

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**MONROE COUNTY SHERIFF  
POLICE BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

-and-

**CASE NO. U-22122**

**COUNTY OF MONROE AND  
MONROE COUNTY SHERIFF,**

Respondent.

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**GOLDBERG SEGALLA, LLP (PATRICK B. NAYLON of counsel),  
for Charging Party**

**BARRY C. WATKINS, ESQ., for Respondent County of Monroe**

**CHARLES PILATO, ESQ., for Respondent Monroe County Sheriff**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the County of Monroe (County) and cross-exceptions filed by the Monroe County Sheriff Police Benevolent Association, Inc. (PBA) to a decision of an Administrative Law Judge (ALJ), finding that the County violated §209-a.1(c) of the Public Employees' Fair Employment Act (Act) when it ceased granting the PBA president a second day per week of union release time in

retaliation for the exercise of protected rights.<sup>1</sup>

### EXCEPTIONS

The County asserts in its exceptions that the ALJ erred in concluding that its reasons for denying the release time were pretextual and were improperly motivated and that the proof relied upon by the ALJ in finding a violation of §209-a.1(c) was circumstantial. The County also argues that the ALJ erred by not accepting evidence of the contract negotiations that followed its denial of union release time and in the remedial relief ordered. The PBA supports the ALJ's decision, but argues that the ALJ erred in denying its motion to amend its improper practice charge to allege a violation of §209-a.1(d) of the Act.

Based upon our review of the record, we affirm the decision of the ALJ.

### FACTS

The facts are set forth in detail in the ALJ's decision<sup>2</sup> and are repeated here only as necessary to our decision.

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<sup>1</sup> The charge originally alleged that §§209-a.1(c) and (e) of the Act had been violated. The (e) allegation was withdrawn after the first day of hearing. The PBA at that time sought to amend the charge to include an allegation that §209-a.1(d) of the Act had been violated, seeking to conform its pleadings to the proof. Reading the PBA's offer of proof as alleging that there was newly discovered evidence upon which the proposed amendment was at least partially based, the ALJ scheduled a second day of hearing and accepted evidence on the alleged (d) violation, while reserving decision on whether to accept the amendment to the charge. Following the second day of hearing, the ALJ denied the proposed amendment to the charge. Her ruling was confirmed in her decision.

<sup>2</sup> 35 PERB ¶4586 (2002).

Daniel Finnerty is the president of the PBA and has been since its inception.<sup>3</sup> He is employed as a road patrol deputy in the Sheriff's Department. Upon commencing his term as PBA president, Finnerty was advised by then Chief Deputy Douglas Nordquist and then Undersheriff Patrick O'Flynn, now undersheriff and Sheriff, respectively, that he would receive one day per week of release time for union business. Finnerty agreed but filed a contract grievance, nonetheless, to protect his rights. Thereafter, in settlement of the grievance and a related improper practice charge, Finnerty, the then sheriff and Barry Watkins, Monroe County Labor Relations Manager, agreed that until June 1, 1999, Finnerty would work a 5-2 schedule (Monday through Friday, with Saturday and Sunday off) with Monday and Friday as his union release days.

Shortly before June 1, 1999, Finnerty met with Nordquist to discuss union release time. It was agreed that Finnerty would commence working a 4-2 schedule (four days on, two days off) with Friday as his union release day, unless his day off was a Friday and then Monday would be his union release day. With respect to the second release day, it was agreed that he would receive a second day per week if he submitted requests to Nordquist, as a package, one month in advance. The agreement was not reduced to writing, although Nordquist did write a memorandum to his PBA file, noting that: "Sgt. Finnerty is **not** (emphasis in original) requesting that we renew the

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<sup>3</sup> In 1998, the PBA was recognized as the representative of the deputies in the road patrol bureau of the office of the Sheriff of the County of Monroe (Sheriff). The road patrol deputies had formerly been in a unit of all Sheriff's Department employees, represented by the Monroe County Deputy Sheriff's Association (DSA), which now represents only the employees in the jail, civil and court security bureaus of the Sheriff's Department.

agreement which allowed for two release days per week. For the time being, he will submit request forms for additional time needed to conduct union business.”

Finnerty submitted requests for the second release day from June 1, 1999 through October 2000. Not one of the requests was ever denied by Nordquist. Contract negotiations between the County and the PBA commenced in October 1999. Fact-finding took place in June 2000 and the fact finder's report and recommendation was issued on October 9, 2000. Nordquist and Finnerty spoke shortly thereafter and Finnerty told Nordquist that the PBA membership was going to be advised by the executive board to reject the fact finder's report.

In August 2000, the PBA voted “no confidence” in the then Sheriff and then Undersheriff O'Flynn. The PBA also sent a letter to Governor Pataki at that time. In early September 2000, Finnerty sent forms for release time in October 2000 to Nordquist and they were approved. In early October 2000, Finnerty submitted the union release request forms for November 2000. Nordquist did not respond to the requests.

Finnerty and Nordquist spoke just prior to a negotiating session on October 24, 2000. When questioned by Finnerty, Nordquist confirmed that Finnerty would no longer be receiving two days of union release time per week, although he did not say why. Finnerty ceased requesting the second union release day per week after that and filed the instant charge.<sup>4</sup>

At the negotiating session, Finnerty formally informed the County and Sheriff that the PBA executive board was advising the PBA members to reject the fact finder's

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<sup>4</sup> Finnerty continued to receive some additional days, as requested, for attendance at grievance hearings and improper practice proceedings. He had always received those days, as requested, in addition to the weekly second day of union release time.

report and recommendations. The parties continued to meet thereafter and reached a financial settlement in late December 2000. However, contract language had still not been finalized as of the first day of hearing in the instant case.

Nordquist testified that the agreement regarding the grant of the second union release day after June 1, 1999, was for the purpose of giving Finnerty union release time during the contract negotiations between the PBA and the County, and that this condition for the second day of union release time was communicated to Finnerty. However, Finnerty denied that this was a condition placed on his receipt of a second union release day, and this condition does not appear in Nordquist's memorandum to the PBA file, memorializing the agreement with Finnerty. The record also reflects that during the time between the fact-finding hearing and the issuance of the fact finder's report and recommendation, the parties were not meeting to negotiate, yet all of Finnerty's requests for the second day of union release time were granted by Nordquist.

At the close of Finnerty's direct testimony, and again at the close of the PBA's case (which consisted solely of Finnerty's testimony), the County moved to dismiss the improper practice charge for failure to prove a *prima facie* case. The ALJ reserved decision on the motion and the County put in its case. In her decision, the ALJ denied the motion.<sup>5</sup>

After the close of the first day of hearing on the instant improper practice charge, the PBA made an application to amend the charge to withdraw the §209-a.1(e) allegation and to add an alleged violation of §209-a.1(d) of the Act. The basis of the motion is that an established past practice existed whereby the PBA president received

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<sup>5</sup> No exceptions were taken to the ALJ's denial of the motion to dismiss.

two days per week for conducting union business. The PBA offered a 1990 arbitration award interpreting the County-DSA contract and finding that the contract and past practice entitled the DSA president to a 5-2 schedule, with Monday and Friday for union release time. The PBA asserted that the motion to amend merely conforms the pleadings to the proof adduced at the first day of hearing. The ALJ denied the motion to amend as not being consistent with due process.

### DISCUSSION

Initially, we find that the ALJ properly denied the PBA's motion to amend the improper practice charge to include an allegation that the County violated §209-a.1(d) of the Act by unilaterally discontinuing the past practice of granting the PBA president two days of union release time per week. A motion to conform the pleadings to the proof is essentially a request to amend the charge. Leave to amend is not available if the effect is to add a new substantive claim otherwise barred by PERB's four-month statute of limitations.<sup>6</sup> Here, as found by the ALJ, the PBA was aware at the time it filed the improper practice charge of the practice it alleged had been changed by the County's refusal to grant a second day of union release time. The arbitration award referred to in its motion does not establish a past practice upon which the PBA can rely and, thus, cannot be considered to be newly-discovered evidence that would allow the filing of the amendment after the first day of hearing.<sup>7</sup> The practice that was changed by the County's refusal to grant additional release time in October 2000, was the practice agreed to by Finnerty and Nordquist prior to the expiration of the temporary agreement

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<sup>6</sup> Rules of Procedure, §204.1(a)(1). See also *Town of Brookhaven*, 26 PERB ¶3066 (1993).

<sup>7</sup> See *County of Westchester (Dep't of Correction)*, 31 PERB ¶3022 (1998).

on June 1, 1999. To grant the PBA's motion would not merely have formalized an issue already before the parties, it would have injected a new issue into the proceeding at a late date.<sup>8</sup>

As to the alleged violation of §209-a.1(c) of the Act, we find, as did the ALJ, that the County denied Finnerty's request for a second day per week of union release time because of his exercise of protected rights. In *County of Wyoming*,<sup>9</sup> we held that:

While timing alone is insufficient to support a finding of a violation of §§209-a.1(a) and (c), a close proximity in time between a protected activity and an adverse action may be sufficient to raise a suspicion of a causal relationship. Proof of such a causal relationship may be found in circumstantial evidence. (footnotes omitted)

Here, there is no dispute that Finnerty was engaged in protected activity when the PBA voted "no confidence" in the operation of the Sheriff's Department and when he and the PBA executive board recommended to the PBA membership that the fact finder's report and recommendations be rejected. It is also clear that Nordquist was aware of the PBA's actions shortly after the issuance of the report and recommendation in early October 2000.

The denial of Finnerty's request for a second day of union release time at the October 24, 2000 meeting, without explanation, after such requests were routinely and promptly granted on a monthly basis for more than a year, was sufficient circumstantial evidence to support a *prima facie* violation of §209-a.1(c) of the Act, thereby shifting the

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<sup>8</sup> See *Town of Brookhaven*, 25 PERB ¶¶3077 (1992). See also *State of New York (Dep't of Trans.)*, 23 PERB ¶¶3005 (1990), *conf'd*, 174 AD2d 905, 24 PERB ¶¶7014 (3d Dep't 1991).

<sup>9</sup> 34 PERB ¶¶3042, at 3102 (2001).

burden to the County to rebut same with evidence of a legitimate business reason for its actions.

We find, as did the ALJ, that the reasons proffered by the County are pretextual. The ALJ credited Finnerty's testimony that the grant of the second day of union release time had never been tied to contract negotiations. There is nothing in the record that would warrant disturbing the ALJ's credibility resolution. Further, we find that the failure of Nordquist to note the alleged condition for the grant of release time in his own memorandum to his files memorializing the agreement with Finnerty belies his assertion that the grant of time was contingent on the ongoing contract negotiations. This conclusion is further buttressed by the fact that Finnerty's requests for the second day of union release time were granted during the summer while the parties were waiting for the issuance of the fact finder's report and recommendation and were not actively engaged in contract negotiations.<sup>10</sup> It was only after Nordquist became aware of the PBA's "no confidence" vote in the Sheriff's Department and its plan to reject the fact finder's report and recommendation that Finnerty's requests were denied.

Lastly, we reach the exceptions filed by the County asserting that the ALJ erred in not allowing the County to introduce evidence about bargaining proposals regarding union release time introduced in contract negotiations after the events covered by the instant charge. The County argues that its willingness to negotiate union release time in contract negotiations after its denial of Finnerty's requests for the second day of union

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<sup>10</sup> The ALJ's point that the duty to bargain continues through fact-finding and subsequent efforts at conciliation and the resumption of negotiations is well-taken. See *City of Newburgh*, 15 PERB ¶3116 (1982), *confirmed sub nom. City of Newburgh v PERB*, 97 AD2d 258, 16 PERB ¶7030 (3d Dep't 1983), *aff'd* 63 NY2d 793, 17 PERB ¶7017 (1984).

release time negates the finding of retaliation. The ALJ correctly found such evidence to be irrelevant in a case alleging a §209-a.1(c) violation. Post-conduct actions may be relevant if they show a continued course of conduct that may relate back to the conduct in question. But an alleged willingness to negotiate the subject matter of an action which is alleged to be discriminatory, especially in the absence of a rescission or correction of the action complained of, is not relevant in determining whether a violation occurred.<sup>11</sup> We find, therefore, that the County violated §209-a.1(c) of the Act when it refused Finnerty's requests for a second day per week of union release time in retaliation for his participation in the "no confidence" vote and his recommendation, as part of the PBA executive board, that the PBA members reject the fact finder's report and recommendation.

Based on the foregoing, we deny the exceptions of the County and the cross-exceptions filed by the PBA, and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the County:

1. Forthwith restore the practice by which Sgt. Daniel Finnerty submitted, one month in advance, requests for, and received, a second day of union release time per week;
2. Make Finnerty whole for his use of any accrued leave credits in order to conduct union business from October 24, 2000, until the restoration of the practice as it existed prior to October 24, 2000;

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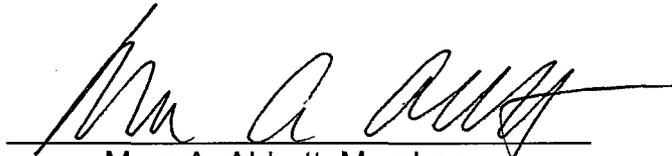
<sup>11</sup> See *Town of Huntington*, 27 PERB ¶3039 (1994).

3. Cease and desist from discriminating against Finnerty in retaliation for the exercise of the protected right to recommend rejection of a fact finder's report and recommendation or to participate in a "no confidence" vote in the operation of the Sheriff's Department; and
4. Sign and post the attached notice to employees at all locations customarily used by the County to communicate with employees in the unit represented by the PBA.<sup>12</sup>

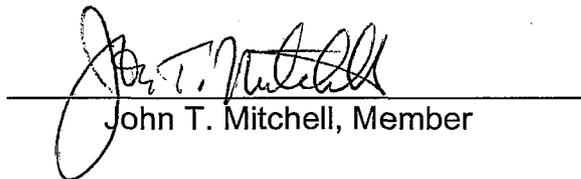
DATED: January 23, 2003  
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>12</sup> The County argues the relief ordered is in excess of PERB's authority. The remedial relief ordered is consistent with PERB's remedial relief powers and is consistent with the instruction of the Court of Appeals in *State Division of Human Rights v. County of Onondaga*, 71 NY2d 623 (1988), which held that remedial relief should not give more to a victim of discrimination than that which he or she would have achieved but for the discrimination, while directing that relief should not fall short of placing an individual in the same position in which he or she would have been had the discrimination not taken place. See also *City of Dunkirk*, 23 PERB ¶3025 (1990).

# NOTICE TO ALL EMPLOYEES

**PURSUANT TO  
THE DECISION AND ORDER OF THE**

**NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD**

**and in order to effectuate the policies of the**

**NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

**we hereby notify all employees represented by the Monroe County Sheriff Police Benevolent Association, Inc. that the County of Monroe and Monroe County Sheriff will:**

1. Forthwith restore the practice by which Sgt. Daniel Finnerty submitted, one month in advance, requests for, and received, a second day of union release time per week.
2. Make Finnerty whole for his use of any accrued leave credits in order to conduct union business from October 24, 2000, until the restoration of the practice as it existed prior to October 24, 2000.
3. Not discriminate against Finnerty in retaliation for the exercise of the protected right to recommend rejection of a fact finder's report and recommendation or to participate in a "no confidence" vote in the operation of the Sheriff's Department.

**Dated .....**

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

**COUNTY OF MONROE and MONROE COUNTY SHERIFF**  
.....

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**RONALD PAGANINI,**

Charging Party,

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- and -

**CASE NO. U-23182**

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

Respondent,

- and -

**CITY OF LONG BEACH,**

Employer.

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**RONALD PAGANINI, *pro se***

**NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of  
counsel), for Respondent**

**WILLIAM G. HOLST, CORPORATION COUNSEL (COREY E. KLEIN  
of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Ronald Paganini to a decision of an Administrative Law Judge (ALJ) on an improper practice charge alleging that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by failing to file a grievance against the City of Long Beach (City) because the City had denied his request for personal days. CSEA, in its answer, denied the material allegations of the

charge and alleged in its defense that it investigated the grievance in good faith. The City, in its answer, also denied the material allegations of the charge and raised several affirmative defenses.

### EXCEPTIONS

Paganini argues in his exceptions, *inter alia*, that the ALJ erred on the law and the facts based upon newly-discovered evidence annexed to the exceptions but not made a part of the original record before the ALJ.

CSEA and the City both object to the introduction of evidence outside the record and urge that the ALJ's decision be affirmed.

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

### FACTS

The facts are set forth in detail in the ALJ's decision.<sup>1</sup> For the purposes of our decision, we will confine our review to the salient facts relevant to Paganini's exceptions.

Paganini is presently employed by the City as a bus driver. He was a CSEA shop steward for four years. In May 2001, he unsuccessfully ran for unit president.

In his amended improper practice charge, Paganini alleged that he had been involved in a very close election campaign for unit president and he lost by 17 votes. He alleged that he exposed certain "wrong doings" and, as a result of his efforts to inform the members, the incumbent president retaliated against him by removing him

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<sup>1</sup> 35 PERB ¶4594 (2002).

from his position as shop steward. Paganini filed a complaint with CSEA's judicial system, and relayed the details of his dispute with CSEA to a newspaper.

In December 2001, Paganini made a request for four days of personal leave. His request went to Eugene Cammarato, Special Assistant to the City Manager. The four personal days plus the contractual holiday leave would have given Paganini seven consecutive days off from work.

On December 18, 2001, Cammarato denied the request because, as Paganini testified, Cammarato never grants more than two personal days. Paganini thereafter used compensatory time for the additional two days and complained to his union representative about the denial of personal leave. Paganini met with Colleen Gallagher-Dodge, executive vice-president of the unit, and they discussed the practice in his department. Gallagher-Dodge then spoke with Cammarato about Paganini's complaint. Cammarato explained to her that he had denied Paganini's request because, if he had allowed Paganini to take four consecutive days together with the holiday, it would be "like a vacation". The City had a vacation procedure in place based upon seniority and it limited the number of bus drivers on vacation at the same time.

Gallagher-Dodge contacted the unit president and the CSEA labor relations specialist concerning the dispute as well as the CSEA president of the region. She advised the region president that she had arranged with Paganini to prepare a grievance and requested that someone from labor relations contact her.

On December 28, 2001, Gallagher-Dodge sent a proposed copy of the grievance to the CSEA labor relations specialist with a request to contact her. She then reviewed Paganini's payroll records that revealed that he had no past history of taking more than

two consecutive personal days, despite his claims that he had done so in the past. She felt that the grievance lacked merit and asked for assistance from the labor relations specialist.

Paganini met with the unit president, labor relations specialist and Gallagher-Dodge at which time they advised him that his payroll records did not support his claim about using more than two consecutive personal days in the past. However, Paganini remained adamant that there was such a practice. The CSEA labor relations specialist determined that Paganini's grievance lacked merit in the face of Gallagher-Dodge's investigation. Paganini, nevertheless, filed a grievance, which Cammarato denied.

#### DISCUSSION

Paganini argued in his exceptions that the ALJ erred in making his determination and he included evidence that was not before the ALJ in support of his claim. He contends that this newly-discovered evidence proves that CSEA failed in its duty of fair representation on his behalf.

Part 213.2 of our Rules of Procedure (Rules) limits our review of the ALJ's determination to the record before him or her.<sup>2</sup> Our review of the record indicates that the proposed document was not before the ALJ when he made his determination. Consequently, we are foreclosed from considering it upon this appeal. We, therefore, dismiss this part of the exceptions.

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<sup>2</sup> See *Margolin v. Newman*, 130 AD2d 312, 20 PERB ¶¶7018 (3d Dep't 1987), *appeal dismissed*, 71 NY2d 844, 21 PERB ¶¶7005 (1988).

We must consider Paganini's remaining exceptions in light of *Civil Service Employees Association, Inc. v. PERB and Diaz*.<sup>3</sup> The standard by which to prove a violation of the duty of fair representation was judicially determined in *Diaz* and requires that:

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. (citations omitted)

We have also held that a mere difference of opinion between an employee organization and an employee about the interpretation of a contractual provision or practice is not sufficient to establish a breach of the duty of fair representation in violation of §209-a.2(c) of the Act.<sup>4</sup>

The record before the ALJ clearly establishes that representatives of CSEA investigated Paganini's grievance. It was only after receipt of payroll data that CSEA determined that Paganini's claim was unsupported and that it would not prosecute Paganini's grievance. Upon this record, we conclude, as did the ALJ, that CSEA undertook a good faith review of Paganini's grievance. CSEA's decision not to prosecute his grievance was neither discriminatory, arbitrary nor made in bad faith but was, rather, based upon the relevant information that it had assembled and considered.

Paganini takes exception to the manner in which Gallagher-Dodge conducted her investigation. The evidence adduced on this record does not support Paganini's

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<sup>3</sup> 132 AD2d 430, 20 PERB ¶¶7024, at 7039 (3d Dep't 1987), *affirmed on other grounds*, 73 NY2d 796, 21 PERB ¶¶7017 (1988).

<sup>4</sup> *Amalgamated Transit Union, Div. 580, AFL-CIO and Central New York Reg. Transp. Auth.*, 32 PERB ¶¶3053 (1999).

contention that CSEA did not use its best efforts to obtain evidence to verify the claimed past practice.

“As we have often held, an employee organization has no duty to process every grievance or to take every grievance to arbitration”,<sup>5</sup> as long as it properly investigates a grievance and informs the grievant of its determination as to the merits of the grievance.

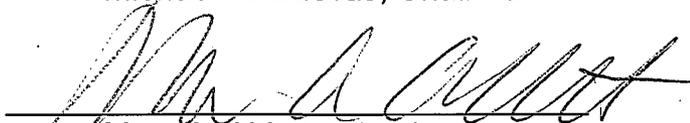
Based upon the foregoing, we deny the exceptions and affirm the ALJ's determination.

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

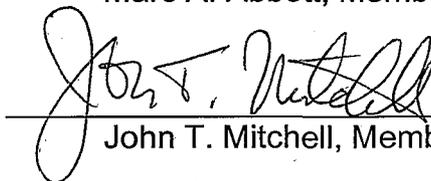
DATED: January 23, 2003  
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

<sup>5</sup> *New York State Public Employees Fed'n*, 29 PERB ¶3019, at 3045 (1996); *New York City Transit Auth. and Chapter 2, Civil Service Technical Guild, Local 375, AFSCME, AFL-CIO*, 22 PERB ¶3028 (1989).

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

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In the Matter of

**TOWN OF ULSTER**

**CASE NO. E-2267**

Upon the Application for Designation of Persons as  
Managerial or Confidential.

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**ROEMER, WALLENS & MINEAUX, LLP (WILLIAM M. WALLENS of  
Counsel), for Employer**

**MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (RICHARD S. CORENTHAL of  
counsel), for Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Laborers' International Union of North America, Local 17 (Local 17) to a decision of an Administrative Law Judge (ALJ), pursuant to an application filed by the Town of Ulster (Town), designating Ann Mitchell, Municipal Bookkeeper, as confidential within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act).<sup>1</sup> Mitchell's title is within the unit represented by Local 17.

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<sup>1</sup> Section 201.7(a) defines the term "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, . . . persons . . . who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board. . . . Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

### EXCEPTIONS

Local 17 alleges in its exceptions that the ALJ erred both on the facts and the law. The Town supports the ALJ's decision.

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

### FACTS

Mitchell has been the bookkeeper for the Town since 1970.<sup>2</sup> Her title has been in the unit represented by Local 17 since 1997. Mitchell has sole access to the Town's financial records, which are kept on her computer. She is primarily responsible for compiling data for the Town's budget, utilizing documents prepared by the various department heads detailing their expenses and revenue for the coming year, including projected staffing increases or decreases. The data she collects is then discussed with the Town Supervisor. Fred Wadnola took office as Town Supervisor on January 1, 2002. At the time of the application, he and Mitchell had not yet worked together on compiling a Town budget.

Wadnola testified that Mitchell reports to him on a daily basis and that he expects that he would discuss the budget data with Mitchell, seeking her input as he constructed a proposed budget for the Town. Included in their discussions would be sources of revenue, projected staffing needs, and expenditures resulting from collective negotiations. The final budget document would then be prepared by Mitchell and submitted by Wadnola to the Town Board.

Mitchell has also advised Wadnola when a department was over-spending and pointed out to him where there were funds that could be transferred to cover the

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<sup>2</sup> Mitchell has been designated as Confidential Bookkeeper to the Town Supervisor by the Town Board, pursuant to Town Law, §29, subd.15.

shortfall. During the last round of negotiations with Local 17, Mitchell was called upon by the then Town Supervisor to calculate the cost of a wage proposal prior to the proposal being made at the negotiations.

### DISCUSSION

In *Town of DeWitt* (hereafter, *DeWitt*),<sup>3</sup> we explained the two-prong test for designation of an employee as confidential within the meaning of the Act:

The definition of a confidential employee incorporates a two-part test for designation. The person to be designated must assist a §201.7(a)(ii) manager in the delivery of the duties described in that subdivision. (footnote omitted) Assistance alone, however, is not enough to support a designation. In addition, the person assisting the §201.7(a)(ii) manager must be one acting in a confidential capacity to that manager. The first part of the test is duty oriented, while the second is relationship oriented.

The parties do not dispute that Wadnola, as Town Supervisor, is a managerial employee, who has a major role in contract and personnel administration and in collective negotiations.<sup>4</sup> Mitchell reports to him and, as Municipal Bookkeeper, has access to, and is responsible for, all of the Town's financial records and accounts. From those records, Mitchell could accurately project how much money the Town has, or will have, available for negotiations and other related matters, such as staffing levels and overtime.<sup>5</sup> An employee is confidential who is privy to information about possible

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<sup>3</sup> 32 PERB ¶3001, at 3002 (1999).

<sup>4</sup> See, *Opinion of Counsel*, 30 PERB ¶5001 (1997).

<sup>5</sup> See, *Town of Stony Point*, 18 PERB ¶3011 (1985), *aff'g* 17 PERB ¶4070 (1984).

reductions in personnel, transfers and layoffs, which have a considerable impact on labor relations.<sup>6</sup>

Mitchell has also, as evidenced on this record, been exposed to the Town's negotiations proposals before they are relayed to Local 17. Exposure to a public employer's negotiation proposals, before they are exchanged with an employee organization, is also sufficient to warrant a confidential designation.<sup>7</sup>

We find, as did the ALJ, that Mitchell serves in a confidential capacity to Wadnola sufficient to meet the standard for designation set forth in *DeWitt*.<sup>8</sup> As the Confidential Bookkeeper to the Town Supervisor, Mitchell reports to Wadnola daily on budget and contract and personnel administration matters and is relied upon by Wadnola for her input into the preparation of the Town's budget and negotiating proposals.

Further, we find the fact that Mitchell, at the time of the hearing, had not yet assisted Wadnola in the preparation of a Town budget or in contract negotiations does not warrant a contrary conclusion. Mitchell's job description and the record testimony evidence that Mitchell has, in the past, performed the responsibilities described above and pointed to by Wadnola as duties he expects she will perform in her capacity as Municipal Bookkeeper. As we noted in *Somers Central School District*: "The correct understanding of §201.7(a) . . . is that an employee may be designated confidential if the confidential duties are already part of the employee's job description, even if

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<sup>6</sup> *South Colonie Cent. Sch. Dist.*, 28 PERB ¶3022 (1995); *City of White Plains*, 14 PERB ¶3052, *aff'g*, 14 PERB ¶4024 (1981).

<sup>7</sup> *Washingtonville Central Sch. Dist.*, 16 PERB ¶3017 (1983).

<sup>8</sup> *Supra*, note 3. In *DeWitt*, we noted that a confidential relationship could be inherent in the nature of a position or in the job description of a title sought to be designated.

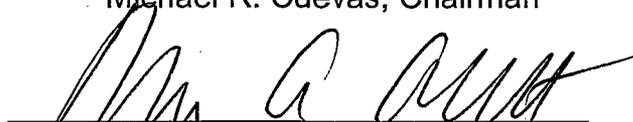
confidential assignments have not yet been performed because there has not yet been any occasion . . . to have performed them.”<sup>9</sup>

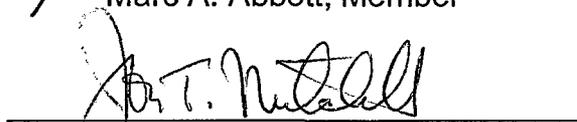
Based on the foregoing, we deny Local 17’s exceptions and affirm the decision of the ALJ.

We, therefore, grant the application and designate Ann Mitchell, Municipal Bookkeeper, as confidential.

DATED: January 23, 2003  
New York, 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

<sup>9</sup> 14 PERB ¶3058, at 3096 (1981).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**ROCHESTER POLICE LOCUST CLUB, INC.,**

Charging Party,

- and -

**CASE NO. U-22824**

**CITY OF ROCHESTER,**

Respondent.

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**TREVETT, LENWEAVER & SALZER, P.C. (LAWRENCE J. ANDOLINA  
of counsel), for Charging Party**

**LINDA S. KINGSLEY, CORPORATION COUNSEL (YVETTE  
CHANCELLOR GREEN of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge, as amended, filed by the Rochester Police Locust Club, Inc. (Club), alleging, *inter alia*, that the City of Rochester (City) violated §§209-a.1(a), (d) and (e)<sup>1</sup> of the Public Employees' Fair Employment Act (Act), when it unilaterally implemented a City-wide overtime detail as part of an "Anti-Crime Initiative" and refused to negotiate the overtime criteria and/or the impact of such criteria and also denied the Club president the right to work the overtime detail.

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<sup>1</sup> As noted in the ALJ's decision, no facts or evidence are found in the record to support an (e) violation. The ALJ dismissed the (e) allegation and no exceptions were taken.

The City, in its answer, denied the material allegations of the charge and raised certain affirmative defenses. A hearing was conducted on January 9, and June 13, 2002.

#### EXCEPTIONS

The Club filed a document purporting to contain 33 exceptions to the ALJ's decision.<sup>2</sup> The Club argues that the ALJ erred on the law and the facts.

The City filed its response in support of 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, although, with respect to the §209-a.1(a) allegation, we do so on other grounds.

#### FACTS

The facts are set forth in detail in the ALJ's decision.<sup>3</sup> We will confine our analysis to the salient facts relevant to the Club's exceptions.

On or about August 1, 2001, the Club president, Ronald G. Evangelista, was informed by the Chief of Police, Robert Duffy, that the City was about to embark on a new "Anti-Crime Initiative" which included the scheduling of voluntary overtime.<sup>4</sup>

Lt. Charles Koerner, the commanding officer in charge of Special Operations, testified without contradiction that, with respect to non-special events overtime, such as

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<sup>2</sup> The Club did not appeal the ALJ's decision dismissing the §209-a.1(d) allegation that the City refused to negotiate the impact of its decision to implement the Anti-Crime Initiative.

<sup>3</sup> 35 PERB ¶14601 (2002).

<sup>4</sup> ALJ Exhibit #1.

the DWI or Seat-Belt Initiatives, the City in the past sought volunteers.<sup>5</sup> Based upon the facts presented in support of the (d) allegation, the ALJ dismissed the charge. We concur with this determination.

On August 3, 2001, Evangelista sent a letter demanding to negotiate “the method, manner and selection process” of the officers involved in the initiative.<sup>6</sup> The Club sent subsequent correspondence, dated August 15, 2001, repeating the same demands.<sup>7</sup> The Club’s charge concluded that the City “unilaterally established overtime criteria and has refused to negotiate this issue with the Union.”

The City responded to the Club’s demand to negotiate in a telephone call from the City’s Manager of Labor Relations, Blaise Lamphier, to Evangelista. Lamphier left a message for Evangelista to return the call.<sup>8</sup> Subsequently, on August 31, 2001, Lamphier, having received no response to the telephone call, wrote to Evangelista indicating his willingness to meet with him regarding the Club’s demand to negotiate.<sup>9</sup> Lamphier testified that, on September 10, 2001 and prior to receipt of the improper practice charge from PERB on or about September 14, 2001, he met Evangelista on the street at which time he repeated the City’s interest in discussing the issue.

The Club amended its charge on February 13, 2002 to include a violation of §209-a.1(a) of the Act. The amendment specifically referred to the details of the original

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<sup>5</sup> Transcript p. 80.

<sup>6</sup> Charging Party Exhibit #2.

<sup>7</sup> Charging Party Exhibit #4 and #5.

<sup>8</sup> Transcript p. 113.

<sup>9</sup> Respondent Exhibit 3.

charge and added the conclusory statement that “the City denied Evangelista the opportunity to work overtime.”<sup>10</sup>

On June 19, 2001, Evangelista wrote to Commander John Girvin and communicated the Club’s position with respect to union officials working overtime who are on union release time. It was the Club’s position that those officials may not be discriminated against simply because of their union affiliation. Evangelista concluded the letter by stating: “[I]f the City’s position is different than the union’s, please respond accordingly so that we can bring this matter to the contract administrator for a final determination.”<sup>11</sup> On August 15, 2001, Girvin replied to Evangelista’s letter and set forth the reasons why Evangelista would not be provided the opportunity to work overtime.<sup>12</sup> The Club did not bring this dispute to the contract administrator, but thereafter filed the instant improper practice charge on August 29, 2001.

## DISCUSSION

### Refusal to Negotiate

This aspect of the charge before us alleges that the City violated §209-a.1(d) of the Act by refusing to negotiate the implementation of overtime and the impact that the anti-crime initiative might have on unit members.

The ALJ found that the decision by the City to implement such an initiative was not a mandatory subject of negotiations but was, rather, within the City’s discretion to determine the method and means to deliver its services to the public. In addition, the

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<sup>10</sup> Charging Party Exhibit #8.

<sup>11</sup> Respondent Exhibit #9.

<sup>12</sup> Respondent Exhibit #5.

ALJ found that it was the City's managerial prerogative to determine the use of its manpower in the delivery of services.<sup>13</sup> We agree.

We have determined, as the ALJ also found, that the procedures for assigning overtime to those who are eligible are mandatory subjects of negotiation.<sup>14</sup> In order for the Club to succeed under the circumstances set forth in the charge, it would have to demonstrate by a preponderance of the evidence that there has been a past practice regarding procedures for the assignment of overtime and that the City has unilaterally changed that practice.<sup>15</sup> The Club failed to do so on this record. To the contrary, the City established that its actions were consistent with the established practice by which overtime has been made available, on a volunteer basis, for similar events.<sup>16</sup>

As the decision to assign overtime is not mandatorily negotiable and the record evidences no change in the procedure for assigning such overtime, we dismiss the alleged violation of §209-a.1(d).

#### Discrimination Charge

The Club argued in its amendment adding the discrimination charge that the charge flows from the facts alleged in its original charge. Thus, the ALJ's dismissal

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<sup>13</sup> *Town of Carmel PBA v. PERB et al.*, 267 AD2d 858 (3d Dep't 1999), 31 PERB ¶3006 (1998); *Churchville-Chili Cent. Sch. Dist.*, 17 PERB ¶3055 (1984).

<sup>14</sup> *City of Peekskill, supra*. See also *Village of Mamaroneck Police Benevolent Ass'n*, 22 PERB ¶3029 (1989).

<sup>15</sup> *City of Peekskill, supra*.

<sup>16</sup> Such events are referred to as "non-special" events and include both DWI and Seat Belt Initiatives.

based upon the untimeliness of the addition of a new alleged subsection (a) violation was error.

Section 204.1(d) of the Rules authorizes an ALJ to permit a charging party to amend its charge before, during or after the conclusion of the hearing upon such terms consistent with due process. We have, therefore, accepted amendments to a charge where the respondent's actions alleged to be in violation of the Act, albeit of a different subsection, remain the same.<sup>17</sup>

However, the amendment alleged a violation of §209-a.1(a) of the Act and the original charge alleged a violation of §209-a.1(d) of the Act. Here, the Club merely pled in its amendment a conclusory allegation that the Club president was denied the right to work overtime. No additional facts which would link any conduct by the City to the Club president's exercise of his protected rights under the Act were alleged. Consequently, the improper motivation required for the finding of such a violation was not pled, nor was it established. As the amendment failed to allege facts which, if proven, would establish the alleged (a) violation, it should have been denied.<sup>18</sup>

Based on the foregoing, we deny the Club's exceptions and affirm the decision of the ALJ; albeit on other grounds, as to the alleged (a) violation.

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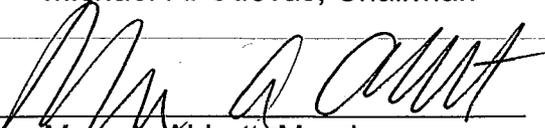
<sup>17</sup> *State of New York (DOT)*, 23 PERB ¶3005 (1990), *conf'd*, 174 AD2d 905, 24 PERB ¶7014 (3d Dep't 1991). See also *Village of Depew*, 25 PERB ¶3009 (1992), *aff'g* 24 PERB ¶4560 (1991).

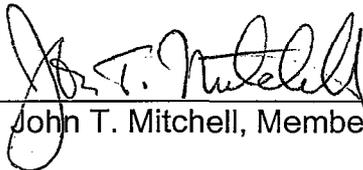
<sup>18</sup> See *Board of Ed. of the City Sch. Dist. of the City of New York and United Fed'n of Teachers (Kresz)*, 34 PERB ¶3026 (2001); *State of New York (DOCS)*, 27 PERB ¶3021 (1994).

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

DATED: January 23, 2003  
New York, New York

  
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Michael R. Cuevas, Chairman

  
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Marc A. Abbott, Member

  
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John T. Mitchell, Member

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

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In the Matter of

**SCHENECTADY-ALBANY-SCHOHARIE BOCES  
FACULTY ASSOCIATION, NYSUT, AFT, AFL-CIO,**

Charging Party,

- and -

**CASE NO. U-22898**

**CAPITAL REGION BOCES,**

Respondent.

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**MICHAEL P. ROWAN, for Charging Party**

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

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Capital Region BOCES (BOCES) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Schenectady-Albany-Schoharie BOCES Faculty Association, NYSUT, AFT, AFL-CIO (Association) alleging that the BOCES had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally increased the workload for certain teachers employed by BOCES. The ALJ found that the assignment to teachers in BOCES' New Visions program<sup>1</sup> of an English Language Arts 12 (ELA 12)

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<sup>1</sup> The program offers advanced courses in the areas of law and government, health, public communications, business and financial management, and human services to academically advanced high school students, who are college-bound. The program consists of classroom instruction offered at the BOCES and internships at a variety of businesses and institutions in the Capital Region.

class for 72 minutes per week resulted in an increase in the number of preparations per teacher and a concomitant increase in workload, in violation of the Act.

### EXCEPTIONS

The BOCES argues in its exceptions that the ALJ erred on the facts and on the law. The Association 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.

### FACTS

The facts are recited in detail in the ALJ's decision<sup>2</sup> and are referred to here only as relevant to the exceptions before us.

The workday for New Visions teachers is 8:00 a.m. to 1:45 p.m. Formal classroom instruction is provided from 8:00 a.m. to 11:30 a.m. in an integrated curriculum including English, Social Studies and two other courses relevant to the program area. Teachers have five preparations for each course: one for each of the academic areas taught and one for the internship portion of the program. The record evidences that the total preparation for each four-subject course and internship component is approximately five hours a day and that some preparation takes place during the school day, after classroom instruction, and some is required after the school day is finished.

In September 2001, the four New Visions teachers were informed that they were to begin teaching ELA 12 at the BOCES Vo Tech center. While there was some discussion between BOCES administrators, the teachers and the Association's labor

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<sup>2</sup>35 PERB ¶4579 (2002).

relations specialist at a meeting on September 14, 2001, about the manner in which the ELA 12 course would be offered, there was no negotiation over whether or not the New Visions teachers would be the instructors for the course. BOCES thereafter issued a memorandum setting forth the assignment and the activities related to the assignment, including the expectations of the course and the manner in which the New Visions teachers were to interact with the Vo Tech teachers in teaching the course. The ELA 12 course was to be taught once a week for 72 minutes or in two periods of 36 minutes each. The record evidences that teaching the ELA 12 course requires approximately two hours of preparation per week.

The Association asserts that the addition of the 72 minutes of instructional time and the two hours of preparation time per week for the ELA 12 course has increased the workload of the New Visions teachers by virtue of the fact that they already perform significant preparation off-duty due to the nature of the integrated course they teach, coupled with supervision of the internship component of the program.<sup>3</sup>

#### DISCUSSION

It is not disputed that an employer may assign additional teaching duties to teachers during unassigned work time.<sup>4</sup> What is at issue here is an alleged unilateral

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<sup>3</sup> The Association's amendment to the charge that the addition of the ELA 12 course has caused some New Visions teachers to lose their 30-minute duty-free lunch period at least once a week was dismissed by the ALJ for lack of proof. The Association has not excepted to the ALJ's decision dismissing this aspect of the amended charge and we, therefore, do not reach it.

<sup>4</sup> *Greece Cent. Sch. Dist.*, 22 PERB ¶¶3005, *aff'd* 22 PERB ¶¶ 7017 (Sup. Ct. Albany County 1989); *Savona Cent. Sch. Dist.*, 20 PERB ¶¶3055 (1987); *East Ramapo Cent. Sch. Dist.*, 17 PERB ¶¶3001 (1984).

increase in workload occasioned by the addition of the ELA 12 teaching assignment and the preparation time required by that assignment.

Where there has been no increase in workday or scheduled hours of work occasioned by the assignment of duties that are inherent to job title, the assignment of such duties is nonmandatory.<sup>5</sup> While we have held, in certain circumstances, that an increase in workload could constitute a mandatory subject of negotiations,<sup>6</sup> here, we find, unlike the ALJ, that the record does not clearly establish an increase in workload sufficient to bring the BOCES' decision to assign an additional class to the New Visions teachers within the scope of mandatory negotiations.

BOCES properly exercised its management prerogative to assign additional teaching responsibilities to New Visions teachers during the workday. That workday includes time to be used for the preparation of lessons for both the ELA 12 course and the integrated courses taught by the New Visions teachers. That the integrated course and internship supervision necessitate preparation outside the scheduled workday that may have been increased by the teaching of, and preparation for, the ELA 12 class does not make the decision to assign the ELA 12 class mandatorily negotiable, nor does it establish an increase in workload that would require negotiations on workload. The amount of preparation time for each course is not set by the BOCES at a required amount of time per class taught, preparation for instruction or supervision of interns is still within the discretion of the teacher.

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<sup>5</sup> *Greece Cent. Sch. Dist.*, *supra* note 4.

<sup>6</sup> *Edgemont Union Free Sch. Dist. at Greenburgh*, 21 PERB ¶3067 (1988); *New Rochelle Housing Auth.*, 21 PERB ¶3054 (1988).

It is, however, possible that the decision of BOCES here to assign the ELA 12 class to the New Visions teachers might have increased preparation time, might have reduced free time and might have affected any number of other mandatory subjects of negotiations. That is the precise rationale behind our decisions to require impact bargaining upon demand.

A demand for impact bargaining permits negotiation about those mandatorily negotiable effects which are inevitably or necessarily caused by an employer's exercise of a managerial prerogative. As the concept has been developed and applied, impact bargaining is actually a limited exception to an employer's duty to negotiate all terms and conditions and to an employer's corollary bargaining duty to refrain from unilateral changes with respect to those mandatorily negotiable subjects. (footnote omitted) We have permitted an employer to exercise the managerial prerogative even though the exercise of that right causes changes to occur in terms and conditions of employment because we have been persuaded that an employer cannot be denied the right to exercise the managerial right while it bargains the mandatorily negotiable effects of the managerial decision. Impact bargaining, therefore, is an accommodation between at times conflicting rights which sacrifices, to an extent and of necessity, the union's right to bargain terms and conditions of employment.<sup>7</sup>

If the assignment by BOCES of the ELA 12 class to the New Visions teachers has necessarily and directly caused changes in workload or other terms and conditions of employment, BOCES would be exposed to an obligation to negotiate, upon demand of the Association, the impact of its decision. No impact demand has yet been made by the Association.

Based on the foregoing, we grant BOCES' exceptions and we reverse the decision of the ALJ.

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<sup>7</sup> *County of Nassau (Nassau County Police Dep't)*, 27 PERB ¶3054, at 3120 (1994).

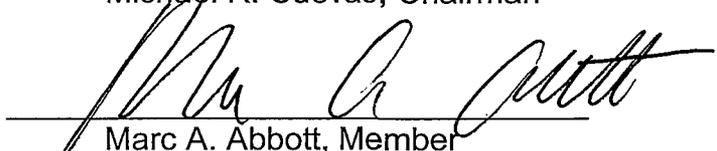
Inasmuch as the Association has failed to establish an increase in the workload of the New Visions teachers, the charge must be dismissed in its entirety. SO

ORDERED.

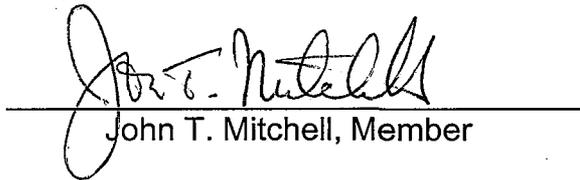
DATED: January 23, 2003  
New York, New York



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

**DRYDEN EDUCATIONAL SUPPORT PERSONNEL  
ASSOCIATION, NEA/NY, NEA,**

Charging Party,

- and -

**CASE NOS. U-22944 &  
U-22953**

**DRYDEN CENTRAL SCHOOL DISTRICT,**

Respondent.

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**JANET AXELROD, GENERAL COUNSEL (Susan Whitely of Counsel), for  
Charging Party**

**RANDY J. RAY, ESQ., for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Dryden Central School District (District) to a decision of an Administrative Law Judge (ALJ) finding that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted the exclusive work of employees in the unit represented by the Dryden Educational Support Personnel Association, NEA/NY, NEA (Association).

The Association filed two charges. The first, U-22944, alleged, *inter alia*, that the Cafeteria Manager, David Bartholomew, who is not a member of the Association, in the latter part of July and early August 2001, made certain renovations to the Middle School

cafeteria. The renovations done by Bartholomew were alleged to be exclusive bargaining unit work.

In U-22953, the second charge, the Association alleged, *inter alia*, that, during the month of August 2001, Archie Sutfin, a retired employee of the District, performed certain welding work which was exclusive bargaining unit work of the Association.

At the hearing, the District moved to dismiss the charges at the conclusion of the Association's direct case. The ALJ granted the District's motion as to U-22944 and reserved decision on U-22953. Each party filed a post-hearing brief. The ALJ thereafter found that the District had violated the Act by subcontracting the welding work that had previously been performed by unit employees.

#### EXCEPTIONS

The District excepts to the ALJ's decision, arguing that the ALJ erred on the law and the facts in finding a violation in U-22953. The Association supports the ALJ's decision. No exceptions have been taken to the ALJ's decision in U-22944; we, therefore, do not consider it.

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

#### FACTS

The facts found by the ALJ are set forth in his decision.<sup>1</sup> We will confine our review of the facts as they relate to the District's exceptions.

The Association presented two witnesses on its behalf. Billie Conger, the Association's president, testified that she met with the District's Business Manager in

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<sup>1</sup> 35 PERB ¶4589 (2002).

June 2001. At that meeting, Conger inquired about work being done in the kitchen by Bartholomew. They had a subsequent meeting on August 16, 2001, to discuss the renovation work being done.

Conger testified that:

before school gets out, around May, there's a sheet that goes around to each office where, if you are a 10-month employee, you can sign up for extra work in the summer. That list is comprised - - you put down what you'd be interested in, whether its cleaning, maintenance, clerical, whatever your interest would be . . . .<sup>2</sup>

When asked to describe the listing for maintenance on the sign-up sheet, Conger replied that ". . . [m]aintenance could do . . . they've done construction. I can't go any further than that, really."<sup>3</sup> Conger identified Bartholomew and Sutfin as the two men involved in the kitchen renovation. Conger testified that Sutfin worked in maintenance until he retired in 2000.<sup>4</sup> During the kitchen renovation (in 2001), Sutfin did some welding.<sup>5</sup>

The Association's other witness, Sutfin, testified that he has been employed about thirteen years by the District. The majority of that time he was employed as a maintenance man.<sup>6</sup> In that capacity, he had performed steel welding on a limited

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<sup>2</sup> Transcript, p. 21.

<sup>3</sup> Transcript, p. 29.

<sup>4</sup> Transcript, pp. 40-41.

<sup>5</sup> Transcript, p. 41.

<sup>6</sup> Transcript, p. 61.

basis.<sup>7</sup> When asked how often he performed welding work, he replied “[w]hen I first went to work there I welded just about everyday for about the first three months because about every piece of equipment they had was broke down.”<sup>8</sup> Sutfin also testified that he was the only maintenance man capable of performing certain tasks because of his background. He was a retired U.S. Naval Officer and, while serving in the Navy, he was an engineer for twenty-five years. Sutfin testified that, after his retirement from the District, he was contacted by Bartholomew, who was an old friend, to help out. Sutfin testified that he told Bartholomew that he would help him “. . . strictly . . . personal . . . no money or nothing.”<sup>9</sup> On cross-examination, Sutfin testified that at the time he left the District there was no one else capable of welding. Sutfin also testified that there was a lot of construction going on in the District involving outside contractors who performed welding. The outside welding involved work on capital projects, a nonunit supervisor “sweating” pipe and welding on alloys, for which the District did not possess the requisite equipment.

At the close of the Association’s direct case, the District made a motion to dismiss “on the grounds that the Association failed to state a *prima facie* case and violation of §209-a.1(d).”<sup>10</sup> The ALJ reserved decision on the motion as to U-22944 and denied the motion as to U-22953. The District then put on its case.

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<sup>7</sup> Transcript, p. 62.

<sup>8</sup> Transcript, p. 62.

<sup>9</sup> Transcript, p. 63.

<sup>10</sup> Transcript, p. 71.

### DISCUSSION

In *Niagara Frontier Transportation Authority*,<sup>11</sup> we established the standard to be used in subcontracting cases in order to determine whether the transfer of unit work to a private contractor violated §209-a.1(d) of the Act. We held that such a transfer was improper where work that had been exclusively performed by employees in the unit is subcontracted and the reassigned tasks are substantially similar to those previously performed, unless the qualifications for the job have changed significantly. Where the qualifications are found to have changed significantly, then a balancing test is invoked whereby the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other.

The District argues in its exceptions that the ALJ erred in finding that welding has been exclusive unit work and, thereby, the Association failed to establish one of the essential elements of its *prima facie* case. We agree.

As we previously stated, in *City of Rome*,<sup>12</sup> “. . . our analysis of exclusivity in cases where the unit work involves multiple tasks, multiple function jobs, or multiple locations, has come to rely upon the concept of a ‘discernible boundary’.” Consequently, in order to determine whether a discernible boundary has been

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<sup>11</sup> 18 PERB ¶3083 (1985).

<sup>12</sup> 32 PERB ¶3058, at 3140 (1999).

established around work deemed exclusive, we have looked at the nature, location and frequency of the work unit employees perform.

At issue here is the performance of welding. The record establishes only that Sutfin did extensive welding at the beginning of his career with the District, some twelve years prior to the work which forms the basis of this charge. There is no record evidence of his performing any additional welding until the at-issue work. The performance of a task, for a limited period of time, more than ten years before the next performance of that same work, is insufficient frequency in the performance of the work to establish it as “exclusive” unit work.

Further, based on the witnesses’ testimony, the work of welding was limited to Sutfin, while he was a unit employee, and, thereafter, during his retirement. Consequently, on this record, to the extent that welding was performed “in-house”, it was exclusively Sutfin’s work and not the work of the unit. We are, therefore, unable to recognize exclusivity – to draw a discernible boundary around it – that is reasonably related to the duties of unit employees, especially now that Sutfin is no longer a unit employee.<sup>13</sup>

The record lacks a coherent analysis of Sutfin’s job duties during his employment with the District, and no job description was offered into evidence and Sutfin’s testimony fails to identify the work performed that was intrinsic to his position as a maintenance man. Sutfin’s testimony regarding the frequency of welding, for example, was limited to

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<sup>13</sup> See, *Town of Brookhaven*, 27 PERB ¶3063 (1994).

the first three months of his employment in the maintenance department.<sup>14</sup> The record is, therefore, unclear regarding the exact frequency with which steel welding was performed by unit employees.<sup>15</sup> Sutfin's testimony merely established that he was capable of performing many tasks because of his experience and training as an engineer while serving in the Navy. The District, therefore, enjoyed the benefits of employing an expert in many trades, but this does not establish that welding is exclusive bargaining unit work.

In fact, the record does indicate that welding was performed by other nonunit employees. If we disregard the welding performed in conjunction with a capital project, as the ALJ did, then we have two other instances. The first of those is when a nonunit supervisor "sweated" a pipe (the ALJ's opinion as to whether this constituted welding is contrary to the witness' testimony and improper as without basis in the record) and, second, when welding was needed to be done on alloys (aluminum) other than steel. The fact that the District did not possess the equipment to do alloy welding, or that Sutfin was not trained, is irrelevant.<sup>16</sup> There is no basis in this record to conclude that steel welding was "routine" or to draw a boundary around "steel" welding as the ALJ did – there is simply insufficient evidence to distinguish the welding performed by Sutfin from that performed by others. We, therefore, do not draw a discernible boundary

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<sup>14</sup> Transcript, p. 62.

<sup>15</sup> *City of Buffalo*, 24 PERB ¶¶3043 (1991); *Otselic Valley Cent. Sch. Dist.*, 19 PERB ¶¶3065 (1986).

<sup>16</sup> *NYS Thruway Auth.*, 33 PERB ¶¶3017 (2000), *confirmed sub nom.*, *NYS Thruway Auth. v. Cuevas*, 279 AD2d 851, 34 PERB ¶¶7003 (3d Dep't 2001).

around “steel” welding and cannot find it to be exclusive work of the bargaining unit. Hence, no violation of §209-a.1(d) can be found.

Based upon the foregoing, we grant the District’s exceptions and reverse the ALJ’s determination.

NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is, dismissed.

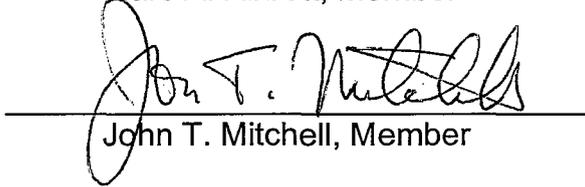
DATED: January 23, 2003  
New York, New York



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.,**

Petitioner,

-and-

**CASE NO. C-5247**

**TOWN OF LOCKPORT,**

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

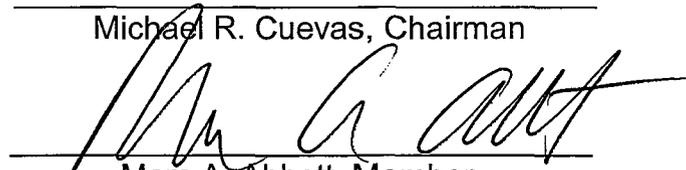
Included: All full-time and part-time employees in the following titles:  
Court clerk, clerk (water), clerk (building and assessing), data processing control clerk, deputy town clerk/deputy registrar of vital statistics, deputy building inspector and deputy assessor.

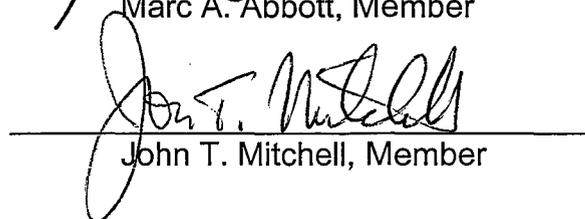
Excluded: Assessor, building inspector and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc. 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: January 23, 2003  
New York, New York

  
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Michael R. Cuevas, Chairman

  
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Marc A. Abbott, Member

  
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John T. Mitchell, Member

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

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In the Matter of

**DUTCHESS COUNTY BOCES SUPPORT STAFF  
ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-5252**

**DUTCHESS COUNTY BOCES,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the Dutchess County BOCES Support Staff Association, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Account Clerk, Account Clerk/Typist, AV Repair Tech, Bus Driver/Maintenance Worker, Cook, Courier, Custodial Worker, Custodial Worker/Courier, Custodial Worker/Groundskeeper, Food Service Helper, Food Service Helper (Lead), Graphics Aide, Head Maintenance Mechanic, Instructional Systems Research Specialist

(Tech I), Instructional Tech Support Assistant, Instructional Technology Acquisition Specialist, Instructional Technology Systems Specialist (Tech II), Intake Worker, Job Coach, Jr. Accountant, Maint.-Coop. Plumber, Maint.-Coop.-Electrician II, Maint.-Coop./Carpenter, Maintenance Helper, Maintenance Worker, Microcomputer Technician, Personnel Assistant, Program Assistant, Receiving Clerk, Receptionist/Typist, Sr. Microcomputer Technician, Stenographer, Transportation Broker, Typist.

Excluded: Job titles represented by the Dutchess County BOCES Faculty Association, the BOCES Administrative and Supervisory Association of Dutchess County, Dutchess County BOCES Adult Education Instructors' Association, the Instructional Systems Research Specialist (Supervisor) title currently held by Rudi Arcardi, EAP Counselor, titles deemed managerial and confidential under the Act, and all other employees.

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

DATED: January 23, 2003  
New York, New York

  
Michael R. Cuevas, Chairman

  
Marc A. Abbott, Member

  
John T. Mitchell, Member