the addition of the computer aides to the Association's unit does not bring into question its continuing majority status, no election need be ordered.

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

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO, ULSTER COUNTY  
LOCAL 856, TOWN OF SHAWANGUNK UNIT,**

Charging Party,

- and -

**CASE NO. U-19740**

**TOWN OF SHAWANGUNK,**

Respondent.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (ROBERT REILLY of counsel),  
for Charging Party**

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

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Ulster County Local 856, Town of Shawangunk Unit (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge which alleged that the Town of Shawangunk (Town) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed a past practice of paying 100% of the health insurance premiums for unit members after their retirement.

The ALJ dismissed the charge, finding that the parties' collective bargaining agreement covered the subject of the alleged practice.<sup>1</sup> We reversed the ALJ, finding that the general references to "health insurance" and "retirement" in the parties' collective bargaining agreement did not satisfy the Town's duty to negotiate the specific subject of retiree health insurance benefits. We, therefore, remanded the matter to the ALJ to decide, *inter alia*, whether the record established a past practice with respect to retiree health insurance that was changed by the Town.<sup>2</sup>

On remand, the ALJ determined that the record before him did not establish a past practice of the Town paying 100% of the health insurance premiums for unit members who retired.<sup>3</sup> CSEA excepts to the ALJ's decision, arguing that the ALJ erred in finding that a past practice did not exist. The Town supports the ALJ's decision.

#### FACTS

It was stipulated by the parties that, in 1984, CSEA was recognized by the Town as the bargaining agent for a unit of Town employees. Prior to that time, two Town employees had retired in 1978 and 1980, respectively. Their titles corresponded to titles that were included in a unit that CSEA was later recognized to represent. The Town provided 100% of the health insurance premium for those two employees upon their retirement. A third Town employee, whose title was not included in the CSEA

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<sup>1</sup>32 PERB ¶14503 (1999).

<sup>2</sup>32 PERB ¶13042 (1999).

<sup>3</sup>33 PERB ¶14584 (2000).

bargaining unit, retired in 1992. That employee was required to pay 35% of the health insurance premium upon his retirement, the Town paid the balance. In 1993, the Town established with the New York State Department of Civil Service and the New York State Employees' Retirement System an employer/employee contribution rate of 50%/35%, respectively, for health insurance coverage of retired employees. No other employees have since retired from the Town.

In October 1997, a CSEA bargaining unit member asked the Town if it would be paying 100% of his health insurance premium upon his retirement. The employee was advised by the Town that it would not pay 100% of his health insurance premiums once he was retired. In January 1998, the CSEA Labor Relations Specialist spoke with the Town Supervisor. CSEA asserted that there was an established past practice of the Town paying the entire health insurance premium for retirees and the Town reiterated that there was no such practice. The Town suggested that CSEA make a proposal to be negotiated regarding health insurance coverage for retirees. The instant improper practice charge followed.

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

#### DISCUSSION

"In determining the existence of a past practice, it must be found that the practice is unequivocal, has been in existence for a significant period of time and that the

employees could reasonably expect the practice to continue without change.”<sup>4</sup> Here, the ALJ determined, on the stipulated record before him, that there was no unequivocal past practice of paying 100% of health insurance premiums for retirees established by CSEA. We agree.

The two employees who retired in 1978 and 1980 retired before CSEA became the recognized bargaining agent. The record shows only that their titles “corresponded” with titles that later became part of the CSEA bargaining unit. Based upon these sparse facts, we cannot find that there is an unequivocal practice of paying 100% of the health insurance premium for bargaining unit retirees.

CSEA relies upon *Auburn Enlarged City School District* (hereafter, *Auburn*),<sup>5</sup> in support of its argument that a long-standing practice of providing fully paid health insurance for retirees may not be unilaterally changed by the employer. CSEA is correct in its statement of our holding in that case, but is in error in arguing that the facts are identical to the instant case. In *Auburn*, there had been in existence for nearly twenty years an officially adopted Board of Education written resolution providing for the total payment by the District of health insurance premiums for retirees. The existence of the policy was undisputed. The Board then sought to amend that policy by resolution and the District thereafter implemented the amended policy. The District argued that the

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<sup>4</sup>*Canastota Cent. Sch. Dist.*, 32 PERB ¶¶3003, at 3005-06 (1999), citing *County of Nassau*, 24 PERB ¶¶3029 (1991). See also *City of Rochester*, 21 PERB ¶¶3040 (1988), *confirmed*, 155 AD2d 1003, 22 PERB ¶¶7035 (4th Dep’t 1989).

<sup>5</sup>25 PERB ¶¶3055 (1992).

management rights and zipper clauses of the parties' collective bargaining agreement effected a contract waiver, giving the District the right to make unilateral changes. We there found that the two clauses did not establish a waiver of the right to object to a unilateral change in practice involving a mandatory subject of negotiation in effect when the contract was negotiated. Here, the very existence of the practice is in issue. In fact, the Shawangunk Town Board passed its only resolution on the issue of retiree health insurance in 1993 setting the retiree's contribution for health insurance at 35%. CSEA's reliance on *Auburn* is, therefore, misplaced.

CSEA's reliance on *Onondaga-Cortland-Madison BOCES*<sup>6</sup> is likewise misplaced. That decision involved a violation of §§209-a.1(a) and (c) of the Act.<sup>7</sup> The holding in that case was based upon the interpretation of an employer's duty under the Act to maintain the *status quo* as to terms and conditions of employment for members of a newly certified bargaining unit until a wage and benefit package was fixed by collective negotiations with the certified bargaining agent. Here, that obligation has been met. A contract was negotiated between the Town and CSEA. No provision was included regarding retiree health insurance and no bargaining unit member has retired since the unit was recognized and unit employees' terms and conditions of employment were negotiated.

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<sup>6</sup>25 PERB ¶13044 (1992), *rev'd on other grounds*, 198 AD2d 824, 26 PERB ¶7015 (4th Dep't 1993), *motion for leave to appeal denied*, 81 NY2d 706 (1993).

<sup>7</sup>Indeed, CSEA has not here alleged a violation of §§209-a.1(a) and (c).

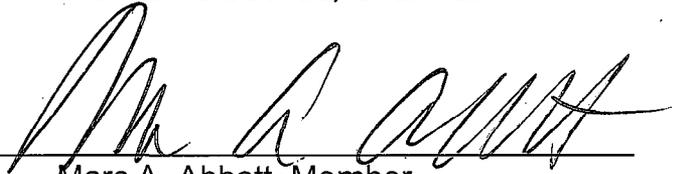
We find, on this record, that there is no established past practice of the Town paying 100% of the health insurance premiums for retirees from CSEA's bargaining unit. We, therefore, deny CSEA's exceptions and affirm the decision of the ALJ.<sup>8</sup>

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

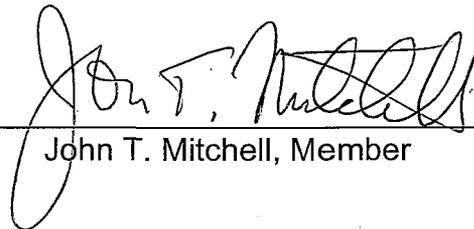
DATED: November 16, 2000  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>8</sup>Because of our determination herein, we do not reach the Town's other defenses.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**PATRICK MICHAEL FLYNN,**

Charging Party,

- and -

**CASE NO. U-20783**

**WILLIAM FLOYD UNITED TEACHERS,  
LOCAL 1568,**

Respondent,

- and -

**WILLIAM FLOYD UNION FREE SCHOOL  
DISTRICT,**

Employer.

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**PATRICK MICHAEL FLYNN, *pro se***

**JAMES R. SANDNER (SHERRY B. BOKSER of counsel), for Respondent**

**RAINS & POGREBIN (CRAIG OLIVO of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Patrick Michael Flynn to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge which alleged a violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by the William Floyd United Teachers, Local 1568 (WFUT) when it denied his request that the WFUT file a grievance on his behalf and that the WFUT appeal the grievance

he thereafter filed to arbitration. The William Floyd Union Free School District (District) is made a statutory party to the proceeding pursuant to §209-a.3 of the Act.

The ALJ dismissed Flynn's charge, holding that all the record established was a disagreement between a unit member and the union about the merits of a grievance. Such a disagreement, the ALJ held, absent evidence of bad faith or evidence that the grievant's position is the only possible one, did not rise to the level of a breach of the duty of fair representation.

Flynn excepts to the ALJ's decision, arguing that the facts do not support the ALJ's decision. The WFUT responded and 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.

#### FACTS

Article VII, Section F of the WFUT - District 1998-1999 collective bargaining agreement provides that:

Secondary school teachers will not be assigned more than five academic classes each day or twenty-five academic periods per week. Teacher academic assignments in excess of twenty-five periods per week shall be reimbursed at the rate specified in Article XVI, Section E.

Secondary school teachers will not be required to teach more than two certification areas or have more than two teaching preparations at any one time except for good and justifiable reasons where three teaching preparations are acceptable; it being understood that limiting the preparation will be a more educationally sound policy. Regents classes and non-regents classes in the same subject will be considered separate preparations. In view of the science teacher's seven periods per week (lab courses), the

following general schedule is advisable except for good and compelling reasons:

3 - seven per week courses	21 periods per week
1 - five per week course	5 periods per week
Total	26 periods per week

The foregoing schedule is to be arranged by the science coordinator in conference with the department concerned.

Science teachers who teach lab courses (in excess of twenty-five periods per week) shall not be assigned supervisory duties.

Flynn is a science teacher in the District who teaches ninth and tenth grade classes. In the school year prior to the filing of the instant charge<sup>1</sup>, he was assigned by the District to what is referred to by the parties as a 4-0 schedule, that is he taught a science class for four periods per day, with two lab periods per class per week, for a total of twenty-eight periods per week. In accordance with Article VII, section F, Flynn was assigned no supervisory periods.

In the Fall of 1998, Flynn read the above contract language regarding extra compensation for teaching more than twenty-five periods per week as applying to his situation. He met initially with Walter Flaherty, the WFUT grievance chair, and then with Ronald Gross, the WFUT unit president, several times in October 1998 about his interpretation of the contract language. Flaherty expressed his reservations about the grievance Flynn proposed WFUT file on his behalf. Flaherty consulted with Gross, who told Flynn repeatedly during their meetings that a grievance seeking extra compensation had no chance because the contract language was clear that, as to

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<sup>1</sup>In 1998-1999, Flynn taught ninth grade Regents Biology.

science teachers, the "extra compensation" referred to in the contract, by practice between the WFUT and the District, had taken the form of being excused from supervisory periods.<sup>2</sup> Gross further advised Flynn that there was a long and uniform practice in the District of the contract language being interpreted in this way. Other science teachers occasionally attended the meetings with Flynn. During this time frame, Gross consulted with Richard Baron, a New York State United Teachers (NYSUT) labor relations specialist, who told Gross that Flynn's proposed grievance was without merit.

Gross suggested to Flynn that he investigate the origin of the contract language and gave him access to WFUT records. Flynn discovered an undated document that appeared to be a draft proposal of the in-issue contract language. The document contained the following language: "teacher academic assignments in excess of 25 per/week (26 in the case of science teachers) shall be reimbursed at the rate specified in Article XIII...." However, the reference to "26 in the case of science teachers" was crossed out and was not included in the subsequent contract. Flynn even spoke to Paul Scanaliato, a former WFUT president, who, Flynn testified, told him the language was only intended to allow the District to assign twenty-six periods of teaching and labs without extra compensation if the teacher was relieved of supervisory duties, but that any assignment in excess of twenty-six instructional periods was not allowed without

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<sup>2</sup>Teachers are normally scheduled to teach five periods per day, five days per week, and are assigned one duty period per day, for a total of thirty assigned periods per week.

monetary compensation. Flynn related this information to Gross, who remained steadfast in his belief that such an interpretation of the contract language was in error.

In November 1998, Gross told Flynn he would not file a grievance on his behalf because he believed such a grievance was without merit, but he told Flynn that he could file the grievance on his own. Flynn thereafter requested that the District pay him for each of the extra periods he taught per week. When the District declined his request on December 3, 1998, Flynn filed a grievance. The District denied the grievance on January 11, 1998. In December, Flynn requested that Gross obtain a legal opinion from NYSUT on the merits of the grievance. Gross spoke to Baron and then told Flynn that Baron also thought the grievance to be without merit.

Flynn presented further evidence in support of his grievance to Gross in December 1998. On January 12, 1999, Flynn was allowed to present his case to the WFUT executive board. Gross also presented his position. The executive board passed a nonbinding resolution recommending that Gross pursue the grievance to arbitration. Gross, who has sole discretion to decide which matters will be grieved, declined to do so. At a later general membership meeting of the WFUT, Gross said he would seek legal advice from NYSUT and then decide whether the grievance would be pursued.

Flynn thereafter presented his grievance at step 2 of the contractual grievance procedure and the District denied the grievance. On January 22, 1999, Flynn asked Gross to take the grievance to arbitration.<sup>3</sup> Gross again declined, telling Flynn that the

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<sup>3</sup>Pursuant to the WFUT-District collective bargaining agreement, only the WFUT can appeal a grievance to arbitration.

grievance lacked merit, it was not a politically opportune time to pursue such a grievance and that it would impair WFUT's position in the upcoming contract negotiations. Gross confirmed his position in a letter to Flynn dated February 5, 1999.

In March 1999, a meeting held at the NYSUT office with Flynn, Gross, Flaherty and Baron, as well as another science teacher, and NYSUT's regional director, provided Flynn with the information that Gross had not received a legal opinion from NYSUT when he considered the merits of the grievance. Baron explained to Flynn that NYSUT counsel did not provide legal interpretations of contracts and that Gross' statement that he would get a legal opinion was based upon a misunderstanding.

#### DISCUSSION

To establish a violation of the duty of fair representation under the Act, Flynn must demonstrate that WFUT's actions toward him were arbitrary, discriminatory or taken in bad faith.<sup>4</sup> As the ALJ found, Flynn has failed to meet his burden of proof.

While Gross from the outset disagreed with Flynn's interpretation of Article VII, section F of the contract, Gross listened on several occasions to Flynn's request to grieve his concerns about extra compensation for science teachers who were teaching in excess of twenty-five periods per week. He researched the request and he explained to Flynn his reasons for deciding that the WFUT would not pursue the grievance and, later, why the WFUT would not take Flynn's grievance to arbitration. Flynn was given

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<sup>4</sup>*Civil Service Employees Ass'n v. PERB*, 132 AD2d 430, at 432, 20 PERB ¶7024, at 7039 (3d Dep't 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

access to WFUT records, the WFUT Executive Board, and to Baron, NYSUT's representative to assist him in making his case. Gross even advised Flynn that he would attempt to address his concerns during the next round of contract negotiations with the District.<sup>5</sup>

A union is not required to agree with a unit employee's interpretation of the contract, although the union must respond to the unit employee's concern or request to file a grievance.<sup>6</sup> The WFUT responded to Flynn's request, spent time evaluating his concerns and informed him of its position and the reasons therefor. We have consistently held that we would not substitute our judgment for that of a union's regarding the filing and prosecution of grievances, for the union is given a wide range of reasonableness in these regards.<sup>7</sup> Therefore, even if there is some merit to Flynn's position regarding compensation for science teachers who teach or have lab assignments in excess of twenty-five periods per week, a conclusion contrary to that of the ALJ's would not be warranted. Different interpretations of the clause in issue are certainly possible and we do not find Gross's interpretation of Article VII, section F to be

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<sup>5</sup>In fact, during negotiations which concluded in December 1999, the District and the WFUT agreed to new language that provides for extra compensation for science teachers working extra instructional periods.

<sup>6</sup>*Amalgamated Transit Union, Div. 500 and Central New York Reg'l Transp. Auth.*, 32 PERB ¶3053 (1999).

<sup>7</sup>*Public Employees Fed'n, AFL-CIO and State of New York (Dep't of Health) (Reese)*, 29 PERB ¶3027 (1996); *Dist. Council 37, AFSCME (Gonzalez)*, 28 PERB ¶3062 (1995).

"patently unreasonable."<sup>8</sup> Even if the WFUT erred in its assessment of Flynn's claim, the charge would still be dismissed because the record is devoid of any evidence of discrimination or bad faith on the part of the WFUT<sup>9</sup> and there is no proof that Flynn's interpretation of Article VII, section F of the contract is the only one possible.<sup>10</sup>

For the reasons set forth above, we deny Flynn's exceptions and we affirm the decision of the ALJ.

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

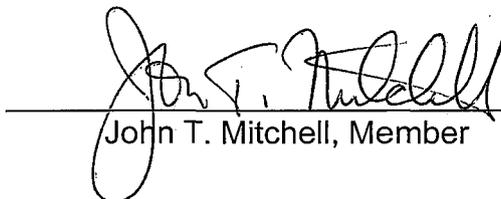
DATED: November 16, 2000  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>8</sup>*Hauppauge Schools Office Staff Ass'n (Haffner)*, 18 PERB ¶3029, at 3061 (1985).

<sup>9</sup>*Civil Serv. Employees Ass'n, Inc., Local 1000, State Univ. College at Buffalo, Local 640*, 27 PERB ¶3004 (1994).

<sup>10</sup> *Supra* note 8.

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

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In the Matter of

**CITY OF NIAGARA FALLS,**

Charging Party,

-and-

**CASE NO. U-21688**

**NIAGARA FALLS POLICE CAPTAINS AND  
LIEUTENANTS ASSOCIATION,**

Respondent.

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**RONALD D. ANTON, CORPORATION COUNSEL (CHRISTOPHER M.  
MAZUR of counsel), for Charging Party**

**DeMARIE & SCHOENBORN, P.C. (ANTHONY J. DeMARIE of counsel),  
for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the Niagara Falls Police Captains and Lieutenants Association (Association) to a decision of the Administrative Law Judge (ALJ) which found that the Association submitted nonmandatory subjects of negotiation to compulsory interest arbitration in violation of §209-a.2(b) of the Public Employees' Fair Employment Act (Act) and directed the Association to withdraw its proposals #1 and #13 from consideration of compulsory interest arbitration.

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

**FACTS**

On May 4, 2000, the City of Niagara Falls (City) filed an improper practice charge alleging that the Association violated §209-a.2(b) of the Act by including in its petition for compulsory interest arbitration two proposals, to wit: proposal #1 and proposal #13, which are nonmandatory subjects of negotiation.

The Association, in its answer, argued that the at-issue proposals are mandatorily negotiable.

The matter was submitted to the ALJ upon the stipulated record described in the ALJ's letter dated June 12, 2000, consisting of the following:

1. The Improper Practice Charge filed by the City on May 4, 2000 and attachments thereto.
2. The Association's Answer.
3. The Parties' Collective Bargaining Agreement covering the period 1994-1996.
4. The 1998 Interest Arbitration Award in Case No. IA97-010; M96-457.
5. The following two (2) proposals included in the Association's Petition for Interest Arbitration which the City asserts are nonmandatory subjects of bargaining:

(a) Proposal 1 - §4.04 - POSTINGS (NON-COMPETITIVE JOB CLASSIFICATION)

The following to replace existing language:

(THE SECTION TO BE RETITLED "NON-COMPETITIVE JOB CLASSIFICATIONS".)

In the event the City decides to fill a vacancy in a non-competitive position, or it creates a new non-competitive

position, assignment to such vacancy shall be made by the City from the three (3) most senior officers who requested assignment and who are qualified. The qualifications will be fixed by the City and may not be unreasonable.

By way of example and not by way of limitation, the following shall be considered as non-competitive positions:

Assistant Superintendent,  
Detective Captain,  
Detective Lieutenant,  
NID Captain (formerly CIU Captain),  
NID Lieutenant (formerly CIU Lieutenant),  
Community Services Supervisor,  
Youth Aid Bureau Captain (formerly JAB Captain),  
Youth Aid Bureau Lieutenant (formerly JAB Lieutenant),  
Traffic Supervisor.

Any position, which has been classified by the Public Employment Relations Board as "managerial or confidential" shall be excluded from the provisions of this section.

Notice of vacancy and of such reasonable qualifications shall be posted on Department Bulletin Boards and a copy shall be provided to the Association for at least thirty (30) days before the selection is made. The position shall be filled within ten (10) days thereafter.

In the event of a vacancy in a position, if no supervising officer indicates a desire to fill such vacancy it will be filled based upon inverse seniority.

For purposes of this section seniority shall be computed based upon the date of appointment to the officer's present rank.

(b) Proposal 13 - §12.06 - ANTICIPATED  
LEGISLATION - [NEW]

In the event the New York State Legislature authorizes the elimination of any restrictions on Tier II employees, the City will eliminate such restrictions.

### ALJ Decision

The ALJ determined that the Association's proposals #1 and #13 were nonmandatory and/or prohibited subjects of bargaining and ordered them withdrawn from compulsory interest arbitration.

### Exceptions

The Association excepted to the ALJ's decision on the facts and law. The City responded with a brief in support of the ALJ's decision.

### Discussion

#### Association Proposal #1

This proposal replaces existing language in §4.04 Postings, of the parties' collective bargaining agreement. The ALJ correctly found that qualifications for a position are a management prerogative and, thus, a nonmandatory subject of bargaining.<sup>1</sup> Proposal #1 also set forth a procedure in which an assignment to a vacant position was to be made from the three (3) most senior officers. We have held, and the ALJ correctly noted, that the procedures to be used to fill a position, e.g., seniority, are a mandatory subject of negotiation.<sup>2</sup>

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<sup>1</sup>See *City of Buffalo (Police Dep't)*, 29 PERB ¶3023 (1996); *Levitt v. The Bd. of Collective Bargaining of The City of New York, Office of Collective Bargaining*, 21 PERB ¶7516 (Sup. Ct. New York County 1988); *West Irondequoit Bd. of Educ.*, 4 PERB ¶3070 (1971).

<sup>2</sup>See *Schenectady Patrolmen's Benevolent Ass'n*, 21 PERB ¶3022 (1988); *Dutchess County BOCES Faculty Ass'n, NEA/NY*, 17 PERB ¶3120 (1984), confirmed 122 AD2d 845, 19 PERB ¶7018 (2d Dep't 1986); *White Plains Police Benevolent Ass'n*, 9 PERB ¶3007 (1976).

We turn to the Association's exceptions to the ALJ's findings based upon the stipulated record.

The Association believes the ALJ erroneously determined that proposal #1 would require the City to fill a vacant position and was, therefore, nonmandatory. The Association argues that the language of proposal #1 is discretionary in that the City makes the initial decision to fill the vacant position and as such is subject to the duty to bargain.<sup>3</sup> The problem, however, is that the language of proposal #1 incorporates mandatory subjects, e.g., procedure to fill a position, as well as nonmandatory subjects, e.g., qualifications, and filling the vacancy within a defined time (ten days). We have held that where a bargaining proposal contains two or more inseparable elements, i.e., a unitary demand, at least one of which is nonmandatory, the entire proposal is deemed nonmandatory.<sup>4</sup> Consequently, we do not agree with the Association's exception and it is denied.

The Association believes that the ALJ erred when she found that Association proposal #13 was nonmandatory. This proposal would add new §12.06 to the parties's collective bargaining agreement Article XII-Miscellaneous Provisions. The language of §12.06 is anticipatory and it refers to amendments to §§302(9)(d) and 443(f) and (f-1) of the New York State Retirement and Social Security Law (RSSL).

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<sup>3</sup>See *County of Westchester*, 33 PERB ¶3025 (2000) (citing cases).

<sup>4</sup>See *Police Benevolent Ass'n of the City of White Plains, Inc.*, 33 PERB ¶3051 (2000) (citing cases).

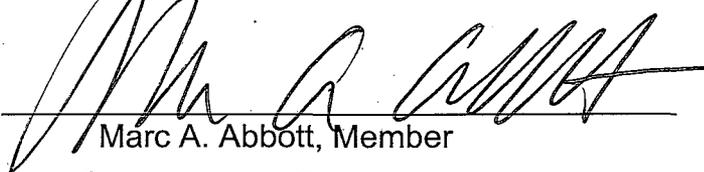
The language of §443(f-1) is clear that a demand in negotiations for the additional pension benefit provided by subdivision (f) of this section *shall not be* subject to compulsory interest arbitration. (emphasis added) Since the legislative intent expressed in §443(f-1) is unequivocal, the Association's argument is specious and, consequently, bargaining over the subject is foreclosed by the language of the statute. Proposal #13 is, therefore, not a mandatory subject of negotiation. The Association's exception is denied.

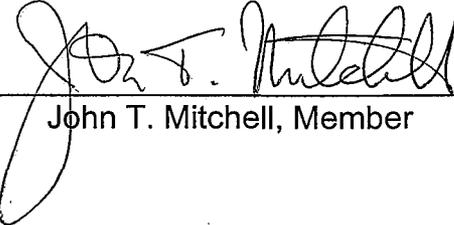
For the reason set forth above, the ALJ's decision is affirmed and the Association's exceptions are dismissed.

IT IS, HEREBY, ORDERED that the Association withdraw its proposals #1 and #13 from consideration at compulsory interest arbitration.

DATED: November 16, 2000  
Albany, New York

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

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

  
\_\_\_\_\_  
John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**CHARLES ASAMOAH,**

Charging Party,

- and -

**CASE NO. U-20785**

**TRANSPORT WORKERS UNION , LOCAL 100,**

Respondent,

-and-

**NEW YORK CITY TRANSIT AUTHORITY,**

Employer.

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**CHARLES ASAMOAH, *pro se***

**O'DONNELL, SCHWARTZ, GLANSTEIN, ROSEN, DIPRETA & GOLDSTEIN,  
L.L.P. (DAVID M. GLANSTEIN of counsel), for Respondent**

**MARTIN B. SCHNABEL, GENERAL COUNSEL (KIMBERLY WESTCOTT of  
counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Charles Asamoah to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge which alleged that the Transport Workers Union, Local 100 (TWU) violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) when it placed him at the bottom of a seniority list for work assignments and job location picks after he participated in a

training program which removed him from the unit for more than twelve months.<sup>1</sup> Asamoah's employer, the New York City Transit Authority (NYCTA), was made a statutory party to the proceedings pursuant to §209-a.3 of the Act.

The ALJ dismissed Asamoah's charge, finding that Asamoah had failed to prove that the TWU's actions toward him violated its duty of fair representation. The ALJ found that Asamoah had not been treated disparately by the TWU in its assignment of his ranking on the seniority list or in notifying unit members of the consequences of participating in the training program.

Asamoah excepts to the ALJ's findings of fact and law, arguing that his trainee position was not "out of the unit", therefore, there was no reason for changing his seniority date; that the TWU applied its "out of the unit" rule in a discriminatory manner in his case; that he had no way of knowing that his trainee position was "out of the unit"; and that the examples he gave of disparate treatment were not considered by the ALJ. Both TWU and NYCTA support the ALJ's decision, but both argue that Asamoah's exceptions are untimely filed.

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

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<sup>1</sup>We earlier determined that Asamoah's charge was timely and remanded the case to the Director of Public Employment Practices and Representation (Director) for further proceedings consistent with our decision. 32 PERB ¶3062 (1999).

FACTS

Asamoah was hired by the NYCTA, Maintenance Division (Division) in 1991 as a cleaner/helper, a title in the unit represented by TWU. In 1995, Asamoah applied for and was accepted into a Bus Maintainer Trainee program operated by NYCTA. He participated in the program for approximately 22 months. Upon his completion of the training in February 1997, Asamoah moved into the title of chassis maintainer, also a unit title. In February 1998, Asamoah ascertained that his placement on the seniority list prepared by NYCTA and reviewed by the TWU was based upon his 1997 completion of training and not his 1991 date of hire by NYCTA. When he questioned his placement on the list, he was informed by TWU that he was placed at the bottom of the list based upon his new title but on the next year's seniority list he would be restored to his original seniority date. In February 1999, the new seniority list was issued and Asamoah's placement was still based upon his 1997 seniority date. When he again questioned the TWU, he was informed that while he participated in the training program, he was "out of the unit" because the trainee title was not a title represented by the TWU. He was further informed that, pursuant to TWU policy, employees who were "out of the unit" for more than a year lost their Division seniority, although they retained their Company seniority, which was their original date of hire.

Asamoah alleges that he was never told that he would be "out of the unit" while he participated in the training program and that he was never told that he would lose his Division seniority if he was "out of the unit" for more than a year.

The TWU introduced evidence that in 1991 the Division members of TWU had adopted a policy that the date of hire into a Division title would represent the Division seniority date for purposes of picking schedules, locations and vacations. The new policy also provided that if a unit member accepted employment in a job title that was out of the Division for a period of time greater than one year, the employee would lose Division seniority and would receive a new seniority date upon return to a TWU-represented Division title. The TWU also introduced evidence at the hearing that it had informed unit employees by flyer at the time of the inception of the training program in 1995 that unit employees would lose their status as unit employees while participating in the program as Bus Maintainer Trainees.<sup>2</sup> Asamoah's new seniority date was consistent with his date of re-entry into the Division.

While Asamoah named other employees in his direct testimony whom he believed should have been placed lower on the seniority list than he was in 1999, his testimony was refuted by TWU's evidence that those employees had either not been out of the Division for more than twelve months or had greater Division seniority than Asamoah based upon his break in service.

#### DISCUSSION

Initially, we decide the timeliness arguments made by both the TWU and the NYCTA. They allege that Asamoah's exceptions, filed on September 23, 2000, are

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<sup>2</sup>In fact, TWU's notice to employees urges them to refrain from participating in the training program until the unit placement of the trainee title was resolved between the TWU and the NYCTA.

untimely because they were filed more than fifteen working days after Asamoah's receipt of the ALJ's decision.<sup>3</sup> However, our records reveal that Asamoah received the ALJ's decision by certified mail on September 2, 2000. His exceptions, filed on September 23, 2000, are, therefore, timely.

Turning to the merits of the exceptions, we determine that Asamoah's charge must be dismissed. In order to establish a violation of the duty of fair representation, a charging party must prove that the employee organization acted in a manner that was arbitrary, discriminatory or motivated by bad faith.<sup>4</sup> Asamoah has failed to prove that he was singled out for disparate treatment or that the TWU acted negligently or in bad faith with respect to Asamoah's seniority. TWU's practice with respect to Company seniority and Division seniority is long-standing and there is no evidence that it has been implemented in a discriminatory manner.<sup>5</sup> Further, the record established that the title of

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<sup>3</sup>Rules of Procedure, §213.2(a).

<sup>4</sup>*Civil Service Employees Ass'n, Local 1000 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).

<sup>5</sup>*See Amalgamated Transit Union, Local 342 (Lynch)*, 22 PERB ¶3058 (1989), where we held that "[I]t is well established that a breach of the duty of fair representation is established only by proving that an employee organization's decisions, including those which adversely affect some portion of its membership, were made in an arbitrary manner, for discriminatory reasons, or in bad faith. The long accepted broad latitude given employee organizations in the negotiations process is particularly understood in the negotiation of seniority provisions in which, by definition, some employees are advantaged and others are not." *See, e.g., Ford Motor Co. v. Huffman*, 345 US 330, 31 LRRM 2548 (1953). As we have held: "[T]he duty of fair representation does not preclude an employee organization from reaching agreements in negotiations that are more favorable to some unit employees than to others." *UFT Local 2, AFT*, 18 PERB ¶3048, at 3105 (1985).

Bus Maintainer Trainee was not in the unit represented by TWU and that TWU notified unit employees of the representation status of the trainee position at the time the program was introduced. That Asamoah was unaware of the unrepresented status of the Bus Maintainer Trainee title or the impact of accepting that position on his seniority within the Division may not be attributed to discriminatory or arbitrary conduct of the TWU.<sup>6</sup>

Based upon the foregoing, we deny Asamoah's exceptions and affirm the decision of the ALJ.

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

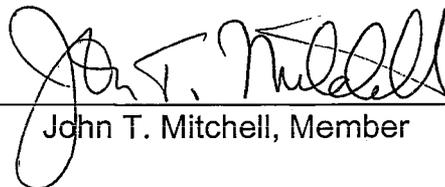
DATED: November 16, 2000  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>6</sup>*Amalgamated Transit Union, supra note 5.*

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

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In the Matter of

**WESTCHESTER COUNTY CORRECTION  
OFFICERS BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

- and -

**CASE NO. U-21137**

**COUNTY OF WESTCHESTER,**

Respondent,

- and -

**STATE OF NEW YORK (DEPARTMENT OF  
CORRECTIONAL SERVICES),**

Intervenor.

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

**ALLEN D. SCHEINKMAN, COUNTY ATTORNEY (CAROL F. ARCURI and  
LORI A. ALESIO of counsel), for Respondent**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (ROSS M. PISCITELLI  
of counsel), for Intervenor**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the Westchester County Correction Officers Benevolent Association, Inc. (COBA) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge alleging that the County of Westchester (County) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted exclusive bargaining unit

duties of guarding New York State (State) inmate-patients housed in Ward 29 of the Westchester Medical Center to the State of New York (Department of Correctional Services) (DOCS).

### FACTS

The record establishes that, prior to 1998, Ward 29 was a secure medical ward in the Department of Hospitals of the County of Westchester located in the Westchester County Medical Center building. The medical center was owned and operated by Westchester County.

On February 11, 1997, the New York State Legislature amended the New York Public Authorities Law by adding a new Article 10-C, Title 1, which created the Westchester County Health Care Corporation (WCHCC). Effective January 1, 1998, the Department of Hospitals ceased to exist as a County department.

Pursuant to the parties' Stipulation, the County of Westchester submitted to the ALJ a copy of the operating certificate issued by the New York State Department of Health to the WCHCC. The certificate authorized the WCHCC to operate the Westchester Medical Center.

At the hearing, the only witness to testify was the current president of COBA, Joseph Spano, a corrections officer employed by the Westchester County Department of Corrections (Westchester DOC). Spano acknowledged that DOCS ceased sending State inmates to Ward 29 in about 1986, and that there were no DOCS inmates on Ward 29 from 1986 to July 1, 1999.

Effective July 1, 1999, through a Memorandum of Understanding (MOU) signed by the DOCS Commissioner, Westchester DOC Commissioner and authorized personnel of both St. Agnes Hospital and WCHCC, outside hospital beds were made available to both DOCS and Westchester DOC.<sup>1</sup>

~~DOCS, in accordance with Correction Law §23(2), operates a ten-bed secure~~ unit in St. Agnes Hospital located in White Plains, New York. WCHCC, as the operator of Westchester Medical Center, agreed to permit Westchester DOC to operate a fourteen-bed secure unit at the Westchester Medical Center (Ward 29), including five beds that were exclusively used for the medical care of federal inmates. Consequently, Westchester DOC agreed to permit DOCS' inmate-patients to be admitted into Ward 29 and, vice versa, DOCS agreed to permit Westchester DOC inmate-patients to be admitted into the secure unit at St. Agnes Hospital. The MOU expressly provided that DOCS was to "maintain care, custody and supervision of said inmate-patients throughout their placement in Ward 29, consistent with all applicable laws and with the Medical Staff Bylaws and the policies and procedures of Westchester Medical Center." The same admonition applied to Westchester DOC whenever it utilized beds at St. Agnes' secure unit. In effect, each agency was responsible for guarding their respective inmates regardless of which secure medical unit they were admitted to.

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<sup>1</sup>See DOCS' Answer.

The parties further agreed that WCHCC could at its option cancel this agreement with thirty days written notice. The MOU was effective for one year, with the option to extend the term.

Robert L. Page, Assistant Warden of the Westchester DOC, sent a memo, dated June 25, 1999, to all staff regarding security. Page advised staff that:

1. Effective July 1, 1999, Westchester County Department of Correction (County) will be using Saint Agnes Hospital in White Plains instead of the Westchester Medical Center for all hospital services . . . .
2. The State will co-use the secure ward (Ward 29) at the Medical Center with the County.
  - a. County staff will continue to be assigned for the care, custody and supervision of the U.S. Marshal's Service (Federal) inmate-patients housed on Ward 29.
  - b. State staff will also be assigned for the care, custody and supervision of State inmate-patients also housed on Ward 29.
  - c. County rules and regulations will prevail for both Federal and State inmates, as well as County and State Staff.

On September 23, 1999, COBA filed this improper practice charge alleging *inter alia*: "Ward 29 at the Westchester Medical Center has been and still is in the exclusive control of the County of Westchester."

A hearing was scheduled on the charge for March 21, 2000. At that hearing, Spano was COBA's only witness. COBA argues in its charge that the County has unilaterally subcontracted exclusive bargaining unit duties, specifically, guarding State inmate-patients housed in Ward 29 of the Westchester Medical Center. In support of its argument, COBA offered the testimony of its president, Spano, who testified about his

knowledge of the security for inmate-patients on Ward 29. Spano claimed he never observed a DOCS corrections officer actually guarding a state prisoner on Ward 29 nor was he aware of any such arrangement from conversations with his fellow corrections officers assigned to Ward 29.<sup>2</sup> Spano did admit, however, that DOCS ceased sending State inmate-patients to Ward 29 in 1986. Consequently, there were no State inmate-patients on Ward 29 from 1986 to 1999. At the conclusion of the COBA's direct case, both the County and DOCS moved to dismiss the charge. The ALJ denied their motions. A subsequent hearing date was adjourned and the parties stipulated to submit briefs in support of their positions and to allow the County to submit the Operating Certificate as an exhibit to its brief.

#### ALJ DECISION

On September 18, 2000, the ALJ rendered his decision dismissing the charge. The ALJ found that, although the Westchester DOC issued the June 25, 1999 memo which contradicted the alleged practice described by Spano, the Correction Law preempted negotiation over the alleged unilateral change in practice.

#### EXCEPTIONS

COBA excepted to the ALJ's decision on the law. In its exceptions, COBA contends that the ALJ's conclusion is incorrect. COBA argues that Ward 29 does not fit the definition of an outside hospital referred to in §23(2) of the Correction Law. COBA contends that Ward 29 is not an outside hospital because it is part of a local

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<sup>2</sup>He testified that during his eighteen-year career, he worked shifts at Ward 29 on and off only about six times.

correctional facility as defined in §40 of the Correction Law. COBA argues that Ward 29 is a hospital prison ward effectively "part and parcel of" the Westchester County Correctional Facility.

### DISCUSSION

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

The record establishes that as of January 1, 1998, Ward 29 was no longer under the control of Westchester County. Rather, it was under the control of the WCHCC as evidenced by the operating certificate issued by the New York State Health Department and by the amendment to the Public Authorities Law, to which judicial notice was properly taken. Westchester DOC and DOCS entered into a reciprocal MOU effective July 1, 1999 to provide medical services to inmate-patients at both Ward 29 and St. Agnes. What is clear from this MOU is that the County is not in exclusive control of Ward 29 because it is WCHCC that has agreed to permit Westchester DOC to operate a 14-bed secure unit.<sup>3</sup> Furthermore, pursuant to the MOU, DOCS is responsible for the care, custody and supervision of State inmate-patients at Ward 29.

COBA also contends in its exception that State inmates assigned to Ward 29 are not assigned to an "outside hospital" because, if they were, the Chief Officer of the "outside hospital" would be responsible for the supervision of the inmate-patient. COBA

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<sup>3</sup>Under the terms and conditions imposed by WCHCC and the hospital by-laws.

relies on a 1932 Attorney General's opinion.<sup>4</sup> The authority for this opinion is Corrections Law §508; however, this section has been amended since 1932 to eliminate the Chief Officer as the responsible party. The new §508 requires that "the prisoner be kept in the custody of the officials in charge of the jail to which he is committed until he has sufficiently recovered from his illness."<sup>5</sup> Consequently, by virtue of the statutory amendments and the MOU, this argument fails.

Lastly, COBA argues, in the alternative, that Correction Law §508(2) allows the sheriff to remove an inmate from a local correctional facility to receive medical attention at an outside hospital. Ward 29 is part of the local correctional facility; §508 permits transfers to "outside hospitals" when the medical facilities at Ward 29 are inadequate to treat the inmate-patient. Thus, COBA argues, since §508 is modeled after §23, the same rule should apply, i.e., Ward 29 is not an "outside hospital" but part of the Westchester County Department of Corrections so that §23 is not applicable to the situation at bar.

Again, COBA's argument fails because it ignores the ownership and control of Ward 29. In order for COBA's argument to have merit, Ward 29 would have to be owned and operated by the County or Westchester DOC and this is not the case.

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<sup>4</sup>1932 Op. of Atty. Gen'l 293.

<sup>5</sup>Correction Law §508(1).

The essence of COBA's charge, subcontracting, has been characterized as the reassignment of unit work [Westchester DOC] to nonunit employees [DOCS].<sup>6</sup> The test that the Board has employed to determine whether there has been a unilateral transfer of unit work was announced in *Niagara Frontier Transportation Authority*.<sup>7</sup>

1. Whether the at-issue work had been performed exclusively by unit employees, and
2. Whether the reassigned tasks are substantially similar to those previously performed by unit employees.

In *Town of West Seneca*, 19 PERB ¶3028 (1986), the Board discussed the issue of exclusivity and recognized that work may be considered exclusive unit work, even if, at times, it is performed by nonunit employees. The principle of "defined perimeters" around the nonunit work was amplified and was later referred to as "discernible boundary" in *Indian River Central School District*, 20 PERB ¶3047 (1987). In recent years, the Board refined the discernible boundary precedent by introducing the theory of the "core components" of the work at issue.<sup>8</sup> In *Town of Brookhaven*, it was noted, however, that this Board has "not recognized a discernible boundary when we have been unable to identify a reasonable relationship between the components of the discernible boundary and the duties of unit employees."<sup>9</sup> The definition of unit work may

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<sup>6</sup>See *Public Sector Labor and Employment Law*, Lefkowitz, Osterman and Townley, 1998 New York State Bar Association, p. 478.

<sup>7</sup>18 PERB ¶3083 (1985).

<sup>8</sup>County of Westchester, 31 PERB ¶3034 (1998).

<sup>9</sup>27 PERB ¶3063, at 3147 (1994).

also, if warranted, include specific location at which the work is performed.<sup>10</sup> To include work location in the definition of unit work, there must be an identifiable, reasonable relationship between the work site and the duties performed by unit employees.<sup>11</sup>

Since it is the charging party that bears the burden of proof to establish by a preponderance of the reliable evidence that a change in the past practice had, in fact, occurred,<sup>12</sup> our inquiry focuses, therefore, on the duties actually performed by Westchester DOC officers.<sup>13</sup> COBA's evidence on this issue consists solely of Spano's testimony which is devoid of any details regarding the duties he actually performed. In fact, Spano's recollection is limited by his lack of work assignments to Ward 29. Furthermore, Spano admitted that he did not know whether the County turned over Ward 29 to the WCHCC.<sup>14</sup> To the extent that Spano testified that Westchester DOC officers had guarded State inmates in Ward 29 at some time prior to 1986, we find that the unit work, as defined, is the guarding of Westchester DOC inmates at all locations at which they are receiving medical treatment, and the guarding of State DOCS prisoners when receiving treatment at a facility solely under the County's control.

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<sup>10</sup>*Hudson City Sch. Dist.*, 24 PERB ¶¶3039 (1991); *City of Rochester*, 21 PERB ¶¶3040 (1988), *confirmed*, 155 AD2d 1003, 22 PERB ¶¶7035 (4th Dep't 1989).

<sup>11</sup>*Union-Endicott Cent. Sch. Dist.*, 26 PERB ¶¶3075 (1993), *rev'd on other grounds, sub nom Board of Educ. of Union-Endicott Cent. Sch. Dist. v. PERB*, 197 AD2d 276, 27 PERB ¶¶7005 (3d Dep't 1994), *leave to appeal denied*, 84 NY2d 803, 27 PERB ¶¶7012 (1994).

<sup>12</sup>*See State of New York*, 33 PERB ¶¶3024 (2000) (and cases cited therein).

<sup>13</sup>*See County of Westchester*, 31 PERB ¶¶3033, at 3072 (1998).

<sup>14</sup>*See Transcript*, pp 39-40.

The record is clear that Ward 29 ceased to be a facility under the jurisdiction of the County as of January 1, 1998. After that date, Ward 29 was under the jurisdiction of WCHCC. The last DOCS inmate-patient to be treated in Ward 29 was in 1986.

COBA, through Spano, failed to describe the duties actually performed by Westchester DOC officers at Ward 29. Given the record before us, we hold that COBA has failed to establish exclusivity over the work here in-issue; the guarding of State DOCS prisoners at facilities which are not operated or controlled by the County. As the guarding of State DOCS prisoners is not the exclusive unit work of Westchester DOC officers, the County was free to enter into the MOU with State DOCS and WCHCC regarding the supervision of inmates housed for Ward 29. Therefore, the charge must be dismissed.

COBA's charge also fails because Correction Law §23(2) expressly states that the Commissioner of Corrections may permit inmates to be treated in outside hospitals. "[Those] inmates *shall* remain under the jurisdiction and in the custody of the department while in said outside hospital and said superintendent . . . *shall* enforce proper measures in each case to safely maintain such jurisdiction and custody." (emphasis added)

We believe that the New York Court of Appeals in *Board of Education of the City School District of the City of New York v. PERB*<sup>15</sup> has determined, under certain circumstances, such as those presented here, that the Legislature has plainly and clearly removed the obligation to bargain. The Court of Appeals noted:

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<sup>15</sup>75 NY2d 660, 23 PERB ¶7012, at 7014 (1990).

[C]ertain decisions of an employer though not without impact upon its employees, may not be deemed mandatorily negotiable "terms and conditions of employment," either because they are inherently and fundamentally policy decisions relating to the primary mission of the public employer or because the Legislature has manifested an intention to commit these decisions to the discretion of the public employer . . . .

The MOU acknowledges that the County and Westchester DOC have ceded their jurisdiction over Ward 29 to WCHCC. The Page Memorandum of June 25, 1999 merely confirms the parties' understanding that Ward 29 is an independent entity and Westchester DOC and DOCS are willing to share bed space under the express terms that DOCS supervise its own inmate-patients as required by Correction Law §23(2).

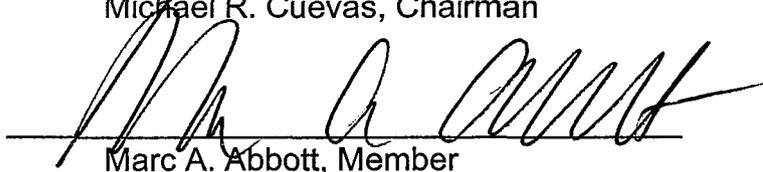
Based upon the foregoing, we deny COBA's exceptions and affirm the ALJ's decision.

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

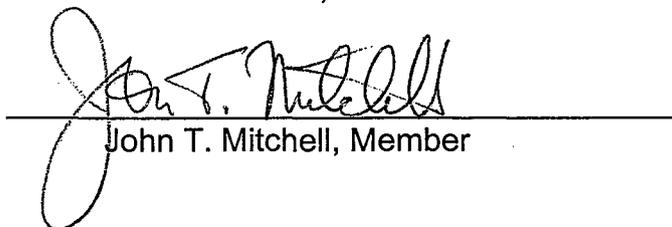
DATED: November 16, 2000  
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Petitioner,

-and-

CASE NO. C-5011

**TOWN OF LLOYD,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

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

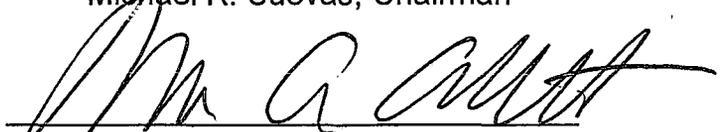
Included: HMEO, Laborer, Mechanic, Foreman, Highway Secretary, Transfer Station Attendant, Working Supervisor, Motor Equipment Operator (MEO), Senior Plant Operator, Plant Operator, Water/Sewer Maintenance, Water/Sewer Foreman, Water/Sewer Asst. Foreman, Senior Accountant, Clerk/Typist, Water/Sewer Superintendent, Typist/Planning/ZBA, Typist, Building Dept. Secretary, TH Custodian P/T, P/T Building Inspector, P/T Zoning Inspector, Court Clerk.

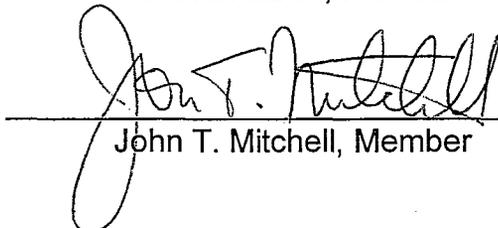
Excluded: All other Town employees.

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

DATED: November 16, 2000  
Albany, New York

  
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Michael R. Cuevas, Chairman

  
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Marc A. Abbott, Member

  
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John T. Mitchell, Member