STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ICHABOD CRANE REGISTERED NURSES ASSOCIATION,

Petitioner,

- and -

CASE NO. C-4880

ICHABOD CRANE CENTRAL SCHOOL DISTRICT,

Employer,

- and -

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ICHABOD CRANE CENTRAL SCHOOL DISTRICT CSEA UNIT,

Intervenor.

HINMAN STRAUB P.C. (WILLIAM F. SHEEHAN of counsel), for Petitioner

ROEMER, WALLENS & MINEUX, LLP (WILLIAM M. WALLENS of counsel), for Employer

NANCY E. HOFFMAN, GENERAL COUNSEL (MARILYN S. DYMOND of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Ichabod Crane Registered Nurses Association (Association) to a decision of an Administrative Law Judge (ALJ) dismissing its petition to fragment the title of nurse from an existing unit of

noninstructional school personnel represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Ichabod Crane Central School District CSEA Unit (CSEA) and to be certified as the representative of a separate unit of nurses employed by the Ichabod Crane Central School District (District). The ALJ determined that the nurses had not demonstrated a conflict of interest within the existing unit and had not shown that their interests had received inadequate representation from CSEA.[1]

The Association excepts to the ALJ's decision, arguing that the ALJ erred in applying our "fragmentation" standard because the nurses have not been represented by CSEA for more than the term of two collective bargaining agreements. According to the Association, because CSEA's representation is not "long-standing", our initial uniting standard of community of interest should have been used. The Association further argues that the ALJ erred in failing to find that the record facts evidence inadequate representation by CSEA and a conflict of interest between the interests of the nurses and the other employees in the noninstructional unit. CSEA supports the ALJ's decision; the District has filed no response to the exceptions.[2]

For the reasons set forth below, we affirm the ALJ's decision, in part, but reverse her dismissal of the petition.

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[1]Because of the dismissal of the petition on other grounds, the ALJ did not reach the issue of whether the Association is an employee organization within the meaning of the Act, which was raised by CSEA.

[2]The District has taken no position with respect to the merits of the petition.

FACTS

There are four registered nurses employed by the District, one each at the primary school, the elementary school, the middle school and the high school. Although there is no record evidence regarding the impetus behind the placement of the title of nurse in the CSEA bargaining unit, nurses have been represented by CSEA since at least 1991, and there have been two collective bargaining agreements negotiated which covered the nurses.[3] Other titles in the noninstructional unit represented by CSEA include custodians, cleaners, mechanics, cafeteria workers, office workers, bus dispatchers, bus drivers, transportation aides, teacher aides and monitors.

The nurses all have college degrees, two with Bachelor's of Science degrees and two with Associate's degrees. Registered nurses must have at least an Associate's degree and must pass a New York State certification exam to be licensed. They must renew their licenses every four years. In order to do so, nurses must participate in an annual update of their first aid and CPR certifications. The nurses also take special courses each year in subjects such as drug abuse and child abuse. Registered nurses are subject to the provisions of the New York State Nurse Practice Act. All the nurses carry professional malpractice insurance.[4]

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[3]The 1991-1993 collective bargaining agreement does not identify the titles in the unit, but the 1993-1996 collective bargaining agreement includes the title of nurse in the salary schedule.

[4]Currently, the nurses obtain and pay for such insurance themselves.

The nurses are the primary health care providers in their assigned school buildings. The high school nurse, who is also president of the Association, testified that she regularly sees between 20 and 30 students a day in the high school health office. The students are seen for illness, such as nausea and fever, and injuries requiring first aid, such as cuts, bruises, sprains, broken bones and concussions. The primary school nurse testified that she sees from 40 to 80 students a day for illness or first aid and that she contacts the parents of from 10 to 40 students each day with respect to students' illnesses or injuries. Likewise, the middle school nurse testified that she sees approximately 40 students each day.

The high school nurse also regularly administers medicine, such as Ritalin, inhalers, seizure medicine, antibiotics and pain relievers, to students, most of whom are able to self-medicate. The primary school nurse also administers medicine to students but, because of their age, she actually medicates the students.[5]

Records are kept on each student who is seen by the nurse. The high school nurse also regularly counsels students, primarily female students, about health concerns and will intercede with other agencies, where necessary, on their behalf. All nurses are required to report incidents of child abuse to the proper authorities and may be called upon by the principal to interview and examine a student who the principal or

[5]The nurses testified about the special care certain students require, such as diabetic students who require glucose monitoring and the administration of insulin and students who have feeding tubes and require medication and feeding.

a teacher suspects has been abused. Likewise, the nurses may be directed by the principal to observe a student who is suspected of using drugs.

The high school nurse annually conducts vision tests and scoliosis screenings for each of the approximately 700 high school students and conducts hearing tests and physical exams for each of the tenth grade students and any new students. The primary school nurse must check immunization records and take health histories of all new students and meet with parents with respect to those issues. The nurses also identify communicable diseases that may be present in the school and notify parents and staff if there has been an outbreak of such illnesses.

Nurses meet regularly with teachers, principals and the special education committee to discuss students' needs.[6] They also have daily contact with the school psychologist. The middle school nurse testified that she serves on a child study team which also includes the social worker, guidance counselor and assistant principal. The nurses report directly to their building principals. They are also under the jurisdiction of the District Medical Board which is made up of the school doctors and which annually sets the first aid guidelines for the District.

In 1995, CSEA began negotiations with the District for a successor agreement to the 1993-1996 collective bargaining agreement. After protracted negotiations, CSEA and the District concluded a five-year collective bargaining agreement. The nurses put forward no specific contract proposals for the 1996-2000 collective bargaining

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[6]For example, the middle school nurse works with the social worker in assisting students who have school phobia to cope with their anxieties.

agreement.[7] Apart from receiving the other benefits negotiated for unit employees, the nurses received a $.75 an hour increase to their salaries effective July 1, 1999. CSEA originally had proposed an annual stipend of $200 for each nurse in lieu of the payment of professional dues and fees but agreed to accept the $.75 per hour increase offered by the District. CSEA also obtained better family health insurance coverage which would have benefitted one of the nurses in return for giving back a dual coverage option that had benefitted unit employees who were not nurses.

The record also shows that in the last few years, CSEA had obtained subscriptions at the school libraries for professional journals requested by the nurses. CSEA also was instrumental in removing attendance duties from one nurse's schedule and in seeing that an aide was provided during that nurse's lunch period. CSEA offered to pursue the payment by the District of malpractice insurance for the nurses, but the nurses withdrew their request for such a benefit. Finally, support and representation were offered to a nurse who had been involved in a heated meeting with a student's parents.

Other concerns articulated by the nurses were not brought to CSEA's attention by the nurses or, having been raised with CSEA, were not pursued by the nurses.

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[7]The nurses testified that they had not received contract proposal solicitations from CSEA, which CSEA alleged had been sent to all unit members. The nurses did prepare a chart for CSEA to utilize during fact-finding which compared their salaries with nurses in neighboring school districts. CSEA chose not to present the chart at fact-finding because the years during which those salaries were paid were not provided, there were other titles besides nurse included in the chart and some of the salaries listed were less than those received by the nurses at the District. CSEA subsequently did not accept the fact finder's report.

These include confidentiality, continuing professional education, office staffing and substitutes, uniformity in office protocol, medical concerns and the effect of new legislation and court decisions.

DISCUSSION

Although not decided by the ALJ, because of our determination on the fragmentation issue, *infra*, we must first reach the issue of the status of the Association as an employee organization.

As relevant herein, §201.5 of the Act defines an employee organization as "an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees. . . . " The Board has taken a liberal approach to the definition of an employee organization in this regard. For example, in *Enlarged City School District of the City of Saratoga Springs*,[8] we affirmed the decision of the Director of Public Employment Practices and Representation (Director) finding that the petitioner therein was an employee organization because a name for the petitioner was adopted, an interim president had been elected, the members discussed a constitution, and the petitioner sought to represent public employees to improve their terms and conditions of employment.[9]

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[8]14 PERB ¶3080 (1981), *conf'd*, 90 AD2d 114, 15 PERB ¶7032 (3d Dep't 1982).

[9]*See also Board of Educ. of the City Sch. Dist. of the City of New York*, 15 PERB ¶3041 (1982); *Half Hollow Hills Community Library Dist.*, 13 PERB ¶3104, *aff'g* 13 PERB ¶4050 (1980); *State of New York*, 1 PERB ¶399.85 (1968).

In this matter, the Association has adopted a name, elected officers, established membership criteria and adopted a statement of purpose. The Association has a stated purpose of negotiating the terms and conditions of employment for the registered nurses employed by the District. These factors satisfy the indicia necessary to demonstrate that the Association is an employee organization within the meaning of the Act.[10]

Turning to the merits of the fragmentation petition, the remaining issue, as framed by the parties, to be determined is whether there should be a separate unit for nurses or whether they should continue in the noninstructional unit.[11] In several previous cases, both the Board and the Director have determined that nurses are not appropriately fragmented from existing units where there has not been inadequate representation or proof of a conflict of interest.[12] For example, the Board held in *Chautauqua County Board of Cooperative Educational Services*[13] that despite a felt community of interest between the school nurses and the health-related professionals included in a different bargaining unit, where there was no evidence of ineffective

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[10]*See also Connetquot Cent. Sch. Dist.*, 31 PERB ¶3057 (1998); *Elba Cent. Sch. Dist.*, 16 PERB ¶3003 (1983); *Lakeland Cent. Sch. Dist. of Scrub Oak*, 12 PERB ¶3017 (1979), *aff'g*, 11 PERB ¶4073 (1978).

[11]*See Copiague Union Free Sch. Dist.*, 23 PERB ¶4067 (1990).

[12]*See, e.g., County of Cattaraugus*, 31 PERB ¶3048 (1998); *County of Erie*, 18 PERB ¶3045 (1985) (subsequent history omitted); *Chautauqua County Bd. of Coop. Educ. Serv.*, 15 PERB ¶3126 (1982); *Kenmore-North Tonawanda Union Free Sch. Dist.*, 24 PERB ¶4025 (1991); *County of Oswego*, 23 PERB ¶4054 (1990).

[13]*Supra*, note 12.

negotiations on behalf of the nurses in the noninstructional unit, the stability of the existing unit structure would not be disturbed. Likewise, in *County of Rockland*,[14] the Board dismissed a petition to fragment nurses from a county-wide unit, even where the nurses expressed that they felt no community of interest with the other employees in the unit and where there was some evidence that the bargaining representative had not been as responsive as it might have been to the nurses' specific concerns. In those cases, the Board utilized the standard first articulated in *Town of Smithtown*,[15] which disfavors disturbing the *status quo* absent good cause shown.

The Association presented evidence on the conduct of negotiations for the last collective bargaining agreement between CSEA and the District, which it asserts establishes inadequate representation by CSEA. We affirm the ALJ's decision that the evidence presented by the Association was not sufficient to establish that the nurses had been systematically and intentionally ignored by CSEA so as to warrant their fragmentation from the overall unit of noninstructional employees.[16]

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[14]10 PERB ¶3014 (1977).

[15]8 PERB ¶3015 (1975). It should be noted that in *Smithtown*, the unique blurring of the differences between white-collar and blue-collar employees in the existing unit was a decisive factor considered by the majority in the Board's decision, as was the long-standing history of effective and meaningful negotiations. The dissent argued that the doctrine of most appropriate unit was "stretched" by the majority's decision to find appropriate an existing unit that would not have been the unit found most appropriate in a case involving initial uniting.

[16]*State of New York (Long Island Park, Recreational and Historical Pres. Comm'n)*, 22 PERB ¶3043 (1989).

Were we to limit our analysis to inadequate representation, we would affirm the ALJ and dismiss the petition. However, we take this opportunity to address the uniting concerns raised by the Association's petition.

The Association argues that we should employ the standard used in initial unit determinations to decide this case.[17] The Association argues that if the "community of interest" standard is used, we would find that the petitioned-for separate unit of nurses is most appropriate.

From PERB's first year, in initial uniting cases, separate units of nurses were found to be most appropriate. In considering whether nurses should be included in an overall unit of county employees or should be placed in a separate unit, it was held that "nurses form a cohesive group having a substantially different community of interest from that of all other employees."[18] In *Putnam Valley Central School District*, it was determined that, in a school setting, the same standard should apply.[19] There, however,

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[17]The Association premises its argument not only on the felt community of interest between the nurses but on the fact that CSEA's representation of the nurses has not been "long-standing" enough to compel the use of the fragmentation standard. We do not reach the second basis for the Association's exceptions in support of our decision, *infra*., beyond noting that the nurses' inclusion since 1991 in the CSEA bargaining unit is certainly "long-standing". *See Chautauqua County BOCES*, *supra*, note 12.

[18]*County of Putnam*, 2 PERB ¶4012, at 4202 (1969), citing to *Chemung County*, 1 PERB ¶415 (1968). *See also County of Sullivan*, 1 PERB ¶399.80 (1968); *County of Rensselaer*, 1 PERB ¶399.73 (1968). *See also County of Fulton*, 4 PERB ¶4002 (1971) (nurses fragmented from a unit of nonprofessional employees to create a separate unit of nurses); *Jefferson County*, 5 PERB ¶4012 (1972) (nurses fragmented from a unit of professional and supervisory employees and placed in a separate unit).

[19]7 PERB ¶4025, *aff'd*, 7 PERB ¶3055 (1974).

it was held that if a petition sought to include nurses with professional or pedagogical employees or noninstructional employees, the most appropriate unit placement of nurses would be with other professional employees. In the years following those early decisions, when the issue of initial unit placement of nurses was before either the Director or the Board, nurses were consistently placed in either their own unit or with other professional employees.[20]

But, in those cases where nurses were included in a unit of nonprofessional or noninstructional employees which were later the subject of fragmentation petitions seeking to remove the nurses and place them in a separate unit or in a unit of other professional employees, the fragmentation standard which had grown out of *Town of Smithtown*, *supra*, was utilized. Invariably, nurses were continued in the non-professional or noninstructional units that had not been devised by PERB. In those cases, the Board and the Director gave controlling weight to the standard that

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[20]*See, e.g., Union-Endicott Cent. Sch. Dist.*, 28 PERB ¶3029 (1995); *Carthage Cent. Sch. Dist.*, 16 PERB ¶3085 (1983); *Caledonia-Mumford Cent. Sch. Dist.*, 25 PERB ¶4043 (1992); *York Cent. Sch.* Dist., 25 PERB ¶4044 (1992); *Jamestown City Sch. Dist.*, 21 PERB ¶4036 (1988); *Hannibal Cent. Sch. Dist.*, 18 PERB ¶4031 (1985); *Akron Cent. Sch. Dist.*, 17 PERB ¶4054 (1984); *Charlotte Valley Cent. Sch. Dist.*, 16 PERB ¶4083 (1983); *Malverne Union Free Sch. Dist.*, 16 PERB ¶4057 (1983). *See also Charlotte Valley Cent. Sch. Dist.*, 16 PERB ¶4083, at 4122 (1983), where the Director held that the "cases make clear that absent a history of negotiations or preference for separate representation, PERB has given dispositive weight to the closer community of interest between school nurses and teachers." (emphasis added) *See also Lindenhurst Union Free Sch. Dist.*, 10 PERB ¶4023 (1977).

fragmentation of existing bargaining units will not be granted in the absence of compelling evidence of the need to do so.[21]

The Association has urged us to utilize the uniting standard articulated in our early cases and still used in cases involving initial uniting of nurses: community of interest in a cohesive group having substantially different interests than those of other, nonprofessional, employees. This Board has not had the opportunity to consider whether the unique professional responsibilities and duties of nurses warrant their removal from units which also include nonprofessional employees.[22] We now consider the policy implications of the reliance of prior Boards on the conflict of interest standard and not the community of interest standard in cases involving the fragmentation of nurses from existing units and we conclude that nurses are not properly placed in units of nonprofessional or noninstructional employees.[23]

As is evident from the record before us, nurses are required to have a college education, meet certification and licensing requirements, participate in continuing professional education and are subject to changing professional requirements brought

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[21]*See Deer Park Union Free Sch. Dist.*, 22 PERB ¶3014 (1989); *State of New York*, 21 PERB ¶3050 (1988); *Chautauqua County BOCES*, *supra* note 12.

[22]*County of Cattaraugus*, *supra* note 12, sought to fragment all employees, not just the nurses, of the county nursing home from an overall unit of County employees. The petition, filed by the County, was based upon administrative convenience. Because of the identity of the petitioner, the nature of the unit sought and the economic factors upon which the petition was based, we dismissed the petition and did not treat with the status of nurses in either the existing or proposed unit.

[23]*See County of Orange*, 14 PERB ¶3060 (1981).

about by legislation and court decisions. They have daily, direct contact with students, teachers, administrators, parents and other health care professionals. Nurses clearly share an occupational identity and professional interests. It has been recognized, based upon their education, training and professional responsibilities and duties, that they are appropriately placed together in bargaining units, even in the face of a range of working conditions and/or benefit level.[24] We here determine that the duties of nurses establish "an arguable unique community of interest and/or conflict of interest with other, [nonprofessional], employees...who may not have any similar duties."[25]

To the extent that earlier decisions have dismissed petitions seeking to fragment nurses in reliance upon the standard that existing units will not be fragmented absent compelling need to do so, they are overruled.[26] We are also mindful, as we noted in *County of Erie and Sheriff of Erie County*, [27] that "any fragmentation ordered in this case cannot be confined logically to [nurses] and will lead inexorably to similar requests

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[24]*See, e.g., County of Erie*, 18 PERB ¶4074, *on remand from* 18 PERB ¶3045, *aff'g in part*, 18 PERB ¶4020 (1985) (subsequent history omitted).

[25]*See County of Dutchess and Dutchess County Sheriff*, 26 PERB ¶3069 at 3130 (1993).

[26]"In doing so, we note that we are not bound by the earlier decisions. A labor relations agency may reappraise its prior decisions and overrule them when new insights gained from practical experience with past principles change its understanding of how to protect the statutory rights of employees." *County of Orange*, *supra* note 23, at 3100, n.5 and cases cited therein. *See also Charles A. Field Delivery Service, Inc. v. Roberts*, 66 NY2d 516 (1985).

[27]29 PERB ¶3031, at 3070 (1996), *conf'd*, 247 AD2d 671, 31 PERB ¶7004 (3d Dep't 1998).

by any other employees who can reasonably claim some unique community of interest. We will decide such issues as appropriate should they arise in the future. However, nothing in this decision is intended to hold or suggest that we are abandoning our fragmentation standards generally."

Based on the foregoing, the Association's exceptions relating to the ALJ's determination that there had been adequate representation of the nurses are dismissed and the Association's exceptions relating to the community of interest standard are granted. The ALJ's decision is, therefore, affirmed, except as to the dismissal of the petition; in that respect, it is reversed.

We, therefore, find that the following unit is most appropriate:[28]

Included: All full-time registered nurses.

Excluded: All other employees.

This case is hereby remanded to the Director for purposes of ascertaining the unit employees' choice of bargaining representative pursuant to §207.2 of the Public Employees' Fair Employment Act.

DATED: October 6, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[28]*See Copiague Union Free Sch. Dist.*, *supra* note 11; *County of Jefferson*, *supra* note 18.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

- and -

CASE NO. U-19691

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (MARILYN S. DYMOND of counsel), for Charging Party

ANDREA R. LURIE, GENERAL COUNSEL (LAUREN P. DESOLE of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the State of New York-Unified Court System (UCS) to the decision of the Administrative Law Judge (ALJ) on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). CSEA alleged that UCS violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally issued an Administrative Order (Order) on December 29, 1997, amending Part 108 of the Rules of

the Chief Administrator of the Courts (Rules) relating to the rates of payment for transcripts furnished to private litigants by court reporters.[1, 2]

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

FACTS

The ALJ's findings of fact are extensive and detailed. We, therefore, adopt them for the purposes of our decision and summarize them, as here relevant, as follows.

CSEA represents persons in various court reporter titles who are employed by the UCS. The job duties of the reporters, as set forth in title standards applicable to

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[1]The original charge alleged violations of §§209-a.1(a), (d) and (e) of the Act and was consolidated for hearing with several other improper practice charges brought by several employee organizations representing court reporters in different bargaining units. PERB's Director of Public Employment Practices and Representation (Director) determined that the (a) and (c) charges were deficient and processed only the (d) violation. No exceptions were taken to this ruling and, as such, we need not reach that issue. On June 11, 2000, the ALJ issued her decision in this case. On June 22, 2000, the employee organizations, except the CSEA, executed a stipulation of discontinuance.

[2]"The Chief Judge of the Court of Appeals is, by virtue of that position, the Chief Judge of the State of New York (Chief Judge). The Chief Judge appoints the Chief Administrative Judge of the Courts (Chief Administrative Judge) to oversee the daily administration and operation of UCS and perform duties delegated by the Chief Judge and required by law. The Administrative Board of the Courts (Administrative Board) consists of the Chief Judge and the presiding justices of each of the four Appellate Divisions of Supreme Court. (footnote omitted). The Chief Judge consults with the Administrative Board concerning the establishment of administrative standards and policy to be utilized throughout the court system." *State of New York (Unified Court System)*, 30 PERB ¶3067, at 3165 (1997).

their positions, focus primarily on the preparation of transcripts at hearings, trials, arraignments and other proceedings, for the purpose of making an accurate record.[3]

The Judiciary Law also requires reporters to furnish transcripts to private parties or their attorneys as well as the courts.[4] The authority for the fees allowed by law for transcripts is found in the Civil Practice Law and Rules (CPLR) at §8002. The language of this statute has remained unchanged since 1984[5] and was the product of collective negotiations resulting in a Memorandum of Understanding dated November 16, 1983. Those negotiations also produced the rate to be charged to the UCS for transcripts.[6] It also produced the rate to be charged to private parties for a transcript copy "unless

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[3]See also §§299 through 302 of the New York State Judiciary Law for reporters' duties to furnish the official transcript of proceedings.

[4]Section 302 specifically provides:

> Every stenographer in a court of record must, upon request, furnish, with all reasonable diligence, to the defendant in a criminal case, or a party, or his attorney in a civil cause, a copy, written out at length from his stenographic notes, of the testimony and proceedings, or a part thereof, upon the trial or hearing, upon payment, by the person requiring same, of the fees allowed by law.

[5]Section 8002 specifically provides:

> Unless otherwise agreed or provided by law, a stenographer is entitled, for a copy fully written out from his stenographic notes of testimony or other proceedings taken in a court, and furnished upon request to a party or his attorney, to the fee set forth in the rules promulgated by the chief administrator of the courts.

[6]These are transcripts which are "expedited" or "daily" copies. Regular copies are provided at the end of the proceedings free of charge to the judges. Judiciary Law §299.

otherwise agreed", called the "default rate", which the parties agreed would be set forth in the Rules.[7] The Memorandum further provided that the Rules shall not be modified except through collective negotiations.

The Administrative Board is responsible for adopting the administrative rules and is the governing body of the court system. On December 29, 1997, the Chief Administrative Judge issued an Order, implemented on December 31, 1997, which set forth guidelines establishing maximum rates to be charged by court reporters to private parties for transcripts, set a time limit for the production of an expedited copy and mandated written agreements between court reporters and private parties be on a form prescribed by the Chief Administrative Judge. The Order was issued without negotiations with CSEA.

ALJ DECISION

The ALJ determined that UCS's Order of December 29, 1997 contravened its duty to negotiate and violated §209-a.1(d) of the Act. The ALJ rejected UCS's waiver defense based upon the management rights and zipper clauses in the parties' collective bargaining agreement. She found the language of these two clauses to be too broad to support UCS's defense that CSEA bargained away certain protected rights at issue.

The ALJ focused on UCS's mission defense, to wit, the subject matter of the instant charge was a nonmandatory subject of negotiation. In dismissing this defense, she balanced the employer's interests against those of the employees. She concluded

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[7]The rate established as of July 1, 1986 was $1.375 per page.

that the Order of December 29, 1997 had little bearing on UCS's mission of ensuring that private parties have access to the court record, but instead went directly to the issue of the reporter's compensation and earnings. Thus, she found the employees' interest outweighed that of UCS.[8]

Lastly, she concluded that UCS's unilateral imposition of the disputed Order violated the Act because the content of the Order related to terms and conditions of employment which are mandatory subjects of negotiation.

EXCEPTIONS

In its exceptions, UCS points to numerous factual and legal errors resulting from the ALJ's lack of appreciation of UCS's mission and the necessity to promulgate the December 29, 1997 Order.

UCS also objects to that part of the ALJ's order that directs a "make whole" remedy on the grounds that such relief is speculative at best. CSEA supports the ALJ's decision.

DISCUSSION

In *McCoy v. Helsby*,[9] it was determined that the Act applied to nonjudicial employees of the Unified Court System. That being the case, UCS may not, in the absence of a viable defense, unilaterally alter terms and conditions of employment of the reporters. How did the Order of December 29, 1997 affect the court reporters'

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[8]*See County of Rensselaer*, 13 PERB ¶3080 (1980).

[9]28 NY2d 790, 4 PERB ¶7007 (1971).

terms and conditions of employment? The Order sets maximum rate "guidelines" to be used by reporters and private litigants in negotiating the page rate to be paid for the provision of transcripts. Whether truly just guidelines or whether the Order fixes the page rate, which may not be excepted, even though negotiated between the reporters and private litigants, the record evidences that the effect of the Order has been to limit the amount of compensation received by reporters for a transcript provided to private litigants. As UCS ties the rate of compensation it pays reporters to their earnings from private transcript production and the production of those transcripts for private litigants is a job requirement of the reporters, it is clear that the Order directly affects the reporters' terms and conditions of employment.

UCS argues that because of its mission, the Order was a nonmandatory subject of negotiation. We have held that "[a]s a general proposition, an administrative work rule constitutes a mandatory subject of negotiation unless it has but a slight impact upon terms and conditions of employment or if it has a major impact upon managerial responsibilities that, by law or public policy, may not be shared."[10] Thus, we have struck a balance between an employer's freedom to manage its affairs and the right of employees to negotiate their terms and conditions of employment.[11, 12]

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[10]*Police Ass'n of New Rochelle, New York, Inc.,* 13 PERB ¶3082, at 3131 (1980), citing *Newspaper Guild v. NLRB*, 636 F2d 550 (D.C. Circ. 1980).

[11]*See County of Niagara (Mount View Health Facility)*, 21 PERB ¶3014 (1988); *State of New York (Governor's Office of Employee Relations)*, 18 PERB ¶3064 (1985).

[12]"The term 'terms and conditions of employment' means salaries, wages, hours and other terms and conditions of employment . . . ." Act, §201.4.

In *Evans v. PERB*,[13] "the Office of Court Administration (OCA) argue[d] that the judicial branch of government has 'two missions'. . . ." Special term noted that OCA correctly asserted that the judiciary has the responsibility for impartial dispute resolution. The court disagreed with OCA when it argued that it had a separate and distinct "mission" which was self-administration. The Court held that the exclusive function of the judiciary as the third branch of government has been and continues to be the unbiased resolution of disputes, stating that "[t]he administrative bureaucracy was not created for a separate mission but solely to relieve the judiciary of its administrative duties, in order that judges would be better able to devote themselves to their constitutionally appointed task of rendering justice."[14]

In this proceeding, UCS again attempts to justify its unilateral action by arguing a "dual" mission role. We disagree. UCS's exclusive mission is to dispense justice. UCS's exceptions focus on the complaints made to it by certain bar associations and others recommending changes in the rate structure. In making this argument, UCS ignores, among other things, the testimony of its own witness that the Part 108 rates in question are a subject of negotiations between the litigants or their attorneys and the reporters.

We adopt the findings of the ALJ that the other subjects covered by the Order, *i.e.*, rates for expedited copies and the requirement that a form be used, are mandatory subjects of negotiation.[15] UCS's mission argument fails and the balance is weighed in

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[13]113 Misc2d 986, 15 PERB ¶7014, at 7024 (Supreme Ct. Alb. County 1982).

[14]*Id.*

[15]Transcript, p. 218.

favor of the right of court reporters to negotiate Part 108 transcript fees and the other terms and conditions unilaterally imposed by the December 29, 1997 Order. The effect on compensation and hours of work, as well as contractual problems revolving around the various rates charged by court reporters for outside work, transcends UCS' mission.

Lastly, UCS excepts to the "make whole" remedy directed by the ALJ on the theory that it is purely speculative. The violation of the Act lies in the unilateral implementation of the December 29, 1997 Order.[16] The specific fees that a certain court reporter may have charged under a given set of circumstances may affect the "make whole" remedy, but it is not material to our assessment of a violation.[17] That the amount of money owed may prove difficult to ascertain does not warrant a finding that no "make whole" order is appropriate.[18]

For the reasons set forth above, the ALJ's decision is affirmed and UCS's exceptions are dismissed.

IT IS, THEREFORE, ORDERED that UCS:

1. Rescind its December 29, 1997 amendments to Part 108 of the Rules of the Chief Administrator of the Courts.

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[16]In fact, there is evidence in the record that fees that were negotiated between reporters and private litigants were reduced by the litigants, who accepted the maximum rate set forth in the Order.

[17]*See State of New York-Unified Court System*, 28 PERB ¶3003 (1995); *State of New York-Unified Court System*, 28 PERB ¶3004 (1995).

[18]*See City of Troy*, 29 PERB ¶3004 (1996); *Village of Buchanan*, 22 PERB ¶3001 (1989); *City of Rochester*, 21 PERB ¶3040 (1988), *conf'd*, 155 AD2d 1003, 22 PERB ¶7035 (4th Dep't 1989).

2. Cease and desist from unilaterally establishing page rates for the production of transcripts for private litigants, the definition of expedited copy for the production of transcripts for private litigants, and reporting requirements regarding transcript production for private litigants.
3. Make unit employees whole for lost compensation, if any, suffered as a result of the amendments to the Rules, with interest at the currently prevailing maximum legal rate; and
4. Sign and post notice in the form attached at all locations ordinarily used to post written communications to unit employees.

DATED: October 6, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify the employees of the State of New York Unified Court System represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the State will:

1. Rescind its December 29, 1997 amendments to Part 108 of the Rules of the Chief Administrator of the Courts.

2. Not unilaterally establish page rates for the production of transcripts for private litigants, the definition of expedited copy for the production of transcripts for private litigants, and reporting requirements regarding transcript production for private litigants.

3. Make unit employees whole for lost compensation, if any, suffered as a result of the amendments to the Rules, with interest at the currently prevailing maximum legal rate.

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

STATE OF NEW YORK UNIFIED COURT SYSTEM

. . . . . .

Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MONROE COUNTY SHERIFF POLICE BENEVOLENT ASSOCIATION,

Charging Party,

- and -

CASE NO. U-20786

COUNTY OF MONROE and MONROE COUNTY SHERIFF,

Respondents.

SAPERSTON & DAY, P.C. (PATRICK B. NAYLON of counsel), for Charging Party

BARRY C. WATKINS, ESQ, for Respondent County of Monroe
CHARLES M. PILATO, ESQ., for Respondent Monroe County Sheriff

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Monroe (County) and the Monroe County Sheriff (Sheriff) (collectively, Employer) and cross-exceptions filed by the Monroe County Sheriff Police Benevolent Association (PBA) to a decision of an Administrative Law Judge (ALJ) finding that the Employer violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued the practice of allowing certain employees in the Criminal Investigation Section (CIS) of the Sheriff's Department (Department) represented by the PBA to use County-owned vehicles to travel to and from work in retaliation for the PBA's complaining about

changes in the use of flex-time by CIS employees.[1] The ALJ dismissed the allegation that the Employer had violated §209-a.1(d) of the Act when it unilaterally discontinued the past practice of employees utilizing County-owned vehicles for travel to and from work, finding that the use of the vehicles had been based upon a condition precedent.[2]

The County excepts to the ALJ's determination that its decision to rescind the use of certain vehicles by certain CIS employees was improperly motivated and was predicated upon the Association's complaint about changes in the use of flex-time. The County argues that, but for timing, there is no record evidence to support a finding that the County's decision was improperly motivated and that timing alone cannot support the finding of §§209-a.1 (a) and (c) violations. Finally, the County argues that there were legitimate business reasons for the Sheriff's decision which the ALJ ignored. The Sheriff also excepts to the ALJ's finding of improper motivation for the same reasons articulated by the County. The County and the Sheriff otherwise support the ALJ's decision.

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[1]As used throughout the ALJ's decision, flex-time refers to a practice by which CIS employees who worked beyond their normal shift or were called in for additional duties would not put in for overtime pursuant to the collective bargaining agreement but would take the time they had accrued as compensatory time at their discretion at a later date.

[2]The ALJ also dismissed the alleged §209-a.1(e) violation because the collective bargaining agreement between the Employer and the Association's predecessor employee organization, the Monroe County Deputy Sheriff's Association, Inc., had not expired at the time of the actions complained of in the charge. No exceptions have been taken to this aspect of the ALJ's decision and we, therefore, do not reach it.

The Association's cross-exceptions are directed to the ALJ's finding that the Employer did not violate §209-a.1(d) of the Act when its practice allowing the use of cars by certain CIS officers was discontinued. The Association argues that the use of County vehicles was not conditional. The Association argues in support of the remainder of 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

Use of County Vehicles

The CIS is made up of several different units within the Department, including the warrants, vice, technical and major felony units.[3] Officers in these units are stationed both at Department headquarters, which is located in downtown Rochester, and in suburban locations in the county, which are designated Zones A, B, and C. For various periods of time up to eight to ten years prior to March 1999, approximately twenty-five deputy sheriffs, investigators and sergeants in CIS units were assigned a County vehicle for use during their tours of duty and to travel to and from work and home. Some of those employees did not take the vehicles home but instead left them at the end of their shifts at the zone located nearest to their homes.

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[3]The employees represented by the Association include deputy sheriff assistant court security supervisor, deputy sheriff senior court security, deputy sheriff court security, deputy sheriff civil, deputy sheriff assistant supervisor-civil, deputy sheriff jailor, deputy sheriff jailor corporal, deputy sheriff jailor sergeant, deputy sheriff patrol, deputy sheriff sergeant patrol and deputy sheriff investigator.

As is apparent from the unit descriptions above, the unit employees in CIS are involved in various areas of law enforcement of a serious nature. They are deputy sheriffs, sergeants, and investigators and many are subject to be called in to work at any time, to respond to calls from various geographical locations in the county and to participate in investigations or operations which take place outside of the normal workday.

In June 1997, Captain Maureen Chisholm assumed command of the CIS. In March 1998, in response to a request from the Sheriff, she undertook a review of the vehicles assigned to CIS and their use by the individuals to whom they were assigned. She reported to the Sheriff in a March 18, 1998 memorandum that approximately thirteen named individuals had County vehicles assigned to them, some which were taken home by the individual and some which were driven to the zone nearest the employee's home. Her notations on the memorandum reflect that the vehicles were assigned "due to frequent activation on call" and, with respect to the vice squad and two task forces, that an unidentified number of undercover vehicles were taken home by employees involved in those operations.[4] In June 1998, the Sheriff also issued a memorandum to Chief Deputy Douglas Nordquist directing him to look into the vehicle situation. Nordquist thereafter coordinated his efforts with those of Chisholm.

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[4]The record reflects that the undercover vehicles are taken home so that they are not parked in identifiable CIS parking spots in downtown Rochester lest they be identified as vehicles assigned to the Sheriff, which would render them useless in undercover work.

A subsequent memorandum dated June 29, 1998, from Chisholm to the Undersheriff, Patrick O'Flynn, gave a more detailed description of the vehicle assignments and the reasons therefor. For example, Chisholm stressed that in the vice unit, overtime had decreased significantly by allowing officers to take cars home due to the reduction in call-out time. Chisholm further noted that the CIS employees had been willing to flex their hours as a result of being given the limited use of County vehicles.

In October 1998, Nordquist sent an even more detailed memorandum to the Undersheriff providing a count of employees who drove County vehicles back and forth to work or left vehicles at one of the zones. There were twenty-six vehicles listed with either the assigned individuals or squads named. The reasons given for the assignments varied from "on-call" to "prior agreement" to "response/marine-SWAT". Nordquist noted that if the Sheriff wanted to operate from the premise that "***no*** vehicle leave headquarters after hours", then those cars that have been taken back and forth from zone to zone for the employees' "convenience and transportation" should be immediately suspended (emphasis in the original). However, Nordquist also recommended that certain employees retain the use of County vehicles because of the demands of their jobs. He noted that the adjusted policy would result in ten fewer vehicles leaving headquarters each day and that he had discussed his proposed policy with Chisholm but that he had delayed implementation pending the Sheriff's response.

In late November or early December 1998, Nordquist and Chisholm met with the Sheriff to discuss the assignment of vehicles to various CIS employees. At that time, the Sheriff articulated a concern about the efficiency and economy of the current plan,

the impact on the taxpayer and the fairness of assigning vehicles to a relatively small number of employees when there were many other Department employees working in the downtown area who were not assigned County vehicles.

On December 3, 1998, Nordquist sent a memorandum to all CIS employees who were using County vehicles to drive to and from home or to the nearest zone asking each to provide him with a justification for their current status. The responses to the memorandum received in December by Nordquist listed a variety of reasons for the employees to retain the use of a County vehicle. Frequently, a reduction in response time in arriving on the scene and a reduction in call-out time with a concomitant reduction in overtime was noted. Other reasons were the maintenance of the vehicles' status as an unidentifiable undercover car, the congestion in the downtown parking facility, a savings to the Department of parking fees, the ability to leave certain safety or investigative equipment in a vehicle left at a zone so that it is always ready for "direct scene response", disparity in salary for similar positions, and the ability to respond to incidents on the way to and from work. For some employees who are always on-call, the use of a vehicle was noted to be a convenience and a compensation for their agreement to be on-call.

Nordquist shared the survey results with Chisholm and Flynn. The Sheriff received the report in January or early February 1999. In March 1999, the Sheriff decided to discontinue the assignment of some vehicles to CIS staff. The decision was verbally communicated to Chisholm, who, in turn, relayed the information to CIS employees on or about March 25, 1999.

Flex-Time

Prior to 1999, flex-time as utilized in the vice and warrants units of CIS took two different forms.[5] As testified to by Chisholm,

> if...it was Monday and we had a deal going Tuesday and the deal couldn't take place till 7:00 p.m., we would move the shift on Tuesday to encompass that buy, so we could do that buy, so we might work noon to eight that day. That's one form. Another form would be, there are times when we don't have the election for planning for a deal in advance, so we'd be working a normal day and the sergeant would [tell me that we had a deal that night.] What we would do is, I would ask the members if they would flex, which meant would they work the deal and then take time and one half off at a later date. And that was totally up to them.

Flex-time as is described above came about under Chisholm's command by at least 1998, when she was looking into ways to cut the overtime in the vice unit. In discussions with unit employees who did not want to change their nine-to-five shifts to later shifts, for example, eleven-to-seven, it was agreed that the employees, where possible, would adjust their schedules to meet the demands of an investigation and would thus avoid incurring overtime.

In January and February 1999, Sergeant Daniel Finnerty, president of the Association, began receiving complaints that there had been a change in the way flex-time was being handled in CIS. Employees informed him that there were now occasions when they reported for work at the start of their shifts and were told to go home and report back later for an investigation. Additionally, when the employees put in for

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[5]Employees in the arson, identification, major crimes and white-collar crimes units did not participate in flex-time.

overtime for time actually worked, their requests were not being paid and were being converted into compensatory time to be utilized later at the Employer's discretion.

Also in January 1999, a question was raised by the sergeants about how the flex-time was to be entered into the employees' time record books when it became evident to Chisholm that not all sergeants were recording flex-time in the same way. Chisholm testified that there was an agreement reached to record flex-time as "SD" or "special detail" time in the record books.

Finnerty was investigating the flex-time issue and learned about the manner in which flex-time was being recorded by the sergeants. He met with Flynn in March 1999 and Flynn agreed at that time that flex-time would stop and there would be no retaliation taken against CIS personnel for complaining about the changes in the way flex-time had been utilized in the past.

During this time frame, Chisholm expressed her concern to CIS employees that the time record books had been reviewed by the Association and also that employees had not come directly to her with their complaints about flex-time. On March 26, 1999, a meeting took place between Finnerty, Nordquist and Chisholm. At the meeting, both flex-time and the use of County vehicles were discussed. Finnerty's version of the meeting was that agreement to flex-time was tied to use of County vehicles. Nordquist's testimony was that the two were separate issues and that the review of the use of County vehicles had been prompted by the Sheriff's concerns about the "fairness" of the assignment of the vehicles to only certain CIS employees. Nordquist did indicate, however, that if the Association could come to some agreement on flex-time, perhaps

he and Chisholm would be able to approach the Sheriff about reinstating the prior practice with respect to the use of County vehicles.[6]

DISCUSSION

It has long been held that the benefit of the use of an employer-owned vehicle by an employee during the workday and to drive to and from work is a term and condition of employment and, therefore, a mandatory subject of negotiations.[7] The ALJ found that there was sufficient evidence in the record that the use of County-owned vehicles by employees in the CIS units was conditional in nature and when the condition precedent to the use of the vehicles was no longer present, the use of the vehicles could be withdrawn by the County without negotiations.[8] We do not agree with the ALJ's finding.

The record reveals that there were many reasons that vehicles were assigned to CIS employees, such as many CIS employees being subject to be called-in while off-duty, a longer response time to call-ins or emergencies if these employees were required to go to the downtown parking lot to obtain a County vehicle for response, and that some vehicles used in undercover work cannot be left in the Department parking

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[6]The ALJ, based upon her credibility resolutions, discredited some of Chisholm's testimony in favor of that of Finnerty and Nordquist.

[7]*County of Nassau*, 13 PERB ¶3095 (1980), *aff'g* 13 PERB ¶4570 (1980), *conf'd*, 14 PERB ¶7017 (Sup. Ct. Nassau County 1981), *aff'd*, 87 AD2d 1006, 15 PERB ¶7012 (2d Dep't 1982), *motion for leave to appeal denied*, 57 NY2d 601, 15 PERB ¶7015 (1982); *County of Onondaga*, 12 PERB ¶3035 (1979), *conf'd*, 77 AD2d 783, 13 PERB ¶7011 (4th Dep't 1980); *County of Cattaraugus*, 8 PERB ¶3062 (1975).

[8]*See County of Nassau*, 32 PERB ¶3034 (1999).

areas lest the anonymity of the cars be compromised.[9] All those conditions still exist in the Department. For example, one employee testified that he was assigned a vehicle to be used when he was called out after hours, which is illustrative of the reasons for the use of cars. Another employee testified that upon being called out, he agreed that he would only request compensation for the time actually worked instead of the contractually provided minimum of 2.7 hours of overtime. This does not impose a condition on either him or others represented by the Association which justifies the unilateral cessation of the practice of assigning County-owned vehicles to CIS employees. There is no record evidence that any employee has reverted to the contractually guaranteed overtime benefit or, that if he or she had, the Employer would be privileged to withdraw the benefit from all the other CIS employees who had no such condition imposed upon their use of County-owned vehicles.

We, therefore, reverse the ALJ and find that the Employer has violated §209-a.1(d) of the Act by unilaterally discontinuing the past practice of allowing CIS employees to use County-owned vehicles during the day and to drive to and from work.

The ALJ determined that the Employer violated §§209-a.1(a) and (c) of the Act because she found that the Sheriff would not have rescinded the assignment of County-owned vehicles to many CIS employees who had been using them during the workday and to drive to and from work "but for" the Association's objection to the manner in which flex-time was being utilized by the Department in 1999. The ALJ relied heavily on

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[9]In fact, two employees testified that there were no conditions attached to their use of County cars.

the fact that the Sheriff's decision to restrict the use of County vehicles followed closely upon the Association's complaints to Flynn about the manner in which the CIS employees were being compelled to change their schedules and to then take compensatory time at the Employer's discretion. The ALJ also found the Employer's proffered business reasons to be pretextual.

It is well-settled that the elements necessary to prove a case of discrimination for union activity under the Act are that the affected individual was engaged in protected activity, that such activity was known to the person(s) making the adverse employment decision, and that the action would not have been taken but for the protected activity. The existence of anti-union animus may be established by statements or by circumstantial evidence, which may be rebutted by presentation of legitimate business reasons for the action taken, unless found to be pretextual.[10]

Here, there is no dispute that the Association was engaged in protected activity when Finnerty went to Flynn about the method of flex-time being utilized in the CIS units in 1999. There is also no dispute that Chisholm, Nordquist and Flynn were aware of the concerns of the CIS employees as articulated by Finnerty. The Sheriff was made aware of the practice of utilizing flex-time in certain CIS units to help alleviate overtime because Chisholm and Nordquist articulated the employees' willingness to use flex-time when they argued to the Sheriff that the assignment of vehicles to employees in those

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[10]*Cayuga-Onondaga BOCES*, 32 PERB ¶3079 (1999); *Town of Independence*, 23 PERB ¶3020 (1990). *See also State of New York (Div. of Human Rights)*, 22 PERB ¶3036 (1989).

units should be continued. There is, however, no record evidence that the Sheriff was aware of the Association's complaints and the abolition of flex-time by Flynn as a response to Finnerty's articulated concerns. While the record evidences that Chisholm was not happy that the Association had complained about flex-time to Flynn, there is no evidence that she communicated her feelings about the Association's concerns to the Sheriff. Indeed, the record evidences that both Chisholm and Nordquist supported the assignment of County vehicles to CIS employees and made that support known to both Flynn and the Sheriff.

There is no evidence, save the timing of the Sheriff's decision to discontinue the practice of assigning County-owned vehicles, which would support a conclusion that the Sheriff would not have changed the practice with respect to the use of County vehicles but for the Association's complaints about flex-time as it was then being utilized. The Sheriff, however, began his inquiries into the use of County-owned vehicles as early as 1997. The final report on the review of the assignments by Chisholm and Nordquist were not given to the Sheriff until January or February 1999. The fact that the Sheriff took a month to come to a decision on reports that had taken over a year to compile does not stretch the imagination. Nor does it compel a finding that the Sheriff reached his decision on the vehicles at the same time as flex-time was abolished by Flynn because the Sheriff was retaliating against the Association. As we have stated before, timing alone is insufficient to establish a finding of animus.[11]

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[11]*Rockville Ctr. Union Free Sch. Dist.*, 32 PERB ¶3050 (1999); *Town of North Hempstead*, 32 PERB ¶3006 (1999).

In fact, Nordquist made it plain in his statements to Finnerty that the two issues were separate. That both he and Chisholm hoped to use the employees' willingness to utilize flex-time to reduce overtime costs and response time to calls, as well as the other reasons they articulated for the continuation of the practice of allowing employees to use County-owned vehicles, to convince the Sheriff to continue or reinstate the practice does not support a finding that the two issues were linked or that the reasons for eliminating the practice with respect to County-owned vehicles attributed to the Sheriff by Chisholm and Nordquist were pretextual.

Based on the foregoing, we reverse the ALJ's decision that the Employer violated §§209-a.1(a) and (c) of the Act when it unilaterally discontinued the past practice of allowing employees in CIS units to use County-owned vehicles to travel to and from work. The specifications in the charge alleging a violation of §§209-a.1(a) and (c) are, therefore, dismissed.

IT IS, THEREFORE, ORDERED that the Employer:

1. Forthwith restore the benefit of the use of County-owned vehicles for travel to and from home or to and from the zones to those CIS employees represented by the Association who previously had such vehicles assigned to them;
2. Make whole all CIS employees represented by the Association for any parking and/or other expenses incurred by driving personal vehicles to and from home and to and from the zones, with interest at the maximum legal rate from March 25, 1999;

3. Sign and post the attached notice in all locations customarily used to communicate with employees in the unit represented by the Association.

DATED: October 6, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Monroe and Monroe County Sheriff (Employer) in the unit represented by the Monroe County Sheriff Police Benevolent Association that the Employer will:

1. Forthwith restore the benefit of the use of County-owned vehicles for travel to and from home or to and from the zones to those CIS employees represented by the Association who previously had such vehicles assigned to them.

2. Make whole all CIS employees represented by the Association for any parking and/or other expenses incurred by driving personal vehicles to and from home and to and from the zones, with interest at the maximum legal rate from March 25, 1999.

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

COUNTY OF MONROE and MONROE COUNTY SHERIFF

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GRADUATE STUDENT EMPLOYEES' UNION,

Charging Party,

- and -

CASE NO. U-20890

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK AT STONY BROOK),

Respondent.

PETER HENNER, ESQ., for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (MAUREEN SEIDEL of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Graduate Student Employees' Union (GSEU) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the State of New York (State University of New York at Stony Brook) (SUNY) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally rescinded its academic freedom policy by removing two teaching assistants from teaching English 101 and reassigning them as writing tutors due to their use in their Fall 1998 English 101 classes of "a syllabus and assigned readings which were considered controversial." SUNY argued in its answer that academic freedom derives from the First Amendment to the Constitution of the United States and, as a matter of

constitutional rights, it is a nonmandatory subject of negotiations. The conferencing ALJ directed the GSEU to file an offer of proof in support of its charge. The matter was then assigned to a hearing ALJ who decided the case on the pleadings, the offer of proof and memoranda of law filed by both parties.

The ALJ dismissed the charge, finding that even when constitutional issues are raised, the negotiability of a term turns upon a balancing of the competing interests of the employees and the public employer. Where, as here, the employee interest is the manner in which a teaching assistant will perform the job function of teaching a class and the employer interest is the manner in which duties are to be performed, the ALJ held that the balance, and prior Board decisions, weighs on the side of the employer.

GSEU argues in its exceptions that the teaching assistants' right to decide the appropriateness of instructional materials equates to academic freedom which is a First Amendment right, that SUNY may not reassign the teaching assistants because they exercised their discretion by teaching in a certain manner and that SUNY must negotiate policies alleged to violate Constitutional rights. SUNY argues that the ALJ's decision should be affirmed.

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

The facts are few and are not really in dispute. They are incorporated in the following discussion of the merits of the charge.

GSEU represents graduate students employed by SUNY. In the Fall of 1998, two graduate students employed as teaching assistants at SUNY's Stony Brook campus

were transferred from their classroom teaching assignments to tutoring assignments because of the "controversial" nature of the curriculum and reading materials they were utilizing.

GSEU asserts that SUNY has a practice of recognizing academic freedom for teaching assistants, that the removal and reassignment of the teaching assistants violates the concept of academic freedom and that academic freedom is a term and condition of employment. GSEU defines academic freedom as "freedom from retaliation for the manner in which a teaching professional, including a teaching assistant, performs his/her duties in the classroom." SUNY argues that teaching assistants are not faculty and are, therefore, not entitled to academic freedom and that what is at issue in this charge is the manner in which the teaching assistants will perform the job duty of teaching a class, which is a nonmandatory subject of negotiation.

The ALJ correctly assessed the gravamen of the charge and applied the appropriate case law in her decision.[1] GSEU may characterize the subject matter of the

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[1]While SUNY characterizes the charge as relating to First Amendment issues, we have found that even in such cases, a balancing test must be utilized to determine not whether a term is constitutional or unconstitutional, but whether it is mandatory or nonmandatory. In some circumstances those governmental interests which make an action constitutional can also exempt an employer from a statutory duty to bargain regarding that action. But, "the factors used in assessing the constitutionality of an action may be different from those used in making a negotiability determination. For example, a constitutional analysis might include policy considerations which are not appropriately considered in a negotiability determination because they are divorced from the employment relationship. That, in part, explains why an action may be simultaneously constitutional yet mandatorily negotiable." *Arlington Cent. Sch. Dist*, 25 PERB ¶3001, at 3007, n.9 (1992). *See also Eastchester Union Free Sch. Dist.*, 29 PERB ¶3041 (1996).

charge as "academic freedom" but the facts alleged in the charge and the offer of proof demonstrate that what is at issue is the manner in which English 101 will be taught, including the choice of materials to be utilized in the classroom. We have previously held that the selection of textbooks, examinations and other materials goes to "the essence of educational policy" and is, therefore, a nonmandatory subject of negotiation.[2] A demand relating to changes in curricula, programs and methods has also been found to be nonmandatory as such a demand affects the nature and extent of service provided by a school district to its constituency.[3]

To the extent that the charge can be read to assert that the reassignment of the teaching assistants from the classroom to a tutoring assignment is a separate violation, the ALJ correctly found that the assignment of inherent job duties is also a management prerogative and is nonmandatory.[4] Although GSEU seems to allege in its brief to the ALJ and, again, in its exceptions, that the reassignment was a form of discipline, the ALJ correctly found that there was no allegation in the charge that the

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[2]*Orange County Community Coll. and County of Orange*, 9 PERB ¶3068, at 3120 (1976). *See also Cortland Paid Fire Fighters Ass'n, Local 2737, IAFF*, 29 PERB ¶3037 (1996).

[3]*Somers Faculty Ass'n*, 9 PERB ¶3014 (1976).

[4]*Waverly Cent. Sch. Dist.*, 10 PERB ¶ 3103. *See also Seneca Falls Teachers Ass'n*, 23 PERB ¶3032 (1990); *Oyster Bay-East Norwich Cent. Sch. Dist.*, 18 PERB ¶3075 (1985); *Norwich City Sch. Dist.*, 14 PERB ¶3059 (1981).

reassignment was for disciplinary reasons or that the reassignment might constitute discipline within the meaning of the parties' contractual disciplinary procedure.[5]

For the reasons set forth above, GSEU's exceptions are denied and the decision of the ALJ is affirmed.

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

DATED: October 6, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[5] *Arlington Cent. Sch. Dist*, *supra* note 1. (PERB will not consider allegations not raised in a charge or timely amendment.)

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PORT JEFFERSON ADMINISTRATORS ASSOCIATION, SCHOOL ADMINISTRATORS ASSOCIATION OF NEW YORK STATE,

Charging Party,

- and -

CASE NO. U-21128

PORT JEFFERSON UNION FREE SCHOOL DISTRICT,

Respondent.

BEVERLY R. HACKETT, ESQ., for Charging Party

INGERMAN SMITH L.L.P. (JOHN H. GROSS of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions from the Port Jefferson Union Free School District (District) to a decision of an Administrative Law Judge (ALJ) which found a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) on a charge filed by the Port Jefferson Administrators Association, School Administrators Association of New York State (Association).[1]

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[1]The Association withdrew the specifications alleging violations of §§209-a.1(a) and (c) of the Act.

FACTS

Based upon the record before us, we adopt the ALJ's findings of fact. The material facts are summarized as follows. Dr. Esther Fusco was an elementary school principal within the District until her suspension on June 29, 1999. By letter dated July 29, 1999, the District Superintendent, Edward Reilly, directed Dr. Fusco to return to work on August 2, 1999. She was to report to the high school, where she was provided with a desk, computer and telephone. She was directed to sign in and out whenever she entered or left the school.

On September 15, 1999, charges pursuant to Education Law §3020-a were brought against her. She was suspended with pay from her duties as elementary school principal, and she was to remain at the high school where her work assignment remained as outlined above.

ALJ'S DECISION

By decision dated May 18, 2000, the ALJ found that the District violated §209-a.1(d) of the Act by unilaterally imposing a sign-in, sign-out requirement on Dr. Fusco.

EXCEPTIONS

The District excepted to the ALJ's decision on two grounds:

1. The ALJ erred in concluding the District violated the Act because the ALJ failed to properly apply the balancing test in determining whether an administrative work rule constituted a mandatory subject of bargaining; and

2. The ALJ erred in concluding the District's defense could not be predicated upon the "facts of the case". The Association filed no response to the District's exceptions.

DISCUSSION

It is axiomatic that an administrative work rule constitutes a mandatory subject of negotiation unless it has but a slight impact upon terms and conditions of employment or it has a major impact upon managerial responsibilities that, by law or public policy, may not be shared.[2] While the sign-in, sign-out requirements were imposed by the District pursuant to pending §3020-a charges, Education Law §3020-a is silent with regard to the manner in which a school district may impose restrictions upon a suspended employee.

We have held that employers have the managerial right to maintain a record of attendance and presence of their employees. However, an employer may not, without the agreement of the employees' negotiating representative, require its employees to participate in the recording process.[3] As there is nothing in Education Law §3020-a which would mandate a contrary conclusion, we find that, on balance, the attendance requirement imposed upon Dr. Fusco primarily impacted the conditions of her employment and is mandatorily negotiable.

The District also argues that the sign-in directive is nonmandatory because it encompasses the facts specific to the discipline of Dr. Fusco. We disagree. As the ALJ

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[2]*See Police Ass'n of New Rochelle, New York, Inc.*, 13 PERB ¶3082 (1980), citing *Newspaper Guild v. NLRB,* 636 F2d 550, 89 LC ¶12,207 (D.C. Circ. 1980); *see also State of New York (Unified Court System)*, 33 PERB ¶____ (October 6, 2000).

[3]*Newburgh Enlarged City Sch. Dist.*, 20 PERB ¶3053 (1987).

correctly pointed out, we rejected this negotiability approach in *State of New York (Department of Transportation)*[4] and its progeny.[5]

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

IT IS, THEREFORE, ORDERED that the District shall:

1. Forthwith rescind its directives of July 29, and September 1, 1999, requiring that Dr. Fusco sign in and sign out;
2. Delete from all files any references to her failure to follow the directives referred to in paragraph 1, above;
3. Sign and post the attached notice at all locations customarily used to post notices to unit members.

DATED: October 6, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

[4]27 PERB ¶3056 (1994).

[5]*See State of New York*, 31 PERB ¶3018 (1998); *City of Glens Falls*, 30 PERB ¶3047 (1997); *Town of Carmel*, 29 PERB ¶3026 (1996).

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify the employees of the Port Jefferson Union Free School District (District) represented by the Port Jefferson Administrators Association, School Administrators Association of New York, that the District shall:

1) Rescind its directives of July 29 and September 1, 1999 requiring that Esther Fusco sign in and sign out;

2) Delete from all files any reference to her failure to follow the directives referred to in paragraph 1, above.

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

Port Jefferson Union Free School District
.....

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ERIE COUNTY SHERIFF'S POLICE BENEVOLENT ASSOCIATION, INC., AFFILIATED WITH THE POLICE CONFERENCE OF NEW YORK, INC.,

Charging Party,

- and -

CASE NO. U-21622

COUNTY OF ERIE and SHERIFF OF THE COUNTY OF ERIE,

Respondents.

BOHL, DELLA ROCCA & DORFMAN, P.C. (JAMES B. TUTTLE of counsel), for Charging Party

BRIAN D. DOYLE, ESQ., for Respondents

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Erie County Sheriff's Police Benevolent Association, Inc., affiliated with the Police Conference of New York, Inc. (SBA), to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its improper practice charge alleging that the County of Erie (County) and Sheriff of the County of Erie (Sheriff) violated §209-a.1(d) of the Act when the Sheriff required unit members requesting contractual union leave to provide an explanation for the request resulting in the denial of certain requests because the Sheriff disapproved of the stated explanation.

The SBA's charge was dismissed as deficient by the Director. He found that the parties' collective bargaining agreement was the SBA's arguable source of right with respect to the subject matter of the charge.

The SBA excepts to the Director's decision on the ground that the Director failed to consider the practice alleged in the charge.

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

FACTS

The salient facts alleged in the amended charge filed on May 9, 2000 are as follows:

Details of Charge

Article XIV, Section 4 of the parties' collective bargaining agreement entitled Union Leave provides:

> (A) Members of the Union who are elected or designated to attend any Convention, Seminars, Educational Forums and/or official meeting of the Local Union Executive Board or official meeting of the Executive Board of the International Union, shall be permitted to attend such functions and be granted the necessary time off work permitting without loss of either time or pay provided that the total said time is not in excess of sixty (60) work days in any calendar year and further provided that a request for such leave is made by the Union in writing to the Sheriff or his designee no less than five (5) calendar days prior to the date that the particular function is scheduled. Any request for such union leave shall not be unreasonably withheld.

Prior to Patrick Gallivan taking office as Sheriff of the County of Erie, his predecessor in office simply allowed the Union its sixty (60) union days with no prior requirement other than the five (5) days written notice.

> After Sheriff Gallivan took office that remained the practice for a substantial period of time.
>
> However, in December 1999, Sheriff Gallivan began a practice of requiring an explanation of the nature, purpose and subject matter of the request for Union leave off and also of denying requested Union leave on the grounds that he disapproved of the subject matter.
>
> This unilateral change from the past practice by the Sheriff has interfered with the right of the Union to operate independently and in privacy . . . and has thereby violated §209-a.1(d) of the Act.[1]

On May 10, 2000, the Assistant Director of Public Employment Practices and Representation (Assistant Director), by letter, informed counsel for the SBA that the charge, as amended, was deficient because "[t]he union's source of right to union leave, not to 'unreasonably withheld', is Article XIV, section 4 of the parties' 'in force' contract. PERB lacks jurisdiction to enforce contract provisions."

On May 26, 2000, counsel for the SBA, by letter, advised the Assistant Director to "recommend to the Director . . . that the matter be dismissed so that we may file exceptions pursuant to §204.10(c) of the Rules."[2]

DISCUSSION

The SBA urges us to retain jurisdiction over this charge because the parties' collective bargaining agreement is silent regarding the dispute. The County and Sheriff

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[1]Charge, ¶5.

[2]Note: effective July 21, 1999, pursuant to amendment of PERB's Rules of Procedure (Rules), §204.10 was reserved for future use. Provisions of the Rules referring to filing exceptions are now set forth in §213.

in their response to the SBA's exceptions argue that the SBA has filed a contract grievance thereby acknowledging that the contract is the SBA's source of right.

In *Maine-Endwell Central School District*, we dealt with the inevitable conflict that occurs when an employer unilaterally changes a past practice that may also be covered by the parties' collective bargaining agreement.[3] We there affirmed the ALJ's dismissal of the charge on the ground that the actions taken by the District were authorized by the language of the collective bargaining agreement. As the ALJ stated:

> [T]he Association misunderstands the employer's obligation, which is to refrain from unilaterally changing not a practice, but a term and condition of employment. When a contract is silent on a particular item, the past practice of the parties may be examined to determine the term and condition. (citation omitted) But when the parties have negotiated and reached an agreement on the item, the contract then defines the term and condition of employment, and actions taken pursuant thereto can no longer be labeled unilateral. In essence, the parties have, for the duration of the contract, waived their right to complain about such actions.[4]

The issues raised by the SBA's exceptions do not take this matter outside of our decision in *State of New York (Governor's Office of Employee Relations)*,[5] because the practice of granting union leave was within the perimeters of the language of Article XIV. We have held that §205.5(d) of the Act divests us of jurisdiction in a failure to bargain charge where, as here, the parties' [contract] provides the charging party with a reasonably arguable source of right with respect to the subject matter of the

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[3]15 PERB ¶3025 (1982), *aff'g* 14 PERB ¶4625 (1981).

[4]*Id.* at 4759.

[5]33 PERB ¶3012 (2000).

reasonably arguable source of right with respect to the subject matter of the charge.[6] This is the case even where, as we held in *City of Troy*, "the contours of the charging party's contract rights and the respondent's corresponding obligations need not be laid out in any detail to trigger the jurisdictional limitation in §205.5(d)."[7]

After reviewing the amended charge containing the language of Article XIV of the parties' collective bargaining agreement, we agree with the Director's decision. Article XIV covers union leave and states that any request for such leave was not to be unreasonably withheld. Consequently, the contract represents a reasonably arguable source of right to the SBA such as to divest us of jurisdiction.

Based upon the foregoing, we deny the SBA's exceptions and affirm the Director's decision.

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

DATED: October 6, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

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[6]*County of Nassau*, 25 PERB ¶3071 (1992).

[7]28 PERB ¶3057, at 3131 (1995).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

- and -

CASE NO. U-20917

STATE OF NEW YORK,

Respondent.

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

WALTER J. PELLEGRINI, GENERAL COUNSEL (MAUREEN SEIDEL of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to the decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) which found that the State of New York (State) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when the State Education Department (SED) discontinued and blocked all computer-generated e-mail of one of its employees, Michael Darcy, who was also an official of the Public Employees Federation, AFL-CIO (PEF).

The Assistant Director found that Darcy was involved in protected activity as a member of PEF's labor-management team within SED, that SED was aware of his union status, that Darcy was directing e-mail to PEF members within SED and that SED

discontinued and blocked Darcy's use of the SED computer-generated e-mail system because Darcy was critical of certain elected and appointed officials at a time when the State and PEF were embroiled in negotiations over a successor contract.

The State excepts to the Assistant Director's decision, arguing that the Assistant Director erred in his interpretation of the facts and the law. PEF, in its response, supports the Assistant Director's decision.

FACTS

We will confine our review to the salient facts relevant to the exceptions filed by the State.

Sometime in 1994, during the course of a labor/management meeting, the issue of whether PEF members would be able to use the OFIS e-mail system at SED to contact its membership was first raised. SED thereafter developed a policy to permit PEF to post PEF-related activities that were determined to be a benefit and/or of interest to the agency. We note that this policy was never reduced to writing and none of the witnesses was able to determine when in 1994 it was developed and thereafter implemented.

In 1996, the OFIS e-mail system was replaced with the Groupwise e-mail system. On or about August 8, 1996, Richard Cate, SED's chief operating officer, sent a memo to all employees advising them of SED's policy that the appropriate use of its e-mail system was to solely support SED business.[1] As Cate testified, and consistent

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[1]Respondent's Exhibit No. 1.

with the 1996 policy memo, he allowed exceptions to the business purpose policy for PEF communications consistent with the 1994 policy. This policy was again published on August 21, 1998[2] and remained in effect as of the date of the charge. Darcy was aware of SED's e-mail policy.[3]

During 1998, Darcy broadcast the events of the PEF delegates convention. This message was received by SED's labor relations specialist, Roswith Apkarian. For her, this represented the first time Darcy transgressed the SED's policy. Several months passed and in early 1999, Apkarian was made aware that Darcy had broadcast electronically the PEF newsletter, the Spark. Subsequently, in March 1999, the parties met in a labor/management forum to discuss, among other things, the appropriate use of SED e-mail; however, there was no resolution of this issue. After the meeting in March 1999, the use of SED's e-mail system to communicate with PEF members on a variety of topics became a source of concern for SED management.

On April 12, 1999, the State sent a memo to all agency heads reiterating that employees may not use state equipment for any use other than departmental business. On May 5, 1999, Cate advised all employees of SED that he had notified the leaders of PEF and CSEA of the State's memo and republished SED's e-mail policy.

Darcy continued to use SED's e-mail system to communicate with PEF members on subjects outside of the policy guidelines. On or about May 21, 1999, Cate and SED's

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[2]Respondent's Amended Answer, Exhibit B.

[3]Transcript, p. 73.

Human Resource Director, Charles Byrne, met with Darcy and another PEF representative, and they restated SED's e-mail policy to Darcy, told him he was violating the policy and they wanted it stopped.

On May 21, 1999, Darcy e-mailed Bryne and advised him that PEF's position was unchanged. He explained that (1) the use of e-mail at SED had developed into a practice and any change would require negotiations; (2) the current collective bargaining agreement between PEF and the State prohibits the use of State resources only for internal union business such as union business elections, which PEF supported because if State resources could be used in PEF internal business, the State could meddle in PEF internal matters by controlling or manipulating the use of such resources; (3) the State's memo of April 22, 1999 was the subject of an improper practice charge and pending its resolution, PEF would continue to operate as before; and (4) that he could not conform to Byrne's request to stop violating SED's e-mail policy.[4]

On May 25, 1999, Cate notified Darcy that he was disconnecting his e-mail access at SED. On June 8,1999, PEF filed the original charge in this proceeding. On June 24, 1999, the parties met in a labor/management forum to discuss the termination of PEF's (Darcy's) use of SED e-mail, among other things. On July 15, 1999, PEF filed an amended charge alleging that SED blocked Darcy's access to PEF employees at SED through the use of his home computer.

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[4]PEF Exhibit No. 4.

DISCUSSION

PEF charged that SED interfered with Darcy's protected right to communicate with other PEF members regarding union issues, e.g. contract negotiations, and that SED took away Darcy's e-mail privileges to punish him for the content of his e-mail messages.

We have 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 been engaged in protected activities, (b) the respondent had knowledge of, and (c) acted because of those activities.[5] If the charging party proves a *prima facie* case of improper motivation, the burden of persuasion shifts to the respondent to establish that its actions were motivated by legitimate business reasons.[6]

We have held that the charging party can establish "[t]he existence of anti-union animus . . . by statements or by circumstantial evidence, which may be rebutted by presentation of legitimate business reasons for the actions taken, unless found to be

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[5]*Town of Independence,* 23 PERB ¶3020 (1989). *See also Convention Ctr. Operating Corp.,* 29 PERB ¶3022 (1996); *City of Rye*, 28 PERB ¶3067 (1995), *conf'd*, 234 AD2d 640, 29 PERB ¶7021 (3d Dep't 1996).

[6]*City of Salamanca,* 18 PERB ¶3012 (1985). *See also City of Albany*, 3 PERB ¶4507, *aff'd*, 3 PERB ¶3096 (1970), *conf'd in pertinent part*, 36 AD2d 348, 4 PERB ¶7008 (3d Dep't 1971), *aff'd*, 29 NY2d 433, 5 PERB ¶7000 (1972).

pretextual".[7] Proof that the employer's stated reasons for its conduct are pretextual may constitute such circumstantial evidence.[8]

It is uncontroverted that the administration at SED was well-aware of Darcy's involvement in PEF. SED and PEF met regularly in labor/management forums and Darcy acted in the capacity of a PEF representative in these discussions. The Assistant Director concluded that the dissemination of information relating to legislation and negotiations is a protected activity even if critical of the employer's conduct.[9]

PEF meets the first two prongs of the test because Darcy was acting in his capacity as a PEF representative at the time the e-mail was sent out on the SED system and SED management was aware of Darcy's PEF membership and his position with PEF in labor/management forums.

However, we disagree with the Assistant Director that there is record evidence that Cate's decision to remove Darcy's e-mail capability at SED was improperly motivated.

We have held that the fundamental right of an employee to participate in the activities of the employee organization of his choosing with the employer's right to maintain order and respect must be balanced one against the other.[10] "On occasion,

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[7]*Town of Independence, supra* note 5 at 3038; *See also Convention Ctr. Operating Corp.,* 29 PERB ¶3022 (1996); *City of Rye, supra note 5.*

[8]See *City of Utica*, 24 PERB ¶3044 (1991); *Town of Henrietta*, 28 PERB ¶4605, *aff'd*, 28 PERB ¶3079 (1995).

[9]See *Binghamton City Sch. Dist.*, 22 PERB ¶3034 (1989).

[10]*State of New York (Ben Aaman)*, 11 PERB ¶3084 (1978).

the [union] representative may engage in impulsive behavior that an employer would not have to tolerate from an employee who is engaged in his normal tasks. Although an employer may not ordinarily discipline the employee representative for such behavior, there are circumstances in which overzealous behavior on his part may constitute misconduct."[11] Consequently, inappropriate conduct, even if part of a union activity which is protected, will not shield an employee from its consequences.[12]

It is uncontroverted through both parties' witnesses that SED met regularly with PEF in their labor/management committees to discuss various issues, including PEF's use of SED's e-mail system. In later meetings, Darcy's use of the SED e-mail system became the focus of their discussions. This is in conformity with the letter and the spirit of the Act.[13] Although the parties failed to agree on this issue, Cate's position regarding PEF's use of SED's e-mail system remained consistent. Cate directed Darcy to cease using SED's e-mail for purposes beyond the previously agreed upon perimeters of e-mail usage. It is Darcy's refusal to comply with Cate's directive that prompted the action taken against Darcy, not Cate's feelings about the content of Darcy's e-mails.

We believe that the Assistant Director erred in crediting Darcy's and Kolowitz' testimony over Cate. A fair reading of the transcript revealed that both Darcy and

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[11]*Id.* at 3137. *See also NLRB v. Thor Power Tool Co.*, 351 F2d 584 (7th Cir. 1965).

[12]*Kings Park Cent. Sch. Dist.*, 27 PERB ¶3022 (1994); *State of New York (OMRDD)*, 24 PERB ¶3036 (1991); *Island Trees Public Schs.*, 14 PERB ¶3020 (1981). *See also Earle Industries v. NLRB*, 75 F3d 400 (8th Cir. 1996).

[13]Act, §204.3.

Kolowitz had a selective memory regarding significant facts and events. For example, Darcy denied under cross-examination that he had ever discussed Cate's objections with Byrne prior to Darcy's last meeting with Cate. Darcy's testimony was contradicted by PEF's own exhibit 4.[14] At their last meeting, Cate requested that Darcy cease using the SED e-mail system.[15] Darcy acknowledges this request in the confirming e-mail sent on May 21, 1999.[16] PEF offers no explanation for Darcy's refusal to comply with Cate's request. We have held that the appropriate response to an objectionable directive is to comply and seek redress through available legal channels.[17] We find, therefore, that Darcy's refusal to comply with Cate's request was tantamount to misconduct, even though clothed in protected activity.[18]

Based upon our review of the record and consideration of the parties' arguments, we find no evidence of anti-union animus and we reverse the Assistant Director's decision on the merits.

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[14]Transcript, pp. 67-68, PEF Exhibit 4.

[15]Transcript, pp. 132-133.

[16]PEF Exhibit 4.

[17]*See Farmingdale Union Free School Dist.*, 11 PERB ¶3055 (1978).

[18]*Plante v. Buono*, 172 AD2d 81 (3d Dep't 1991), *appeal denied*, 79 NY2d 756 (1992).

NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: October 6, 2000
New York, 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

MARLBOROUGH TOWN POLICE BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-5001

TOWN OF MARLBOROUGH,

Employer,

-and-

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Marlborough Town Police Benevolent Association has been designated and selected by a majority of the employees of the

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

Included: All part-time BMP certified police officers.

Excluded: All others.

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

DATED: October 6, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 693,

Petitioner,

-and-

CASE NO. C-5008

TOWN OF MCDONOUGH,

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 Teamsters Local 693 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 MEOs.

Excluded: Supervisors and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters Local 693. 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: October 6, 2000
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

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Petitioner,

-and-

CASE NO. C-4780

COUNTY OF ROCKLAND,

Employer,

-and-

CSEA, LOCAL 1000, AFSCME, AFL-CIO,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Federation of Police Officers, Inc., 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: Investigative Aide I (Narcotics), Investigative Aide II (Narcotics), Investigative Aide III (Narcotics).

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Police Officers, Inc. 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: October 6, 2000
Albany, New York

Michael R. Cuevas, Chairman

Marc A. Abbott, Member

John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 264,

Petitioner,

-and- **CASE NO. C-4995**

TOWN OF LEWISTON,

Employer,

-and-

LEWISTON POLICE BENEVOLENT ASSOCIATION,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,[1]

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

IT IS HEREBY CERTIFIED that Teamsters Local 264 has been designated and

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[1] This unit has been represented by the Lewiston PBA, who notified PERB that it supports the petition and disclaims any interest in further representing the unit.

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

Included: All full-time and regular part-time police officers employed by the Town of Lewiston.

Excluded: Police chief, corporals, sergeants, clerical, administrative staff, officers assigned to the court, and all non-sworn officers.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Teamsters 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: October 6, 2000
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

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

Petitioner,

-and-

CASE NO. C-5005

COUNTY OF LIVINGSTON,

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 Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All part-time permanent (as defined by New York State Civil Service Law) and all full-time or part-time seasonal positions (as defined by New York State Civil Service Law) employed by Livingston County in the job titles set forth below within the County's Skilled Nursing Facilities, Office for the Aging, Public Health Department, Department of Social Services, Records Management Department, County Historian's Office, Office of Central Services, Highway Department and Conesus Lake Sewer District.

Permanent Positions (Livingston County Civil Service Title):
Clerk/Typist, Clerk, Typist, Account Clerk, Account Clerk/Typist, Licensed Practical Nurse, Registered Professional Nurse, Nursing Assistant, Pharmacist, Charge Nurse, Personal Care Assistant, Activities Aide, Laundry Worker, Cleaner, Housekeeper, Building Maintenance Person, Courier, Senior Nutrition Program Site Manager, Aging Services Caseworker, Foster Grandparent Assistant, Food Service Helper, Ombudsman Coordinator, Home Health Aide, Senior Public Health Engineer, Case Worker, Registered Physician's Assistant, Public Health Educator, Hospice Volunteer Coordinator, Public Health Social Worker, Nutrition Aide, Clinical Aide, Public Health Technician, Deputy County Historian, Records Inventory Clerk, and Custodial Worker.

Seasonal:
Motor Equipment Operator I, Laborer, Home Energy Assistance Program Examiner, and Summer Camp Worker.

Excluded: Positions within the bargaining unit represented by the New York State Nurses Association, positions within the existing Civil Service Employees Association, Livingston County Local 826 Unit, temporary employees as defined by the New York State Civil Service Law and substitute employees, as defined below.

Substitute employees are all employees who are hired to perform work during the absences of other employees, so long as the period of substitution does not exceed 300 hours in a calendar year; provided that no employees in the nursing departments of the Skilled Nursing Facilities shall be considered to be substitute employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO,. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: October 6, 2000
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

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and- **CASE NO. C-5010**

SOUTH HUNTINGTON 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 found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Regularly scheduled full-time and part-time Group Leader and Assistant Leader working in the South Huntington Childcare Program.

Excluded: 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.

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