STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WINSTON E. BRATHWAITE,

Charging Party,

- and - **CASE NO. U-22968**

TRANSPORT WORKERS UNION, LOCAL 100,

Respondent,

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

WINSTON E. BRATHWAITE, *pro se*

KENNEDY, SCHWARTZ & CURE (ELIZABETH PILECKI of counsel), for Respondent

MARTIN B. SCHNABEL, VICE-PRESIDENT AND GENERAL COUNSEL (JOYCE RACHEL ELLMAN of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Winston E. Brathwaite to a decision of an Administrative Law Judge (ALJ) dismissing Brathwaite's improper practice charge, which alleged, as amended, that the Transport Workers Union, Local 100 (TWU) violated §209-a.2(c)[1] of the Public Employees' Fair Employment Act (Act) when it failed

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[1] The ALJ confirmed the Director's ruling finding deficient the alleged violations of §§209-a.1(a), (d) and (e) of the Act. Based upon our decision herein, we need not reach this issue.

to submit a doctor's note to the New York City Transit Authority (Authority) that would have prevented dismissal of his disciplinary grievance and the subsequent imposition of discipline. The ALJ determined that Brathwaite had failed to prove that the TWU's actions were arbitrary, discriminatory or taken in bad faith.[2]

EXCEPTIONS

Brathwaite filed exceptions to the ALJ's decision alleging, *inter alia*, that the ALJ erred in her findings of fact and conclusions of law. In opposition to Brathwaite's exceptions, TWU and the Authority have raised an objection that they were not served with the exceptions as required by §213.2(a) of our Rules of Procedure (Rules).

We deny the exceptions on procedural grounds.

DISCUSSION

Section 213.2(a) of our Rules requires a party filing exceptions to serve those exceptions on all other parties and to file proof of such service with us. The record indicates that Brathwaite filed his exceptions with us on November 25, 2002. However, he failed to file proof of service on the other parties at that time. On December 30, 2002, counsel to the Board requested proof of service on the other parties to be filed with the Board on or before January 6, 2003. Thereafter, Brathwaite mailed to us the receipts of service of the exceptions by mail carrier on the TWU and the Authority dated January 4, 2003.

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[2] See *Civil Service Employees Association, Inc., Local 1000 v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep't 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988). *See also Dist. Council 37, AFSCME (Gonzalez)*, 28 PERB ¶3062 (1995).

We have consistently held that service is a component of the timely filing of exceptions, and we will deny exceptions that have not been timely served.[3] Thus, Brathwaite's exceptions, not having been timely served on the TWU and the Authority, must be denied.

Based upon the foregoing, we need not reach the merits of Brathwaite's exceptions. Therefore, for the reasons stated herein, the exceptions are denied, and the ALJ's decision dismissing the improper practice charge is affirmed.

SO ORDERED.

DATED: February 28, 2003
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[3] *Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO*, 35 PERB ¶3012 (2002).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SARA-ANN P. FEARON,

Charging Party,

- and - **CASE NO. U-22693**

UNITED FEDERATION OF TEACHERS,

Respondent,

- and -

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

Employer.

SHELLMAN D. JOHNSON, for Charging Party

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

DALE C. KUTZBACH, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE BARGAINING (MICHELE A. BAPTISTE of counsel), for Employer

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Sara-Ann P. Fearon to a decision of an Administrative Law Judge (ALJ) dismissing her improper practice charge alleging that the United Federation of Teachers (UFT) breached its duty of fair representation in violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it failed to represent Fearon in a Step 1 grievance and, thereafter, failed to respond to Fearon's request for representation in a Step 2 grievance.

The UFT and the Board of Education of the City School District of the City of New York (District)[1] filed answers denying the allegations in the charge. The District also raised the affirmative defenses of failure to file a notice of claim and timeliness.

Fearon, through her representative, Shellman D. Johnson, filed a motion to preclude certain allegations set forth in UFT's answer. The ALJ denied the motion prior to the hearing on March 21, 2002.

EXCEPTIONS

Fearon excepts to the ALJ's decision on the law and the facts. UFT interposed a response to the exceptions 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

The facts are set forth in detail in the ALJ decision.[2] We will only review the salient facts relevant to the exceptions.

DISCUSSION

Fearon contends that:

1. The UFT Chapter Chair, Paul DePace, failed to initiate a procedure to compel the principal of Fearon's school to comply with Article 7(c) 1 a of the collective bargaining agreement.
2. The union failed to initiate a procedure to compel the principal to comply with the agreement reached at the September 14, 1998 conciliation held pursuant to Article 24A of the collective bargaining agreement.

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[1] Pursuant to §209-a.3 of the Act, the District is made a party to this proceeding.

[2] 35 PERB ¶4606 (2002).

This simple case has been made complex by the many permutations which this issue has taken. Fearon has engaged in a long-standing controversy with the UFT and the instant charge is but another example of the parties' disagreement over the extent to which UFT must represent Fearon.[3] Fearon, in this charge, again alleges that the UFT failed to represent her in a grievance alleging the District's violation of the collective bargaining agreement with UFT.

The ALJ noted in her decision that the evidence did not establish a violation of the Act. We agree. Fearon's disagreement with UFT is summarized in her opening statement and her exhibits wherein she refers to UFT's failure to implement the 1998 conciliation agreement.[4]

We previously held in *United Federation of Teachers (Fearon)*[5], that our jurisdiction is limited to violations of the Act and not violations of the parties' collective bargaining agreement. Fearon testified on cross-examination that, after learning from the UFT representative that her principal refused to hold a Step 1 grievance hearing, she filed a Step 2 grievance on her own. She failed to inform the UFT district office responsible for Step 2 grievances of this action, but faxed a copy to the UFT borough office instead. Fearon again took unilateral action by filing the instant improper practice charge before the District had scheduled her Step 2 grievance. Fearon testified that she chose not to comply with the grievance procedure set forth in the UFT contract.[6] In faxing the Step 2 grievance form to the borough office, Fearon sought to have a certain

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[3] *See United Federation of Teachers (Fearon)*, 34 PERB ¶3031 (2001); *United Federation of Teachers (Fearon)*, 33 PERB ¶3003 (2000).

[4] Charging Party Exhibit #4.

[5] 33 PERB ¶3003 (2000).

[6] Transcript, p. 75.

UFT borough representative, who had handled a grievance for her in the past represent her, rather than her district representative with whom she had had a prior disagreement. The ALJ correctly noted that "a union is and must be afforded a wide range of reasonableness in making decisions associated with the processing of a grievance."[7] In this matter, it was Fearon's actions and not UFT's that resulted in the confusion that led to UFT not processing her grievance and, therefore, UFT cannot be found to have violated its duty of fair representation.

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

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

DATED: February 28, 2003
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[7] *Public Employees Fed'n, AFL-CIO and State of New York (Dep't of Health) (Reese)*, 29 PERB ¶3027, at 3062 (1996).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

- and -

CASE NO. U-23370

GREAT NECK WATER POLLUTION CONTROL DISTRICT,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN CRAIN of counsel), for Charging Party

KREISBERG, MAITLAND & THORNHILL, LLP (JEFFREY L. KREISBERG of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) that found a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the Great Neck Water Pollution Control District (District) unilaterally discontinued a past practice of allowing Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) unit members to use the Personnel Facilities Building (personnel building) during breaks.

EXCEPTIONS

The District filed exceptions to the ALJ's decision, on the law and the facts. CSEA filed a 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 ALJ's decision.

FACTS

The facts are set forth in detail in the ALJ's decision.[1] We will confine our analysis to the salient facts relevant to the District's exceptions.

The parties are signatories to a collective bargaining agreement covering the period January 1, 1999 through December 31, 2001.[2] Article V, subd. B of the agreement states that "[A]ny employee working an afternoon shift or a weekend shift shall not leave the grounds of the District for the meal break."

Article XL entitled "Past Practices" states that:

> The District will maintain its past practices with regard to (1) its employees possessing and maintaining drivers licenses in good standing; and (2) tuition reimbursements. The District's past practices regarding its employees possessing and maintaining drivers licenses in good standing and tuition reimbursements shall be set forth in the work rules promulgated in accordance with Article XXXI of this Agreement.

Article XLIII entitled "Management of the District" states that:

> Subject only to the express provisions contained in this agreement, the District shall continue to have sole right to manage and operate its business and property and to direct its working force, including but not limited to, effecting any changes in the nature or scope of the business, or method or system of operating the same, the consolidation or change in the organization of departments, the location of work duties, the selecting and directing of the working force in accordance with the requirements determined by management, the changing of job titles (to the extent permitted by law), the creation, modification or discontinuance of job assignments, the employment of and assignment of employees, and the taking of such measures as the District may determine to be necessary to the orderly, efficient and economical operation of the District's facilities.
>
> Nothing herein shall be construed to prevent the Association from asserting or processing any right it may have under the Public

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[1] 35 PERB ¶4610 (2002).

[2] Joint Exhibit #1.

> Employment Relations Act or general provisions of the law arising out of the District's exercise of any management right under this Article.

The witnesses for both CSEA, Gregory O'Connor, Unit President, and for the District, Joseph William Roesch, Superintendent, testified that the personnel building had been used exclusively by CSEA members since 1990. The District provided the use of this building to its employees without any reference to such use in the parties' collective bargaining agreement.

On April 9, 1999, Roesch sent a memorandum to the Board of Commissioners detailing an investigation that he conducted into a broken window in the kitchen/lounge area of the personnel building. On December 14, 2000, counsel for the District sent a memorandum to the Board of Commissioners. The memorandum indicates that Roesch and the counsel met with representatives of CSEA on December 6, 2000 and informed them that any further damage or vandalism in the personnel building would not be tolerated and that any recurrence would result in the loss of use of the building to CSEA members.

On April 8, 2002, Roesch sent a memorandum to all staff, Board of Commissioners, counsel for the District and CSEA that, effective April 19, 2002, the personnel building was off limits to staff. The reason given in the memorandum was the damage done to the building over an extended period of time.

On May 1, 2002, CSEA filed the instant improper practice charge alleging a violation of §§209-a.1(d) and (e) of the Act in that:

> On or about April 19, 2002 the [District] unilaterally cancelled a past practice which provided a furnished staff building used by the staff on breaks. This came about because the unit officers and members resisted working out of title. The union members are being discriminated against as the employer's action came after the members had a labor management meeting with the commissioners where they

> complained of conditions at the District, this meeting to take place on or about April 11, 2002.

On May 16, 2002, the District filed an answer that denied the material allegations of the charge and interposed affirmative defenses. On May 22, 2002, Roesch sent a memorandum to the Board of Commissioners itemizing the damage done to the personnel building from March 26, 1998 to December 14, 2001, along with other miscellaneous damage repaired. On May 30, 2002, an ALJ advised CSEA that, among other reasons, the §209-a.1(e) violation would not be processed because it failed to allege facts upon which to base such a charge. The ALJ directed CSEA to clarify whether it would proceed on the theory of a unilateral change in past practice (§209-a.1(d)) or whether there is an additional charge of discrimination based upon another section of the Act.

On June 11, 2002, CSEA informed the ALJ that it was proceeding on the theory that the District violated §§209-a.1(a), (c) and (d) of the Act. CSEA thus amended its charge to remove the (e) violation and add the (a) and (c) violations.[3]
At the hearing held on July 30, 2002, counsel for CSEA advised the ALJ that the only specification in issue is the allegation the District violated §209-a.1(d) of the Act. Counsel for the District acknowledged this change and consented thereto.

DISCUSSION

Under appropriate circumstances, the employees' unconditional use of the employer's facilities for breaks is a term and condition of employment and a mandatory subject of negotiation.[4]

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[3] On July 18, 2002, CSEA asked the ALJ to further amend the charge to delete the name of Deena Lesser, Chairperson, from the name of the ernployer.

An employer's duty to negotiate in good faith includes an obligation to continue past practices that involve mandatory subjects of negotiation, even in the absence of a provision to that effect in the collective bargaining agreement.[5] The ALJ correctly stated the test to prove the existence of a past practice.[6] There is no question on this record that the District provided the personnel building to CSEA unit members for their use during break periods for over ten years and unit employees could reasonably believe this long-standing practice would continue.

The District alleges in its answer that CSEA representatives agreed and consented to the closing of the personnel building. However, the record evidence does not support this allegation. O'Connor testified that he never agreed to the District's decision to discontinue the use of the building as an employee lounge by CSEA members. Significantly, Roesch also testified unequivocally that O'Connor never agreed to the District's decision.

We have consistently held that a party to a bargaining relationship who seeks a change in a term and condition of employment must do so through collective negotiations.[7] A public employer's duty to seek negotiations over a change in a mandatory subject is not shifted to the employee organization simply by the employer's announcement that it is going to implement the change.[8]

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[4] *County of Nassau*, 32 PERB ¶3005 (1999).

[5] *State of New York (Dep't of Corr. Serv.-Wende Corr. Fac.)*, 33 PERB ¶3022 (2000).

[6] *Bellmore Union Free Sch. Dist.*, 34 PERB ¶3009 (2001).

[7] *County of Orange*, 12 PERB ¶3114 (1979).

[8] *City of Niagara Falls*, 31 PERB ¶3085 (1998).

The District, frustrated by its perception of the employees' misuse of the personnel building, decided to discontinue the employees' use of the building, a benefit that it had conferred upon the employees. However, instead of seeking to negotiate a change in this term and condition of employment that had ripened into a practice, the District announced at its meeting on April 8, 2002 with the CSEA representatives that it intended to discontinue the use of the building by employees effective April 19, 2002. Since the use of the building represented an economic benefit to the employees and, therefore, a mandatory subject of negotiation, CSEA was not obligated to demand negotiations over the change.[9] Consequently, the District's unilateral action taken on April 19, 2002 to discontinue the use of the personnel building as an employee lounge for District employees in the CSEA bargaining unit resulted in a violation of the Act.

Based on the foregoing, we find that the District violated §209-a.1(d) of the Act by unilaterally discontinuing the past practice of providing the personnel building for the use of District employees in the CSEA bargaining unit.

IT IS, THEREFORE, ORDERED that the District shall:

1. Forthwith restore the past practice of allowing the unit members to use the Personnel Facilities Building during break times;
2. Cease and desist from unilaterally rescinding the past practice of allowing the unit members to use the Personnel Facilities Building during break times;

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[9] *Wappingers Cent. Sch. Dist.*, 19 PERB ¶3037 (1986). *See also County of Orange, supra,* note 7.

3. Make whole unit employees for any loss of pay or benefits by reason of the District's failure of allowing the unit members to use the Personnel Facilities Building during break times;
4. Forthwith sign and post the attached notice at all locations customarily used to communicate with CSEA bargaining unit members.

DATED: February 28, 2003
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

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 of the Great Neck Water Pollution Control District (District) in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the District will:

1. Forthwith restore the past practice of allowing the unit members to use the Personnel Facilities Building during break times;

2. Not unilaterally rescind the past practice of allowing the unit members to use the Personnel Facilities Building during break times;

3. Forthwith make whole unit employees for any loss of pay or benefits by reason of the District's failure of allowing the unit members to use the Personnel Facilities Building during break times.

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

Great Neck Water Pollution Control District

. . . . . .

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

In the Matter of

INEZ ZEIGLER,

Charging Party,

- and - **CASE NO. U-23094**

DISTRICT COUNCIL 37, AFSCME,

Respondent,

- and -

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

Employer.

INEZ ZEIGLER, *pro se*

JOEL GILLER, GENERAL COUNSEL (KIM HSUEH of counsel), for Respondent

ROBERT WATERS, GENERAL COUNSEL (ORINTHIA E. PERKINS of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Inez Zeigler to a decision of an Administrative Law Judge (ALJ), dismissing her improper practice charge that alleged that District Council 37, AFSCME (DC37) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it failed to file a grievance on her behalf and then failed to respond to her inquiries. The Board of Education of the City School District of the City of New York (District), Ziegler's employer, is made a party by virtue of §209-a.3 of the Act.

The ALJ found that Ziegler, a substitute school aide, was not in the bargaining unit represented by DC37 and that, therefore, DC37 owed her no duty of fair representation. To the extent that the charge was found to be timely, the ALJ found that DC37 had undertaken initially to assist Ziegler and had acted in a reasonable manner.

EXCEPTIONS

Ziegler excepts to the ALJ's decision by a letter dated December 10, 2002. The exceptions were not served on the other parties to this proceeding. Ziegler was directed to file proof of service with the Board by January 6, 2003. No proof of service has been received from Ziegler.

We deny the exceptions on procedural grounds.

DISCUSSION

Section 213.2(a) of the Rules of Procedure (Rules) requires a party filing exceptions with the Board to also serve those exceptions on all other parties within the same fifteen working day period as provided for filing with the Board and, in addition, to file proof of such service with the Board. It is clear that Ziegler did not serve a copy of the exceptions on either DC37 or the District. We have consistently held that timely service upon other parties is a component of timely filing.[1] We will deny exceptions that have not been timely served, even if no objection to failure of service is received from the other parties.[2]

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[1] *Civil Service Employees Ass'n, Inc., Local 1000, AFSCME, AFL-CIO (Gore)*, 35 PERB ¶3012 (2002); *City of Watervliet*, 30 PERB ¶3024 (1997); *Ballston Spa Educ. Ass'n and Ballston Spa Cent. Sch. Dist.*, 25 PERB ¶3084 (1992); *United Fed'n of Teachers (Costabile)*, 25 PERB ¶3034 (1992).

[2] *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶3037 (2002).

Based upon the foregoing, we need not reach the merits of Zeigler's exceptions. Thus, for the reasons stated herein, the exceptions are denied.

SO ORDERED.

DATED: February 28, 2003
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Petitioner,

- and - **CASE NO. CP-533**

STATE OF NEW YORK,

Employer.

WILLIAM P. SEAMON, GENERAL COUNSEL (STEVEN M. KLEIN of counsel), for Petitioner

WALTER J. PELLEGRINI, GENERAL COUNSEL (WILLIAM L. BUSLER of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (State) to a decision of the Director of Public Employment Practices and Representation (Director), pursuant to a unit clarification/unit placement petition filed by the Public Employees Federation, AFL-CIO (PEF), alleging that the title of Forester 4 is in or should be added to the unit of Professional, Scientific and Technical Employees (PS&T Unit) represented by PEF.

EXCEPTIONS

The State excepts to the Director's determination, arguing that the Director erred on the facts and law in finding that the Forester 4 is not a managerial employee within

the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act).[1] PEF supports the Director's decision.

Based upon our review of the record and our consideration of the parties' arguments, we remand the case to the Director for further processing.

FACTS

Bruce Williamson is the only incumbent in the title of Forester 4. The title was preliminarily classified by the State as a managerial employee effective July 24, 1997. Williamson was named as the bureau chief of the Department of Environmental Conservation (DEC) Bureau of Private Land Services (Bureau) in December 1998.

PEF filed a unit clarification/unit placement petition on June 19, 1998, objecting to the State's preliminary classification as managerial or confidential of several titles and alleging that the titles either are, or should be placed, in the PS&T unit. The parties reached agreement as to all of the titles named in the petition, except for the Forester 4. That title was the subject of a hearing held on May 7, 2002.

PEF and the State are parties to an agreement that provides that upon the creation of a new title or its substantial alteration, the State may initially designate the

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[1] 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)."

title as managerial or confidential.[2] Pursuant to the agreement, PEF may file objection to the initial designation, which is usually accomplished by way of a unit clarification/unit placement petition.[3] PEF did so with this petition. At the hearing held on May 7, 2002, at the direction of the Director, the State put on evidence in support of its assertion that Williamson is a managerial employee by virtue of his policy-making role. PEF put on no direct case.

DISCUSSION

Representation proceedings are fundamentally investigations conducted by PERB.[4] A unit placement petition is a mini-representation proceeding, calling only for a nonadversarial investigation and application of the statutory uniting criteria.[5] In a unit clarification petition, however, the petitioner has the burden of proving that the at-issue title possesses a community of interest with the other positions in the bargaining unit.[6]

Here, the matter came before the Director as a unit clarification/unit placement petition. There is no evidence in the record as to whether the title of Forester 4 was in the PS&T unit and was thereafter classified by the State as managerial because of a substantial alteration in the duties and responsibilities of the title or is a newly-created title. PEF did not specify under which theory it asserted that the title of Forester 4 is or

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[2] *State of New York*, 6 PERB ¶3019 (1973). PEF and the State agreed to continue the practice in their Board-approved agreement of July 31, 1984.

[3] *State of New York (GOER)*, 26 PERB ¶4063 (1993); *State of New York (GOER)*, 23 PERB ¶4022 (1990).

[4] *Matter of Halley*, 30 PERB ¶3023 (1997).

[5] *Monroe-Woodbury Cent. Sch. Dist.*, 33 PERB ¶3007 (2000); *General Brown Cent. Sch. Dist.*, 28 PERB ¶3065 (1995).

[6] *State of New York (Dep't of Audit and Control)*, 24 PERB ¶3019 (1991).

should be in the PS&T unit. The record does not clarify this issue because only the State introduced any evidence regarding the duties of the Forester 4 and that evidence pertained only to the alleged managerial duties of the title. The record also does not reveal why the State was called upon to present its case first, which would be the proper order of proof in a managerial/confidential application and perhaps in a unit placement petition, but not necessarily in a unit clarification petition.

As the Director's decision does not address these issues and is silent as to the manner in which this case was processed and the rationale for the manner in which it was litigated, we are unable to decide the underlying issue in the matter: whether the title of Forester 4 is in the PS&T unit, is appropriately placed there or is appropriately excluded from the PS&T unit as a managerial employee.

We find, therefore, that matter should be remanded to the Director for further development of the record and for such further processing as is consistent with this decision.

SO ORDERED.

DATED: February 28, 2003
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

THOMAS ABRAHAM,

Charging Party,

- and -

CASE NO. U-22012

TRANSPORT WORKERS UNION, LOCAL 100,

Respondent,

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

PETER L. GALE, ESQ., for Charging Party

KENNEDY, SCHWARTZ & CURE (ELIZABETH PILECKI of counsel), for Respondent

MARTIN B. SCHNABEL, VICE-PRESIDENT AND GENERAL COUNSEL (DANIEL TOPPER of counsel), for Employer

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Thomas Abraham to a decision of an Administrative Law Judge (ALJ) dismissing Abraham's improper practice charge alleging, as amended, that the New York City Transit Authority (NYCTA) and the Transit Workers Union, Local 100 (TWU) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when the NYCTA terminated

his employment[1] and the TWU failed to request an adjournment or postponement of his Step 1 disciplinary hearings.

EXCEPTIONS

Abraham excepted on the grounds that the determination was contrary to the law and the evidence. NYCTA filed a response in support of the ALJ's decision on the merits and a cross-exception alleging that the ALJ's dismissal of its timeliness defense was in error.

Based on our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ on the dismissal of the TWU's timeliness defense and would affirm the ALJ on the merits, if it were necessary to reach them.

FACTS

Hearings took place on January 8, 2002, March 19, 2002, and May 13, 2002, at which time Abraham presented his evidence. A detailed recitation of the facts is set forth in the ALJ's decision.[2] We adopt the ALJ's findings of fact and credibility determination as our own, but will confine our analysis to the salient facts relevant to our resolution of the issues.

Abraham charged that the TWU breached its duty of fair representation by failing to properly advise and fully assist him in his efforts to defend a Disciplinary Action Notification (DAN) that resulted in his termination from employment with

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[1] The NYCTA is a statutory party pursuant to §209-a.3 of the Act. Abraham's allegation that the NYCTA violated §209-a.1(d) of the Act was not prosecuted, upon an initial determination of deficiency, and is not before us.

[2] 35 PERB ¶4611 (2002).

the NYCTA. Abraham claims that the TWU should have sought an adjournment or postponement of the Step 1 hearings scheduled by the NYCTA on the DAN because he was in India at the time, under a doctor's care and unable to arrange for a flight to New York to appear. Abraham testified that he called the TWU from India when he received the DAN a couple of days prior to the scheduled hearings and was told by TWU representative, Arnold Cherry, that he would "take care" of the matter. Although this occurred in August 1999, Abraham claimed that he was unaware that the TWU could have requested that his hearings be "laid over" or "held in abeyance" until June 2000 when another TWU representative, Kagan, became involved with his case.

NYCTA's witnesses[3] testified that the DAN issued to Abraham was consistent with the NYCTA's procedure in cases where an employee is absent without leave (AWOL). The NYCTA witnesses testified that requests for adjournments of these types of Step 1 hearings are not granted; that the DAN was issued with two, pre-scheduled, Step 1 hearing dates, in accord with NYCTA practice; that when an employee is unable or unwilling to appear, the NYCTA may impose the penalty sought of termination of employment and that the employee may then request an abandonment hearing to present evidence and to appeal the termination. The NYCTA witnesses disputed Abraham's and Kagan's claims that the Step 1 hearings could have been "laid over" or "held in abeyance". The TWU appeared for Abraham at the Step 1 hearings, notified him

[3] The ALJ credited the testimony of these witnesses over Abraham's witness, Marc Kagen. There is nothing in the record which warrants disturbing the ALJ's credibility resolution.

of the outcome by letter dated August 20, 1999 and requested an abandonment hearing on his behalf. Upon his return from India, Abraham met with TWU officials and was advised that he must personally appear at the abandonment hearing when scheduled. Despite this advice, Abraham returned to India and failed to appear at his abandonment hearing. After an adverse ruling from the abandonment hearing, Abraham's case was then appealed to arbitration, where Abraham was again represented by the TWU. The appeal was heard by the Tripartite Arbitration Board, which sustained the penalty of dismissal in a June 8, 2000 decision. Abraham filed his charge with us on October 6, 2000.

DISCUSSION

Upon our review of the record, we find that the ALJ erred in failing to dismiss the petition as untimely. Were we to reach the merits, we would concur with the ALJ that Abraham failed to make out a *prima facie* showing of arbitrary, discriminatory or bad faith conduct on the part of the TWU.[4]

Our Rules of Procedure (Rules) require that a charging party file a charge within four months of the action alleged to constitute an improper practice.[5] As a general rule, in a duty of fair representation case, the time runs from the date the union performed or failed to perform the complained of action.[6] We have

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[4] *Civil Service Employees Ass'n v. PERB*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep' 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

[5] Rules, §204.1(a)(1).

[6] *Public Employees Fed'n (Levy)*, 31 PERB ¶3090 (1998). The time for filing an improper practice charge against a union for breach of duty grounded upon alleged inadequate representation during the processing of the grievance runs

interpreted this rule to allow a party to file a charge within four months of when he or she knew or should have known that his or her request had not been granted.[7] In the instant case, Abraham knew or should have known that the adjournment of the Step 1 hearings was not "taken care of" when he received the correspondence from the NYCTA and the TWU or upon his return to New York on or about September 1, 1999, or within a reasonable time thereafter. That Abraham claims that he first learned that the Step 1 hearings could have been "laid over" or "held in abeyance" for the first time in June 2000 is irrelevant. His ignorance of the procedural rules pertaining to postponements of Step 1 hearings is also irrelevant. The fact is he knew that the hearings were not put off well before June 2000. Therefore, Abraham did not file his charge within the time limits prescribed by our Rules and the charge should have been dismissed as untimely.

Were we to reach the merits, the record evidences that the TWU handled Abraham's Step 1 hearing in a manner consistent with the NYCTA's procedures and the practice of the parties in these matters. There is no evidence of any animosity or other indicia of bad faith or discrimination by the TWU. The handling of the matter was sufficiently adequate under prevailing standards to avoid characterization as arbitrary.

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from the date of the alleged inadequate representation, not the conclusion of the underlying proceeding.

[7] *Subway-Surface Supervisors Ass'n (Sayad)*, 28 PERB ¶3070 (1995).

For the reasons set forth above, we deny Abraham's exceptions and we affirm the decision of the ALJ, as stated above, on other grounds.

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

DATED: February 28, 2003
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF POUGHKEEPSIE,

Charging Party,

- and -

CASE NO. U-23563

POUGHKEEPSIE PROFESSIONAL FIRE FIGHTERS' ASSOCIATION, LOCAL 596, IAFF, AFL-CIO-CLC,

Respondent.

PETER C. MCGINNIS, CORPORATION COUNSEL (STEPHEN J. WING of counsel), for Charging Party

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Poughkeepsie (City) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge which alleged that the Poughkeepsie Professional Fire Fighters' Association, Local 596, IAFF, AFL-CIO-CLC (Association) violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by submitting to compulsory interest arbitration several negotiations proposals which the City alleged are not mandatory subjects of negotiations.

The ALJ found that the demands were mandatory subjects of negotiations.

EXCEPTIONS

The City excepts to the ALJ's determination that the at-issue demands are mandatory, arguing that the demands are virtually identical to the demands we found to be nonmandatory in *Poughkeepsie Professional Firefighters' Association, Inc., Local 596, IAFF, AFL-CIO-CLC* (hereinafter, *Poughkeepsie 1*).[1] The Association asserts that the new demands addressed those aspects of its prior demands found to be nonmandatory in *Poughkeepsie 1* and are mandatory subjects of negotiations.

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

FACTS

The at-issue demands, which all relate to a unit member's eligibility for General Municipal Law (GML) §207-a benefits and the procedures concerning a review of such eligibility, and light duty assignments, are as follows:

Section 12

> In the event the applicant is not satisfied with the decision at the Fire Chief's level and wishes to appeal the decision, the applicant shall file within thirty days of receipt of the Fire Chief's decision a written demand for arbitration of his GML 207-a claim. The claim shall be submitted to binding arbitration pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association or the Voluntary Grievance Arbitration Rules of the New York State Public Employment Relations Board (Part 207 of the PERB Rules). In submitting the claim to arbitration, the party initiating the arbitration shall request that the administering agency forward for selection by the City and the member a list of seven arbitrators from its panel of arbitrators.
>
> The parties to the arbitration shall be the City and the member involved. All costs billed by the arbitrator and the administrative agency shall be borne equally by the City and the member. All other costs shall

[1] 33 PERB ¶3029 (2000).

be paid by the party incurring such costs, i.e., witnesses, exhibits, transcripts, etc.

Section 13

The Arbitrator shall have the authority to review the claim of entitlement to GML 207-a benefits. The Arbitrator shall have the authority to consider and decide all allegations and defenses made with regard to the GML 207-a claim, including but not limited to assertions regarding the timeliness of the GML 207-a claim. In the event of a dispute between the parties as to the nature of the proceeding, the Arbitrator shall first decide whether the proceeding presents an issue of an applicant's initial entitlement to GML 207-a benefits or whether the proceeding presents an issue of termination of GML 207-a benefits. The burden of proceeding with evidence as to the nature of the issue(s) presented shall be on the member. In the event the Arbitrator decides that the matter presents an initial GML 207-a claim, the member shall have the burden of proof by a preponderance of the evidence that he is entitled to receive the benefits set forth in GML 207-a with respect to an injury alleged to have occurred in the performance of his duties or to a sickness resulting from the performance of duties which necessitated medical or other lawful remedial treatment. In the event the Arbitrator decides the matter presents a termination of GML 207-a benefits, the City shall have the burden of proof by a preponderance of the evidence that the member is no longer eligible for GML 207-a benefits.

The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this procedure. The Arbitrator shall have no authority to make a decision on any issue not submitted or raised by the parties.

The decision and award of the Arbitrator shall be final and binding on all the parties.

Section 18

In the event the member is not satisfied with the decision at the Fire Chief's level and wishes to appeal, the member shall file within thirty days of receipt of the Fire Chief or designee's decision a written demand for arbitration of his termination of GML 207-a benefits and status. The claim shall be submitted to binding arbitration pursuant to the Voluntary Labor Arbitration Rules of the American Arbitration Association or the Voluntary Grievance Arbitration Rules of the New York State Public Employment Relations Board (Part 207 of the PERB Rules). In submitting the claim to arbitration, the party initiating the arbitration shall request that the

administering agency forward for selection by the City and the member a list of seven arbitrators from its panel of arbitrators.

The parties to the arbitration shall be the City and the member involved. All costs billed by the arbitrator and the administrative agency shall be borne equally by the City and the member. All other costs shall be paid by the party incurring such costs, i.e., witnesses, exhibits, transcripts, etc.

Section 19

The Arbitrator shall have the authority to review the claim of continued entitlement to GML 207-a benefits. The Arbitrator shall have authority to consider and decide all allegations and defenses made with regard to the GML 207-a claim, including but not limited to assertions regarding the timeliness of the GML 207-a claim. In the event of a dispute between the parties as to the nature of the proceeding, the Arbitrator shall first decide whether the proceeding presents an issue of an applicant's initial entitlement to GML 207-a benefits or whether the proceeding presents an issue of termination of GML 207-a benefits. The burden of proceeding with evidence as to the nature of the issue(s) presented shall be on the member. In the event the Arbitrator decides that the matter presents an initial GML 207-a claim, the member shall have the burden of proof by a preponderance of the evidence that he is entitled to receive the benefits set forth in GML 207-a with respect to an injury alleged to have occurred in the performance of his duties which necessitated medical or other lawful remedial treatment. In the event the Arbitrator decides the matter presents a termination of GML 207-a benefits, the City shall have the burden of proof by a preponderance of the evidence that the member is no longer eligible for GML 207-a benefits.

The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this procedure. The Arbitrator shall have no authority to make a decision on any issue not submitted or raised by the parties.

The decision and award of the Arbitrator shall be final and binding on the parties.

Section 21

If the member disputes the light duty determination, he may appeal the determination using the procedures set forth in Sections 17, 18 and 19. Any such appeal must include the factual basis for the appeal, including any medical reports that dispute the light duty determination.

Section 22

> Provided the employee files a timely appeal that complies with Section 21, the member's GML 207-a benefits shall continue until the Arbitrator renders a decision or the member abandons the appeal.

DISCUSSION

At issue here is whether the Association's demands seek review of the City's determination regarding eligibility for GML §207-a benefits or whether the demands seek review of the employee's underlying claims for GML §207-a benefits. In *City of Watertown* (hereinafter *Watertown*)[2], we determined that the PBA demand acknowledged the City's right to make the initial determination and merely requested that any such dispute over that initial determination be processed to arbitration pursuant to PERB's Voluntary Dispute Resolution Procedure. The demand was a substitute appeal procedure in order to avoid commencing an Article 78 proceeding, and was found on that basis to be a mandatory subject of negotiations. Here, section 12 of the Association's proposals also seeks arbitration, not of the City's initial determination of ineligibility, but of the employee's underlying GML §207-a claim. The ALJ erred in determining that the proposal seeks a review of the City's determination when the language in the section clearly seeks arbitration of the claim itself. Because the demand still seeks a redetermination of the merits of the claim without any recognition of, or reference to, the employers' statutory right to make the initial determination, it is still, in essence, a demand for a *de novo* review.

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[2] 30 PERB ¶ 3072 (1997), *confirmed*, 31 PERB ¶ 7013 (Sup. Ct. Albany County 1998), *rev'd*, 263 AD2d 797, 32 PERB ¶ 7016 (3d Dep't 1999), *motion for leave to appeal granted*, 94 NY2d 751 (1999), 33 PERB ¶ 7003, *rev'd*, 95 NY2d 73, 33 PERB ¶7007 (2000).

Here, the Association's proposal regarding Section 12 is not a substitute for an Article 78 review, but a procedure for a determination on the merits of the employee's claim of eligibility for benefits. That this is the Association's intent is made clear by the language of Section 13, which, among other things, gives the arbitrator the authority to determine the claim of entitlement to GML §207-a benefits and sets forth the scope of the arbitrator's jurisdiction and the employee's and City's burdens of proof. This demand is, likewise, nonmandatory.

A similar conclusion must be reached with respect to Sections 18 and 19, which seek the same type of adjudication of the termination of GML §207-a benefits and Sections 21 and 22, which provide for "review" of light duty assignment determinations. None of the demands seek the review of the City's determination; what is sought is a new determination of the underlying claims of the affected employee by a substituted initial decision-maker, who is not designated by the employer.

Our decisions in *Watertown* and in *Poughkeepsie 1* make clear that a demand for a dispute resolution procedure ending in arbitration, which permits for subsequent judicial review under CPLR Article 75, rather than review under CPLR Article 78, is mandatorily negotiable. Both decisions also make clear that it is, and must be, the employer's determination, not the underlying claim, which is subject to review.

The Association's demands seeking review not of the City's determinations of eligibility, termination of benefits and light duty assignment but of the employees'

underlying claims, infringe upon authority vested exclusively within municipalities by the statute.[3]

We find the Association's demands relating to sections 12, 13, 18, 19, 21 and 22 are nonmandatory subjects of negotiations and the Association's submission of those demands to interest arbitration violates §209-a.2(b) of the Act.

IT IS, THEREFORE, ORDERED that the Association immediately withdraw from interest arbitration its demands relating to sections 12, 13, 18, 19, 21 and 22.

DATED: February 28, 2003
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[3] *See DePoalo v. County of Schenectady*, 200 AD2d 277(3d Dep't 1994), *aff'd*, 85 NY2d 527 (1995); *Schenectady County Sheriff's Benev. Ass'n v. McEvoy*, 124 AD2d 911 (3d Dep't 1986).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO; CHENANGO COUNTY LOCAL 809, SHERBURNE-EARLVILLE CSD UNIT 6601,

Charging Party,

- and -

CASE NO. U-22985

SHERBURNE-EARLVILLE CENTRAL SCHOOL DISTRICT,

Respondent.

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

FRANK W. MILLER, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Sherburne-Earlville 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 discontinued a practice of permitting unit employees to borrow District tools and equipment for personal use as alleged by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Chenango County Local 809, Sherburne-Earlville CSD Unit 6601 (CSEA)[1] in its improper practice charge.

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[1] The charge identified the charging party as Delaware County Local 813, Sidney Hospital Unit 6612. A review of the record shows that the name of CSEA as it appears in the collective bargaining agreement with the District is Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO; Chenango County Local 809, Sherburne-Earlville CSD Unit 6601.

EXCEPTIONS

The District filed exceptions to some of the ALJ's findings of fact and to most of the ALJ's conclusions of law. CSEA filed a response opposing the District's exceptions and supporting the ALJ's decision.

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

FACTS

The parties' collective bargaining agreement covers the period July 1, 2002 to June 30, 2003. Article III of the contract identifies the bargaining unit represented by CSEA. The bargaining unit includes the following categories of employees: Clerical, Custodial, School Lunch Department, Teacher Aides and Transportation. Each of the bargaining categories is further defined by specific titles. The head custodian, custodian, custodial worker, maintenance man, laborer and custodial worker, and laundry worker are within the custodial unit.

On or about October 23, 2001, CSEA filed a notice of claim with the District, pursuant to Education Law, §3813, alleging *inter alia*, that on October 15, 2001, the District changed a long-standing practice of District employees represented by CSEA being able to use tools and equipment that belong to the District.[2]

Subsequently, on November 5, 2001, the District served upon CSEA a notice for examination under General Municipal Law, §50-h. On November 13, 2001, CSEA responded that it did not believe that the District was entitled to such an examination and, therefore, would not submit to the examination scheduled on December 4, 2001. On December 17, 2001, the District notified CSEA that its failure to submit to the §50-h examination would be considered as a failure to

[2] Joint Exhibit 1.

satisfy a precondition to the notice of claim provision of the General Municipal Law.

CSEA filed the instant improper practice charge on December 3, 2001 alleging, *inter alia*, that "[F]or at least 20 years, it has been the practice that CSEA-represented employees of the District have been permitted to borrow and use tools and equipment that belong to the District." The District thereafter filed an answer denying the material allegations of the charge and alleging affirmative defenses that included CSEA's failure to file a timely and proper notice of claim, failure to submit to a §50-h hearing and that the alleged past practice violated the State Constitution.

The parties entered into a Stipulation of Facts dated February 22, 2002. The parties agreed that "[T]he Board of Education of the District unilaterally adopted a policy which established that no employee would be permitted to borrow School District tools and equipment for a personal purpose. Borrowing would be permitted for purposes related to legitimate District use."

At the hearing conducted on May 6, 2002, CSEA proffered testimony from Charles S. Gregory, its labor relations specialist for this bargaining unit; John Rusavage, a unit member and District employee in the maintenance department since 1986; David Palmiter, another unit member and a 20-year employee of the maintenance department; and Robert Wright, also a unit member and former member of the Board of Education.

The District proffered testimony from Thomas Strain, an Assistant Superintendent of the District since 1996, whose responsibilities include the District's maintenance/custodial and transportation departments; Steven Szatko, the District's Superintendent of Schools since July 1999; Tim Furner, the

District's Superintendent of Buildings and Grounds since 1986, whose responsibilities include the day-to-day supervision of the maintenance/custodial department; and Elena Casscles, past president of the Board of Education and a current Board member.

Gregory testified that CSEA assigned him to represent the unit in 1995. He was the unit's chief negotiator. He stated that during the 1996 negotiations for a successor agreement, there were discussions concerning tools. He recalled that Rusavage spoke at length on "how tools are used at the facility, and the need for it was mainly on the need for an increase in the tool allowance".[3] He testified that Rusavage also spoke about the "free exchange of bringing in tools and taking home tools",[4] specifically, recalling that Rusavage claimed to have brought his table saw into the workplace and kept it there for a long period because the District did not have one available for them to use. On cross-examination, Gregory testified that there was some District response to the tool allowance discussion, but that he could not recall what it was and that none of the members of the District's negotiating team commented on the claim that there was a practice of the "free exchange" of tools.

Rusavage testified that he had been employed by the District since 1986 and has served in the past as unit president. He testified that, in performing his job, he used his own tools and that, on occasion, he has borrowed District tools for personal use without advising anyone. However, on the few occasions when he borrowed the District's tractor, he asked Furner. Rusavage also confirmed that the discussion during the 1996 contract negotiations centered on CSEA's request for an increase in the tool allowance. He claims to have told the District

[3] Transcript, p. 16.

[4] *Id.*

negotiating team that "we did use some of the school's tools on occasion" and that there was no reaction. On cross-examination, he acknowledged that Peg Winton, a district bus driver, was the individual who complained to Strain about Palmiter's use of the District's tractor. He admitted that she was a unit member and that he had never seen her use any of the District's equipment nor did he know whether she knew about the practice. He also stated that he knew a former District full-time bus driver, Frank Wells, had used the tractor once and that Pamiter had used the tractor and a drain cleaner. He further claimed that school aides used the District's digital cameras outside of school and the District's computers on school property, for personal projects.

Palmiter testified that he has worked for the District for 20 years, all in maintenance. He claims to have used a District planer/joiner, a snake and other tools, including the tractor, about six times. He also testified that custodians used the District's carpet cleaners with Furner's approval. He acknowledged that use of any equipment was conditioned upon Furner's assessment that the person requesting the equipment knew how to use it, would use it carefully and would not damage it. He acknowledged that Casscles is his sister-in-law.

Wright testified that he has been employed by the District for thirteen years as a bus driver, that he was a CSEA shop steward for four years and the immediate past unit president. He further testified that, while he served as a member of the Board of Education prior to 1986, he was aware CSEA unit members employed by the District borrowed District tools and equipment. On cross-examination, however, he testified that he believed that the Board discussed a policy regarding the use of tools and equipment, but he did not know when that was or whether it was approved. In addition, he stated he never saw a

written policy and he did not know what action, if any, the Superintendent or the president of the Board might have taken regarding this issue.

Strain testified that he has been Assistant Superintendent for the District for six years, is responsible for maintenance and transportation and that Furner reports to him. He acknowledged that Winton came to see him about using District equipment because she had been Palmiter driving the District's tractor on a public street. When Strain spoke to Furner about this report, Furner stated that Palmiter had taken the tractor without permission. Strain testified that, during the six years that he served as Assistant Superintendent, this was the first time he was aware that employees used District equipment for personal use. As a result of this incident, the Board issued a policy regarding the use of District equipment.

Furner testified that he has served as the District's Superintendent of Buildings and Grounds since 1986 and that the 26 employees in the maintenance and custodial department report directly to him. He further testified that he alone granted permission to District employees in the maintenance department regarding the personal use of certain equipment. Specifically, he allowed certain employees to use the District's tractor based upon his assessment of the individual employee's years of service, whether they were qualified to operate the respective piece of equipment or tractor, whether they would use it properly and return it undamaged. He further testified that during his tenure no District employee had used the bobcat, school trucks,[5] lawn mowers or irrigation reel for non-District uses. However, where he allowed District tools and equipment to be borrowed for personal use, he never obtained permission from

[5] Although various witnesses testified regarding the use of District vehicles, we do not read the charge to include vehicle use as an issue. The testimony demonstrated which employees were assigned vehicles and no testimony was elicited regarding any other employee's request to use District vehicles (assuming the tractor is a piece of equipment and not a vehicle).

the Superintendent or the Board. Furthermore, he never notified anyone of his decisions to permit the personal use of any District equipment, including the tractor.

Casscles testified that she has been on the Board of Education for eight years and that any negotiations with CSEA regarding tools concerned the amount of the contractual tool allowance. The personal use of tools was never discussed during contract negotiations. She specifically recalled that, in 1996, the parties negotiated about the tool allowance and, as a result, the tool allowance was increased from $100 to $120. She was not aware, until October 2001, that employees were using District tools and equipment for personal use.

Szatko testified that Winton came to inquire of him about how she might sign up for the District's tractor for personal use, based upon her observation of Palmiter's use of the tractor. Szatko informed the Board of the request and issued a memo to staff prohibiting such use pending review by the Board of Education. Prior to this incident, no one had advised him that Furner had been permitting employees to use District equipment and the tractor. The District issued an interim policy that specifically excluded certain pieces of equipment and vehicles from personal use by employees. The District rescinded that policy after consultation with counsel in favor of a total prohibition on the personal use of the District's tools, equipment and vehicles.

DISCUSSION

The District excepts to several of the findings of fact and conclusions of law contained in the ALJ's decision.

As to the District's exceptions concerning its claims that CSEA failed to timely file a proper notice of claim and failed to submit to a GML §50-h hearing,

we adopt the ALJ's rationale as our own and, therefore, affirm the ALJ on these points and dismiss these exceptions. The District argues, in effect, that the subject matter of the practice is prohibited by virtue of it being an unconstitutional gift of public funds. We would only need to address that issue if we found that there was no consideration for the practice and that there was no mutual agreement to it. Certainly the use of District property would constitute a form of compensation, which would be a mandatory subject of negotiations. That the District might deem it a subject that it would choose not to agree upon in negotiations because of liability and other concerns, is, likewise, not the issue.

The balance of the District's exceptions deal with whether CSEA has established the existence of a past practice and the appropriateness of the remedy ordered by the ALJ. The ALJ found a violation relying, in part, upon her application of our prior decision in *Bellmore Union Free School District*, (hereafter, *Bellmore*).[6] In *Bellmore*, we determined that, like wages and salary generally, the issue of starting salary was a mandatory subject of negotiations and that if a practice were established, a change in such a term and condition of employment would give rise to a violation of the Act.[7] In determining whether a practice had been established, we found that we must look to the subject matter of the alleged practice to determine whether it is an issue of unit-wide concern or of concern to only some sub-set of the unit. We needed to make such a determination in order to judge whether the alleged practice is unequivocal, has existed substantially unvaried for a significant period of time prior to the change, and could reasonably have been expected by the bargaining unit members to

[6] 34 PERB ¶3009 (2001).

[7] Act, §209-a.1(d).

have continued unchanged.[8]

Here, CSEA represents a general unit in the District, with over 200 employees. However imprecisely pleaded or argued, the ALJ determined that CSEA's charge was filed on behalf of the unit members in the "maintenance/custodial department". Since the record is devoid of any precise definition of the composition of the "maintenance/custodial department", except Furner's testimony that it is comprised of 26 employees and various references to maintenance, laborer and custodial or custodian titles, we must assume that the department consists of those titles listed as custodial in the collective bargaining agreement: head custodian, custodian, custodial worker, maintenance man, laborer and custodial worker and laundry worker. We must also assume, then, that the charge was not filed on behalf of all other titles in the CSEA unit. Consequently, any testimony involving the use of District property by employees in titles outside the custodial titles is irrelevant to the determination we must make.[9]

Having established the universe of affected employees and the mandatory nature of the subject matter, we must proceed to apply the three-pronged test outlined above. Without determining whether it meets our other criteria, it appears that the practice alleged was in place for a substantial period of time. Furner has been the District's Superintendent of Buildings and Grounds since 1986 and, for his entire tenure, has allowed certain District employees to use certain tools and pieces of equipment on terms that he deemed appropriate.

We find, however, that the practice is not unequivocal, nor could unit

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[8] *County of Nassau*, 24 PERB ¶4523, *aff'd* 24 PERB ¶3029 (1991).

[9] For example, we do not consider testimony regarding school aides' use of digital cameras or computers.

employees reasonably expect the practice to continue unchanged. To be unequivocal is to be clear and unambiguous; expressed in full and definite terms; carrying no implications of future change.[10] Generally, the practice testified to was that permission of Furner was necessary and was conditioned upon his desire to reward certain senior employees and his subjective assessment of the individual's capabilities and trustworthiness, which varied depending upon the individual and the type of equipment or tool involved. The testimony leads us to conclude that, within even this small sub-set of the CSEA bargaining unit, a building custodian was likely to be deemed fit by Furner to borrow a floor cleaner, but not a tractor; that a senior maintenance man, like Rusavage or Palmiter, might be deemed trustworthy enough to borrow a tractor, but a less senior employee in the same title could not. Decisions as to who could use what, while determined somewhat by title, were, in the final analysis, based by Furner upon his subjective feelings about the individual requesting the equipment. This practice is, then, certainly not expressed in full and definite terms and it was subject to change as the individuals in the titles changed, as the individuals' capabilities changed and Furner's assessments of the individuals changed. Certain pieces of District equipment were never loaned to employees;[11] making the "practice" even more ambiguous. We can only conclude that Furner's subjective determinations of which tools or equipment could be borrowed, and by whom, does not make a cognizable practice. That it may be difficult to prove practices such as the one in question, should not be unexpected. Our law favors

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[10] Webster's Third New International Dictionary (unabridged), 2494 (1996).

[11] For example, Furner testified that no one ever borrowed the District's bobcat, lawn mowers or irrigation reels.

collective bargaining and generally requires written agreements[12] as to terms and conditions of employment so that both parties can clearly understand their rights and obligations. It appears to us, a better case could probably be made that Furner was dealing directly with certain members of the bargaining unit and conferring upon them economic benefits not negotiated by CSEA, thereby undermining CSEA's status as the exclusive bargaining agent. The bargaining agent has a duty to all its members and therefore, terms and conditions negotiated or obtained for some should be known to all so that they may knowingly assent to the differences and so that internal unit dissension not arise. That issue is not before us.

Were we not to find a failure of proof for the reasons stated above, we would find that the practice fails on the basis that the District did not acquiesce in the practice, nor did it authorize, ratify or condone the practice. The ALJ, citing to the *Town of Huntington*, (hereafter, *Huntington*),[13] concluded that our decisions do not require specific authorization, ratification or condonation of conduct of a supervisor in order to attribute liability to the employer. After a careful review of the record, and an analysis of our precedents, we disagree.

The ALJ concluded that Furner's knowledge of, and participation in, the alleged past practice should be imputed to the District. The ALJ's reliance on our decision in *Huntington* for support is misplaced. In *Huntington*, the union had filed an improper practice charge alleging a violation of §209-a.1(a) of the Act, not §209-a.1(d) as is the case here. The Town's Director of the Department of General Services was the Town's first-step representative in the parties' contractual grievance process. We found a violation of the Act based upon the

[12] Act, §§201, 203.

[13] 26 PERB ¶3073 (1993).

Director's conduct toward an employee when the employee attempted to file a grievance. By tearing up the grievance and making negative statements to the employee, the Director interfered with the employee's exercise of his protected rights. The Town's violation of the Act, therefore, resulted from the Director's failure to perform his duties under the grievance provision of the parties' collective bargaining agreement. The violation was found against the Town because it affirmatively placed the supervisor in the contractual grievance process with authority to act on its behalf with respect to grievances at step one.

Here, Furner testified that he had been Superintendent of Buildings and Grounds since 1986. From 1981 to 1986, he was a building maintenance mechanic. He testified that there had been the occasional use of equipment by certain unit employees between 1981 to 2001. Significantly, on none of these occasions did he obtain permission from either the Superintendent or the Board of Education. Under the Education Law, Furner would have no authority to bind the Superintendent or the Board of Education absent a delegation of authority.[14] Our cases also require an actual or implied delegation of authority.[15] No such delegation of authority can be found on this record.

The ALJ's analysis of the practice started with the assumption that Furner had the authority to negotiate an oral modification of the parties' agreement. However, the record shows that Furner was a first line supervisor. He was not part of the District's negotiating team and there is no indication that he was a

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[14] Education Law, §1711, subd. 2, par. E 1. *See also Stoetzel v. Wappingers Cent. Sch. Dist.*, 118 AD2d 636 (2nd Dep't 1986).

[15] *Deer Park Union Free Sch. Dist.*, 22 PERB ¶3014 (1989), *aff'g*, 21 PERB ¶4535 (1988)(subsequent history omitted); *Bd, of Educ. of the City Sch. Dist. of the City of New York and Leo E. Silverstone*, 15 PERB ¶3136, *aff'g*, 15 PERB ¶4603 (1982).

District policy-maker.[16] We then should not assume merely by virtue of his status as a supervisor that Furner had the apparent authority to bind the District to a practice with the long-term legal, liability, budgetary and personnel policy implications that this practice raises, but should instead require a more definite delegation of authority to him in this regard.[17]

Given their direct, clear and unambiguous responses, we credit the testimony of the District's other witnesses that they were unaware of Furner's practice in regards to allowing the use of the District's tools and equipment. Their testimony is buttressed by the fact that, as soon as they became aware, the Superintendent and the Board moved swiftly in developing and adopting a policy prohibiting the personal use of the District's property. While we credit the testimony of CSEA's witnesses regarding the need for a tool allowance increase in the 1996 negotiations, their testimony that tool or equipment borrowing was occurring is not credible because it is non-specific, would have been out of context and was clearly and emphatically denied by Casscles, who demonstrated superior knowledge of the events surrounding those negotiations. Wright's testimony that the Board of Education was confronted with the issue while he was on the Board is given no weight since his Board service commenced 26

[16] "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." Act, §201.7(a).

[17] *See City of Schenectady*, 26 PERB ¶3038, at 3064 (1993), where the Board held that even if a liberal approach to agency principles were taken, the supervisory status alone of an employee was not sufficient to warrant attributing the employee's actions to the employer, noting that "...an employer is not always strictly responsible for the conduct of its supervisors. (footnote omitted) The ultimate focus must always be on the agency relationship, not supervisory status itself....The pertinent inquiry is simply whether, in the totality of circumstances, an employer may fairly said to be responsible for a given individual's actions."

years ago and ended 13 years ago and he could not recall when this event occurred or what the outcome was. No one testified to any express delegation of authority to Furner to establish District policy, even limited to his own department, as to the personal use by employees of District tools and equipment. Our application of agency theory does not extend to hold the District liable for Furner's unauthorized acquiescence in the use of District equipment by unit employees.[18] There is no evidence on this record that either the Superintendent or the Board of Education was aware that Furner was lending District equipment and tools on condition that he approve of the employees' use of District property.[19] Leniency by individual supervisors must be distinguished from mutual agreement or acquiescence by the contracting parties in a consistent course of repetitive action.[20] CSEA failed to prove that Furner had the authority to permit such activity. Furthermore, we do not believe that CSEA has met its burden of establishing that, by reason of Furner's actions, the Superintendent and the Board of Education have divested themselves of their discretion to eliminate the borrowing of District equipment and tools for personal use.[21]

Thus, having failed to prove all the elements of a *prima facie* case, CSEA's charge should have been dismissed.

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[18] An employer is not always strictly liable for the conduct of its supervisors. As we found in *State of New York (Dep't of Corr. Serv.-Groveland Corr. Fac.)*, 35 PERB ¶3030 (2002), a practice that was limited to one group of employees on the authority of a supervisor, without actual or apparent authority from the employer, does not bind the employer.

[19] *Westbury Union Free Sch. Dist.*, 31 PERB ¶3087 (1998). *See also Public Employees Fed'n v. PERB*, 195 AD2d 930, 26 PERB ¶7008 (3d Dep't 1993); *Schalmont Cent. Sch. Dist.*, 29 PERB ¶3036 (1996).

[20] *See* Elkouri and Elkouri, *How Arbitration Works*, 4th Edition, p. 439 n. 10 quoting in *Univac*, 54 LA 48, 52 (1969).

[21] *See Unatego Cent. Sch. Dist.*, 21 PERB ¶3039 (1988).

Based on the foregoing, we grant the District's exceptions[22] and reverse the decision of the ALJ.

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

DATED: February 28, 2003
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[22] Because of our determination herein, we do not reach the District's other exceptions dealing with the nature and scope of the ALJ's remedial order.