

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

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

- and -

CASE NO. C-5257

HILLSIDE PUBLIC LIBRARY,

Employer.

RICHARD M. GREENSPAN, for Petitioner

WILLIAM M. CULLEN, for Employer

BOARD DECISION AND ORDER

On November 4, 2002, the United Public Service Employees Union filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Hillside Public Library.

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: All Page employees.

Excluded: All others.

Pursuant to that agreement, a secret-ballot election was held on June 19, 2003, at which a majority of ballots were cast against representation by the petitioner.

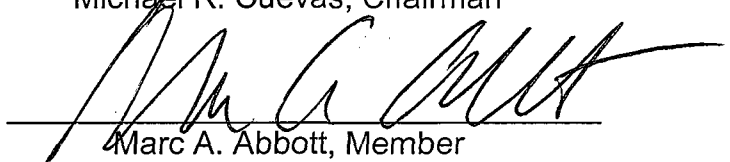
Inasmuch as the results of the election indicate that a majority of the eligible

voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

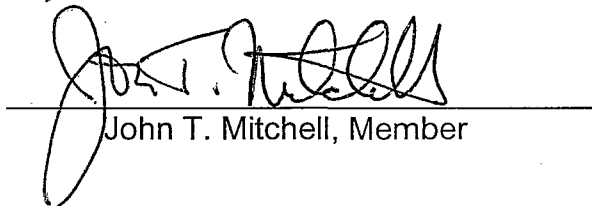
DATED: August 18, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

TOWN OF RAMAPO STAFF ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5181

TOWN OF RAMAPO,

Employer.

ANN MARIE BURKE, for Petitioner

**ALAN M. SIMON, TOWN ATTORNEY (JACK SCHLOSS of counsel) for
Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Ramapo (Town) to a decision of an Administrative Law Judge (ALJ) on a petition filed by the Town of Ramapo Staff Association (Association) seeking to represent certain unrepresented Town employees.¹ The parties thereafter agreed to the creation of a bargaining unit

¹ The unit as petitioned for included: All full-time and part-time employees in the titles of Assessor, Maintenance Mechanic II (Director of Buildings and Grounds), Building Inspector II (Director of Building, Planning & Zoning), Town Clerk, Deputy Town Clerk, Director of Finance, Senior Program Assistant & Grant Writer, Justice Court Clerk, Director of Parks & Recreation, Recreation Facilities Manager (Deputy Director Recreation), Recreation Activities Manager, Personnel Administrator, Director of Public Works, Engineer III (Deputy Director of Public Works), Director of Purchasing, Receiver of Taxes, and Director of Youth Counseling Services.

which included several of the at-issue titles.² The remaining titles were the subject of a hearing,³ as the Town asserted that they are managerial employees within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act).⁴ After the hearing, the hearing ALJ retired from employment with PERB and another ALJ was substituted who subsequently issued the decision to which the Town takes exception. The ALJ determined that only Edward Dzurinko, Director of Public Works, was managerial and, therefore, properly excluded from the proposed unit. The remaining titles were included in the bargaining unit sought by the Association.

² The unit included: Maintenance Mechanic II (Director of Buildings and Grounds), Engineer III (Deputy Director of Public Works), Senior Program Assistant & Grant Writer, Deputy Town Clerk, Justice Court Clerk, and Recreation Activities Manager; and to exclude the following: Personnel Administrator, Director of Finance, Receiver of Taxes, Town Clerk, and Director of Parks & Recreation. The request for the title of Director of Purchasing was not processed due to the fact that it was vacant at the time of the pre-hearing conference.

³ Edward Dzurinko, Director of Public Works; Brian Brophy, Building Inspector II (Director of Building, Planning & Zoning); Daniel Covert, Recreation Facilities Manager (Deputy Director, Recreation); JoAnn Soules, Assessor B (Director of Assessment & Taxation); and Joe Lanzone, Director of Youth Counseling.

⁴ Section 201.7(a) defines the term "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, . . . persons . . . who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board. . . . Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

EXCEPTIONS

The Town excepts to the ALJ's decision, arguing that the ALJ who issued the decision was not the hearing ALJ and, therefore, could not make the credibility resolutions necessary to decide the case and also that the ALJ erred by finding that the at-issue employees are not managerial. The Association supports the ALJ's decision, but excepts to the Town's inclusion in its brief of an affidavit from the Town Supervisor.

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 more fully in the ALJ's decision and are repeated here only as necessary to address the Town's exceptions.⁵

Brian Brophy is a Building Inspector II. His in-house title is Director of Building, Planning and Zoning. He is responsible for determining whether a building complies with Town building codes. He has recommended that the Town Board increase fees for applications to the Town Planning and Zoning Board and adopt a new zoning map for the Town. He attends Town Board meetings when there is an issue related to his department on the agenda, but he has never been present during an executive session of the Town Board. Brophy supervises a staff of several employees, prepares the annual budget request, and is the first step in the grievance procedure. He does not have the authority to hire or fire employees in his department.

In 1999, Brophy instituted a requirement that building inspectors keep a daily log of their activities. An improper practice charge was filed and, when consulted by the

⁵ 36 PERB ¶4006 (2003).

Town Supervisor whether the Town should agree to a settlement of the charge, Brophy opined that the Town should not. PERB found a violation of the Act occurred when Brophy unilaterally instituted a requirement in his department that certain employees keep a daily log.⁶

JoAnn Soules was an Assessor B. Her in-house title was Director of Assessment and Taxation. The Town's exceptions state that, after the hearing in this matter, Soules retired from employment with the Town and the Town hired Scott Shedler to replace her. This information was not before the ALJ. The Town has not excepted to the ALJ's determination that Soules was not a managerial employee.⁷

Joseph Lanzone, Jr., is the Director of Youth Counseling Services. As such, he supervises several employees but he does not have the authority to hire or fire employees⁸, although he has issued counseling memoranda, in consultation with the Town's Personnel Department. Lanzone administers the Town's youth counseling program, under the direction of the Counseling Center Board of Directors. He attended one executive session of the Town Board where he spoke to the number of resignations in his department. He has consulted with the Town Attorney about administrative policy.

Daniel Covert is the Recreational Facilities Manager and also has the in-house title of Deputy Director of the Parks and Recreation Department. He is directly

⁶*Town of Ramapo*, 32 PERB ¶13072 (1999).

⁷ The heading to the Town's exception with respect to Soules states that "Soules was Managerial & Confidential But is Now Retired Mooting the Employers [sic] Application to have her declared Managerial and Confidential". We do not consider the heading to an exception to be the exception and to contain argument which must be addressed.

⁸ He has interviewed prospective employees and made recommendations based upon those interviews.

supervised by the Director of the Parks and Recreation Department and in his absence would be in charge of the department. He is responsible for the day-to-day operation of the municipal golf course and the Town's two swimming pools, supervising approximately 50 employees. He recommends to the Personnel Department the hiring of 15 to 20 seasonal employees each year. He has fired seasonal employees on occasion. He makes recommendations to the Director, the Town Supervisor and the Town Attorney about service contracts at the facilities he manages. He has attended Town Board meetings and has been told to stay for executive sessions on a few occasions to answer questions about service contracts.

DISCUSSION

Initially, the Town's exception as to the substitution of the hearing ALJ must be addressed. An ALJ may be substituted at any time by the Director of Public Employment Practices and Representation (Director) for the ALJ previously assigned.⁹ In this case, the hearing ALJ is no longer employed by the Board. Despite the Town's assertions to the contrary, we find that there are no credibility resolutions presented in this record which would warrant the holding of a hearing *de novo*. We, therefore, deny this exception by the Town.

The Town asserts numerous factual errors were made by the ALJ in her decision finding that Brophy, Covert, Soules and Lanzone were appropriately included in the unit

⁹ Rules of Procedure, §212.4(a). See *Board of Educ. of the Union-Endicott Cent. Sch. Dist.*, 233 AD2d 602, 29 PERB ¶7020 (3d Dep't 1996).

sought by the Association.¹⁰ However, even the transcript references cited by the Town in its brief belie this assertion. The record fully supports the ALJ's findings. The Town further makes absolutely no legal argument in its exceptions in support of its argument that the at-issue employees are managerial within the meaning of the Act.

In *State of New York*,¹¹ the Board defined the policy formulation responsibilities necessary to require designation of an employee as managerial:

Policy is defined in a general sense as a "definite course or method of action selected from among alternatives and in the light of given conditions to guide and determine present and future decisions." (citation omitted) In government, policy would thus be the development of the particular objectives of a government or agency thereof in the fulfillment of its mission and the methods, means and extent of achieving such objectives.

The term "formulate" as used in the frame of reference of "managerial" would appear to include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. It would not appear to include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.

The record clearly establishes that Brophy, Covert and Lanzone are high-level supervisors but it does not establish that they participate regularly, and offer

¹⁰ We need not consider the ALJ's decision as to Soules as no exception was properly taken by the Town to the finding that Soules is appropriately included in the unit sought by the Association. The Town's exceptions merely assert that Soules is no longer the incumbent and that the duties assigned to her title have significantly changed. No exception was taken as to the ALJ's determination that Soules was not a managerial employee. The other facts, included for the first time in the Town's brief, are not properly before us.

¹¹ 5 PERB ¶3001, at 3005 (1972).

information, opinions and advice, in those situations where the employer is determining its goals and objectives and the methods and means for accomplishing them.¹² Nor does it establish that they directly assist the ultimate decision-makers of the Town in reaching the decisions necessary to conduct the business of government.¹³ That they offer technical advice when asked by the Town Board is established by the record, but there is insufficient evidence that they participate with regularity in executive sessions¹⁴ of the Town Board where policies based upon their technical advice are discussed and implemented or that they have any meaningful role in advising the Town Supervisor in the formulation of employer-wide policy. They make some personnel decisions but, without notable exception, their decisions are not independently made and are usually subject to review by the Personnel Department and/or the Town Attorney.

Based on the foregoing, we find that none of the at-issue employees - Brophy, Covert or Lanzone - are appropriately excluded from the unit sought by the Association. We deny the exceptions of the Town, grant the cross-exception of the Association, and affirm the decision of the ALJ.

IT IS ORDERED, therefore, that there be a unit established as follows:

Included: All full-time and part-time employees in the titles of
Maintenance Mechanic II (Director of Buildings and Grounds),
Engineer III (Deputy Director of Public Works), Senior Program

¹² *City of Binghamton*, 12 PERB ¶3099 (1979).

¹³ *City of Lackawanna*, 28 PERB ¶3043 (1995).

¹⁴ The Town included in its exceptions an affidavit from the Town Supervisor stating that Brophy has attended executive sessions of the Town Board. We will not consider this affidavit as it was not in evidence before the ALJ and was improperly included in the Town's exceptions. See *Oswego City Sch. Dist.*, 25 PERB ¶3052 (1992).

Assistant & Grant Writer, Deputy Town Clerk, Justice Court Clerk, Recreation Activities Manager, Building Inspector II (Director of Building, Planning & Zoning), Recreation Facilities Manager (Deputy Director, Recreation), Assessor B (Director of Assessment & Taxation), and Director of Youth Counseling.

Excluded: Personnel Administrator, Director of Finance, Receiver of Taxes, Town Clerk, Director of Parks & Recreation, and Director of Public Works.

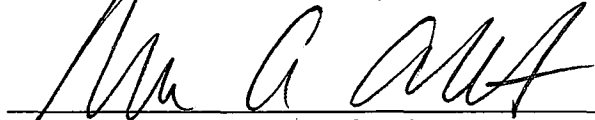
IT IS FURTHER ORDERED that an election by secret ballot shall be held among the employees in the unit found to be appropriate who were employed on the payroll date immediately preceding the date of this decision, unless the petitioner submits to the Director, within fifteen days from the date of receipt of this decision, evidence to satisfy the requirements of §201.9(g)(1) of the Rules of Procedure for certification without an election.

IT IS FURTHER ORDERED that the Employer shall submit to the Director and to the Association, within fifteen days from the date of receipt of this decision, an alphabetized list of all employees within the unit found to be appropriate who were employed on the payroll date immediately preceding the date of this decision.

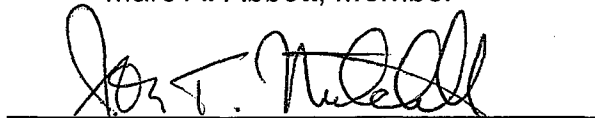
DATED: August 18, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

**VILLAGE OF HAMBURG
POLICE BENEVOLENT ASSOCIATION,**

Charging Party,

-and-

CASE NO. U-22870

VILLAGE OF HAMBURG,

Respondent.

**BARTLO, HETTLER & WEISS (PAUL D. WEISS and YVONNE S. TRIPPI of
counsel), for Charging Party**

ROBERT G. WALSH, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions of the Village of Hamburg (Village) to a decision of an Administrative Law Judge (ALJ), on an improper practice charge filed by the Village of Hamburg Police Benevolent Association (PBA), finding that the Village violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented a Transitional Work Program (Program) that set forth procedures for administering light duty assignments for Village police officers receiving benefits pursuant to General Municipal Law (GML) §207-c.

EXCEPTIONS

The Village excepts to the ALJ's decision, arguing that the ALJ erred by failing to limit his decision to the five points raised by the PBA and by deciding issues outside the scope of the offer of proof submitted by the PBA pursuant to the direction of the conference ALJ, and by finding those aspects of the Program are mandatory subjects of negotiation. The PBA filed no cross-exceptions. It did file a response to exceptions and brief supporting 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 and remand it to the ALJ for further processing consistent with our decision herein.

FACTS

The facts are few and not in dispute. On or about June 29, 2001, the Village unilaterally adopted and implemented the Program. As implemented, it is Order #5-2001 and is set forth below:

The purpose of transitional work is to provide an opportunity to officers who are injured in the performance of their duties and unable to perform the essential functions of their regular duties to remain a productive member of the work force.

The Village, in consultation with the retained medical consultant/nurse case manager, will forward a request for medical documentation of a work related injury to be completed by the physician of the disabled officer. Any officer who is out of work more than one week will be assigned a nurse case manager in order to ensure that the officer is receiving the best care possible in helping them return to permanent duty. Pursuant to General Municipal Law §207-c, the officer shall attend all medical appointments, physical therapy sessions and follow the prescribed medication regime.

Officers who can physically return to work with restrictions will be required to accept transitional work when, in the discretion of the Chief

of Police, such work is available. Officers who do not accept transitional work risk termination of the General Municipal Law §207-c benefits.

All transitional work assignments will be made in accordance with the needs of the department. This includes type of work and duration of assignment. If, at anytime it becomes apparent that a full recovery of the officer is not expected, the officer may be removed from the program.

The officer must continue to provide updated medical [sic] showing the current level of disability. Failure of the officer to do so may result in the Village scheduling an Independent Medical Evaluation and could result in the termination of the officer's General Municipal Law §207-c benefits. The transitional work assignment will be re-assessed every 30 days and job tasks will be correlated with regards to the current medical restrictions.

If the officer's treating physician alleges a permanent disability, the Village of Hamburg may request that the officer's treating physician complete a physical requirement job description form. Said form will list the essential functions of the job along with the physical requirement job descriptions of those essential functions. The physician will be asked to indicate whether or not the officer can perform the essential functions of their job. If the officer cannot perform the essential functions, the physician will be asked to set forth restrictions.

The Village of Hamburg may request that a functional capacity evaluation be performed to quantify the individual's physical capacities as they relate to his/her ability to perform the essential functions of the job. The Village may also employ a physician to conduct an Independent Medical examination.

The Village of Hamburg may initiate an application for disability retirement if there is medical evidence of a permanent disability. The officer may be required to perform transitional work pending the outcome of the disability application.

The Department will determine the availability of transitional work that meets with the restrictions set forth by the treating physician or independent medical examiner. The Department cannot guarantee that transitional work will be available at all times and for all restrictions. The Department also cannot guarantee the duration of the transitional work position.

The PBA objected to the implementation of the Program without negotiations on five points that the PBA argues are mandatory subjects of negotiations: the requirement that an officer to be assigned a nurse case manager; the provision that an officer may be removed from the Program if full recovery of the officer is not apparent; the provision that the transitional work assignment will be re-assessed every 30 days; the provision that the officer's physician may be requested to complete a physical job description form; and the provision that the Village will forward a request for medical documentation of a work-related injury to the officer's physician.

The ALJ determined that the unilateral implementation of the Program violated §209-a.1(d) of the Act because it raised issues that are mandatorily negotiable, finding that the language of the Program was imprecise and two provisions could be interpreted to specifically or impliedly condition or potentially deny an officer receipt of GML §207-c benefits.

DISCUSSION

An employer has the authority to make a determination that an officer who is receiving GML §207-c benefits must accept a "light-duty" assignment to continue to be eligible to receive those benefits.¹ However, once the determination to assign light-duty has been made, the employer may need to negotiate the procedures by which such determinations may be reviewed and the procedure by which such assignments are

¹ GML §207-c (3).

made, as such issues are mandatory subjects of negotiations.² As the Court of Appeals noted in *Watertown, supra*, "matters related to section 207-c, but not specifically covered by the statute, are mandatory subjects of bargaining".³ The duty to bargain is limited, of course, to those matters that are not precluded by GML §207-c (the initial determination of eligibility, the right to assign light-duty or to provide certain medical reports) and which are otherwise mandatory subjects of negotiations. The duty to bargain over GML §207-c is not limited solely to procedures for the review of light-duty assignments or procedures for the termination of benefits, as argued by the Village.⁴

In turning to the provisions found by the ALJ to be mandatory, we concur with the argument raised by the Village in its exceptions that the ALJ considered provisions of the Program that were not raised by the PBA in its offer of proof. We find that the ALJ erred in deciding issues that were not before him and by failing to limit his decision to the charge as pled and clarified.

We further find that a review of the provisions of the Program cited by the ALJ in support of his decision fails to reveal any language that it is mandatorily negotiable.

² *City of Watertown v. PERB*, 95 NY2d 73, 33 PERB ¶¶7007 (2000); *Schenectady Police Benevolent Ass'n v. PERB*, 85 NY2d 480, 28 PERB ¶¶7005 (1995).

³ *Supra* at 7016.

⁴ See *Town of Carmel v. PERB.*, 246 AD2d 791, 31 PERB ¶¶7002 (3d Dep't 1998) [hazardous duty pay for light duty officers held mandatory subjects of negotiation]; *Town of Cortlandt*, 30 PERB ¶¶3031, *petition to review dismissed sub nom. Town of Cortlandt v. PERB*, 30 PERB ¶¶7012 (Sup. Ct. Westchester County 1997) [procedures for implementing GMC §207-c were mandatory subjects of negotiation]; *City of Newburgh v. Newman*, 19 PERB ¶¶7005 (Sup. Ct. Albany County 1986) [demand for benefits broader than those provided in GMC §207-c was a mandatory subject of negotiations].

Certain provisions of the Program advise officers of the risk of termination of benefits if the officer does not comply; for example, the requirement that officers who do not accept transitional assignments risk the termination of benefits and the admonition that officers who do not provide updated medical records consistent with the program risk the termination of benefits. We held in *City of Schenectady*,⁵ “[w]e express no opinion as to whether and to what extent the procedural implementation of these two requirements [light duty assignments and ordered surgery] might be mandatorily negotiable because those questions are not raised in this case”. Here, the ALJ considered the cited language to establish a procedure. We disagree. The language quoted merely parrots the statute even if it does not use the exact words that the Legislature did. The employer has no duty to negotiate over the rights provided it by statute.

The other provision of the Program that the ALJ found objectionable states that an officer will be removed from the Program if it becomes apparent that the officer will not fully recover. The ALJ reasoned that it is not apparent what the status of the officer would be after removal from the program. Inasmuch as the employer has the ability to offer light police duty assignments by statute,⁶ we conclude that it has the ability to discontinue its offer. Since there is no language in the Program that indicates that removal from the Program will affect the officer’s receipt of benefits, we cannot interpret

⁵ 25 PERB ¶¶3022, *annulled in part, confirmed in part sub nom. Schenectady Police Benevolent Ass’n v PERB*, 25 PERB ¶¶7009 (Sup. Ct. Albany County 1992), *aff’d as modified*, 196 AD2d 171, 27 PERB ¶¶7001 (3d Dep’t 1994), *aff’d*, 85 NY2d 480, 28 PERB ¶¶7005 (1995).

⁶ GML §207-c(3).

this as creating an issue subject to mandatory negotiations. Under the statute, an officer otherwise qualified is entitled to benefits whether he is offered light duty or not.

We find that the portions of the Program before us on the exceptions of the Village do not violate §209-a.1(d) of the Act in that the cited language does not deal with mandatory subjects of negotiations. We further find that the ALJ erred in failing to decide the issues that were properly before him and we remand the case to the ALJ for decision on those provisions of the Program to which the PBA objected in its offer of proof.

Based upon the foregoing, we grant the Village's exceptions and reverse the decision of the ALJ and remand the matter to the ALJ for further processing consistent with this decision.

SO ORDERED.

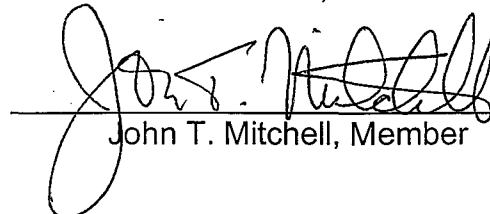
DATED: August 18, 2003
Albany, New York



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), 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) placing the title of Forester 4 in the Professional, Scientific & Technical Unit (PS&T) represented by the Public Employees Federation, AFL-CIO (PEF), pursuant to a unit clarification/unit placement petition filed by PEF.

PROCEDURAL MATTERS

The Director previously issued a decision on the petition,¹ in which he found that, while the incumbent in the position of Forester 4, Bruce Williamson, was a high-level supervisor with substantial and unfettered discretionary authority for the day-to-day operation of his bureau within the State's Department of Environmental Conservation (DEC), he did not formulate policy within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act).² The State filed exceptions to the Director's decision, arguing that there were errors of fact and law. PEF supported the Director's decision.

We remanded the matter to the Director for further development of the record to address whether the position of Forester 4 was newly created or substantially altered and whether the position of Forester 4 shares a community of interest with the other titles in the PS&T Unit. We also requested clarification of the manner in which the instant case was processed and the rationale for the manner in which it was litigated.³

¹ 35 PERB ¶4018 (2002).

² 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...."

³ 36 PERB ¶3007 (2003).

The Director issued a decision on remand,⁴ in which he found that the Forester 4 was a newly-created position that the State had initially designated as managerial/confidential. The Director outlined the long-standing agreement between the State and PEF, approved by PERB, which allows the State to initially designate a newly-created or reclassified position as managerial/confidential. Under the agreement, PEF may then file with PERB a unit clarification/unit placement petition or a certification/decertification petition challenging the designation.⁵

The Director also clarified that the order of proof in the earlier hearing had been set by him in the interest of administrative expedience and economy and in furtherance of the policies of the Act, which favor representation. He noted that, in most representation cases, the employer is generally called upon to proceed first as it is the employer who is in the best position to provide information about where the at-issue title fits within its organizational structure, duties of the at-issue title, and terms and conditions of employment of the title and titles in the relevant bargaining units.

Relying on *County of Rockland*,⁶ the Director noted that "in the context of a petition seeking the representation of unrepresented employees, it is for the employer to present evidence which supports the finding that employees with managerial or

⁴ 36 PERB ¶4002 (2003).

⁵ See *State of New York*, 6 PERB ¶3019 (1973). PEF and the State agreed to continue the practice outlined in this decision in their July 31, 1984 agreement approved by PERB. The Director's decision gives the date of the memorandum of procedure between the parties as October 17, 1986. See ALJ's Exhibit 7.

⁶ 28 PERB ¶3063, at 3141 (1995).

confidential job duties be excluded from the appropriate unit.”⁷ He further found that it was not unusual for an employee organization to call no witnesses and to have the case decided solely on the evidence introduced by the employer.⁸

EXCEPTIONS

PEF and the State advised the Board jointly that they would not file exceptions to the Director’s decision on remand, but sought the Board’s decision on the exceptions filed by the State and the response filed by PEF to the Director’s initial decision adding the title of Forester 4 to the PS&T Unit represented by PEF.

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

FACTS

The facts are set forth in detail in the Director’s initial decision⁹ and will be repeated here only as necessary.

⁷ 36 PERB ¶4002 (2003), quoting *County of Rockland*, 28 PERB ¶3063, at 3141 (1985).

⁸ The Director also relied upon a representation at the second hearing by PEF’s counsel that he had been advised in the 1990’s by the then-Director that the employer would proceed first in any representation proceedings at PERB arising under the PEF-State agreement. The Director also introduced, and relied upon, an internal PERB Representation Office memorandum from 1984 that was addressed to professional staff and which stated that the employer should proceed first in representation proceedings. While he did not cite to *Town of Ossining*, 32 PERB ¶3013 (1999), *rev’d sub nom. CSEA v. PERB*, 33 PERB ¶7013 (Sup. Ct. Albany County 2000), the Director might have been addressing what he perceived would be concerns raised if the internal practices of the Representation section were not followed in this matter. In light of our decision in *State of New York*, *supra* note 5, the Director need not have included an internal office memorandum in his decision.

⁹ *Supra* note 1.

The parties stipulated, at the hearing held pursuant to our remand to the Director, that the Forester 4 is a promotional title in the Forester title series, all of which titles are in the PS&T Unit.¹⁰ The title of Forester 4 is subject to the same general terms and conditions of employment as employees in the Forester 1, 2, and 3 positions. All the employees in the Forester title series share a common mission within DEC. Therefore, the Forester 4 title would appropriately be placed in the PS&T Unit, unless the duties of the title warrant a managerial designation.

Williamson, the only employee in the Forester 4 title, is the Bureau Chief for DEC's Bureau of Private Land Services. He is charged with the day-to-day operation of the Bureau. Williamson supervises a staff of ten in five sections and has an annual budget of approximately \$2 million, half of which comes from the State and half from federal grants.

Williamson's immediate supervisor is the Director of the Division of Lands and Forests (also referred to as the State Forester), who reports to the Deputy Commissioner for Natural Resources. Between the Deputy Commissioner and the DEC Commissioner is the Executive Deputy Commissioner of DEC.

Williamson formulates the Bureau's initial budget request, based upon recommendations he receives from his staff. Williamson allocates the funds he receives, approximately 80 to 90% of his initial request, among the several program areas for which he is responsible. Any changes in funding from his initial budget request require the approval of his supervisor, but are usually approved.

¹⁰ The Forester 4 was a title in the PS&T Unit prior to the 1997 title and salary plan implemented by the State, which eliminated the Grade 23, Forester 4 title. The plan also eliminated the Forester 5 title and revised it to become the new Forester 4 title, designated Grade 29, a managerial designation.

Williamson has a role in entering into contracts and contract negotiations with communities for project work. He approves the contracts, although he is not a signatory. There are no monetary limits placed upon the contracts Williamson negotiates, nor has the Division Director ever overruled Williamson on any contract he has negotiated.¹¹

Williamson makes decisions on which Federal grant opportunities to pursue and prepares drafts of Federal grant proposals. Williamson and his staff also prepare legislative proposals and propose regulatory changes. For example, as pointed out in more detail in the Director's decision, Williamson is solely responsible for the initiation of a regulatory change proposal which would allow gooseberries to be grown commercially in New York, a proposal with significant statewide implications.¹²

Williamson has also been formulating a new long-term policy for the direction of the State Nursery program. He determines the level of funding the State Nursery programs will receive and he decided to halve the production of a certain kind of plant, which had a significant impact on the nursery.¹³ In response to loss of funding and experienced staff, Williamson made the decision to eliminate the funding efficiency studies for small sawmill operators and to allocate the resources to promoting trade shows.

The record evidences that Williamson's recommendations are followed by his superiors without notable exception. He is called upon to provide information to those in

¹¹ Transcript, pp.51-52.

¹² Transcript, p. 31. Williamson testified that current DEC regulations prohibit the production of such plants. Major food producers have expressed an interest in locating a production facility in New York State if the ban on gooseberry cultivation is lifted.

¹³ Transcript, pp. 16-17.

positions above him and has participated in discussions with the Division Director and Deputy Commissioner where DEC policy is discussed and formulated.

DISCUSSION

Shortly after the 1971 amendments to the Act,¹⁴ which defined those managerial and confidential employees who would be excluded from the Act's coverage, the Board decided *State of New York*.¹⁵ In that decision, the Board was called upon to define formulation of policy within the meaning of the Act. The Board stated that:

Policy is defined in a general sense as a "definite course or method of action selected from among alternatives and in the light of given conditions to guide and determine present and future decisions." (citation omitted) In government, policy would thus be the development of the particular objectives of a government or agency thereof in the fulfillment of its mission and the methods, means and extent of achieving such objectives.

The term "formulate" as used in the frame of reference of "managerial" would appear to include not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such a proposal into effect. It would not appear to include a person who simply drafts language for the statement of policy without meaningful participation in the decisional process, nor would it include one who simply engaged in research or the collection of data necessary for the development of a policy proposal.¹⁶

¹⁴ Chapters 503 and 504 of the Laws of 1971.

¹⁵ 5 PERB ¶3001 (1972).

¹⁶ *Id.* at 3005.

Thereafter, the Board designated a number of positions as managerial and/or confidential, including the precursors to the Forester 4.¹⁷

In *City of Binghamton*,¹⁸ the Board further articulated the standard for designation as managerial based upon policy formulation:

[t]o formulate policy is to participate with regularity in the essential process involving the determination of the goals and objectives of the government involved, and of the methods for accomplishing those goals and objectives that have a substantial impact upon the affairs and the constituency of the government. The formulation of policy does not extend to the determination of methods of operation that are merely of a technical nature.

We have interpreted this standard to mean that an employee is managerial who "offers regular and substantial advice on the direction" in which the employer should go in offering services to the public.¹⁹ Only those employees who have a direct and powerful influence on policy formulation at the highest level will be determined managerial under the formulation of policy criterion.²⁰ Such an employee "would regularly participate in the decision-making process by which departmental objectives and policies are formulated and implemented."²¹

¹⁷The Chief Forester (Grade 28), Principal Forester (Grade 25), and Associate Forester (Grade 21) were designated. Since the title and salary plan was implemented, the Forester 4 is now a Grade 29.

¹⁸12 PERB ¶3099, at 3185 (1979).

¹⁹*City of White Plains*, 14 PERB ¶4024, at 4043, *aff'd*, 14 PERB ¶3052 (1981).

²⁰ *County of Putnam*, 20 PERB ¶3059 (1987).

²¹ *City of Jamestown*, 25 PERB ¶3015, at 3035 (1992).

An employee's position in the hierarchy of the employer is certainly one factor to consider in deciding the managerial status, but as government changes and evolves to meet new service and financial demands, it is even more crucial that the duties of the employee, not the title, salary grade or placement on the employer's organizational chart, are the focus of our inquiry. A review of the duties performed by Williamson clearly establishes that the Forester 4 is a managerial title.

Williamson's responsibilities are of State-wide scope. "It is not, however, the fact of an employer-wide responsibility over a program area which warrants a managerial designation, but the nature and the extent of the duties performed by or reasonably required of an individual (citation omitted) as a result of that assigned area of responsibility."²² Williamson makes independent decisions in a variety of areas of responsibility, which are regularly approved and implemented, that affect policy across the State.

In *Town of Brookhaven*,²³ we designated as managerial an employee with duties similar to Williamson, in that she negotiated leases and other contracts, supervised the staff in her department, was responsible for her department's programs within the Town, and prepared the department's budget, including meeting with constituent groups. Williamson negotiates contracts, develops the Bureau's budget, supervises a large and varied staff and makes recommendations to the Division Director, which are regularly implemented without alteration.

²² *Pine Plains Cent. Sch. Dist.*, 27 PERB ¶3044, at 3097 (1994).

²³ 27 PERB ¶3043 (1994).

Board of Education of the City School District of the City of New York,²⁴ lends further support for Williamson's designation as managerial. There a Director of School Curriculum for a Community School District who had the responsibility for developing and establishing the goals, priorities and objectives not only of each subject at each level of education but also at each grade level, as well as developing and establishing alternative educational programs and hiring and supervising the staff, was designated as managerial. The Community School Superintendent relied upon the Director's recommendations in much the same way as the Division Director relies upon Williamson's recommendations and proposals.²⁵

It is clear from this record that Williamson makes recommendations and implements DEC policy. We have previously found that the definition of a policymaker is, and must be, sufficiently broad to include those relatively few individuals who directly assist the ultimate decision-makers in reaching the decisions necessary to the conduct of the business of the governmental entity.²⁶ By this, we mean persons who regularly participate in and influence a process by which the employer makes decisions regarding its mission and the means by which those policy goals and objectives can be best achieved. We have long considered such persons, who are part of the management team or who meet regularly with the management team, to be managers within the

²⁴ 17 PERB ¶3054 (1984).

²⁵ *Supra* note 17.

²⁶ *Clinton Community College*, 31 PERB ¶3070 (1998); *City of Lackawanna*, 28 PERB ¶3043 (1995).

meaning of the Act.²⁷ The record evidence in this case more than sufficiently establishes that the Forester 4 develops strategic plans for the State Nursery, forest health and protected plants programs, researches and composes Federal grants proposals, negotiates contracts, formulates the Bureau budget and makes other decisions with State-wide programmatic impact, and is thus sufficiently engaged in policy-making so as to make his inclusion in a bargaining unit inappropriate.

Based on the foregoing, we grant the State's exceptions and reverse the decision of the Director.

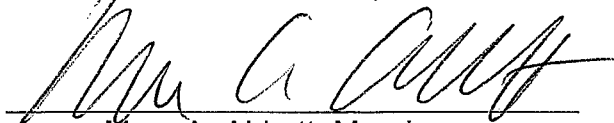
For the aforesaid reasons, PEF's unit clarification/unit placement petition for the title of Forester 4 is, therefore, dismissed.

SO ORDERED.

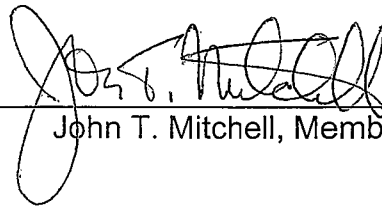
DATED: August 18, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

²⁷ See *Town of Greece*, 27 PERB ¶13009 (1994); *County of Cayuga*, 20 PERB ¶13024 (1987).

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

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, ONTARIO COUNTY
LOCAL 835, AVON CENTRAL SCHOOL DISTRICT
EMPLOYEE UNIT,**

Charging Party,

- and -

CASE NO. U-23450

AVON CENTRAL SCHOOL DISTRICT,

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. GRAIN
of counsel), for Charging Party**

**HARRIS BEACH LLP (JAMES A. SPITZ, JR., & MELISSA A. FINGAR of
counsel), for Respondent**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Avon Central School District (District) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Ontario County Local 835, Avon Central School District Employee Unit (CSEA), alleging that the District had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act), when it refused CSEA's demand to commence negotiations over

the terms and conditions of employment for unit employees following CSEA's certification as the bargaining representative for the unit.

Based upon a Stipulation of Facts, the ALJ found that the District had violated §209-a.1(d) of the Act.

EXCEPTIONS

The District excepts to the findings made by the ALJ on both factual and legal grounds. The District's principal exception is that the ALJ erred in determining that the existing collective bargaining agreement was not a bar to any further negotiations over terms and conditions of employment.¹ CSEA supports the ALJ's decision.

Upon our review of the record and consideration of the parties' arguments, we affirm the decision of the ALJ, as modified.

FACTS

CSEA filed a representation petition on April 11, 2001, seeking to be certified as the representative of the employees in a unit formerly represented by the Avon Central School Support Staff Association (Association).² The members of the Association had voted affirmatively on a resolution on March 18, 2001, to disband the Association and to seek representation by CSEA. CSEA alleged in its representation petition that it had requested recognition by the District as the bargaining agent for this unit of

¹ The District argues that the ALJ erred by not considering a statement made in CSEA's brief to the ALJ in the representation case in which CSEA allegedly stated that its sole purpose in filing the representation petition was to "administer the existing collective bargaining agreement". We do not reach this argument of the District's because it is not properly before us. Argument in a brief does not constitute record facts upon which a decision may be based. See *Greenburgh #11 Union Free Sch. Dist.*, 33 PERB ¶¶3018 (2000). See also *Margolin v. Newman*, 130 AD2d 312, 20 PERB ¶¶7018 (3d Dep't 1987), *appeal dismissed*, 71 NY2d 844, 21 PERB ¶¶7005 (1988).

² The unit includes non-instructional employees of the District.

unrepresented employees and that the District had denied its request. In an interim decision issued in that case,³ the ALJ found that the Association was defunct and, as a result of the Association's dissolution, even though there was an agreement between the District and the Association that covered the period July 1, 2000 through June 30, 2004, it was not a bar to the petition. The ALJ's decision in that proceeding was expressly incorporated into the record in this case.⁴

The District did not appeal that decision and thereafter signed a consent agreement that CSEA be certified as the exclusive bargaining agent for the unit formerly represented by the Association. By order dated January 23, 2002, this Board certified CSEA as the representative of the unit.⁵ Subsequently, on January 30, 2002, CSEA made a demand "to commence negotiations in order to modify the current collective bargaining agreement." The District responded on February 4, 2002 by advising CSEA that the District's contract with the Association was still in effect. The instant improper practice charge alleged an improper refusal to bargain. The District answered by asserting that the existing collective bargaining agreement is a bar to further negotiations until 2004.

DISCUSSION

The ALJ concluded that, upon CSEA's certification as the unit's representative, the District had an obligation to engage in negotiations with CSEA for a new collective bargaining agreement to be effective at the start of the District's next fiscal year. The

³ 34 PERB ¶4019 (2001).

⁴ 36 PERB ¶4534 (2003).

⁵ 35 PERB ¶3000.01 (2002).

ALJ also found that CSEA had the right to administer the Association-District agreement until a successor agreement was negotiated. The District argues that the existing agreement between the Association and the District acted as a bar to any further negotiations with CSEA until the expiration of the agreement in June 2004.

Section 208.1(a) of the Act provides that:

~~§208. Rights accompanying certification or recognition.~~

1. A public employer shall extend to an employee organization certified or recognized pursuant to this article the following rights:

(a) to represent employees in negotiations notwithstanding the existence of an agreement with an employee organization that is no longer certified or recognized, and in the settlement of grievances....

This language clearly supports the ALJ's determination that CSEA had the right upon certification to negotiate with the District for a new collective bargaining agreement, even though the prior agreement between the Association and the District does not expire until June 30, 2004. In *City of Newburgh*⁶, referring to *Fraternal Order, New York State Troopers, Local 1908, AFSCME, AFL-CIO*⁷, we reiterated that a newly certified or recognized employee organization obtains the right to negotiate a contract to succeed a predecessor agreement as of the date when it is certified or recognized. In *County of Rockland*,⁸ we held that:

Section 208.1(a) grants to a newly certified or recognized employee organization the immediate right to negotiate for employees in the unit even though there may still be in existence an unexpired agreement entered into with the former representative. In other words, the commencement of

⁶ 20 PERB ¶3017 (1987).

⁷ 5 PERB ¶3060 (1972).

⁸ 10 PERB ¶3098, at 3169-70 (1977).

negotiations by the newly designated representative is not to be deferred until the existing agreement runs out.

It is clear, therefore, that CSEA has the statutory right upon certification to negotiate a successor to the Association-District collective bargaining agreement and that the District violated §209-a.1(d) of the Act when it refused to negotiate with CSEA.

Our analysis does not end there, however. In deciding the initial representation case, the ALJ determined that the Association had become defunct by virtue of the employees' resolution to disband the Association and subsequently seek representation by CSEA.⁹ Neither the District nor CSEA appealed the ALJ's decision. They thereafter entered into an agreement consenting to CSEA's certification by this Board as the exclusive bargaining agent of the employees in the unit previously represented by the Association.

The issue of whether the Association is defunct is not before us in this proceeding. The Association's status was decided by the ALJ in the previous representation case and, because that decision was not appealed by the District, it is a final decision.¹⁰ The District's exceptions as to this issue are, therefore, not properly raised in this case and will not be addressed in this decision.

We held in *Eastchester Union Free School District*¹¹, that "[a]n employee organization exists for purposes of the [Act] to negotiate and administer collective bargaining agreements. When an organization makes a clear and conscious decision to

⁹ *Supra* note 2.

¹⁰ Act, §213(a); Rules, §213.6(b).

¹¹ 28 PERB ¶3064, at 3147(1995).

entirely stop representing employees with respect to their employment, it must be defunct for purposes of the Act.” As a result, we have held, that when a bargaining agent becomes defunct, the employees who were previously represented by that union become unrepresented.¹²

We here find that as of the date of the Association’s dissolution, the employees in the unit it previously represented became, for purposes of the Act, unrepresented employees. Where employees who were previously represented become unrepresented employees due to the dissolution of their bargaining representative, what becomes of the collective bargaining agreement between the defunct employee organization and the public employer? We have not had the opportunity to decide this question before.

The ALJ did not decide the current status of the agreement negotiated with the Association, although she opined that CSEA had been substituted as the administrator of the agreement and further stated that the terms must be continued pursuant to §209-a.1(e) of the Act. We do not agree with the ALJ’s holding on this issue.

We find that, as of the date of the Association’s dissolution, the employees in the bargaining unit represented by the Association became unrepresented employees.¹³ Indeed, it is because these employees were unrepresented that CSEA’s petition was timely filed in the representation case.¹⁴ When one of the parties to the Association-District collective bargaining agreement ceased to exist, that agreement became null

¹² *Union-Endicott Cent. Sch. Dist.*, 28 PERB ¶¶3029 (1995).

¹³ *See Sachem Cent. Sch. Dist.*, 3 PERB ¶¶4021 (1970).

¹⁴ 34 PERB ¶¶4019 (2001). *See* Rules, §201.3(b).

and void. As found by the Supreme Court, Albany County, in *Evangelisto v. Newman*,¹⁵

§201.12 of the Act:

defines "agreement," *inter alia*, as "the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization which becomes a binding contract." Under such a definition, the only parties to a collective bargaining agreement are the public employer and the union....

Likewise, in *Cuba-Rushford Central School District v. Rushford Faculty Association*¹⁶, the Appellate Division, Fourth Department, held that when a school district had been dissolved and annexed by a reorganized school district, the collective bargaining agreement between the dissolved school district and its employees expired as of the date the district ceased to exist. The court, citing to several PERB decisions, determined that the previous collective bargaining agreement did not survive the annexation and did not follow the employees of the former district hired by the reorganized district.

Applying the same reasoning here, we find that when the Association became defunct, the collective bargaining agreement between the Association and the District was terminated. The employees in the unit have no independent right under the Act to enforce the terms of the Association-District agreement.¹⁷ What, then, are the terms and conditions of employment of these employees now? Even though the Association-District collective bargaining agreement is null and void, the District is still obligated to maintain the status quo of the employees in the unit now represented by CSEA until a

¹⁵ 19 PERB ¶7021, at 7027 (Sup.Ct. Albany County 1986).

¹⁶ 182 AD2d 127, 25 PERB ¶7531 (4th Dep't 1992).

¹⁷ See *Queens Coll. of the City Univ. of New York (Soffer)*, 21 PERB ¶3024 (1988).

new agreement is negotiated. We have previously held that changes in prevailing employment conditions after a bona fide representation question has been raised violate §§209-a.1(a) and (c) of the Act.¹⁸ In *Onondaga-Cortland-Madison BOCES*,¹⁹ we reiterated an employer's duty under the Act to maintain the status quo as to terms and conditions of employment for members of a newly certified bargaining unit until a wage and benefit package was fixed by collective negotiations with the certified bargaining agent. The status quo for these employees would be the terms and conditions of employment in existence at the time that CSEA filed its representation petition. Upon certification, CSEA assumed the right and responsibility to have the status quo maintained for unit employees until a new collective bargaining agreement is negotiated.

Based upon the foregoing, we find that the District violated §209-a.1(d) of the Act when it refused CSEA's demand to negotiate a successor agreement to the Association-District collective bargaining agreement.

The District's exceptions are denied and the decision of the ALJ is affirmed, as modified.

IT IS, THEREFORE, ORDERED that:

1. The District bargain collectively with CSEA over terms and conditions of employment for unit employees upon demand; and

¹⁸ *Genesee-Livingston-Steuben-Wyoming BOCES*, 29 PERB ¶3065 (1996).

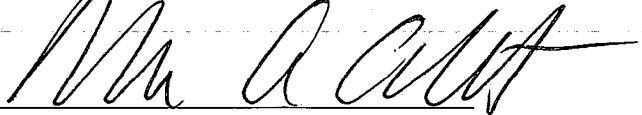
¹⁹ 25 PERB ¶3044 (1992), *rev'd on other grounds sub nom. Onondaga-Cortland-Madison Bd. of Cooperative Educ. Servs. v Kinsella*, 198 AD2d 824, 26 PERB ¶7015 (4th Dep't 1993), *motion for leave to appeal denied*, 81 NY2d 706 (1993). See also *Town of Shawangunk*, 33 PERB ¶3054 (2000).

2. The District sign and post the attached notice at all locations normally used to communicate with unit employees.

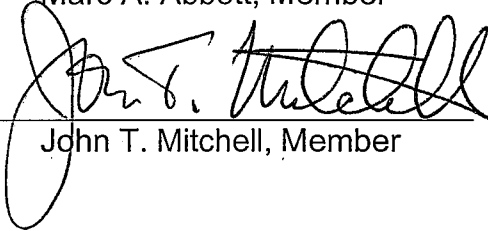
DATED: August 18, 2003
Albany, New York



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 Avon Central School District in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Ontario County Local 835, Avon Central School District Employee Unit, that the Avon Central School District will:

Bargain collectively with CSEA over terms and conditions of employment for unit employees upon demand.

Dated

By
(Representative) (Title)

AVON CENTRAL SCHOOL 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

**NEW YORK STATE SUPREME COURT
OFFICERS ASSOCIATION, ILA, LOCAL 2013,
AFL-CIO,**

Charging Party,

- and -

CASE NO. U-23131

**STATE OF NEW YORK (UNIFIED COURT
SYSTEM),**

Respondent,

- and -

**NEW YORK STATE COURT OFFICERS
ASSOCIATION,**

Intervenor.

PAT BONANNO, ESQ, for Charging Party

**LAUREN P. DE SOLE, ESQ. (RICHARD MC DOWELL of counsel), for
Respondent**

**WHITEMAN OSTERMAN & HANNA (NORMA MEACHAM of counsel),
for Intervenor**

BOARD DECISION AND ORDER ON MOTION

This matter comes to us on exceptions filed by the New York State Supreme Court Officers Association, ILA, Local 2013, AFL-CIO (SCOA) to a denial by an Administrative Law Judge (ALJ) of SCOA's request for the issuance

of a *subpoena ad testificandum* for approximately 37 employees assigned to the Mobile Security Patrol of the State of New York, Unified Court System (UCS) and a *subpoena duces tecum* for the production by UCS of any overtime from the inception of the Mobile Security Patrol to date or the time sheets of all of the court officers, including supervisors, assigned to the Mobile Security Patrol. These employees are represented by the New York State Court Officers Association (COA).

EXCEPTIONS

The ALJ's denial of the subpoena request was a general denial. SCOA argues that the ALJ erred in not articulating the rationale for the denial. Both UCS and COA support the ALJ's ruling and argue against SCOA's exceptions.

DISCUSSION

SCOA's exceptions are before us as an interlocutory appeal of the ALJ's ruling during the processing of this improper practice charge.

As a general rule, this Board will not review the interlocutory determinations of the Director or an Administrative Law Judge until such time as all proceedings below have been concluded, and review may be had of the entire matter (citation omitted). It is only when extraordinary circumstances are present and/or in which severe prejudice would otherwise result if interlocutory review were denied that we will entertain a request for such review.¹

SCOA is not unfamiliar with this holding as this is the third interlocutory appeal it has filed in this matter.² There has been no showing by SCOA that

¹ *County of Nassau*, 22 PERB ¶3027, at 3066 (1989).

² *State of New York (Unified Court System)*, 35 PERB ¶3021 (2002); *State of New York (Unified Court System)*, 35 PERB ¶3032 (2002).

there are extraordinary circumstances present or severe prejudice which would result if its interlocutory appeal was denied. Subpoenas may be issued by the attorney of record,³ or an attorney may obtain a *subpoena duces tecum* from a court.⁴ PERB's Rules of Procedure, §211.1(b), also specify that this agency's power to issue subpoenas shall in no way "affect the right of any person or entity to issue a subpoena pursuant to law."

The Court of Appeals held in *Irwin v. Board of Regents of the University of the State of New York*,⁵ that, where an administrative agency derives its subpoena power from a specific statutory grant, both CPLR §2302(a) and §2307 are inapplicable and that attorneys do not have the authority granted generally under those provisions to issue subpoenas in administrative proceedings. The Appellate Division, Third Department, later interpreted that holding in *Moon v. New York State Department of Social Services*⁶ and found that, in the absence of language in the grant of subpoena power to an agency or in the agency's own regulations delegating the subpoena authority to its hearing officers referring to the power of attorneys to issue subpoenas, attorneys could not issue subpoenas

³ CPLR 2302(a). See also, David D. Siegel, *New York Practice*, 579 (2d ed. 1991).

⁴ CPLR 2302(b).

⁵ 27 NY2d 292 (1970).

⁶ 207 AD2d 103 (3d Dep't 1995).

in administrative proceedings.⁷ Following the reasoning of *Moon*, we conclude that because our statutory grant⁸ of subpoena power provides that subpoenas issued by PERB will be “regulated and enforced under the [CPLR]” and our own Rules specifically preserve the right of any person or entity to issue a subpoena pursuant to law, attorneys have the authority to issue subpoenas in PERB proceedings.⁹

There being no grounds presented which meet our standards for an extraordinary interlocutory review, we will not consider SCOA’s interlocutory appeal of the ALJ’s denial of the subpoena request at this stage of the proceeding.

It appears that one final caution is necessary here. We noted in our earlier decision on SCOA’s second interlocutory appeal,¹⁰ that “SCOA’s interests in this matter would, perhaps, be better served by prosecuting the instant charge, rather

⁷ The Appellate Division held, at 105, that:

Neither the statute nor the relevant regulation which delegates the subpoena power of the Commissioner of Social Services to Hearing Officers (18 NYCRR 519.15[a]) refers to a party’s attorney. Equally as significant is the absence of a proviso similar to that attached to the general subpoena provisions of State Administrative Procedures Act §304(2), which states “[n]othing herein contained shall affect the authority of an attorney to issue such subpoenas under the provisions of the [CPLR].”

⁸ Act, §205.5 (k).

⁹ See *Del Vecchio v. White Plains Unit, Westchester Co. Chapter, CSEA, Inc., Local 860*, 64 AD2d 975 (2d Dep’t 1978) and *City of Albany v. Albany Prof. Permanent Firefighters Ass’n*, 66 Misc.2d 822, 4 PERB ¶8011 (Sup. Ct. Albany County 1971).

¹⁰ 35 PERB ¶3032, at 3089 (2002).

than interlocutory appeals which do not even approach the standard we have set for such a review of the interim rulings of an ALJ." SCOA should be mindful that continued meritless interlocutory appeals might be construed as an abuse of process, an attempt to delay an administrative proceeding or tactics resulting in an unnecessary expenditure of time and resources by PERB and might warrant harsher action than denial of an interlocutory appeal.¹¹

For the reasons set forth above, SCOA's interlocutory appeal is denied.

SO ORDERED.

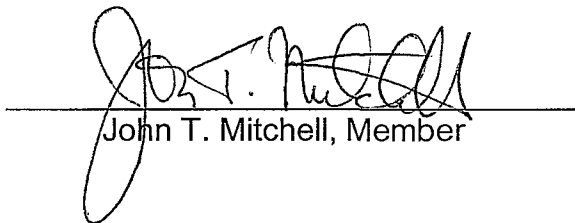
DATED: August 18, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

¹¹ *Matter of Thomas P. Halley*, 30 PERB ¶3023 (1997).

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

In the Matter of

TEAMSTERS LOCAL 294,

Petitioner,

-and-

CASE NO. C-5282

CITY OF RENSSELAER,

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

Included: Account Clerk (Purchasing Department), Account Clerk (Planning Department), Deputy City Clerk, Deputy Commissioner (Water

Department), Pump Operator, Meter Reader, Clerk (Police Department, Building Inspector, Senior Clerk (Department of Public Works), City Accountant, Clerk (Treasurer's and Water Departments), Senior Clerk (Police Department), Part-time Clerk (Planning Department), Clerk (Assessment Department), Rehab Specialist, Assistant Director of Planning.

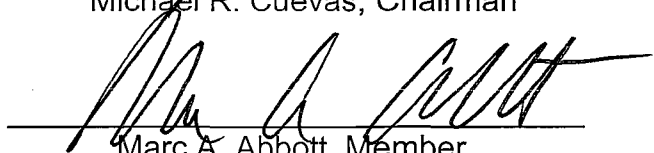
Excluded: Commissioner of Assessments, Deputy Treasurer, Director of Youth, Mayor's Secretary, Senior Accountant, Account Clerk (Treasurer), Deputy Commissioner of Public Works, Deputy Police Chief, Computer Programmer, Secretary (Civil Service Department), and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

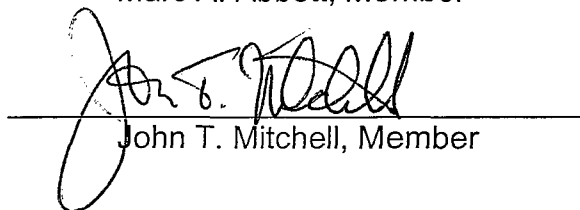
DATED: August 18, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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

In the Matter of

**ALBANY COUNTY NURSING HOME PROFESSIONAL
STAFF ASSOCIATION/NYSUT/AFT/AFL-CIO,**

Petitioner,

-and-

CASE NO. C-5272

**COUNTY OF ALBANY (DEPARTMENT OF RESIDENTIAL
HEALTH CARE FACILITIES,**

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 Albany County Nursing Home Professional Staff Association/NYSUT/AFT/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: Pastoral Care Director, Pharmacy Director, Superintendent of Buildings and Grounds, Director Dietary Services, Director of Physical Therapy, Director of Occupational Therapy, Assistant Dietetic Serv. Supervisor, Asst. Dir. Of Nursing in Service Education, Assistant Pharmacy Director, Physician Asst/N.P., Supervising Nurse, Supervising Nurse P.T., Occupational Therapist, Recreational Therapist, Respiratory Therapist, Physical Therapist, Physical Therapist P.T., Pharmacist F.T., Dietician R.D., Social Worker, Medical Social Worker, Volunteer Program Coordinator, Dietary Service Supervisor, Pharmacy Aide, Social Worker Assistant, Data Entry Clerk, User Specialist Clerk, Accountant II, Account Clerk I, Account Clerk II, Payroll Supervisor, Clerk I, Ward Clerk, Clerk Steno I, Clerk Typist II, Clerk Typist I, Medical Records Clerk, Medical Records Technician, Secretary I, Switchboard Operator, Senior Store Clerk, Maintenance Inventory Clerk, Supervisor Central Supply Clerk, Head Cook, Supervising Food Service Helper, Food Service Training Instructor, Bldg. Grounds Maintenance Supervisor, Head Groundsman, Custodial Work Supervisor II, Custodial Work Supv., Custodial Work Supv. I, Laundry Supervisor, I.D.C. Nurse, RN Recruitment Nurse, Senior Stores Clerk, Security Guards, Buildings Ground Maintenance, Part-time Messenger, Director of Social Work Services, Activities Program Director, Rehabilitation R.N., Clinical Assistant, Chef, RUGS RN.

Excluded: All other employees.

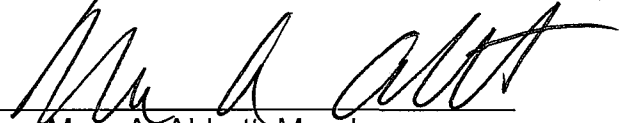
FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Albany County Nursing Home Professional Staff Association/NYSUT/AFT/AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such

obligation does not compel either party to agree to a proposal or require the making of a concession.

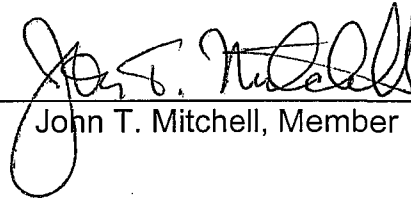
DATED: August 18, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**TOWN OF ROSENDALE POLICE BENEVOLENT
ASSOCIATION,**

Petitioner,

-and-

CASE NO. C-5299

TOWN OF ROSENDALE,

Employer,

-and-

**UNITED FEDERATION OF POLICE
OFFICERS, INC.,**

Intervenor.

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 Town of Rosendale Police Benevolent Association has been designated and selected by a majority of the employees of the

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

Included: All full-time and part-time employees of the Rosendale Police Department.

Excluded: Chief of Police and Deputy Chief of Police.

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

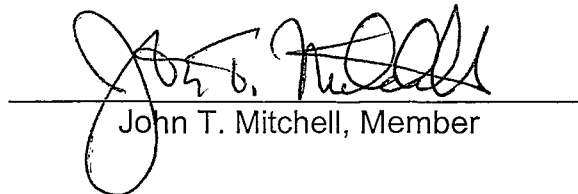
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Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**COMMUNICATION WORKERS OF AMERICA,
LOCAL 1105,**

Petitioner,

-and-

CASE NO. C-5278

ISLIP TERRACE FIRE DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Communication Workers of America, Local 1105 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, part-time firehouse attendants, including call-in firehouse attendance and maintenance personnel.

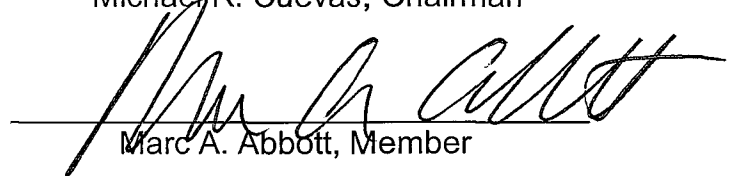
Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Communication Workers of America, Local 1105. 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.

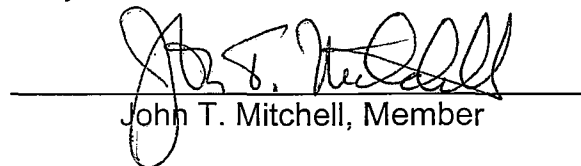
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