

**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-22017

STATE OF NEW YORK (SUNY OSWEGO),

Respondent.

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

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N.
VOLFORTE of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (SUNY Oswego) (State) and cross-exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) finding that the State violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it determined that Odilon Martinez had not passed his probationary period as a Grade 6 Laborer and would, thus, return to his Grade 5 Cleaner position, and by refusing to accept Martinez' withdrawal of his resignation tendered after his receipt of his probationary evaluation.

EXCEPTIONS

The State excepts to the ALJ's decision on numerous grounds, both factual and legal, but primarily argues that the ALJ erred in finding that the rating in Martinez' final evaluation was motivated by anti-union animus and by ordering the State to accept Martinez' withdrawal of his resignation and restore him to his probationary status as a Grade 6 Laborer. CSEA supports the ALJ's findings of fact and law and the remedy, but argues that the ALJ should have found that Martinez was constructively discharged from his employment.

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

FACTS

The facts are thoroughly set forth in the ALJ's decision¹. The facts are set forth here only as relevant to our discussion of the exceptions and the cross-exceptions.

Martinez had been an employee of SUNY-Oswego (SUNY) for over ten years, the bulk of that time as a Grade 5 Cleaner. As a result of the settlement of a grievance filed on his behalf by CSEA, Martinez was placed in the position of a Grade 6 Laborer, effective June 24, 1999, with a one-year probationary period. The conditions of Martinez' appointment were that, during his probationary period, he acquire a CDL license, complete an English as a Second Language (ESL) course and improve, and maintain as improved, his time and attendance record.

¹ 35 PERB ¶4591 (2002).

Martinez worked directly with Thomas Abbott, a Grade 7 highway equipment operator in SUNY's Grounds Department, who sometimes supervised him. Abbott testified that Martinez' work performance was very good, that he never refused overtime, that he requested additional work when his assigned task was completed and that he always arrived early. Abbott further testified that it is not normally a responsibility for a Grade 6 Laborer to initiate work projects.

Alan Buske was Martinez' immediate supervisor at all times relevant to the charge. He worked with Mary DePentu, the head grounds supervisor at SUNY, in compiling the three quarterly, and one final, evaluations of Martinez' probationary appointment. Martinez' evaluations all rated him as a fair employee; a "fair" rating is not sufficient to pass a probationary period. His first, second and final evaluations refer negatively to his sick leave usage and accruals; his third evaluation notes that he had not used any sick leave, but that his accruals were still not at acceptable levels. All the evaluations make reference to Martinez' lack of self-confidence; however, the third evaluation defines this lack of self-confidence as "involving CSEA in matters that [Martinez] should be discussing directly with his supervisors."² Martinez' final evaluation cites the insufficient increase in his sick leave accruals and the fact that Martinez has done little to improve his overall performance, except obtain his CDL license, during his probation.

² CSEA Exhibit 7

It is undisputed on this record that Buske objected to Martinez seeking the assistance of CSEA in any disputes he had with Buske.³ It is further undisputed that both Buske and DePentu believed that Martinez should speak to his supervisor first, before going to CSEA, and that it would be “easier” if Martinez did not go to CSEA but came to Buske or DePentu first. Neither Buske nor DePentu ever forbade Martinez to contact CSEA.

When Martinez received his final evaluation from Buske and DePentu, on June 8, 2000, he was informed that he had failed probation and would be returned to his Grade 5 Cleaner position. Martinez then went to SUNY’s personnel office and spoke to Marta Santiago, SUNY’s human resources manager and affirmative action officer. He informed her he was resigning because of his poor evaluation. She had a letter of resignation typed for him, he signed it, thanked her for all her help and left the office. Martinez’ resignation was confirmed in a June 9, 2000 letter from Santiago to Martinez, which also discussed the mechanics of resigning a position at SUNY.

On June 9, 2000, Martinez called the office of Joseph Micelli, CSEA’s unit president, because he had reconsidered his resignation. As Micelli was not available, Martinez went to Micelli’s office the following Monday, June 12, 2000, and asked Micelli to help him get his job back. The next day, June 13, 2000, with the assistance of Micelli and a CSEA labor relations specialist, Christopher Jamison, Martinez drafted a memorandum in which he withdrew his June 8, 2000 resignation, explaining that he acted under duress from receiving his

³ Buske was not called as a witness by the State.

probationary evaluation. Martinez immediately hand-delivered the memorandum to Santiago. By letter dated the same day, Santiago denied Martinez' request to withdraw his resignation because it had already been accepted.

While there is evidence that other SUNY employees have resigned, there is no record evidence that any have attempted to withdraw their resignations. The reasons given by SUNY for refusing to accept Martinez' withdrawal of his resignation is that there was no compelling reason to do so, as testified to by both Santiago and her supervisor, George Stooks, SUNY's director of physical plant.

DISCUSSION

The ALJ determined that Buske's and DePentu's perception that CSEA was contacting them regarding work issues on Martinez' behalf was a key element in Martinez failing his probation and that the probationary evaluations were motivated by Buske's anti-union animus. She, thus, determined that the State had violated §§209-a.1(a) and (c) of the Act by the evaluation and the termination of Martinez' probation. Because the ALJ determined that Martinez' resignation was a direct result of his failure of probation, the ALJ ordered the State to rescind the final probation evaluation, reinstate Martinez to a probationary Grade 6 Laborer within the Grounds Department at SUNY and reevaluate him without consideration of his union activity.

As correctly noted by the ALJ, we held in *City of Buffalo*⁴:

Section 209-a.1(a) of the Act broadly and generally prohibits employer actions which interfere with

⁴ 30 PERB ¶3021, at 3048 (1997).

employees' statutory rights. Employees have the protected statutory right to have union representation with respect to any issue affecting their employment relationship, whether or not that issue embraces a mandatory subject of negotiation. That request for and receipt of union representation constitutes participation in a union, a right specifically protected by § 202 of the Act.

Here, Martinez had the statutory right to seek the assistance of CSEA in his dealings with his supervisors. To the extent that his supervisors took action against him because of the assistance he sought and received from CSEA, §§209-a.1(a) and (c) of the Act was violated.

The record makes clear that both Buske and DePentu preferred that Martinez deal directly with them and not seek CSEA's assistance. It is also clear from Martinez' third evaluation that Buske and DePentu evaluated him negatively as lacking self-confidence because of his contacts with CSEA. As we stated in *City of Buffalo, supra*,

The statutory right of employees to seek out and receive their union's help regarding any issue, mandatorily negotiable or otherwise, obviously becomes entirely meaningless if they risk losing their jobs or other employment conditions simply because their union has chosen to give them help in a way their employer considers to be unacceptable or frustrating.

We find, therefore, that the State violated §§209-a.1(a) and (c) when it considered in Martinez' evaluation his exercise of protected rights and evaluated him negatively because of it. While there is record evidence of Buske's animus toward Martinez for the exercise of protected rights and evidence that Buske's

animus colored his input into Martinez' evaluations, our finding of a violation is not dependent on a finding of animus.

In *Greenburgh No. 11 Union Free School District*⁵ (hereafter, *Greenburgh*), we moved away from the earlier holding in *State of New York*⁶ that some conduct is so inherently destructive of statutory rights as to be "irrebuttably presumed" to have been engaged in for the purpose of depriving employees of those rights. We found in *Greenburgh* that the better rule would be to hold that if the facts make out a permissive presumption that an employer's conduct was engaged in for the purpose of depriving employees of protected rights, that would shift the burden of proof to the responding party to destroy the presumption by sufficient proof to the contrary. Here, we find that the consideration of Martinez' protected activities in his probationary evaluation was destructive of his statutory rights and that the articulated rationale of DePentu that she and Buske preferred that Martinez deal with his supervisors before consulting with CSEA is insufficient to destroy the presumption that their conduct was engaged in for the purpose of depriving Martinez of his statutory rights.

We find that the evaluation that rated Martinez as a "fair" employee and resulted, at least in part, in his failure of his probationary period for Grade 6 Laborer, violated §§209-a.1(a) and (c) of the Act.

Ordinarily, we would order, as did the ALJ, that Martinez' final evaluation be rescinded, that Martinez be restored to his probationary position as a Grade 6

⁵ 33 PERB ¶3018, at 3048 (2000).

⁶ 10 PERB ¶3108 (1977).

Laborer in SUNY's Grounds Department and that his probationary status be reevaluated without consideration of his exercise of protected rights. However, Martinez has resigned and is no longer an employee of SUNY. The ALJ found that the resignation was a direct result of the failure of probation and ordered the State to offer reinstatement to Martinez.

CSEA argues that Martinez was "constructively discharged" and that his reinstatement should be based upon such a finding. The State argues that Martinez should not be reinstated because there is no causal link between Martinez' failure of his probationary period and his resignation.

Generally, a constructive discharge occurs when an employer "deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation."⁷ Constructive discharge cases often focus on whether the employee reasonably believed he or she was being terminated or whether he or she voluntarily quit.⁸

Here, Martinez was not forced to resign. He was not threatened or harassed into tendering his resignation. That Martinez was frustrated at the thought of being demoted does not render his working conditions intolerable. Martinez was certainly familiar with his rights under the Act, having sought CSEA's assistance on numerous occasions in the past when faced with

⁷ *Pena v. Brattleboro Retreat*, 702 F2d 322, 325 (2nd Cir. 1983) (quoting *Young v. Southwestern Savings and Loan Ass'n*, 509 F2d 140, 144 (5th Cir. 1975); *Crystal Princeton Refining Co.*, 91 LRRM 1302 (1976); *Kripke v. Benedictine Hospital*, 169 Misc2d 98 (Sup. Ct. Ulster County 1996).

⁸ Norman Brand, *Discipline and Discharge in Arbitration*, 71 (1998).

disciplinary issues and contractual concerns. Unfortunately, this time he took matters into his own hands and tendered his resignation.

Additionally, there is no evidence that Santiago harbored any anti-union animus towards Martinez that prompted her refusal to accept the withdrawal of his resignation; the ALJ specifically declined to make such a finding based upon the record before her. Further, there is no evidence that the State deviated from any practice at SUNY of accepting the withdrawal of a resignation from an employee after it had been tendered and accepted.

We do not find on this record that Martinez was “constructively discharged”. We further find no causal link between the final evaluation and Martinez’ loss of employment that would compel ordering the State to accept Martinez’ withdrawal of his resignation and to reinstate him to the Grade 6 Laborer position.⁹

We, therefore, find that the State violated §§209-a.1(a) and (c) of the Act when it considered Martinez’ exercise of protected rights in his final probationary evaluation. We affirm the ALJ’s decision on the merits of the charge. However, given that Martinez resigned, our remedial options are limited to addressing the State’s conduct in Martinez’ final evaluation. We, therefore, reverse the ALJ’s remedy insofar as it orders that Martinez be offered reinstatement as a Grade 6 Laborer in SUNY’s Grounds Department.

IT IS, THEREFORE, ORDERED that the State of New York (SUNY Oswego) forthwith:

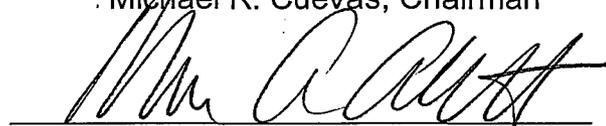
⁹See *Holland Patent Cent. Sch. Dist.*, 32 PERB ¶3041 (1999).

1. Rescind the final probationary evaluation of Odilon Martinez dated June 8, 2000;
2. Cease and desist from interfering with, restraining or discriminating against Odilon Martinez for the exercise of protected rights in its final evaluation of him as a Grade 6 Laborer;
3. Sign and post the attached notice at all locations ordinarily used to post notices of information to unit employees.

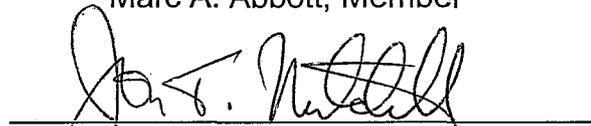
DATED: April 4, 2003
Albany, New York



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 State of New York (SUNY Oswego) in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the State will forthwith:

1. Rescind the final probationary evaluation of Odilon Martinez dated June 8, 2000;
2. Not interfere with, restrain or discriminate against Odilon Martinez for the exercise of protected rights in its final evaluation of him as a Grade 6 Laborer.

Dated

By
(Representative) (Title)

State of New York (SUNY Oswego)
.....

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

**COLD SPRING HARBOR TEACHERS' ASSOCIATION,
LOCAL #2710, NYSUT, AFT, AFL-CIO,**

Charging Party,

- and -

CASE NO. U-22619

**COLD SPRING HARBOR CENTRAL SCHOOL
DISTRICT,**

Respondent.

DANIEL A. BAHR, for Charging Party

**INGERMAN SMITH, LLP (WARREN RICHMOND of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Cold Spring Harbor 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 assigned to nonunit employees work exclusively performed by employees in the bargaining unit represented by the Cold Spring Harbor Teachers' Association, Local #2710, NYSUT, AFT, AFL-CIO (Association).¹ The ALJ found that the District had assigned the unsupervised teaching of students to two teaching assistants, who are not in the unit represented by Association.

¹ The ALJ dismissed the alleged §209-a.1(a) allegation. No exceptions have been filed to that part of the ALJ's decision.

EXCEPTIONS

The District excepts to the ALJ's decision arguing that the ALJ failed to rule properly on its affirmative defense of timeliness, its defense that Association's Education Law §3813 notice of claim was not timely and on the facts and 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

In September 2000, the District began providing Academic Intervention Services (AIS), pursuant to regulations promulgated by the New York State Commissioner of Education (Commissioner), to students in its two elementary schools who were in danger of performing poorly on standardized tests. The services were provided by two teaching assistants, Sandra Curcuru and Christine Iwanczewski.² Curcuru and Iwanczewski are both employed as half-time teachers and half-time AIS teaching assistants. The record reflects that Iwanczewski's appointment was recommended by her Building Principal, Gary LaFemina, to the Superintendent of Schools, Rick Volp, in a memorandum dated October 25, 2000, which states, in relevant part: "Christine will be providing academic intervention service (AIS) under the direction of Phyllis Miller." Miller is a teacher in the Association's bargaining unit. Barbara Lacey, principal of the elementary school to which Curcuru is assigned, testified that Curcuru was assigned to meet with the regular classroom teachers to identify students in need of assistance and to coordinate her services with the lesson plan being taught by the teachers.

² Teaching assistants are not in the teachers' unit represented by NYSUT.

Curcuro and Iwanczewski testified, however, that they functioned autonomously, without direct supervision from classroom teachers. Curcuro testified that she had not been told to report to any teacher upon her appointment. Iwanczewski and Miller both testified that Iwanczewski was not supervised by Miller; indeed, Miller testified that she had never been directly instructed to supervise Iwanczewski.³

In December 2000, Tom Hall, the junior and senior high school principal, met with Bird Norton, president of the Association unit, and advised him that AIS services would begin in the high school in February 2001, that teachers would be assigned to provide the service, and that the teachers so assigned would receive additional pay. Hall pointed out to Norton that it was the District's position that its right to assign teaching assistants to provide the service was not prejudiced by the assignment of teachers at the high school to the AIS program. This conversation was memorialized in Hall's December 6, 2000 memorandum to Volp, which notes that, based upon his informal discussions with the union leadership, there would be no opposition to such an arrangement. In February 2001, Norton was notified by the building representatives of the two elementary schools that teaching assistants had been acting as AIS teachers without teacher supervision.

It is undisputed that Norton knew in January or February 2000 that teaching assistants were assigned to the AIS program in the elementary schools. He testified that he assumed, however, that the teaching assistants were functioning under the supervision of teachers and not teaching independently. Both elementary school principals testified to the same assumption, that the AIS teaching assistants were

³ Miller did acknowledge that she worked with LaFemina in preparing a document that would set forth the details of the AIS program, but that she had not seen the memorandum submitted to Volp by LaFemina.

providing the AIS instruction with teacher supervision. LaFemina stated that he had had conversations with Miller about AIS students assigned to Iwanczewski. Lacey testified that although no one teacher was assigned to supervise Curcuru, she was supervised collectively by the teachers of the students who were participating in AIS.

The Association filed the instant charge on June 1, 2001, alleging that the District had unilaterally assigned direct independent instruction of students, which was bargaining unit work, to Curcuru and Iwanczewski. The Association had filed a notice of claim pursuant to Education Law, §3813, on May 1, 2001.

DISCUSSION

We affirm the ALJ's decision as to timeliness of the improper practice charge and timeliness of the notice of claim. The improper practice charge was filed within four months of the time that Association was notified that Curcuru and Iwanczewski were independently teaching AIS students. That Norton had notice of the hiring of the two teaching assistants to provide AIS services is not sufficient to establish that the Association had knowledge of their performance of unit work, neither is the fact that some unit members may have known before February 2001, that Curcuru and Iwanczewski were performing their duties without teacher supervision. The employee organization, or its leadership, must have knowledge of the act that constitutes the improper practice charge for it to be held to have notice, upon which timeliness determinations may be based.⁴

As we have found the filing of the charge to be timely, we likewise find the filing of the notice of claim to be timely. The notice of claim was filed with the District on May

⁴ *County of Nassau*, 23 PERB ¶13051 (1990).

1, 2001, within 90 days of when we find that Association had notice of the facts underlying the alleged improper practice. A party complies with the notice of claim requirements of §3813 of the Education Law when it notifies the school district of its claim within 90 days of learning that the school district had unilaterally transferred unit work.⁵

We turn to the merits of the charge and reverse the ALJ's finding that the District unilaterally assigned exclusive bargaining unit work to nonunit employees. The record does not support a finding that the District assigned teaching duties to Curcuru and Iwanczewski that would be performed without teacher supervision.

We accept for the purposes of our decision the ALJ's definition of unit work as teaching independently without supervision of a teacher. It is clear from the record that both Curcuru and Iwanczewski have been performing AIS duties independently. The question raised by this case is whether their performance of the work without supervision by a teacher was pursuant to an assignment by the District. We find that it was not.

Both principals testified that it was their understanding that the teaching assistants were to perform the AIS assignment under the supervision of teachers. LaFemina confirmed this understanding in his memorandum to the superintendent of schools. Indeed, in making her timeliness determination, the ALJ found that both elementary school principals thought that the teaching assistants were supervised by teachers and that any notice given to the Association would have presumed that the teaching assistants who were performing the AIS assignment were properly supervised.

⁵ Because of our findings on the merits of the improper practice charge, we do not reach the District's other exceptions.

The ALJ further found that the Association's unit president, Norton, also thought that the teaching assistants were being supervised by teachers.

However, the ALJ then found that neither Curcuru nor Iwanczewski were told that they were to perform the AIS duties under the supervision of a teacher, and that Miller was never informed that she was to supervise Iwanczewski . In reaching this conclusion, the ALJ makes certain credibility resolutions, finding that the presumptions of Lacey and LaFemina do not outweigh the direct testimony of Curcuru, Iwanczewski and Miller. We do not agree that a credibility resolution was required here. The record reflects that the two principals did not assign unsupervised teaching responsibilities to the two teaching assistants. That their understanding of the nature of the assignment was not made clear to Curcuru and Iwanczewski, either at the time of their initial assignment or subsequently, does not require a credibility resolution to resolve the differing positions taken by the parties. The differences between the testimony of the Association's witnesses and the District's witnesses evidences a misunderstanding of the assignment to the AIS program and does not compel a finding that the District specifically, or by acquiescence, assigned unit work to the teaching assistants.

In fact, Hall's memorandum to the superintendent recommending Iwanczewski for appointment contained the proviso that Miller would be supervising her. The District's knowledge about the appointment of the teaching assistants to perform AIS services stems from that notification, and the presentation of Hall's memorandum at a Board of Education meeting. Curcuru and Iwanczewski were hired by the District as teaching assistants. As this record does not establish that the District hired the teaching assistants to teach the AIS program independently, or that the District was aware that

Curcuru and Iwanczewski thereafter provided AIS services without teacher supervision, we cannot find that the District violated §209-a.1(d) of the Act.⁶

Based on the foregoing, we grant the District's exception to the ALJ's finding that the District assigned unit work to nonunit employees, deny or decline to reach the other exceptions, and reverse the decision of the ALJ.

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

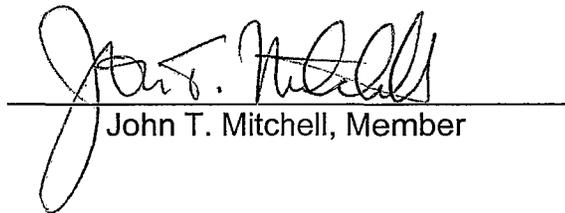
DATED: April 4, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁶ See *City of Schenectady*, 26 PERB ¶ 3038 (1993), where we held that an employer is not always strictly responsible for the conduct of its supervisors. Even if we were to find that LaFemina and Lacey directed Curcuru and Iwanczewski to teach AIS without teacher supervision, on this record, we would not find the District liable. See also *Sherburne-Earlville Cent. Sch. Dist.*, 36 PERB ¶ 3011 (February 28, 2003) and *Deer Park Union Free School Dist.*, 22 PERB ¶ 3014 (1989), *aff'g* 21 PERB ¶ 4535 (1988) (subsequent history omitted).

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

In the Matter of

DIANA L. SIEGEL,

Charging Party,

- and -

CASE NO. U-22972

UNITED FEDERATION OF TEACHERS,

Respondent.

- and -

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

Employer.

DIANA L. SIEGEL, *pro se*

**JAMES R. SANDNER, GENERAL COUNSEL (PAUL H. JANIS of counsel), for
Respondent**

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Diana L. Siegel (Siegel) to a decision by an Administrative Law Judge (ALJ) dismissing her improper practice charge which, as amended, alleged a violation of §209-a.2(c) of the Public Employees' Fair Employment Act (Act) by the United Federation of Teachers (UFT) when it denied her request to process her grievance to arbitration, did not properly process her internal UFT appeal of that denial and renounced its settlement of her appeal. The Board of

Education of the City School District of the City of New York (District) is made a statutory party to the proceedings pursuant to §209-a.3 of the Act.

EXCEPTIONS

Siegel excepts to the ALJ's decision, arguing that the facts do not support the ALJ's decision. UFT responded and supports the ALJ's decision.

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

FACTS

The facts in this case are discussed in detail in the ALJ's decision,¹ therefore, the Board will only review the facts relevant to Siegel's exceptions.

Siegel's charge, as amended, alleges that she is a hospital school teacher.² She complained that she was not assigned to teach during the summer at St. Mary's Rehabilitation Center, Ossining, New York, in 1997, 1998 and 1999, notwithstanding her contractual seniority and retention rights. She contends the position had not been posted in accordance with the contract between UFT and the District.

The record demonstrates that Siegel has been a hospital school teacher for twenty-five years. Since 1997, her assignment during the school year has been at PS 401 in Manhattan and her duties have been performed at Children's Hospital New York Presbyterian. She has worked in summer programs for the District since 1996. She stated that, because the St. Mary's summer assignment was not posted, she did not know about it for three summers. The St. Mary's assignment was only a half hour from

¹ 35 PERB ¶4612 (2002).

² Hospital school teachers give instruction to severely disabled students, including students who are restricted to hospitals and medical centers for medical reasons.

her house.

Siegel learned of the St. Mary's position in the Spring of 2000, and immediately went to UFT representative, Alfonse Mancuso, for assistance. She wanted to file a contract grievance because she believed that UFT would resolve the situation. Siegel testified that Mancuso convinced her to forego filing a grievance while they investigated her complaint. She received the assignment to St. Mary's for the summer of 2000.

In her direct testimony, Siegel stated that the principal for the hospital schools, Joseph Leonzio, hired the teachers for the summer assignment. Siegel applied for the 2001 summer assignment at St. Mary's, but she did not receive it. On May 11, 2001, she filed a contract grievance. On June 8, 2001, she received a written denial of her grievance. She instructed Mancuso to "[p]roceed to step three." As she states in her charge, the UFT letter from Howard Solomon dated, July 16, 2001, denying her request to proceed to step three "is the smoking gun of my charge," She alleged that it was from that point that UFT acted in a manner that was arbitrary, discriminatory and in bad faith.

In her testimony, Siegel described UFT's conduct in handling her grievance which, she believed, supported her charge. In a prior grievance, her appeal request had been processed through the Bronx borough office of UFT. The July 16, 2001 letter from Solomon, however, informed her to contact Mr. Sprung, Assistant Director of Staff, if she wished to appeal UFT's decision not to proceed to step three.

After unsuccessful attempts to reach Sprung by telephone, as instructed, Siegel sent him a letter outlining the grounds for her appeal. She subsequently received a telephone call from Gary Rubinowitz who informed her that there was no record of her grievance in their computer. Thereafter, she faxed a copy of the July 16, 2001 letter

with other papers to Rubinowitz. Several days later, on September 14, 2001, she received a written denial of her appeal request from Vince Gaglione, Bronx borough representative of UFT. She was given the names of the UFT officials to contact should she wish to process the appeal further.

On September 21, 2001, Siegel submitted a written request to appeal the ~~September 14, 2001 denial.~~ She was advised by telephone that her appeal was scheduled for October 2, 2001. She attended the appeal with a witness, Gloria Charny. At that meeting, Tom Pappa, secretary of UFT, conducted the discussion and, at one point, announced to Siegel “[w]hat if we gave you the job at St. Mary’s next summer.” Based on that statement, Siegel considered that she had won her appeal. Pappa told her that she would hear from UFT. Siegel received a letter dated October 31, 2001 denying her appeal.

On cross-examination, Siegel admitted that her grievance was based upon the agreement that UFT and the District made regarding seniority and retention credit prior to 2001. Also, that UFT did not take her grievance any further because of this agreement.

With regard to the agreement made between UFT and the District which in effect “grand-fathered” teachers for seniority and retention credit in summer assignments for the years prior to 2001, Siegel admitted that she did not know what UFT had a right to do when negotiating on behalf of its members. She also admitted that the agreement protected Ruth Weiss as a member of UFT.

Regarding Pappa's statement concerning the St. Mary's assignment, Siegel admitted that she did understand that she might not get the assignment.

UFT's witness, Alphonse Mancuso, testified that, during the Spring or Summer of 2001, Siegel brought to his attention the method by which Leonzio selected teachers for summer assignment, UFT undertook an investigation into the complaint. This issue was discussed with the district superintendent, Dr. Erber, and they reached the conclusion that there was a problem with the selection process. An agreement was reached that standardized the rules between the schools. As part of that agreement, teachers who were in summer assignments prior to 2001 would not be disadvantaged. At the insistence of the superintendent, the agreement was not put in writing.

After Siegel contacted Mancuso regarding the fact that she did not receive the Summer 2001 assignment at St. Mary's, he determined that the agreement had been followed. Mancuso testified that, during the course of his investigation, he concluded that Siegel was not the most senior applicant for the summer assignment at St. Mary's. Consequently, it was upon this basis that UFT decided not to pursue her appeal at step three. Mancuso acknowledged that this was not an inconsistent position for UFT to take because at the lower steps it was the "grievant's right to take a grievance to a step one or step two level. Even if it's absurd ... the union has no right to prevent them...." However, if they want to proceed to step three then the grievance is presented to the borough committee of UFT. They make the determination as to whether the grievance has merit and should proceed.

UFT's other witness, George Fesko, assistant to the president, testified that the appeal process is not uniform. Appeals generally go to the borough before they can go

before the officers of the union, however, each appeal is handled through Sprung, who, at times, will route an appeal directly to the UFT officers.

DISCUSSION

Siegel argues in her exceptions that the ALJ committed various factual and legal errors in dismissing her charge. In support of these exceptions, she offers additional facts which are not part of the record and, therefore, may not be considered by us through her exceptions.³

The record fails to demonstrate that UFT violated the standard for a duty of fair representation charge found in *Civil Service Employees Association v. PERB and Diaz*.⁴ Siegel has, therefore, failed to demonstrate that UFT's conduct, or lack thereof, was deliberately invidious, arbitrary or done in bad faith.

The record is clear that UFT investigated Siegel's complaint over the summer assignment in 2000. UFT reached an oral agreement with the District that would affect all the units' teachers prior to the summer assignments for 2001. Despite Siegel's contention in her exceptions, there is no duty to reduce settlement agreements to writing under §204.3 of the Act.⁵ That Siegel did not like the terms of the agreement reached with the District over seniority and retention rights to summer employment assignments is evident by her testimony. However, the terms by which the parties elect

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

⁴ 132 AD2d 430, 20 PERB ¶¶7024 (3d Dep't 1987), affirmed on other grounds, 73 NY2d 796, 21 PERB ¶¶7017 (1988).

⁵ *Local 1170, Communication Workers of America*, 23 PERB ¶¶3004 (1990). *Glens Falls Police Benev. Ass'n v. PERB*, 195 AD2d 933, 26 PERB ¶¶7009 (3d Dep't 1993), conf'g 25 PERB ¶¶3011 (1992).

to settle their differences in this case does not rise to the level of a violation. We have previously held that a union is free to waive the rights of one member in preference for those of other members, as long as the agreement is not arbitrary, discriminatory or made in bad faith.⁶

Siegel also takes exception to the manner in which UFT handled her grievance. On this issue, the record demonstrates that, regardless of the merit of Siegel's grievance, UFT pursued it through step two of the process. At this stage of the process, UFT was not required to agree with Siegel's interpretation of the contract, although UFT was under an obligation to respond to her concern or request to file a grievance, which it did.⁷ It was at step three that UFT reserved the right to refuse to proceed to arbitration. We have consistently held that we would not substitute our judgment for that of a union's regarding the filing and prosecution of grievances, for a union is given a wide range of reasonableness in these regards.

UFT's witnesses' explanation of the grievance process at step three was unrefuted. Siegel was provided with its reason for denying her request to pursue the grievance.⁸ We find, as did the ALJ, that UFT did not act in an arbitrary, discriminatory or bad faith manner in the consideration of the merits of Siegel's grievance or in the manner in which it was processed.

⁶ *AFSCME, Council 66, Local 930*, 25 PERB ¶13070 (1992).

⁷ See *Amalgamated Transit Union, Div. 500 and Central New York Reg'l Transp. Auth.*, 32 PERB ¶13053 (1999); *United Fed'n of Teachers (Grassel)*, 33 PERB ¶13062 (1990).

⁸ See *District Council 37, AFSCME (Gonzalez)*, 28 PERB ¶13062 (1995).

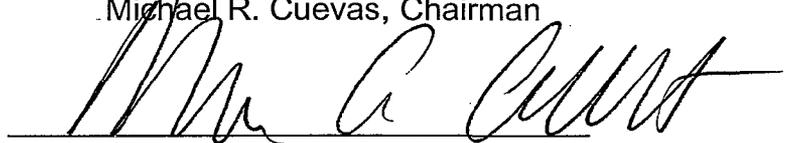
Based on the foregoing, we deny Siegel's exceptions and we affirm the decision of the ALJ.

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

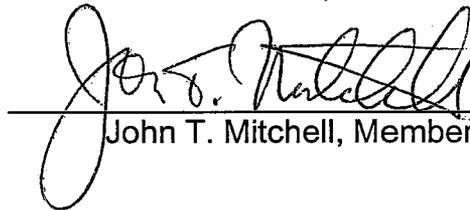
DATED: April 4, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

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

Charging Party,

- and -

CASE NO. U-23093

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

**KENNEDY, SCHWARTZ & CURE, P.C. (ARTHUR Z. SCHWARTZ of
Counsel), for Charging Party**

**MARTIN SCHNABEL, GENERAL COUNSEL (VICTOR LEVY and DANIEL
TOPPER of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York City Transit Authority (NYCTA) to a decision of an Administrative Law Judge (ALJ) finding that the NYCTA violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it allegedly threatened to terminate the employment of an employee who had been subpoenaed by the Transport Workers Union of America, Local 100 (TWU) to testify in a disciplinary arbitration on behalf of a TWU member.

EXCEPTIONS

NYCTA argues in its exceptions that the ALJ erred on the law and the facts. The TWU filed no response to the exceptions.

Based upon our review of the record and our consideration of the arguments offered by the NYCTA, we reverse the decision of the ALJ.

FACTS

The facts, as determined by the ALJ, are set forth in her decision.¹ We will recite the facts here that are relevant to the exceptions.

The TWU is the certified bargaining representative of certain non-supervisory, operational, maintenance, technical, administrative and clerical employees of the NYCTA. The charge, as amended, alleged, *inter alia*, that on or about November 27, 2001, a hearing had been scheduled to contest the penalty of dismissal given to Track Inspector John Mahon. Prior to the hearing, TWU served a subpoena on Maintenance Supervisor II Andre Morgan. The November hearing was adjourned. On or about December 13, 2001, General Superintendent of Track, Franz Theodore and Superintendent R. Sergio allegedly threatened Supervisor Morgan with termination for complying with the subpoena.²

The TWU's first witness, John Samuelson, testified that at the time of the Mahon grievance, he was in the employ of the TWU as the Chairman of the Track Division, which is an elected office. In that capacity, he was responsible for the administration of the contract between the TWU and NYCTA. He was involved in the contract and disciplinary grievance process. With regard to disciplinary grievances, he was involved in the defense of members against whom disciplinary charges had been filed.

NYCTA dismissed Mahon in October 2001 because it alleged that Mahon left a dangerous condition on the track unrepaired. TWU initiated a disciplinary grievance arbitration to appeal the dismissal that was scheduled to be heard on November 27, 2001. In preparation for the hearing, Samuelson contacted Mahon's supervisor, Andre

¹ 35 PERB ¶4615 (2002).

² ALJ Exhibit 1.

Morgan. Samuelson asked Morgan about the alleged condition of the track and Morgan informed him that, in his opinion, the condition of the track was not dangerous. As a result of this conversation, Samuelson informed Morgan that TWU would be serving him with a subpoena to testify on behalf of Mahon. NYCTA, however, adjourned the November 2001 hearing to December 27, 2001. On or about December 15, 2001, Morgan complained to Samuelson that Sergio threatened his job and that he was scared. Morgan did not appear at the hearing. Nevertheless, the TWU and the NYCTA entered into a settlement of Mahon's discipline.

The settlement stipulated that the penalty of dismissal was reduced to a reprimand and, at paragraph numbered fifth, the parties agreed that:

Grievant [Mahon] and the Union jointly and severally hereby release the Transit Authority from any and all claims, whether at law, in equity or arising by virtue of contract which they may have had heretofore in connection with underlying dispute(s) in case number(s) 01-2831-0003.

Samuelson acknowledged that the settlement stipulation was entered into in good faith notwithstanding his prior conversation with Morgan. It was for that reason that he took no steps to overturn the settlement.

Morgan, the TWU's second and final witness, testified that he had been employed by the NYCTA since August 1, 1983. At the time of Mahon's discipline in October 2001, Morgan was no longer supervising Mahon's work, having been transferred to Queensboro in February 2001. He acknowledged that, because of his transfer, he did not know the condition of the track at the time Mahon was disciplined. Morgan testified that he spoke with both Sergio and Theodore prior to Mahon's hearing. They told him to watch what he said.

Franz Theodore, General Superintendent of Track, testified for the NYCTA. He stated that, as the result of his inspection on October 29, 2001, Mahon received discipline. Mahon had been warned about loose bolts on the track resulting from an earlier inspection in July 2001.

Theodore was unaware of Mahon's hearing. He learned about it through Morgan who came to see him about one week later to complain about Sergio. Morgan complained that Sergio would not let him work overtime and, as a result, he attended the November 2001 hearing on his day off. Theodore's response was "you didn't have to go if you didn't want to." Theodore explained to Morgan that Sergio had to change schedules because another supervisor was on vacation. As a result, Morgan had a scheduled day off on December 27, 2001. Morgan never complained about any threat from Sergio regarding the hearing, only that he was having a difficult time dealing with Sergio's style of work. Theodore stated that he never threatened Morgan.

Ron Sergio was the NYCTA's last witness. He has been employed by the NYCTA for over 24 years. For the past eight years, he has been employed as Superintendent of Track Maintenance. Morgan was under his supervision from February 2001 to mid-November 2001. In his opinion, Morgan's work performance needed improvement.

Sergio informed Morgan on November 20, 2001 that another supervisor would be on vacation and Morgan's regular days off would have to be changed. Morgan was concerned that he would lose his premium pay. There was no conversation about the Mahon hearing.

On November 24, 2001, Sergio sent counseling memos to Morgan; his fellow supervisor, Nathan Streeder; Track Inspector G. Gaske; and Track Inspector D.

Goellner, because of conditions on the track that were in need of immediate repair.

Sergio indicated in the counseling memo that their failure to take corrective action would result in further disciplinary action.

On December 5, 2001, Morgan was issued a written warning for improperly completing the repair work as well as Gaske and Goellner. Morgan, however, refused to acknowledge receipt of the warning in writing. Morgan was given until December 18, 2001 to complete this task. On December 18, 2001, he reported to work without the document signed.

DISCUSSION

Before the ALJ decided the merits of the improper practice charge, she disposed of certain defenses set forth in the NYCTA's answer. Specifically, she dismissed the defense of waiver, which the NYCTA argued in its exception was error.

The ALJ found that the settlement stipulation in the Mahon grievance was different from the facts and circumstances that gave rise to the waiver defense. The ALJ concluded that it was not apparent that the TWU knew that it was relinquishing its right to bring the instant charge when Samuelson executed the settlement stipulation. We disagree.

It cannot be argued, as the ALJ opined, "the connection of this case with the underlying Mahon dispute is tangential at best." But for the Mahon grievance, this charge would not have a factual basis. The ALJ assumed that Samuelson did not understand the consequences of his actions by executing the settlement stipulation. The record does not support this assumption.

Samuelson was the elected representative of the TWU serving in the capacity of the Chairman of the Track Division. He had been in that title since January 1, 2000.

Prior to that time, he served as Vice Chairman of the Track Division since 1997. Prior to that time, he served as an elected shop steward. In his capacity as Chairman of the Track Division, he was responsible for the administration of grievances.³ With respect to disciplinary grievances, Samuelson represented members through the entire step process along with a lawyer.⁴ The settlement stipulation is signed by Mahon, on his own behalf, Samuelson, and a third party, on behalf of TWU.

The ALJ cites to *City of Newburgh*⁵ for support of her conclusion that the TWU lacked the requisite knowledge in order to find a waiver. The facts and circumstances of *Newburgh* are distinguishable from the instant charge. In *Newburgh*, the issue involved was whether the parties had waived our statutory jurisdiction in their contractual language providing for grievance arbitration. As we held in *Newburgh*, our statute constrains our interpretation of contract language except to the extent that it forms the basis of an improper practice charge.⁶

We have determined, and the ALJ acknowledged, that language such as that found in the Mahon settlement stipulation waives a party's right to prosecute an improper practice before PERB.⁷ The stipulation expressly stated that the grievant and the union jointly and severally released the Transit Authority. There is a presumption that the parties to a contract intend to bind not only themselves but also their personal representatives, unless the contract calls for some personal quality or its

³ Transcript, pp. 21-22.

⁴ *Id.*

⁵ 30 PERB ¶3027 (1997).

⁶ Act, §205.5(d).

⁷ *New York City Transit Auth. (Frederickson)*, 34 PERB ¶3006 (2001).

words plainly preclude such a presumption.⁸ Here, the language of the stipulation fails to rebut the presumption. The testimony of Samuelson further supports the knowing waiver of TWU's rights because the stipulation resulted from good faith negotiations even though Morgan had previously advised Samuelson that Sergio had threatened his employment.

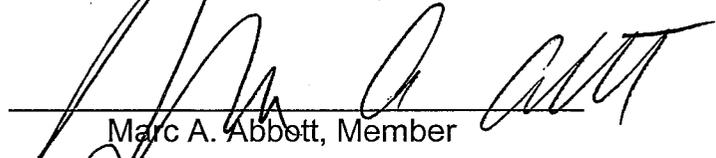
Based upon the foregoing, we grant the NYCTA's exceptions and reverse the decision of the ALJ.

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

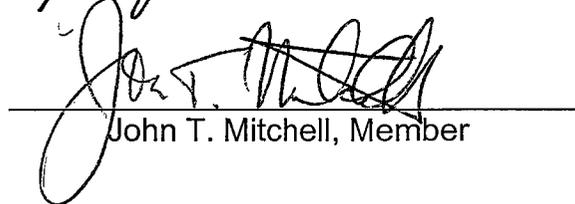
DATED: April 4, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁸ *Minevitch v. Puleo*, 9 AD2d 285 (1st Dep't 1959).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DOUGLAS DIETZ,

Charging Party,

- and -

CASE NO. U-23271

UTICA TEACHERS ASSOCIATION,

Respondent,

- and -

UTICA CITY SCHOOL DISTRICT,

Employer.

**COHEN AND COHEN (DANIEL S. COHEN of counsel), for
Charging Party**

**JAMES R. SANDNER, GENERAL COUNSEL (MARY SCALISE
PERILLO of counsel), for Respondent**

**FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.
(HENRY F. SOBOTA and CRAIG ATLAS of counsel), for Employer**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Douglas Dietz to a decision of an Administrative Law Judge (ALJ) dismissing Dietz's improper practice charge filed against the Utica Teachers Association (Association) alleging, *inter alia*, that the Association violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it failed to consult with him over the terms of a disciplinary settlement, thereby allowing certain counseling memoranda to be placed in his personnel file without his knowledge.

The Utica City School District (District) is made a statutory party pursuant to §209-a.3 of the Act.

EXCEPTIONS

Dietz excepts to the ALJ's decision on both legal and factual grounds. The Association and the District support 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

A detailed description of the facts is set forth in the ALJ's decision.¹ We will, therefore, confine our analysis to the salient facts relevant to our resolution of the exceptions.

Between October 25, 2000 and May 2, 2001, Dietz received several memoranda criticizing his job performance. Dietz is a tenured special education teacher and he received these memoranda from Karen Kunkel, the principal at the school in which he worked. Dietz did not file any grievances over the contents of these memoranda or Kunkel's remedial directives.

In May 2001, however, Dietz contacted the Association's president, Al Martorella, to discuss these problems. Martorella referred Dietz to the Association's vice-president and grievance chairperson, Nancy Murphy. Although the subject of filing a grievance came up in Dietz's discussion with Murphy, there is no record evidence that Dietz asked Murphy to file a grievance on his behalf.

Subsequently, Dietz met with William Morgan, labor relations specialist for the Association's parent organization, New York State United Teachers (NYSUT). Morgan

¹ 36 PERB ¶4504 (2003).

instructed Dietz to obtain and review copies of the memoranda that had been placed in his personnel file.

Dietz then met with Morgan and the newly-elected president of the Association, Laurence Custodero, in August 2001. They discussed the memoranda as well as Dietz's concern over what he considered to be the illegal main-streaming of Special Education students assigned to Dietz. During this discussion, they agreed that some of the memoranda were too old to challenge. Morgan indicated that he would try to persuade the District to remove the memoranda or, alternatively, to modify them into counseling memoranda. Again, Dietz did not request that the Association file a grievance on his behalf. The District later agreed to modify the memoranda.

In mid-October, Custodero communicated with the District's Personnel Director, James Salamy, regarding the modified memoranda. Salamy faxed copies to Custodero who was satisfied that the memoranda had been revised. The District placed the revised counseling memoranda into Dietz's personnel file without any further notification to either Dietz or the Association.

In November 2001, Morgan received a letter from Dietz's attorney, D. Victor Pellegrino, inquiring into the situation. Morgan responded and directed Pellegrino to Custodero, who, in turn, responded to Dietz on December 5, 2001. The letter from Custodero explained the steps the Association had taken to have the reprimand letters reduced to counseling memoranda. By letter dated January 10, 2002, Dietz informed the Association of his objections to the manner in which the Association handled the matter and advised the Association that he would consult with counsel.²

² See ALJ Exhibit 1, attachment #8.

On April 3, 2002, Dietz filed his original improper practice charge. An amended charge was thereafter filed on April 17, 2002. At the conclusion of the hearing, held on October 18, 2002, the Association moved to dismiss the charge for failing to state a claim of breach of duty of fair representation and for failing to exhaust the grievance procedure. The ALJ denied the motion and the Association presented its case.

DISCUSSION

To establish a violation of the duty of fair representation under the Act, Dietz must demonstrate that the Association's actions toward him were arbitrary, discriminatory or taken in bad faith.³ As the ALJ found, Dietz has failed to meet his burden of proof. We agree

Dietz's charge is premised on the fact that the Association acted arbitrarily by settling his dispute with the District without investigating the allegations made against him and, thereafter, failing to consult with him. Such an action does not violate the Act because we have held that a union may settle a grievance without an employee's participation as long as it is not done in a manner that violates the Act.⁴

Since he offered no evidence to demonstrate that the Association's action was either discriminatory or done in bad faith, we must determine whether the Association's action was arbitrary. In assessing whether the Association's action was arbitrary, we are guided by certain principles. In the absence of proof of improper motive or of grossly negligent or irresponsible conduct or of proof of unlawful intent,⁵ a union does

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

⁴ *AFSCME, Counsel 66 and Local 2055 and Capital Dist. Off-Track Betting Corp. (Gregory)*, 26 PERB ¶¶3036 (1993).

⁵ *Civil Service Employees Ass'n (Kandel)*, 13 PERB ¶¶3049 (1980); *Nassau Educ. Chapter of the Syoset CSD Unit, CSEA, Inc.*, 11 PERB ¶¶3010 (1978).

not breach its duty of fair representation merely because it settled the grievance short of arbitration.⁶ Thus, an employee's dissatisfaction with the disposition of a grievance is not enough.⁷ The complete satisfaction of all who are represented is hardly to be expected.⁸

Here we find that Dietz received several memoranda over a period of about seven months which have been characterized as critical of his performance and disciplinary in nature. He took no steps to complain until May 2001. At that time, he contacted the Association for assistance. By August 2001, Dietz and Custodero met with Morgan who noted that Dietz had waited beyond the contractual forty calendar days in order to file a grievance for some of the memoranda. As an alternative, Morgan discussed with Dietz and Custodero a plan to persuade the District to either remove the memoranda or modify them to counseling memoranda. Dietz did not object to Morgan's proposal and the District agreed to modify the memoranda.

As far as the Association was concerned, the dispute had been resolved except that Dietz had not been notified. The record indicates that Custodero had overlooked contacting either the District or Dietz concerning the final resolution. Dietz, in turn, failed to communicate with the Association or the District. Instead, Dietz consulted with an attorney in November 2001 who wrote to Morgan inquiring about the situation. Custodero responded to Dietz, by letter dated December 5, 2001, and informed him of the action the Association had taken and that the disciplinary letters had been reduced

⁶ *Vaca v. Sipes*, 386 US 171, 64 LRRM 2377 (1967).

⁷ *State of New York (SUNY at Buffalo) and United University Professions (Yoonessi)*, 29 PERB ¶¶3075 (1996); *State of New York and Public Employment Federation, AFL-CIO (Robinson, et al.)*, 14 PERB ¶¶3043 (1981).

⁸ *Ford Motor Co. v. Huffman*, 345 US 330, 31 LRRM 2548 (1953).

to counseling memoranda. Assuming, *arguendo*, that Custodero's actions could be characterized as negligent, we would not find a violation. We have held that allegations that a union has been careless, inept, ineffective or negligent in the investigation and presentation of a grievance do not evidence a breach of the union's duty of fair representation.⁹

Based on the foregoing, we deny Dietz'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.

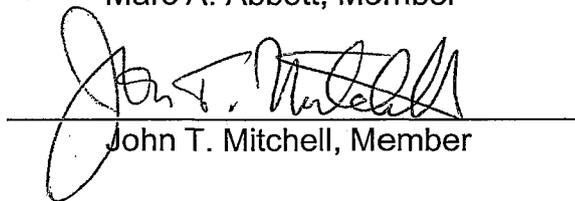
DATED: April 4, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁹ District Council 37, AFSCME (Gonzalez), 28 PERB ¶3062 (1995).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

IUOE LOCAL 545, AFL-CIO,

Petitioner,

-and-

CASE NO. C-5229

TOWN OF LYSANDER,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the IUOE Local 545, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regular part-time employees of the Town filling the following positions (Civil Service titles): Deputy Town Clerk, Assessment Clerk, Data Collector, Receiver of Taxes, Deputy Receiver of Taxes, Clerk to Town Justice, Recreation Attendant, and Clerk I.

Excluded: All other employees, including seasonal employees and the confidential secretary to the Town Supervisor.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the IUOE Local 545, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 4, 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

TEAMSTERS LOCAL 182,

Petitioner,

-and-

CASE NO. C-5265

TOWN OF OHIO,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local 182 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: Highway Department medium equipment operators.

Excluded: Highway Superintendent, Highway Department secretary/bookkeeper and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 182. 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.

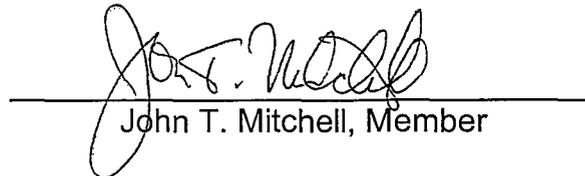
DATED: April 4, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

IUOE LOCAL 463, 463A, B, C & D,

Petitioner,

-and-

CASE NO. C-5275

TOWN OF CAMBRIA,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the IUOE Local 463, 463 A, B, C & D 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: Employees of the Town of Cambria's Highway, Sewer and Water Departments in the following titles: Motor Equipment Operator, Motor Equipment Operator/Foreman, Mechanic, Water Maintenance Person and Sewer Maintenance Person.

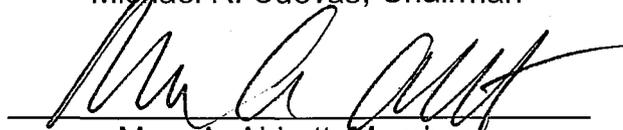
Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the IUOE Local 463, 463 A, B, C & D. 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.

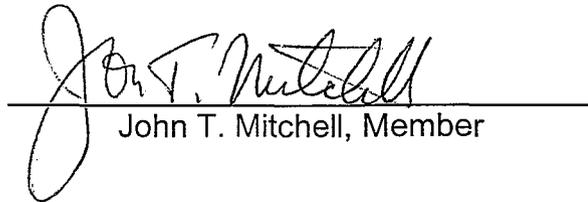
DATED: April 4, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member