

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

In the Matter of

**ORANGETOWN POLICEMEN'S BENEVOLENT
ASSOCIATION,**

Charging Party,

**CASE NOS. U-25534 &
U-25733**

- and -

TOWN OF ORANGETOWN,

Respondent.

**BUNYAN & BAUMGARTNER LLP (JOSEPH P. BAUMGARTNER of counsel),
for Charging Party**

KEANE & BEANE, P.C. (LANCE H. KLEIN of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Orangetown Policemen's Benevolent Association (PBA) to two decisions¹ of an Administrative Law Judge (ALJ) dismissing its improper practice charges alleging that the Town of Orangetown (Town) violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it refused to provide certain information that the PBA requested to defend disciplinary charges filed by the Town against two unit employees, Lorraine Wetzel (U-25534) and Ennio Munno (U-25733).

The ALJ dismissed both charges, finding that the employees' disciplinary rights were limited to those available under the Rockland County Police Act, based upon

¹ As both Case Nos. U-25534 and U-25733 deal with the same substantive issues, we have consolidated them for decision.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-5570

EAST ROCKAWAY UNION FREE SCHOOL 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 United Public Service Employees Union 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 regularly scheduled full and part-time Monitors, Cooks and Food Service Workers.

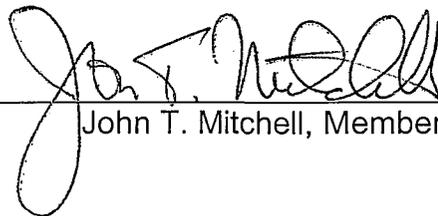
Excluded: Cook Manager, substitute Food Service Workers and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. 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: June 7, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**TEAMSTERS LOCAL 118, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,**

Petitioner,

-and-

CASE NO. C-5585

VILLAGE OF CLYDE,

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 118, International Brotherhood of Teamsters 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 employees in the Highway, Water and Sewer Departments, full-time Water/Sewer Clerk, and full-time Police Department Clerk.

Excluded: Mayor, Village Clerk, Highway Superintendent, Police Chief, Police Officers.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 118, International Brotherhood of Teamsters. 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: June 7, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

Orangetown Policemen's Benevolent Association v Town of Orangetown.² In that case, the Appellate Division, Second Department, held that the disciplinary procedures for unit employees were governed by the Rockland County Police Act and not the procedure set forth in the collective bargaining agreement between the Town and the PBA. The ALJ further found that the PBA had no entitlement under the Act to the information it sought, based upon the Board's decision in *County of Ulster* (hereafter, *Ulster*).³

EXCEPTIONS

The PBA excepts to the ALJ's decisions, arguing that the holding in *Ulster* has been superseded by subsequent Board decisions and is no longer valid law, that the Rockland County Police Act does not preclude the Town from providing the requested information, and that the demand for information was sufficiently grounded in the collective bargaining agreement to require the Town under the Act to provide the information sought by the PBA. The Town supports the ALJ's decision.

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

FACTS

The facts are fully set forth in the ALJ's decisions and are repeated here only as necessary to decide the issues raised by the exceptions.⁴

In 2002, Munno, a police officer, was charged by the Town with violating certain Town Police Department rules and regulations. Pursuant to Article 15 of the PBA-Town

² 18 AD3d 879 (2d Dept 2005). For subsequent history, see note 7, *infra*.

³ 26 PERB ¶3008 (1993).

⁴ 39 PERB ¶4502 (2006) and 39 PERB ¶4524 (2006).

collective bargaining agreement, an arbitration hearing was scheduled.⁵ The PBA requested certain information from the Town, both by subpoena and discovery, and by requests made pursuant to §209-a.1(d) of the Act. When the Town refused to comply with the requests made pursuant to the Act, the charge in Case No. U-25733 was filed by the PBA.

In 2004, Wetzel, a police officer, was charged by the Town with numerous violations of Department rules and regulations. The PBA requested information from the Town that the PBA asserted was necessary to defend the charges. The Town did not respond. The PBA thereafter filed the improper practice charge in Case No. U-25534.

Section 7 of the Rockland County Police Act (L 1936, Ch 526) provides, in relevant part:

The town board shall have the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department. Except as otherwise provided by law, no member or members of such police department shall be fined, reprimanded, removed or dismissed until written charges shall have been examined, heard and investigated in such manner or by such procedure, practice, examination and investigation as the board, by rules and regulations from time to time, may prescribe.

DISCUSSION

In *Patrolmen's Benevolent Association of the City of New York v NYS Public Employment Relations Board*,⁶ the Court of Appeals held that bargaining under the Act is required over disciplinary procedures unless there is State legislation that specifically commits the power to discipline police to local officials. The Rockland County Police Act

⁵ Article 15 prescribes detailed procedures, culminating in arbitration, for any dispute concerning the discipline or discharge of Town of Orangetown police officers.

⁶ __NY3d__, 2006 Slip Op 02288, 2006 NY Lexis 584, 39 PERB ¶7006 (March 28, 2006).

is such legislation. After the date of the ALJ's decisions in these cases, the Court of Appeals decided *Town of Orangetown v Orangetown Policemen's Benevolent Association*.⁷ In that decision, the Court affirmed the decision of the Appellate Division and held that the Rockland County Police Act is a special law that pre-dated CSL §76(4) and that matters of police discipline are within the power and authority of the Orangetown Town Board. The Court, therefore, found that Article 15 of the Town-PBA collective bargaining agreement was invalid. In reaching its decision, the Court of Appeals considered the following question:

Is there a public policy strong enough to justify excluding police discipline from collective bargaining? It might be thought this question could be answered yes or no, but the relevant statutes and case law are not so simple. In general, the procedures for disciplining public employees, including police officers, are governed by Civil Service Law §§75 and 76, which provide for a hearing and an appeal. In *Auburn*, a case involving police discipline, the Appellate Division rejected the argument that these statutes should be interpreted to prohibit collective bargaining agreements "that would supplement, modify or replace" their provisions (62 A.D.2d at 15), and we adopted the Appellate Division's opinion (46 N.Y.2d at 1035). Thus, where Civil Service Law §§75 and 76 apply, police discipline may be the subject of collective bargaining.

But Civil Service Law §76 (4) says that sections 75 and 76 shall not "be construed to repeal or modify" pre-existing laws, and among the laws thus grandfathered are several that, in contrast to sections 75 and 76, provide expressly for the control of police discipline by local officials in certain communities. Such laws are applicable in . . . the Town of Orangetown

Therefore, Wetzel's and Munno's disciplinary rights are limited to those available under the Rockland County Police Act. The Rockland County Police Act has no procedure for the production of information to a police officer's representative.

Based upon our decision in *Ulster*, the ALJ also found that the PBA was not entitled, under the Act, to the requested information. That case dealt with an improper

⁷ 2006 NY Lexis 584, 2006 NY Slip Op 2288 (March 28, 2006).

practice charge alleging that a refusal to produce information to an employee organization for defense of a CSL §75 disciplinary charge violated §§209-a.1(a) and (d) of the Act. The charge was dismissed by the Board, based upon a finding that:

...there is no obligation under the Act to provide information concerning CSL §75 litigation. A union's entitlement to information under the Act derives from its right and obligation to represent unit employees in the negotiations for, and the administration of, collective bargaining agreements. Effective representation for such purposes requires access to necessary and relevant information. CSL §75 is a statutory procedure pursuant to which certain public employees are provided procedural due process prior to the implementation of disciplinary action. The CSL §75 procedures are separate and independent of the obligation to negotiate under the Act. While CSL §75 specifically affords an employee a right to representation by an attorney or a representative of a certified or recognized employee organization, such representation in that statutory proceeding is for purposes of litigation, not collective bargaining. Thus, we find that the entitlement to information in the context of a statutory proceeding such as CSL §75, if any, derives from the rights attendant to those proceedings, not the Act. (at 3015 -16)

The PBA argues that *Ulster* is no longer valid in light of our decision in *New York City Transit Authority*.⁸ In that case, we determined that the employer violated §209-a.1(a) of the Act when it denied a unit employee's request for union representation at an investigatory interview that the employee reasonably believed might result in discipline. The PBA argues that such a right to representation in a disciplinary investigative interview establishes a concomitant duty on the part of the employee organization to provide representation to employees facing disciplinary charges and a right to obtain the information necessary to provide such representation. The PBA's logic is faulty: a public employee's right to representation does not carry with it an absolute obligation on the part of an employee organization to provide such

⁸ 35 PERB ¶13029 (2002), *affd sub nom Matter of New York City Transit Auth v New York State Pub Empl Relations Bd*, 196 Misc2d 532, 36 PERB ¶17009 (Sup Ct Kings County 2003), *affd* 27 AD3d 11, 38 PERB ¶17019 (2d Dept 2005), *application for lv pending*, __NY3d __ (2006).

representation. As we have frequently noted: an employee organization does not violate the Act by failing to institute an action on the behalf of a unit employee or by failing to provide representation to a unit employee, unless the failure to represent the employee was due to arbitrary, discriminatory or bad faith reasons.⁹ Employees facing disciplinary charges in CSL §§75 or 76 proceedings are entitled to legal representation during those proceedings; such entitlement, however, does not carry with it a right to obtain information from the employer that is enforceable under the Act. Our decision in *New York City Transit Authority, supra*, does not change our holding in *Ulster* and we here reiterate that there is no Taylor Law right to information in conjunction with a statutory proceeding in which a union may be providing representation to a unit employee.

In support of its exceptions, the PBA argues that our decision in *Town of Evans*¹⁰ holds that a union is entitled to information in connection with its representation of an employee in a CSL §§75 or 76 proceeding and that the same relief is appropriate here. That case, however, unlike the instant cases and *Ulster*, dealt with a contractual disciplinary procedure that was adopted in lieu of CSL §§75 and 76 procedures. Having filed a disciplinary grievance pursuant to the contractually provided procedure protesting the employee's discharge, we found that the union was entitled under the Act to "the disclosure of information relevant to a grievance prior to arbitration." (at 3050) The instant cases are governed by the Rockland County Police Act and, thus, involve charges brought pursuant to a statutory non-contractual disciplinary procedure,

⁹ See *CSEA v Diaz*, 132 AD2d 430, 20 PERB ¶¶7024 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶¶7017 (1988). See also Phillip L. Maier, *The Taylor Law and the Duty of Fair Representation*, 53-55 (2002) and the cases cited therein on a union's obligation or lack thereof to represent employees in actions unrelated to the collective bargaining agreement.

¹⁰ 37 PERB ¶¶3016 (2004).

therefore, our holding in *Town of Evans, supra*, does not apply.

Therefore, the Town's refusal to provide information requested by the PBA in conjunction with Wetzel's and Munno's disciplinary charges does not violate §§209-a.1(a) and (d) of the Act.

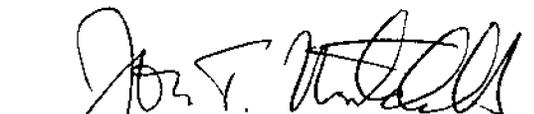
Based on the foregoing, we deny the PBA's exceptions and we affirm the decisions of the ALJ.

IT IS, THEREFORE, ORDERED that the charges in U-25534 and U-25733 are dismissed in their entirety.

DATED: June 7, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

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

In the Matter of

**ULSTER COUNTY SHERIFF EMPLOYEES
ASSOCIATION, CWA, LOCAL 1105, AFL-CIO,**

Charging Party,

CASE NO. U-25697

- and -

**COUNTY OF ULSTER AND ULSTER COUNTY
SHERIFF,**

Respondent.

**SPIVAK, LIPTON, WATANABE, SPIVAK, MOSS & ORFAN LLP (NICOLE
CUDA PEREZ of counsel), for Charging Party**

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Ulster County Sheriff Employees Association, CWA, Local 1105, AFL-CIO (Association) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the County of Ulster and Ulster County Sheriff (Employer) violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it refused a unit employee's request

to have a union representative present while being questioned by a superior officer, in violation of his *Weingarten*¹ rights.

EXCEPTIONS

The Association argues in its exceptions that the ALJ erred in applying the law and erred in assessing the credibility of the witnesses, thereby rendering the decision arbitrary and capricious. The Employer filed a response in support of the ALJ's decision.

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

FACTS

The facts are set forth in the ALJ's decision and adopted by the Board.²

The Association filed an improper practice charge on February 11, 2005, alleging, in substance, that on December 30, 2004, Corporal Paul Wesolowski met with Sergeant Charles Polacco, at Polacco's invitation, in the presence of Sergeant Michael McGirr. Polacco questioned Wesolowski about what time he left work the day before. Wesolowski allegedly asked for and was refused a union representative.

¹ In *National Labor Relations Board v Weingarten*, 420 US 251 (1975), the Supreme Court held that an employee has a statutory right to refuse to submit without union representation, once requested, to an interview which he/she reasonably fears may result in his discipline. While the Association used the term "Weingarten rights", it was clear that it meant to assert the rights accorded to public employees under §202 of the Act, as found by the Board in *New York City Transit Auth*, 35 PERB ¶¶7012 (2002), *affd sub nom, Matter of New York City Transit Auth v NYS Pub Empl Relations Bd*, 196 Misc2d 532, 36 PERB ¶¶7009 (Sup Ct Kings County 2003), *affd* 27 AD3d 11, 38 PERB ¶¶7019 (2d Dept 2005), *lv denied* ___ AD3d ___, 39 PERB ¶¶7003 (2006), *motion for leave pending*.

² 39 PERB ¶¶4533 (2006).

The Association further alleges that, on January 4, 2005, the Employer served Wesolowski with charges of insubordination at the December 30, 2004 meeting and misconduct for leaving work early on December 29, 2004. Wesolowski served a 30-day suspension.

The Association called Wesolowski and Correction Officer Brian Lyons in support of its charge. On direct examination, Wesolowski testified that Polacco asked him why he left work early on December 29, 2004. Wesolowski denied leaving early and, from the tone of Polacco's voice, he stated that he was under the impression that Polacco was going to have him charged with leaving work early. Since Polacco persisted with the same question, Wesolowski requested union representation. Wesolowski testified on cross-examination that he could not recall whether Polacco said that the meeting was not a counseling session.

Correction Officer Brian Lyons testified on behalf of the Association that he was standing outside of the office and could overhear the conversation between Wesolowski and Polacco. Lyons recalled that Wesolowski requested union representation.

Sergeant McGirr testified on behalf of the Employer. Mc Girr, the Association Treasurer, was already seated in Polacco's office when Wesolowski came in and observed the conversation between Wesolowski and Polacco. McGirr stated that he recalled Polacco telling Wesolowski that "he was not there to counsel him."³ McGirr described how Wesolowski became agitated and was about to leave the room when Polacco informed him that, if he left the room, he would be insubordinate. McGirr

³ Transcript, p. 91.

testified that interrogations that lead to disciplinary charges are conducted by either Internal Affairs Division or the Detective Division.

Polacco testified that the purpose of meeting with Wesolowski was simply to determine whether everything was all right at home. If there were no problems that caused Wesolowski to leave early, then Polacco wanted to review the time clock policy with him. He insisted that the meeting was not intended as a counseling session. Polacco testified that Wesolowski never asked for a union representative. Polacco stated that disciplinary investigations are conducted by either the Detective Division or Internal Affairs Division. Although he conceded on cross-examination that he discussed Wesolowski's conduct during his meeting with either the warden or Superintendent Ebel, the written memo⁴ he sent Ebel did not include events of December 29, 2004, when Wesolowski allegedly left work early without permission.

DISCUSSION

The Association contends in its exceptions that the ALJ erred on the law by applying an arbitrary standard in assessing the credibility of the witnesses and misstating the law as it relates to discipline for insubordination when union representation has been wrongfully withheld.

It is axiomatic that, in an improper practice proceeding, the charging party has the burden of proof.⁵ The Association has alleged a violation of §209-a.1(a) of the Act in that the employer has interfered with, restrained or coerced a public employee in the

⁴ Respondent's Exhibit 1.

⁵ See *Civ Serv Employees Assn v Cuevas*, 274 AD2d 930, 33 PERB ¶7012 (3d Dept 2000).

exercise of his rights guaranteed in §202 of the Act. We recently extended the principles of §202 to include the right of a public employee to request a union representative during an investigatory interview which the employee reasonably believes may result in discipline.⁶

In a recent decision,⁷ we articulated the test to be used to determine the reasonableness of an employee's belief that an investigatory interview may result in discipline. We concluded that "[i]n testing the reasonableness of an employee's belief, we use a reasonable person standard. 'An employee's fear is reasonable if the interview is calculated to form the basis for taking discipline or other job-affecting actions against such employee because of past misconduct' or 'incompetence'." (footnote omitted). Here, Wesolowski testified that it was his impression that Polacco wanted to have him charged with leaving early. The circumstances then, were such that Wesolowski's concerns were reasonable.

The ALJ, however, concluded that it was as likely as not that Wesolowski requested that a union representative be present during the meeting. Since the evidence rested upon the conflicting testimony of the witnesses, the ALJ based his decision on the credibility of the witnesses. In doing so, the ALJ considered certain factors, including their demeanor, tone, directness of their answers and the fact that the

⁶ *New York City Transit Auth*, *supra* note 1.

⁷ *New York City Transit Auth*, 36 PERB ¶3049, at 3143-4 (2003), *confd sub nom Transport Workers Union of America, Local 100, AFL-CIO v Pub Empl Relations Bd*, 24 AD3d 224, 38 PERB ¶7018 (1st Dept 2005).

witnesses were sequestered. The ALJ also considered the interest or bias of Wesolowski and Polacco.

In *Fashion Institute of Technology v Helsby*,⁸ the Appellate Division held that “[t]he determination of the hearing officer rested on a weighing of the credibility of the testimony adduced. In such a case, the findings of the hearing officer as trier of fact should be given the greatest weight.”

The Association argues in its brief that the ALJ’s assessment of the credibility of Polacco and McGirr was arbitrary and capricious. The Association contends that the ALJ discounted Polacco’s testimony because of his status as a supervisor and union officer, but, at the same time, credited McGirr’s testimony. The Association’s argument misapprehends the ALJ’s analysis. McGirr’s testimony was not credited merely because of his supervisory status and union office. The uncontradicted evidence demonstrated that McGirr was merely a disinterested observer who happened to be in the office with Wesolowski and Polacco at the time of the discussion. There is no record evidence that Polacco invited McGirr to be a witness. Furthermore, as a union officer, Wesolowski proffered no evidence to establish bias or a conflict of interest which might affect the weight of McGirr’s testimony. We find, therefore, that there is substantial evidence in the record that establishes Wesolowski did not request union representation during the interview with Polacco. As there was no request for representation, there could be no violation of §209-a.1(a) of the Act.

⁸ 44 AD2d 550, 7 PERB ¶¶7005 at 7009 (1st Dept 1974).

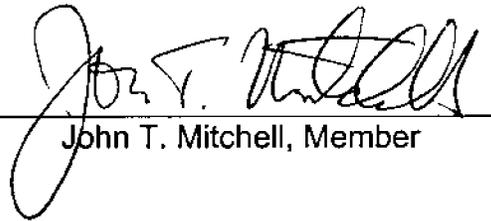
Based on the foregoing, we deny the Association's exceptions and affirm the decision of the ALJ.

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

DATED: June 7, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

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

In the Matter of

**PLUMBERS LOCAL UNION NO. 1,
UA, AFL-CIO,**

Charging Party,

-and-

CASE NO. U-25883

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

Respondent.

**BROACH & STULBERG (JOSHUA S.C. PARKHURST of counsel), for
Charging Party**

**DANIEL McCRAY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE
BARGAINING (KAREN SOLIMANDO of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Plumbers Local Union No. 1, UA, AFL-CIO (Union) and the Board of Education of the City School District of the City of New York (District) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Union. The Union alleged that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred work performed by employees in the bargaining unit represented by the Union to employees of a private contractor, Strategic Distribution, Inc. (SDI); when it

failed to respond to the Union's demand to negotiate its decision to privatize unit work; and when it likewise failed to respond to the Union's request for information regarding its decision to privatize the work previously performed by bargaining unit members.

Pursuant to the District's motion to dismiss at the close of the Union's direct case, the ALJ dismissed the charge as to the alleged unilateral assignment of unit work, finding it to be untimely. The ALJ also dismissed the refusal to negotiate allegation, finding that the Union had failed to demonstrate that the work transferred was exclusive bargaining unit work. However, the ALJ found that the District violated §209-a.1(d) of the Act by refusing the Union's request for information.

EXCEPTIONS

The Union excepts to the ALJ's dismissal of certain aspects of its improper practice charge, specifically the ALJ's determination that the unilateral change allegations are time-barred and that the Union had not established exclusivity over the in-issue bargaining unit work. The District excepts to the ALJ's finding that it violated the Act by not supplying the Union with the requested information pertaining to the privatization of bargaining unit work.

Based upon our review of the record and our consideration of the parties' arguments, we reverse and remand this case to the ALJ.

PROCEDURAL MATTERS

The hearing was adjourned at the end of the Union's direct case so that the ALJ could consider the District's motion to dismiss. Therefore, pursuant to our decision in

County of Nassau (Unterweiser),¹ in assessing the record evidence, we must “assume the truth of all the charging party’s evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts” and must reverse the granting of a motion to dismiss “unless we could conclude that the evidence produced by the charging party, including all reasonable inferences therefrom, is plainly insufficient even in the absence of any rebuttal by the respondent to warrant a finding that the charge should be sustained”.

FACTS

The facts are set forth in the ALJ’s decision.² Additional facts are set forth below in order to address the exceptions.

The record testimony consists solely of the Union’s two witnesses: Frank Podmore, a unit employee and Union shop steward, and Tom Kempf, an organizer for the Union. The Union represents plumbers, plumbers’ helpers and plumber supervisors employed by the District, either performing plumbing duties at various District properties or working at plumbing supply shops located in each borough of New York City. The record evidence shows that unit employees working at the plumbing supply shop located at 4435 Vernon Boulevard in Queens took orders, retrieved tools and materials from the stock room, fabricated materials, packaged items, completed tracking forms, entered information into the computers, filled out various forms and stocked shelves. In June or August 2004, the District introduced an SDI employee into the shop for two

¹ 17 PERB ¶3013, at 3030 (1984).

² 39 PERB ¶4527 (2006).

days to monitor the operation. In September 2004, the District advised unit employees at the supply shop to turn their keys to the stockroom over to SDI employees so they could inventory the stock. Podmore, a plumber working in the shop, informed Kempf at that time that nonunit employees were going through the stockroom and questioned whether unit employees were required to work with them. Kempf told Podmore that he had to work with whomever he was assigned to work with. The District did not inform any employees at the shop of the nature of the work being performed by the SDI employees or the duration of their tenure in the shop, beyond the fact that they would be performing the stockroom function. Unit employees continued the work of entering orders and adjusting inventory on the shop's computers, but SDI employees began filling the orders from the stockroom.

In December 2004, Podmore testified that the unit employees at the shop were informed by the District that they were going out into the field and that there would be no more unit employees assigned to the shop. In April 2005, the unit employees were removed from the shop and given field assignments by the District.

Kempf testified that in December 2004, Podmore informed him that the unit employees were being removed from the shop and the work at the shop was going to be done by SDI. Kempf informed the Union's lawyer and, in a letter dated December 30, 2004, the Union demanded bargaining over the District's decision to subcontract the work performed by unit employees in the shop and requested information from the District regarding the subcontracting so as to be able to conduct negotiations on the subject. The District did not respond to the Union. The District neither informed the

Union of its decision to subcontract unit work nor negotiated with the Union over its decision nor provided the Union with any of the requested information.

The District moved to dismiss the improper practice charge, as to the unilateral assignment of unit work to nonunit employees, at the close of the Union's direct case. The District argued that the charge, filed on April 21, 2005, was untimely because the Union knew that unit work was being assigned to SDI in September 2004. The ALJ adjourned the hearing and requested briefs on the motion to dismiss. The ALJ thereafter additionally confirmed, in a letter to the parties, that the District did not respond to the Union's December 30, 2004 demand to negotiate and its request for information and that the District's position was that it had no legal obligation to do so. The ALJ also stated that the District had no further evidence on those issues.

DISCUSSION

As noted previously, in deciding a motion to dismiss, we must assume the truth of all the Union's evidence and give the Union every reasonable inference from those assumed facts. On this record, therefore, we cannot find that the Union had notice of the assignment of unit work at the shop to SDI employees until December 2004. Podmore's testimony that he knew there were SDI employees working in the stockroom in September 2004, but he did not know the extent of their work or the duration of their assignment, is insufficient to impute notice to the Union that bargaining unit work was being assigned to nonunit employees. "The employee organization, or its leadership, must have knowledge of the act that constitutes the improper practice charge for it to be

held to have notice, upon which timeliness determinations may be based.”³ This record does not establish that Podmore, as a shop steward, was empowered to bind the Union to notice of the assignment in September 2004. This would be the case even if we could find that the assignment of the stockroom work to SDI employees, as set forth on this record, was sufficiently unequivocal to constitute an announcement of the District’s plan.⁴ Likewise, we do not find that Podmore’s inquiry to Kempf in September 2004 was sufficient notice to the Union of the privatization of bargaining unit work. The Union was not “reasonably positioned to know” of the unilateral assignment of unit work at the shop based on that one call from Podmore.⁵ On the record thus far, the charge as related to the unilateral assignment of unit work to SDI employees, as announced by the District in December 2004 may not be dismissed as untimely.⁶ We remand the matter to the ALJ to take more evidence on this issue.

³ *Cold Spring Harbor Cent Sch Dist*, 36 PERB ¶¶3016, at 3048 (2003), *confirmed sub nom.*, *Matter of Cold Spring Harbor Teachers Assn v NYS Pub Empl Relations Bd*, 12 AD3d 443, 37 PERB ¶¶7009 (2d dept 2004). *See also County of Nassau*, 23 PERB ¶¶3051 (1990).

⁴ *Cold Spring Harbor*, *supra*, where we found that the fact that the union president was aware of the hiring of nonunit employees was not sufficient notice of the unilateral assignment of unit work to nonunit employees where the president was not aware of the exact nature of the duties being assigned to the nonunit employees. *See also County of Cattaraugus*, 8 PERB ¶¶3062 (1975), holding that an employer must give notice to the certified or recognized bargaining agent of a change in terms and conditions of employment and that notice to the affected employees does not discharge this obligation.

⁵ *See Wayne-Finger Lakes BOCES*, 27 PERB ¶¶3014 (1994).

⁶ Rules of Procedure, §204.1(a).

The unilateral subcontract of unit work is itself a rejection of the bargaining process and a refusal to bargain. No demand to bargain is necessary in such circumstance.⁷ A demand to bargain is necessary only as to those §209-a.1(d) allegations which are grounded upon a refusal to bargain pursuant to a specific demand. A refusal to bargain premised upon a unilateral change in a mandatory subject of negotiation is a violation of the Act separate from a refusal to bargain pursuant to demand.⁸ The ALJ's finding that there is no obligation to negotiate upon demand about an action which is the subject of an "untimely" charge alleging a unilateral change is in error. The obligation to negotiate a mandatory subject upon demand is different and separate from the allegation of a unilateral change, even if both are based upon the same underlying action, as long as there has been a separate demand to negotiate.

Based upon the record evidence at the time the motion to dismiss was made, the Union had established a *prima facie* case that the work performed by unit employees at the shop was exclusive bargaining unit work. Podmore's testimony is that unit employees exclusively performed work in the shop.⁹ We, therefore, find that the ALJ erred in granting the motion to dismiss the alleged refusal by the District to negotiate in good faith for lack of exclusivity by the Union over the work sought to be bargained. We

⁷ *Wappingers Cent Sch Dist*, 19 PERB ¶¶3037 (1986); *County of Cattaraugus*, *supra*, note 5.

⁸ *Incorporated Village of Rockville Centre*, 18 PERB ¶¶3082 (1985); *County of Schenectady and Sheriff*, 18 PERB ¶¶3038 (1985).

⁹ The District's allegations in its exceptions that the work was never exclusively the Union's work or had been previously reassigned to SDI employees in other shops operated by the District are argument and are not record facts.

remand the matter to the ALJ to complete the hearing on this issue by hearing the District's case and any rebuttal thereto.

As to the violation of §209-a.1(d) found by the ALJ, that the District failed to respond to the Union's request for information which it required to bargain the decision to subcontract, we reserve decision. The District has raised arguments in its exceptions that cannot be addressed based on the evidence in the record at the time of the motion to dismiss. The District may renew its exceptions to this portion of the ALJ's decision after it has presented evidence on this point.

Based upon the foregoing, we grant the Union's exceptions, reserve decision on the District's exception, and reverse the ALJ's rulings on timeliness, exclusivity and refusal to bargain. We remand the case to the ALJ for the presentation of the District's case and the Union's rebuttal, if any, of that evidence.

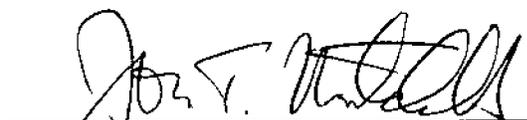
For the reasons set forth above, the case is remanded to the ALJ for further proceedings consistent with our decision.

SO ORDERED.

DATED: June 7, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

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

In the Matter of

ALICE ALTIERI,

Charging Party,

CASE NO. U-26097

- and -

AFSCME, COUNCIL 66, LOCAL 3933,

Respondent,

- and -

ALBANY PUBLIC LIBRARY,

Employer.

ALICE ALTIERI, *pro se*

KENNETH J. LARKIN, for Respondent

**WHITEMAN OSTERMAN & HANNA LLP (ROBERT T. SCHOFIELD
of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Alice Altieri to a decision of an Administrative Law Judge (ALJ) dismissing her improper practice charge which alleged that AFSCME, Council 66, Local 3933 (AFSCME) failed to file a grievance on her behalf and thereby breached its duty of fair representation in violation of §209-a.2(c) of the

Public Employees' Fair Employment Act (Act). Both the employer, Albany Public Library (Library),¹ and AFSCME filed answers denying the allegations of the charge.

EXCEPTIONS

Altieri alleges that the ALJ erred on the facts. The Library's response to the exceptions contends that the ALJ's decision is supported by the facts and the law and that the charge is, in any event, moot.

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

FACTS

The facts are set forth in the ALJ's decision² and are herein adopted by the Board.

Altieri's charge stems from the Library's request for a release of medical records in order to address Altieri's July 2004 request for reasonable accommodation pursuant to the Americans With Disabilities Act of 1990 (ADA).. The Library requested a meeting on May 11, 2005 with Altieri. Altieri's charge states that AFSCME's Local Vice President, Joseph Burke, assisted her at the meeting, held on May 11, 2005, to discuss the medical release. AFSCME thereafter determined that the Library acted within its prerogative under the ADA and further, did not violate the terms of the parties' collective bargaining agreement.

¹ The Library is a joined as party to the charge, pursuant to §209-a.3 of the Act.

² 39 PERB ¶4545 (2006).

In a letter dated January 27, 2006, the ALJ wrote the parties in an attempt to narrow the legal and factual issues. In that letter, the ALJ advised the parties that the details of the charge failed to establish a violation of the Act. However, the ALJ provided Altieri with an opportunity to submit further documentation by February 14, 2006, in the form of "a written statement so indicating and setting forth the provisions of the parties' collective bargaining agreement claimed to have been violated and whether her request(s) to the bargaining agency included identification of provision(s) she claims to have been violated."

Altieri's February 10, 2006 submission, responding to the ALJ's letter, lists the preamble to the parties' collective bargaining agreement and a nondiscrimination clause found in Article II of that agreement. Altieri's submission also alleged that the AFSCME Executive Board failed to meet on her grievance request.

In response to Altieri's submission, the Library alleged that she merely repeated the allegations of her charge, and alleged that it "did not file a grievance because grounds to substantiate such a grievance never existed" because the Library did not violate or improperly apply the collective bargaining agreement. AFSCME also contends that Altieri failed to inform it of what collective bargaining agreement articles were allegedly violated as her original e-mail to Burke on May 23, 2005 simply referenced the AFSCME Steward Handbook.

DISCUSSION

In order to establish a breach of the duty of fair representation, a charging party must prove that the employee organization acted in a manner that was arbitrary,

discriminatory or in bad faith.³ We have consistently held that we will not substitute our judgment for that of a union regarding the filing and prosecution of grievances, since a union has a wide range of reasonableness in this regard.⁴

Here, the underlying basis for Altieri's charge, that the Library discriminated against her by requesting a medical release subsequent to her request for reasonable accommodation, is unsubstantiated in the record. The charge is fatally defective, however, in that it fails to specify how AFSCME acted in an arbitrary manner, discriminated against her, or acted in bad faith by failing to file a grievance on her behalf.

Altieri's dissatisfaction with AFSCME's determination that a grievance was not warranted does not establish a violation of the Act. Dissatisfaction with an employee organization's tactics or strategy in handling a grievance does not establish a violation of the Act.⁵ Altieri's allegation that AFSCME did not meet to discuss her request for representation is also without merit. Altieri concedes that AFSCME consulted with her and discussed the merits of her complaint before it reached its decision and that she was advised of the decision that AFSCME would not pursue the grievance.

Based on the foregoing, Altieri's exceptions are denied and the ALJ's decision is affirmed.

³ *Civil Service Employees Assn, Inc v PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dept 1987), *affd on other grounds* 73 NY2d 796, 21 PERB ¶7017 (1988).

⁴ *See District Council 37, AFSCME (Gonzalez)*, 28 PERB ¶3062 (1995).

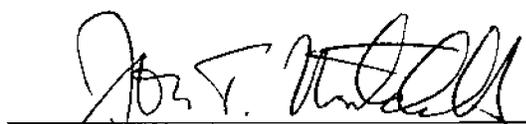
⁵ *Local 1655, District Council 37, AFSCME, AFL-CIO*, 25 PERB ¶3008 (1992).

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

DATED: June 7, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member