

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

In the Matter of

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

Petitioner,

- and -

CASE NO. CP-810

HARRISON CENTRAL SCHOOL DISTRICT,

Employer,

- and -

HARRISON ASSOCIATION OF TEACHERS,

Intervenor.

In the Matter of

HARRISON ASSOCIATION OF TEACHERS,

Petitioner,

- and -

CASE NO. CP-820

HARRISON CENTRAL SCHOOL DISTRICT,

Employer,

- and -

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

Intervenor.

**NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of
counsel), for Civil Service Employees Association, Inc., Local 1000,
AFSCME, AFL-CIO**

**INGERMAN SMITH, LLP (GUS MOUNTANOS of counsel), for
Employer**

**NEW YORK STATE UNITED TEACHERS (JONATHAN D. RUBIN), for
Harrison Association of Teachers**

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Harrison Association of Teachers (Association) to a decision of an Administrative Law Judge (ALJ) granting the unit clarification petition (CP-810) filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), seeking a determination that it represents the newly-created title of teaching assistant in the Harrison Central School District (District), and dismissing the Association's petition for unit clarification or unit placement (CP-820) for the same title.

The ALJ determined that the title of teacher assistant had been included in CSEA's recognition clause since the 1978-81 collective bargaining agreement with the District and that the newly-created title of teaching assistant is the same title and, therefore, included in CSEA's unit.

EXCEPTIONS

The Association excepts to the ALJ's decision, arguing that the ALJ erred in interpreting our decision in *Monroe-Woodbury Central School District*,¹ (hereafter, *Monroe-Woodbury*). CSEA supports the ALJ's decision. The District has not responded.

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

¹ 33 PERB ¶3007 (2000).

FACTS

The parties stipulated to the facts upon which the ALJ based her decision.

CSEA and the District are parties to a memorandum of agreement for the period July 1, 2000, to June 30, 2004. It makes no change in the recognition clause, most recently set forth at Article I of their prior collective bargaining agreement, effective July 1, 1995, to June 30, 2000, which defines the bargaining unit as:

all non-teacher personnel...performing the duties of Teacher Assistant, School Aide or Teacher Aide, excluding all other non-teacher personnel, covered by other agreements.

Article II of the contract, entitled "Definition of Terms", which is also unchanged, defines the titles of school aide and teacher aide, but does not define teacher assistant.² There have been no teacher assistants employed by the District during the term of at least the last CSEA-District collective bargaining agreement.

The District created the title of teaching assistant by action of the Board of Education on January 9, 2002. However, the Board of Education resolution is entitled "Teacher Assistants" and the sub-title is "Authorization to Employ Individuals as Teacher Assistants." The resolution itself states that "the Board of Education hereby creates the position of teaching assistant...."

The District notified CSEA and the Association of the creation of the new title by letters dated January 14, 2002. The letter to the Association from the Superintendent of Schools, with copy to CSEA, states:

² Prior to 1995, the recognition clause referred to "all non-teaching personnel". The clause now refers to "all non-teacher personnel". The parties stipulated that this change in the wording did not constitute a change in the composition of CSEA's bargaining unit.

...the Harrison Association of Teachers (HAT) has taken the position that the teaching assistants should be included in the teachers' union.³ Although the District is in agreement with respect to the legal basis for HAT's position, the Teacher Aide union has refused to consent to the inclusion of teacher assistants in the Teachers' Union. The Teacher Aide Union's position is based upon the fact that the teaching assistant position appears in the recognition clause of the Teacher Aide collective bargaining unit.

On the same day, the Superintendent wrote to CSEA, with copy to the Association, advising them that the Board of Education had created the title of teaching assistant and further stating that:

Although I realize that the recognition clause of the Teacher Aide [CSEA] collective bargaining agreement contains the position of teaching assistant, it is the District's position that the inclusion of this position is contrary to applicable law.

DISCUSSION

The ALJ relied upon our decision in *Monroe-Woodbury* in deciding CSEA's unit clarification petition. In that case, we held that where a title has been specifically included in a unit recognition clause, a unit clarification petition seeking a determination that the title is within the petitioner's unit will be granted, with no further inquiry into the parties' practice with respect to the title. The ALJ reasoned that because of the recognition clause and the language in the CSEA-District collective bargaining agreement further defining the unit, and the District's use of both "teaching assistant" and "teacher assistant" when referring to the at-issue title, the parties' collective bargaining agreement clearly included the title.

³ The recognition clause of the Association-District collective bargaining agreement includes all personnel certified as teachers, and lists titles included and excluded from the bargaining unit. The title of "teacher assistant" or "teaching assistant" is not listed in the recognition clause as either an included title or an excluded title.

The Association argues that the ALJ's reliance on that case is misplaced because the title here at issue, teaching assistant, is not a title in CSEA's recognition clause. CSEA argues that the titles of teaching assistant and teacher assistant have been used interchangeably by the District and are included in its bargaining unit.

The Association is correct that the title of teaching assistant is not specifically included in the recognition clause of the CSEA-District collective bargaining agreement; the title included in the recognition clause is teacher assistant. However, the CSEA-District collective bargaining agreement has additional language originally defining the unit as including "non-teaching personnel" and, now, including "non-teacher personnel", with no apparent reason for the use of the different terms. Therefore, a reading of the parties' contract, the first level of inquiry in a unit clarification petition,⁴ leads us to conclude, as did the ALJ, that the title "teacher assistant" is the same as "teaching assistant" and is included in the bargaining unit represented by CSEA.

Even if it could be argued that the recognition clause is ambiguous, in the context of a unit clarification petition, the parties' treatment of the title would then be relevant to our inquiry.⁵ The District, in both the resolution creating the title of teaching assistant and in correspondence to CSEA and the Association, has referred to the new position interchangeably as either teaching assistant or teacher assistant.

⁴ See *Clinton Community College*, 31 PERB ¶13070 (1998), where the recognition clause was title-specific but the unit clarification petition was dismissed because the titles sought were not listed in the recognition clause.

⁵ See *County of Niagara*, 21 PERB ¶13030 (1988).

Based on the foregoing, we deny the Association's exceptions to the ALJ's decision on CSEA's unit clarification petition and affirm the decision of the ALJ.

We find that the title of teaching assistant is included in CSEA's bargaining unit and we, therefore, grant CSEA's unit clarification petition. Based upon our grant of CSEA's unit clarification petition, we dismiss the Association's unit clarification/placement petition.⁶

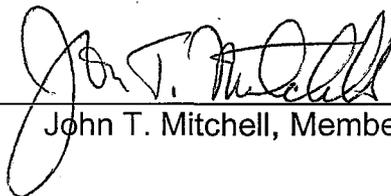
DATED: December 12, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁶ Because of our determination on CSEA's unit clarification petition, we need not reach the exceptions taken to the ALJ's determination on the unit clarification/placement portion of the Association's petition.

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

In the Matter of

**TRANSPORT WORKERS UNION OF AMERICA,
LOCAL 100, AFL-CIO,**

Charging Party,

- and -

CASE NO. U-23862

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

**KENNEDY, SCHWARTZ & CURE, P.C. (STUART LICHTEN of counsel), for
Charging Party**

**MARTIN B. SCHNABLE, VICE-PRESIDENT AND GENERAL COUNSEL
(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 (Authority) to a decision of an Administrative Law Judge (ALJ) finding that the Authority violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it denied Andrew Saloma representation by the Transport Workers Union of America, Local 100, AFL-CIO (TWU), during a medical examination and when it took him out of service for insisting on his right to TWU representation.¹

The Authority denied the material allegations of the charge and raised several defenses.

¹ The TWU filed the improper practice charge which alleged violations of §§209-a.1(a) and (c) of the Act. The ALJ dismissed the alleged violation of §209-a.1(c); no exceptions have been taken to that determination.

EXCEPTIONS

The Authority excepts to the ALJ's decision, arguing that he erred on the facts and the law. TWU 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

Saloma has been employed by the Authority as a train operator or conductor for 20 years. He reported to the Authority's Medical Assessment Center (MAC) for his required biennial physical examination on June 21, 2002.² Based upon his response to questions posed during the examination about drug and alcohol use, Saloma was referred for a psychological examination at the Authority's Employee Assistance Program (EAP).³

Saloma was required to appear at the EAP Psychological Services Unit for an evaluation on July 17, 2002. Michael Stanton, a TWU representative, sought to attend the examination at Saloma's request, but was denied permission by the Authority.⁴

Saloma was thereafter examined at the MAC on July 25, 2002. As a result of that

² The Authority's collective bargaining agreement with the TWU provides for biennial physical examinations.

³ Our recent decision in *New York City Transit Authority*, 36 PERB ¶3043 (October 31, 2003), details Saloma's medical examination history.

⁴ The ALJ dismissed the allegation that Saloma was improperly denied union representation at this examination because the record did not support a finding that Saloma had specifically asked the Authority to allow a TWU representative to be present at the July 17 examination. No exceptions were taken to this aspect of the ALJ's decision.

examination, Saloma was recommended for participation in a chemical dependency relapse prevention program. A periodic re-examination was scheduled for August 30, 2002. Saloma requested Stanton's representation and, when Stanton was denied permission to attend the examination, Saloma refused to participate. As a result, Saloma was placed in a "no work" status, which signifies that the examining physician does not believe the employee is capable of working. Because of his status, Saloma was taken out of service by the Authority on August 31, 2002. He returned to the MAC on September 5, 2002, at which time he was examined without a TWU representative present, and was thereafter returned to "full work" status.⁵

The circumstances under which an employee may be required to submit to a drug or alcohol test are set forth in the Drugs and Controlled Substances Appendix E-1 and the Alcohol Appendix E-2 of the parties' collective bargaining agreement.⁶ The examination scheduled for August 30, 2002, was to determine medically whether Saloma required further education and/or treatment. Therefore, no drug or alcohol test was scheduled nor could one have been required pursuant to the terms of the parties' collective bargaining agreement or the Authority's Rules and Regulations.⁷

⁵ Saloma and Stanton had appeared for the examination on September 4, 2002, but when Stanton was denied admission to the examination, they left. Stanton was in the waiting room during Saloma's September 5 examination.

⁶ Charging Party's Exhibit 1.

⁷ Charging Party's Exhibit 2.

DISCUSSION

In *New York City Transit Authority*,⁸ we determined that a public employee has a statutory right to demand and receive, union representation in an investigatory interview which he or she reasonably fears may result in discipline. The ALJ found that the August 30, 2002, examination was an investigatory interview, making it reasonable for Saloma to objectively conclude that disciplinary action could result from the examination. The ALJ determined that Saloma was, therefore, entitled to TWU representation upon demand. We disagree.

We do not find that the examination on August 30, 2002, was an investigatory interview which Saloma could reasonably conclude would lead to discipline. The ALJ correctly noted that the August 30 examination was a follow-up to Saloma's earlier evaluations and examinations to determine the outcome of Saloma's referral to an alcohol/drug relapse prevention program. At that time, Saloma was in full work status. No alcohol or drug test was scheduled for the August 30 examination. Discipline, pursuant to the parties' collective bargaining agreement and the Authority's rules, would result if Saloma had a third positive drug or alcohol test, not from answers given in a medical evaluation. Since no test was scheduled, Saloma could not have reasonably concluded that the August 30 examination might result in discipline. The discipline that resulted from the August 30 examination was based upon Saloma's refusal to

⁸35 PERB ¶3029 (2002), *confirmed*, 196 Misc2d 523, 36 PERB ¶7009 (Sup. Ct. Kings County 2003).

participate in the examination without TWU representation, not on the results of the examination.

The private sector cases cited by the ALJ and referred to by TWU in its brief deal with situations in which employees were requested or required to submit to a drug or alcohol test.⁹ Such was not the case here. We find that *United States Postal Service*,¹⁰ provides a better analysis of the law applicable to this case. In that decision, the National Labor Relations Board determined that an employer-ordered doctor's examination of an employee who had absentee problems was outside the purview of *NLRB v. J. Weingarten, Inc.*,¹¹ because no questions of an investigatory nature were asked of the employee during the doctor's examination, and there was insufficient evidence to establish that the examination was intended by management to form the basis for taking disciplinary or other job-affecting action against the employee because of past misconduct. In defining "discipline" the NLRB held that:

We may assume, for purposes of discussion, that the employees involved herein reasonably believed that there was a possibility that the fitness for duty examination might have an adverse impact on their employment. (footnote omitted) However, it would seem to unduly expand the ordinary meaning of the word "discipline" -- at least as it is understood in labor relations parlance -- to make it fit into the instant situation. That is to say, the use of the term

⁹ See *Safeway Stores, Inc.*, 303 NLRB 154 (1991); *System 99*, 289 NLRB 723 (1988).

¹⁰ 252 NLRB 61 (1980).

¹¹ 420 US 251 (1974). The US Supreme Court held there that an employer violates §8(a)(1) of the National Labor Relations Act when it denies an employee's request that a union representative be present at an investigatory interview which the employee reasonably believes might result in disciplinary action.

"discipline" in the industrial context normally means a punishment or penalty which is imposed upon an employee for violation of an employer's policy, practice, or plant rules. (footnote omitted)...To be sure, in the case of any individual employee, the results of the examination could have an adverse impact upon their employment, i.e., their hours could be shortened, they might not be able to perform the work which they believed themselves capable, or, in the extreme case, it could be recommended that he (or she) be suspended for lack of ability or capacity to perform the job. However, this is not "discipline" in the sense of punishment for the breach of a rule or practice, but rather, a resolution of a medical problem for the health and safety of the employee, his fellow workers, and possibly the public with which the employee may come in contact.¹²

Here, no questions of an investigatory nature could be asked at the August 30 examination and the parties' procedures do not provide that any disciplinary action would flow from the results of the examination. What was involved were issues of continued treatment for Saloma, not issues involving discipline. That Saloma could possibly have been referred for further treatment or additional exams based upon a doctor's findings, does not make the examination itself an investigatory interview or the subsequent referral for treatment and/or counseling discipline.

We reiterate here that a public employee has a right under the Act to union representation upon demand, in an investigatory interview which he or she reasonably believes may result in discipline. In testing the reasonableness of an employee's belief, we use a reasonable person standard. An employee's fear is reasonable if the

¹² *Supra*, note 10, at 64.

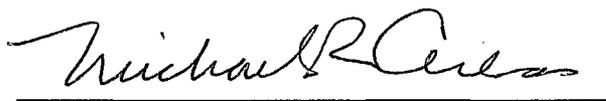
interview is "calculated to form the basis for taking discipline or other job-affecting actions against such employee because of past misconduct,"¹³ or incompetence.¹⁴

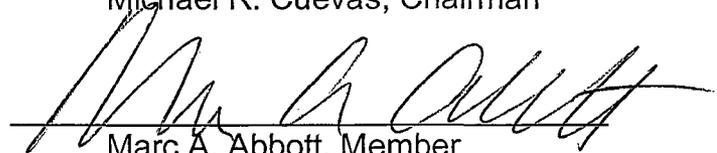
We grant the Authority's exception that the August 30, 2002 examination was not the type of investigatory interview that would trigger Saloma's right to representation under the Act and our earlier decision in *New York City Transit Authority, supra*, and reverse the ALJ's decision. Based upon our findings, we need not reach the other exceptions raised by the Authority.

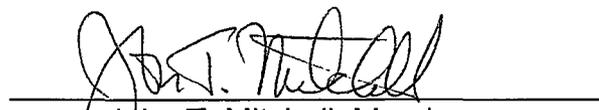
We find, therefore, that the Authority did not violate §209-a.1(a) of the Act when it denied Saloma's request for TWU representation at the August 30, 2002 examination or when it removed him from service as a result of his refusal to participate in the examination without TWU representation.

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

DATED: December 12, 2003
Albany, New York


Michael R. Cuevas, Chairman


Marc A. Abbott, Member


John T. Mitchell, Member

¹³ *Id.* at 61.

¹⁴ See, e.g., *In re University of Medicine and Dentistry*, 1996 NJ Lexis 792.

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

In the Matter of

EDWARD JACKSON,

Charging Party,

- and -

CASE NO. U-24391

YONKERS FEDERATION OF TEACHERS,

Respondent.

EDWARD JACKSON, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Edward Jackson to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his improper practice charge which alleged that the Yonkers Federation of Teachers (YFT) violated §209-a.1(c) and §209-a.2(c) of the Public Employees' Fair Employment Act (Act) from December 2001 through June 2002 by misinforming him as to his rights concerning classroom observations. The Director found that the charge was untimely and, even if timely, failed to state facts which, if proven, would establish the violations alleged.¹

¹ Jackson had been earlier advised that his charge was deficient in that an employee organization cannot violate §209-a.1(c) of the Act and that Jackson had neither identified his employer nor named his employer as a respondent.

EXCEPTIONS

Jackson filed exceptions to the Director's decision alleging that any defects in the charge, as amended, resulted from his ignorance of PERB's Rules of Procedure (Rules) and, nevertheless, such defects should be overlooked in the interests of justice. YFT has not filed a response to the exceptions.

Based upon our review of the record and our consideration of Jackson's arguments, we must dismiss his exceptions as untimely filed.

DISCUSSION

Section 213.2(a) of the Rules requires a party filing exceptions with PERB to also serve those exceptions on all other parties within the same 15 working day period and, in addition, to file proof of such service with us. It is clear from the record that YFT² was not served with Jackson's exceptions within the time required under our Rules. As a result, Jackson failed to timely file proof of service with PERB as required by the Rules.

Jackson contends that we should ignore our Rules because he is filing his petition as a *pro se*. While we have been somewhat lenient in the content of pleadings received from *pro se* parties, we have never sacrificed adherence to our Rules for the benefit of *pro se* parties.³

In *Town/City of Poughkeepsie Water Treatment Facility*,⁴ we stated:

² Jackson also served a copy of his exceptions simultaneously on the principal of Lincoln High School.

³ *Board of Educ. of the City Sch. Dist. of the City of New York and United Fed'n of Teachers*, 34 PERB ¶3037 (2001). See also *Transport Workers Union of Greater New York*, 32 PERB ¶3004 (1999); *CSEA (Juszczak)*, 22 PERB ¶3020 (1989).

⁴ 35 PERB ¶3037, at 3105-06 (2002).

We have consistently held that timely service upon other parties is a component of timely filing. Consequently, we will dismiss exceptions that have not been timely served. In prior decisions in which we have dismissed exceptions for failure of timely service, our decision has been prompted by an objection from one or more of the parties who was not timely served. We here determine that requiring strict compliance with the filing requirements of our Rules with respect to the service of exceptions on all affected parties at the same time they are filed with the Board should not be dependent upon the urging of one of the parties to the proceeding. (footnotes omitted)

Consequently, Jackson's failure to properly and timely serve exceptions upon the other party warrants dismissal of his exceptions.⁵

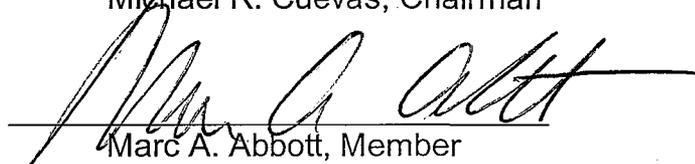
Based on the foregoing, we need not reach the merits of Jackson's exceptions.

The exceptions are, therefore, dismissed. SO ORDERED.⁶

DATED: December 12, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁵ See *City of Albany*, 23 PERB ¶3027 (1990), *confirmed*, 181 AD2d 953, 25 PERB ¶7002 (3d Dep't 1992).

⁶ As we herein find that the exceptions have not been filed in accordance with the requirements of our Rules, the Director's decision is the final decision on the merits in this matter. Rules, §213.6(b).

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

In the Matter of

SYRACUSE POLICE BENEVOLENT ASSOCIATION,

Charging Party,

- and -

CASE NO. U-22825

CITY OF SYRACUSE,

Respondent.

DEPERNO & KHANZADIAN (ROCCO A. DEPERNO of counsel), for Charging Party

BOND, SCHOENECK & KING, LLP (PETER JONES of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Syracuse (City) to an Administrative Law Judge's (ALJ) decision, on an improper practice charge filed by the Syracuse Police Benevolent Association (PBA), that found that the City violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it temporarily transferred Sergeant Therese Lore to the Patrol Division in retaliation for having filed a grievance. The City's answer denied the material allegations of the charge. A hearing was held on June 12 and December 5, 2002.

EXCEPTIONS

The City, in its exceptions, argues that the ALJ erred on the law and the facts. The PBA supports the ALJ's decision.

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

FACTS

The facts, as set forth in the ALJ's decision are in dispute.¹

Lore has been employed by the Syracuse Police Department since September 1, 1978. She was promoted to Sergeant, on or about August 15, 1990. In January 1996, Lore was transferred to the office of Chief of Police as Public Information Officer. She was in that position for about three and one-half years. On May 10, 1999, Lore was removed from the position of Public Information Officer. On May 21, 1999, Lore filed a grievance over the removal. On June 3, 1999, Lore was transferred to the Technical Operations Section. On June 17, 1999, Lore filed a contract grievance over the transfer, complaining that she did not request the transfer and, therefore, her involuntary transfer violated the parties' collective bargaining agreement.

On December 7, 1999, the two grievances came before an arbitrator. At that time, the parties entered into a stipulation of settlement in which Lore was to be transferred to the Crime Prevention Unit of the Community Relations Division as a supervisor. The settlement also provided certain other provisions which became the subject of a subsequent grievance alleging the City's non-compliance with the original settlement.² The matter was heard by an arbitrator on July 26 and September 20, 2000.

¹ 36 PERB ¶4560 (2003).

² Lore argued, among other things, that the settlement agreement provided that, as a supervisory employee, she did not have to wear a uniform.

The arbitrator issued an award dated December 21, 2000 finding that the City had substantially complied with all the terms of the stipulation of settlement.

Lore continued as a supervisor in the Crime Prevention Unit and, in May 2001, she was advised by her supervisor, Lt. Michael Rathbun, that her unit would be patrolling the parks beginning June 1, 2001. On June 14, 2001, the PBA filed a grievance at Lore's request in which she alleged that the City's transfer to park patrol violated the settlement agreement. PBA president Jeffrey Piedmont told Police Chief John Falge that the PBA was going to file a grievance about Lore's transfer from the Crime Prevention Unit to park patrol. Falge responded with the statement "[H]ere we go again." On June 15, 2001, Lore's unit was transferred to the Uniform Bureau, Patrol, Platoon 2. Subsequent to the transfer and the filing of the grievance, Piedmont and Falge spoke again about the grievance and the transfer. According to Piedmont, Falge said that he was not punishing the other eleven officers but that Lore and the PBA were at fault. Piedmont testified that it was his practice to discuss possible legal action against the department as leverage in the hopes of effecting a compromise.³ Falge testified that he had criticized Piedmont in the past for not screening frivolous grievances.⁴ Falge also testified that he believed that Lore's temporary transfer to park patrol did not violate the settlement agreement.⁵

³ Transcript, p. 106.

⁴ Transcript, pp. 218-19.

⁵ Transcript, pp. 197-200.

On June 21, 2001, eight additional officers from the Community Policing Bureau assigned to the schools as School Information Officers (SIRP's) were transferred to the Uniform Bureau, Patrol, Platoon 2.

Falge also testified that during a discussion with the Deputy Chiefs concerning redeployment of officers to parks patrol, there was no mention of individuals to be redeployed. He stated that: "We don't deal in names. We have to deal in bodies."⁶ When asked whether Falge considered Lore individually in the transfer decision, he answered: "[A]bsolutely not."⁷ Falge testified that Lore's grievances had no effect on the decision to assign her to patrol.⁸

Deputy Chief Robert Tassone testified, on cross-examination, that he was in command of the Crime Prevention Unit and SIRP officers. During the Deputy Chiefs' meeting on June 14, 2001, he stated that his bureau was able to redeploy these officers to patrol because they were regarded within the department as a luxury.⁹ Tassone was disappointed that "[he] had to sacrifice most of [his] Crime Prevention Unit, but the needs of the department [came] first."¹⁰ Tassone's disappointment came from his belief that he had an obligation to keep his personnel within his bureau.¹¹

⁶ Transcript, p. 189.

⁷ Transcript, p. 190.

⁸ Transcript, pp. 191-92.

⁹ Transcript, pp. 140-41.

¹⁰ Transcript, p. 142.

¹¹ Transcript, p. 143.

Lieutenant Thomas Rathbun is also in the unit represented by the PBA. He testified that Tassone informed him late in the day on June 14, 2001, of the decision to redeploy Lore's unit and the SIRP officers from parks to patrol¹² and that they would be assigned to days.¹³ He testified that Lore's grievances were not a factor in the decision to transfer her unit to patrol.¹⁴ He had a conversation with her and her subordinates and he emphatically explained to them that Lore's grievance activity had nothing to do with the decision. Rathbun was adamant that the transfers were not in retaliation against Lore because of her grievance activity.¹⁵ He stated that "[he] would not have been a party to that; [he] wouldn't have allowed that to happen with people that I worked with."¹⁶ Rathbun described the need for additional personnel in patrol during the summer:

Q. Okay. Are there more calls in the summer for police help?

A. Yeah. This is a fact, there's no question about it. In part its due to warmer weather, people are out of their houses. You'll see alcoholic consumption increase dramatically because of the weather.

Again, I'm in charge of schools; and with the influx of twenty-three thousand or more children to the streets or neighborhoods, your call load - calls for service - increase proportionately.¹⁷

¹² Transcript, p. 154.

¹³ Transcript, p. 156.

¹⁴ Transcript, pp. 156-57.

¹⁵ Transcript, p. 171.

¹⁶ Transcript, p. 171.

¹⁷ Transcript, p. 156.

Piedmont, Rathbun and Falge testified that every summer officers from community relations are transferred to patrol.¹⁸ Falge added that “I think it was done every summer in my entire twenty-eight years . . . depending on what the crime rate was and what activity was.”¹⁹ Falge also testified that the reason to deploy the Crime Prevention Officers and SIRP officers to patrols was as the result of street crime incidents. “I kind of put the kibosh on it [the commitment to neighborhoods to do the best we could in the parks, street security and safety comes first].”²⁰

On August 31, 2001, the PBA filed the instant improper practice charge as amended, alleging, *inter alia*, that on June 1, 2001, Lore was involuntarily reassigned to hours and duties inconsistent with the terms of a settlement agreement.

DISCUSSION

Among the many exceptions the City raised to the ALJ's finding of fact and conclusions of law,²¹ is its contention that the ALJ failed to defer the improper practice charge to the parties' grievance arbitration mechanism.

At the hearing held on June 12, 2002, the City moved to defer this charge to the grievance arbitration provision in the parties' collective bargaining agreement. The grounds for such motion were that the PBA has a grievance pending over the transfer of Lore to the parks detail as a violation of their prior settlement. The hearing ALJ denied

¹⁸ Transcript, pp. 98, 154-55, 191.

¹⁹ Transcript, p. 191.

²⁰ Transcript, p. 188.

²¹ At the close of the hearing, the ALJ advised the parties that because his retirement was imminent, the decision would be written by another ALJ. The City's exceptions were taken to the decision written by the successor ALJ.

the motion from the bench on the grounds that, under PERB's case law, charges alleging violations of §§209-a.1(a) and (c) are not deferred. We agree that the charge should not have been deferred. Our reasons for such a rule have been discussed in prior Board decisions.²² As we noted in *Riverhead Central School District*,²³ we do not usually defer a charge alleging violations of §§209-a.1(a) and (c) even if there is a pending grievance dealing with the subject matter of the charge.

Turning to the merits of the charge, we have long held that in order to establish improper motivation under §§209-a.1(a) and (c) of the Act, a charging party must prove that (a) he/she had engaged in protected activities, (b) the respondent had knowledge of those activities and (c) the respondent acted because of those activities.²⁴

The City, in its exceptions to the ALJ's decision, argues that the PBA has failed to establish a *prima facie* case under our case law. We agree. There is no question that the PBA filed a number of grievances on Lore's behalf. We have upheld the right of an employee to seek the assistance of his or her union.²⁵ An employee's statement of his

²² See *State of New York (Div. of State Police)*, 35 PERB ¶3031 (2002); *Schuyler-Chemung-Tioga BOCES.*, 34 PERB ¶3019 (2001); *Riverhead Cent. Sch. Dist.*, 32 PERB ¶3070 (1999); *Connetquot Cent. Sch. Dist.*, 19 PERB ¶3045 (1986).

²³ *Supra* note 22.

²⁴ *Town of Independence*, 23 PERB ¶3020 (1990). See also *Convention Ctr. Operating Corp.*, 29 PERB ¶3022, petition for review dismissed as untimely, 29 PERB ¶7023 (Sup. Ct. New York County 1996); *City of Rye*, 28 PERB ¶3067 (1995), confirmed sub nom. *DeVito v. Kinsella*, 234 AD2d 640, 29 PERB ¶7021 (3d Dep't 1996).

²⁵ See *Cayuga-Onondaga BOCES*, 32 PERB ¶3079 (1999), confirmed sub nom. *Hoey v. PERB*, 284 AD2d 633, 34 PERB ¶7023 (3d Dep't 2001).

or her intent to do so is likewise protected by the Act.²⁶ The record is also uncontroverted that Falge was aware of Lore's grievance activities. However, we find that Falge did not retaliate against Lore because of her grievance activities nor were they a factor in the decision to transfer Lore, the rest of her unit, and the SIRP unit to park patrol.²⁷

The record lacks evidence that the City would not have acted but for Lore's protected activities. An employer's conduct must be deliberate in order for us to find a violation of §§209-a.1(a) and (c) of the Act.²⁸ The ALJ found Falge's June 14, 2001 conversation with Piedmont significant in demonstrating that the City's action was in response to Lore's protected activity. The ALJ concluded from this conversation that Piedmont was trying to avoid a problem whereas Falge, by his remark, "here we go again," was going to exacerbate the situation with Lore's transfer to park patrol. Upon this record, we find that the ALJ mischaracterized Falge's remark as an expression of anti-union animus rather than frustration over what he perceived to be a frivolous grievance. The ALJ's conclusion that Falge's conversation with Piedmont placing the responsibility for the transfers on the PBA evidences animus is contradicted by the record and Piedmont's cross-examination about his conversation with Falge. Piedmont

²⁶ See *State of New York (State Univ. of New York at Oswego)*, 34 PERB ¶3035 (2001), *confirmed*, 301 AD2d 946, 36 PERB ¶7003 (3d Dep't 2003).

²⁷ Transcript, pp. 190, 196.

²⁸ See *Greenburgh #11 Union Free Sch. Dist.*, 33 PERB ¶3018 (2000).

admitted that Falge jokes around a lot and that he does not believe everything Falge says is one hundred percent accurate.²⁹

We are cognizant that the labor relations process must tolerate robust debate of employment issues, even if occasionally intemperate.³⁰ This concept was ignored by the ALJ in evaluating the record and the conversations between Piedmont and Falge, in reaching her conclusion that the PBA had made out a *prima facie* case based upon Falge's statements. It is only when the charging party makes out a *prima facie* case that the burden of going forward to establish a legitimate business purpose shifts to the respondent.³¹ An employer may impose adverse personnel actions for a good reason, a bad reason, or no reason at all, so long as it is not a reason proscribed by the Act. It is incumbent upon the charging party to sufficiently establish the alleged improper motivation prompting the employer's actions before an analysis by the ALJ of the legitimacy of the reasons offered to justify it.³² We find that the PBA failed to establish improper motivation on the part of the City because we do not find that Falge's remarks provide sufficient evidence of animus.

Even if we were to consider the City's proffered reasons for the transfer, we would find no violation. The ALJ found that the City's offered business reason was pretextual because there was an absence of any evidence that the summer of 2001 was extraordinary by any measure that would require the transfer of personnel, including

²⁹ Transcript, p. 97.

³⁰ See *Town of Greenburgh*, 32 PERB ¶3025 (1999).

³¹ *State of New York (SUNY- Oswego)*, 34 PERB ¶3017 (2001).

³² *Id.*

Lore, to park patrol. Thus, the ALJ found that, but for Lore's grievances, she would not have been transferred to patrol. We disagree. The City's witnesses all testified as to the need for the additional personnel assigned to park patrol. There is nothing in the record to controvert the reasons offered by the City for its decision to deploy Lore and the other personnel to the park patrol.

The ALJ also found that the speed of the transfer caught Lore's immediate superior unaware and, therefore, the proximity of time between Lore's grievance and the transfer raised a suspicion of a causal relationship. In the absence of any evidence of animus, however, timing alone is insufficient to support a finding of violations of §§209-a.1(a) and (c).³³ Furthermore, a coincidence of events alone is insufficient to justify such an inference.³⁴

The PBA has merely demonstrated that it filed a grievance on Lore's behalf and that Falge was aware of her grievance and past grievance activity. The PBA has failed to prove that "but for" this grievance Lore would not have been temporarily transferred from community relations to patrol during the summer of 2001.

Based upon our review of the record, we grant the City's exceptions and reverse the decision of the ALJ.

³³ See *County of Monroe and Monroe County Sheriff*, 33 PERB ¶3044 (2000); *Town of North Hempstead*, 32 PERB ¶3006 (1999).

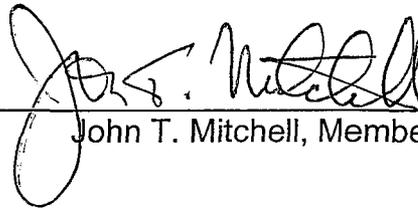
³⁴ See *Holbrook Fire Dist.*, 33 PERB ¶3050 (2000), *confirmed*, 295 AD2d 668, 35 PERB ¶7011, (3d Dep't 2002).

IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is,
dismissed in its entirety.³⁶

DATED: December 12, 2003
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

³⁶ Member Abbott recused himself from consideration of this case.

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

In the Matter of

**POLICE BENEVOLENT ASSOCIATION OF THE
NEW YORK STATE TROOPERS, INC.,**

Charging Party,

- and -

CASE NO. U-22896

**STATE OF NEW YORK (DIVISION OF STATE
POLICE),**

Respondent.

**GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN 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 to an Administrative Law Judge's (ALJ) decision dismissing an improper practice charge, filed by the Police Benevolent Association of the New York State Troopers, Inc., (Association) against the State of New York (Division of State Police) (State) alleging, as amended, that the State violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) by unilaterally changing a past practice when it denied annual leave in one-day increments to a troop commander, Major Walter Heesch, Jr.

The State filed an answer that, *inter alia*, admitted denying the leave request but asserted that Heesch had been advised at the time of his appointment that his required work week was Monday through Friday.¹

PROCEDURAL MATTERS

By decision dated December 26, 2001,² the case was deferred to the parties' contractual grievance procedure by the ALJ assigned to the case.³ The arbitrator dismissed the Association's grievance by award dated May 12, 2002, finding that there was no meaningful past practice of granting one-day leave requests to majors under the circumstances set forth in the grievance. The Association then moved to reopen the improper practice charge, arguing that the State's denial of Heesch's requests established a new annual leave policy that had not been negotiated with the Association. By letter dated July 29, 2002, the same ALJ granted the Association's request to reopen the improper practice charge, finding that this issue had not been covered by the arbitrator's decision. However, the ALJ precluded the Association from relitigating the issue of an existing past practice, finding that the arbitrator's decision

¹ Heesch had made requests for one-day leave on Wednesdays and Fridays in the summer months.

² 34 PERB ¶4612 (2001).

³ In accordance with our long-standing policy, the alleged violation of §209-a.1(a) would have been deferred as it is purely derivative of the alleged §209-a.1(d) violation, no independent facts which would support a finding of improper motivation having been pled by the Association. PERB does not ordinarily defer an alleged §209-a.1(a) violation. See, *Schuyler-Chemung-Tioga BOCES*, 34 PERB ¶3019 (2001).

must be given preclusive effect on that issue because it had been fully litigated in the arbitration.

The Association requested a hearing on the issue. The ALJ assigned to decide the reopened improper practice charge⁴ directed the Association to file an offer of proof and, thereafter, issued a letter ruling on the Association's offer and the State's response to the offer, determining that there would be no hearing. The ALJ then decided the charge based on the pleadings, the arbitration award, the Association's offer of proof, the State's response thereto, and the letter rulings described *supra*. Finding that collateral estoppel applied, the ALJ gave the arbitrator's award preclusive effect and determined that the denial of Heesch's one-day leave requests did not contravene the parties' past practice and, therefore, did not constitute a unilateral change in practice.⁵

EXCEPTIONS

The Association excepted to the ALJ's decision on the grounds that the ALJ erred by precluding the Association from relitigating the issue of past practice in the present improper practice charge. The State filed a response in support of the ALJ's decision.

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

⁴ The prior ALJ subsequently retired.

⁵ The ALJ also dismissed the alleged §209-a.1(a) violation as derivative of the §209-a.1(d) allegation. No exceptions have been taken to this aspect of the ALJ's decision.

FACTS

The facts are set forth in the ALJ's decision.⁶ We will confine our review to the facts relevant to these exceptions.

The amended charge alleges that employees in the Association's bargaining unit, including majors, were consistently permitted to take annual leave in one-day increments. Heesch made such a request on June 26, 2001, that was denied by the Field Commander, Colonel William DeBlock. Heesch was thereafter informed by DeBlock that he could not take annual leave in one-day increments.

The Association then filed a grievance, alleging that the State violated the parties' collective bargaining agreement when DeBlock denied Heesch's request for one day of vacation leave for June 27, 2001.⁷ The arbitrator found that DeBlock had previously notified Heesch that, as a major commanding a troop, he was expected to maintain a Monday through Friday work schedule and that requests for one-day leaves would not be routinely granted. Finding that Heesch's repeated one-day leave requests were attempts to alter his regular Monday to Friday work schedule and that DeBlock's denial and notification were to prevent that alteration, the arbitrator identified the dispute as whether one-day leave requests which attempt to create a work week other than Monday through Friday can be denied. In denying the grievance, the arbitrator found that the parties' past practice of granting one-day leave requests did not include allowing

⁶ 36 PERB ¶4558 (2003).

⁷ The Association argued that Article 13.1 of the parties' collective bargaining agreement, dealing with annual leave, was violated by DeBlock's denial.

majors to utilize leave in one-day increments, under the circumstances set forth in the grievance. The arbitrator found that no provisions of the collective bargaining agreement had been violated.

DISCUSSION

The Association argues in its exceptions that it should not have been precluded from relitigating the issue of past practice based upon the arbitration award. The Association contends that, since the arbitrator determined the grievance was not covered by the collective bargaining agreement and, as a result, his authority was limited, he did not conclusively determine the issue of whether a past practice existed.

During the arbitration, the Association proved that there had been a practice of granting annual leave in one-day increments, and, in fact, the arbitrator acknowledged this fact in his award. The arbitrator made a two-part determination on past practice: one, on the extent of the practice, finding that the practice did not include majors; and, two, finding that the practice shed no light on the disputed contractual language. The fact that the arbitrator denied the grievance on contractual grounds does not mean that collateral estoppel does not apply to the past practice issues litigated in the arbitration.

We have long held that, as to any factual issues, or mixed question of law and fact, necessarily resolved by an arbitrator in arriving at his or her determination, the principle of *res judicata* is applicable.⁸ The doctrine of collateral estoppel is but a corollary to the doctrine of *res judicata*, so that a party is precluded from relitigating in a

⁸ *New York City Transit Auth.*, 32 PERB ¶13057 (1999) (later history omitted).

subsequent action or preceeding an issue actually litigated and necessarily determined in a prior proceeding, whether or not the tribunals or causes of action are the same.⁹

The doctrine of collateral estoppel prevents parties from relitigating, in a subsequent proceeding, an issue of fact or law "clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same."¹⁰ Collateral estoppel will be imposed where it is shown that the issue previously decided was "material to the first action or proceeding and essential to the decision rendered therein,"¹¹ and the party against whom it is sought to be imposed had a full and fair opportunity in the proceeding to contest the decision now said to be controlling.¹²

We find that there was an identity of issues in both the improper practice charge and the grievance arbitration, specifically, the alleged past practice of granting one-day annual leave requests. The record demonstrates that the Association had a full and fair opportunity to litigate the alleged past practice before the arbitrator and the Association takes no exception to this point. We find unpersuasive the Association's argument that, since the arbitrator determined that the parties' contractual grievance procedure was limited to disputes over the interpretation or application of the term of the agreement, and since a past practice that stands alone without ties to the contract is not reviewable

⁹ *Ryan v. New York Telephone Co.*, 62 NY2d 494 (1984).

¹⁰ *Id.* at 500.

¹¹ *Id.*

¹² *Id.* at 501.

as a contract grievance, the arbitrator did not conclusively determine the issue of whether a past practice existed. The arbitrator determined that the Association presented evidence of the past practice. He then made findings as to the nature and extent of the past practice and whether the past practice, as established by the Association, lent any clarification to the contract provisions under which the grievance was brought. The arbitrator found that there was no relevant past practice as it related to the at-issue dispute. The Association, under the doctrine of collateral estoppel, is barred from re-litigating that issue in this proceeding.

As no past practice of granting one-day annual leave requests was altered by DeBlock's denial of Heesch's June 26, 2001 request, we find that the State neither unilaterally changed a past practice nor unilaterally implemented a new annual leave policy.

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

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

DATED: December 12, 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 DRYDEN POLICE BENEVOLENT
ASSOCIATION,**

Petitioner,

- and -

CASE NO. C-5283

VILLAGE OF DRYDEN,

Employer.

JOHN M. CROTTY, ESQ., for Petitioner

**FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C. (DAVID W.
LARRISON, ESQ. of Counsel), for Employer**

BOARD DECISION AND ORDER

On March 5, 2003, the Village of Dryden Police Benevolent Association (petitioner) 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 Village of Dryden.

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

Included: All full-time and part-time Police Officers.

Excluded: Chief of Police, Lieutenant and all other employees of the Village of Dryden.

Pursuant to that agreement, a secret-ballot election was held on October 17, 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.

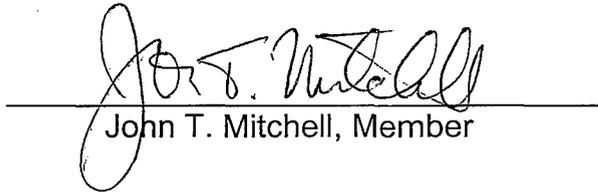
DATED: December 12, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, AND HELPERS
OF AMERICA, LOCAL 264,**

Petitioner,

-and-

CASE NO. C-5208

COUNTY OF ERIE AND ERIE COUNTY SHERIFF,

Employer,

-and-

**ERIE COUNTY SHERIFF'S POLICE BENEVOLENT
ASSOCIATION, INC.,**

Intervenor.¹

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,

¹ While the Erie County Sheriff's Police Benevolent Association, Inc., originally intervened and argued that its unit was the most appropriate for the at-issue employees, it thereafter consistently indicated no interest in representing these employees.

IT IS HEREBY CERTIFIED that the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local 264 has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Mounted Reserve Deputies.

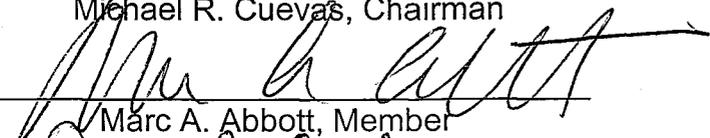
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Local 264. 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.

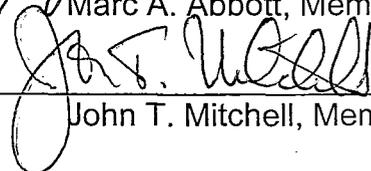
DATED: December 12, 2003
Albany, New York



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.

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 Ramapo Staff Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time employees in the titles of 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, 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.

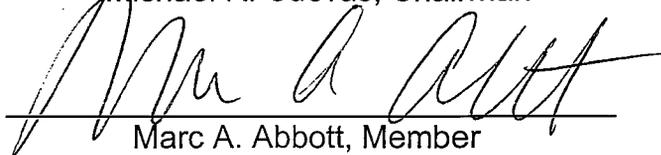
Excluded: Personnel Administrator, Director of Finance, Receiver of Taxes, Town Clerk, Director of Parks & Recreation, and Director of Public Works.

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

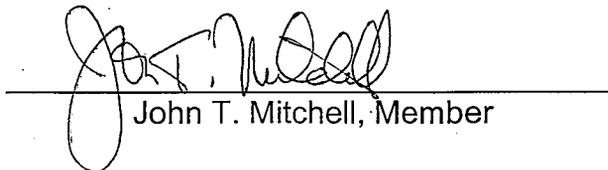
DATED: December 12, 2003
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member