STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GREENBURGH UNIFORMED FIREFIGHTERS ASSOCIATION, LOCAL 1586, I.A.F.F.,

Charging Party,

-and-

CASE NO. U-15830

FAIRVIEW FIRE DISTRICT,

Respondent.

THOMAS F. DE SOYE, ESQ., for Charging Party

KORNFELD, REW, NEWMAN & ELLSWORTH (FRANK T. SIMEONE and SHARON WORTHY of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Greenburgh Uniformed Firefighters Association, Local 1586, I.A.F.F. (Association) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ dismissed the Association's charge against the Fairview Fire District (District) which alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it transferred certain fire dispatching duties from the Association's unit of fire fighters to the employees of a different employer.[1/]

[1/]The dispatching in issue is now done through the Westchester County Fire Control.

Relying upon our decision in State of New York (DOCS)[2/] (hereafter State DOCS), our three "civilianization" cases,[3/] and Niagara Frontier Transportation Authority[4/] (hereafter Niagara Frontier), the ALJ concluded that the District's substitution of civilian personnel for fire fighters to do certain fire dispatching necessitated a balancing of the parties' interests under Niagara Frontier. Balancing those interests, the ALJ concluded that the impact of the transfer on the Association's unit and its unit employees was de minimis and that the District's interests were predominant. Therefore, the ALJ held that the District was not under any duty to negotiate the transfer decision with the Association.

The Association argues in its exceptions that the ALJ misapplied the precedents earlier referenced. It argues that the ALJ should not have used a balancing test because the District did not allege and prove that there was a significant change in the job qualifications for dispatch duties. According to the Association, the ALJ erred in finding that the civilianization of the dispatch function constituted a per se change in qualifications for that job. Similarly, the Association argues that the District was required to prove a change in its dispatch

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[2/]27 PERB ¶3055 (1994), aff'd, ___ A.D.2d ___, 29 PERB ¶7008 (3d Dep't 1996).

[3/]City of New Rochelle, 13 PERB ¶3045 (1980); City of Albany, 13 PERB ¶3011 (1980); County of Suffolk, 12 PERB ¶3123 (1979).

[4/]18 PERB ¶3083 (1985).

services and that the ALJ again erred in concluding that any change in qualifications effected, per se, a change in those services. Finally, the Association argues that if the ALJ correctly resorted to a balancing test, she incorrectly balanced the parties' interests because the Association's interests are not de minimis and because the District transferred the work only to save money, not to effectuate any change in its level or manner of services.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision.

The Association's arguments that existing precedent was misapplied by the ALJ persuades us of the need to explain our reasoning in cases involving the civilianization of uniformed services in more detail.

The civilianization cases cited involved the transfer to civilian personnel of several tasks which had been performed exclusively by police officers. The holding in each case was that the civilianization of the work which had been done by the police officers involved what was described variously as the employer's "fundamental management right to determine the necessary employment qualifications of personnel performing the tasks at issue",[5/] "a determination of the qualifications for the respective jobs involved",[6/] or the "right of the [employer]

[5/]City of New Rochelle, supra n. 3, at 3073.

[6/]City of Albany, supra n. 3, at 3015.

to alter the qualifications of the personnel performing the tasks in question . . . ."[7/]

Similarly, in West Hempstead Union Free School District[8/] (hereafter West Hempstead) and Town of Brookhaven[9/], the two other cases discussed in Niagara Frontier, there was no inquiry or determination as to whether the employees to whom the work was transferred, either as a group or individually, were more or less qualified in fact to do the work transferred than the employees they replaced or whether the work performed after the transfer was done better, worse or the same as before the transfer. Despite there being no substantial change in fact in the actual duties performed, the transfers in both West Hempstead and Town of Brookhaven were held to be predominantly related to the employer's decision to alter the level of service it provided to its constituency and, therefore, nonmandatory.[10/]

Niagara Frontier attempted to distill all of the prior transfer of unit work cases and produced the now familiar basic framework for analysis of such cases. Against the backdrop of the earlier civilianization cases, West Hempstead and Town of Brookhaven, the Board in Niagara Frontier stated the following:

[7/]County of Suffolk, supra n. 3, at 3221.

[8/]14 PERB ¶3096 (1981).

[9/]17 PERB ¶3087 (1984).

[10/]In West Hempstead, the charging party's unit employees lost their jobs as a result of the transfer. In Town of Brookhaven, the unit employees were reassigned to other duties without loss of pay or benefits.

> With respect to the unilateral transfer of unit work, the initial essential questions are whether the work had been performed by unit employees exclusively and whether the reassigned tasks are substantially similar to those previously performed by unit employees. If both of these questions are answered in the affirmative, there has been a violation of §209-a.1(d), unless the qualifications for the job have been changed significantly. Absent such a change, the loss of unit work to the group is sufficient detriment for the finding of a violation. If, however, there has been a significant change in job qualifications, then a balancing test is invoked; the interests of the public employer and the unit employees, both individually and collectively, are weighed against each other. (footnote omitted)[11/]

In State DOCS, we again sought to comprehensively consider and analyze earlier transfer of work cases. In doing so, we specifically stated in State DOCS that the employer's civilianization of uniformed services represented "a de facto" change in qualifications.

That case did not represent any change in our existing case law regarding the transfer of unit work. Our intention in State DOCS was merely to restate, in a more readily understandable way, what had already been said in the civilianization cases, West Hempstead, Town of Brookhaven and Niagara Frontier.

The Association nonetheless seizes upon our reference in State DOCS to a "de facto" change in qualifications as the primary basis for its argument that a change in qualifications and services must be affirmatively pleaded and proved by an employer as the reason for a civilianization of uniformed

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[11/]18 PERB ¶3083, at 3182 (1985)

services before there can be any balancing of interests under Niagara Frontier.

Our use of the term "de facto" in State DOCS was not meant to suggest that a change in qualifications must be proven factually in a case involving civilianization of uniformed police or fire services. Such an interpretation is entirely inconsistent with the police civilianization cases, with Niagara Frontier, the cases discussed therein, and with State DOCS which reaffirmed those cases. Our use in State DOCS of the term "de facto" was intended as nothing more than a recognition of the fact that civilians lack the "special employment qualifications"[12/] required of and possessed by police officers or fire fighters. We very recently had reason to reaffirm that these uniformed personnel are "fundamentally different from everyone else."[13/] The substitution of civilians for police officers or fire fighters to deliver services previously performed by those uniformed personnel necessarily reflects an employer's determination that the specialized training and skills of the uniformed officer are not necessary to the performance of a given set of tasks, e.g., dispatch. It is the employer's determination to substitute positions having fundamentally different qualifications which has always been held to embrace

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[12/]County of Suffolk, supra n. 3, at 3221.

[13/]County of Erie and Sheriff of Erie County, 29 PERB ¶3031, quoting with approval from City of Amsterdam, 10 PERB ¶3031 (1977).

the managerial right to establish qualifications even when specific tasks are unchanged. Therefore, it is not material that one or more civilians may be as capable objectively of performing certain tasks as one or more of the uniformed officers they replaced.

The change in qualifications occasioned by the substitution of a civilian for a uniformed officer is sufficient to trigger the balancing of employer and employee interests under Niagara Frontier. The District was not required to also prove a change in level of service as a condition to invocation of Niagara Frontier's balancing test. As we stressed in State DOCS, the conclusion that qualifications are changed by a decision to civilianize uniformed services is only sufficient to trigger the balancing test in Niagara Frontier. But a balance of competing interests must still be made. In making that balance, it may be necessary, and it is certainly appropriate under our existing case law, to undertake an examination of the facts to ensure that the parties' interests which are to be balanced are correctly identified and properly weighed. The title-by-title examination conducted in State DOCS, for example, was not, as the Association argues, for the purpose of deciding whether to balance under Niagara Frontier, but how that balance should be struck. As State DOCS demonstrates, although a change in qualifications is present in a civilianization case to a degree sufficient to trigger a balancing, the changes in level of service or other matters affecting managerial prerogatives effected by the

civilianization may, in fact, not be significant, and they may not be sufficient on balance to outweigh the employees' interests in a given case. The balance of interests on the facts of the case may reveal, for example, as it did in State DOCS, that there is not and was never intended to be any substantial change in the services actually delivered. If that be so, then that fact is as much properly considered in a balance of interests as any other relevant to that balance. The extent of the change in qualifications and services and the detriment to the unit and its employees will weigh heavily in making the necessary balance. The less the change in the former and the greater in the latter, the more likely the balance will favor negotiability of the decision to transfer the work. Conversely, the balance will tend to favor a determination that the civilianization is not mandatorily negotiable when the change in qualifications and services is substantial and the detriment to the unit employees is minimal.

This brings us to the Association's argument that the ALJ inappropriately balanced the parties' interests and that she should have found the employees' interests to be predominant. We do not agree, and find that the ALJ made the correct balance.

Although the Association argues to the contrary, the transfer of work from the Association's unit is not itself sufficient to shift the balance of interests in favor of the Association. As work is always removed from a negotiating unit in every transfer case, regardless of the means by which the

transfer is effected, every transfer of work would have to constitute a refusal to negotiate if the Association were correct in its assertion. The dismissal of several improper practice charges after a balancing of all parties' interests establishes conclusively that there is not a refusal to negotiate simply because work has been transferred from a unit for performance by others outside of that unit. The simple loss of unit work is sufficient to support a violation when the balancing test under Niagara Frontier is not triggered, i.e., when there is not a significant change in qualifications. But if the balancing test under that decision is triggered by a significant change in qualifications, the loss of unit work is but one of the many factors which can be taken into account in making the balance.

In this case, the loss of the unit work is the only detriment to the Association and its unit employees. As the ALJ found, unit employees did not suffer any loss of employment or benefits. What has been transferred is only the work of determining which apparatus to send to a fire on receipt of an alarm and the dispatching of that apparatus. The Association has retained all of its current members and all of the dispatching duties which are not related to fire alarms, which account for about ninety percent of the job. The civilianization decisions previously referenced hold clearly that a transfer of work in such circumstances, even if motivated solely by economic considerations, does not constitute a violation of an employer's duty to negotiate.

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

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

DATED: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, WESTCHESTER LOCAL 860, EASTCHESTER UNION FREE SCHOOL DISTRICT UNIT,

Charging Party,

-and-

CASE NO. U-15775

EASTCHESTER UNION FREE SCHOOL DISTRICT,

Respondent.

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

RAINS & POGREBIN, P.C. (CRAIG R. BENSON of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision by an Administrative Law Judge (ALJ) filed by the Eastchester Union Free School District (District) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester Local 860, Eastchester Union Free School District Unit (CSEA). CSEA alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it rescinded a past practice pursuant to which unit employees were allowed days off with pay on request for religious observance.

On a stipulated record, the ALJ held the District in violation as alleged, rejecting the District's only defense, that

the practice was unconstitutional under the Establishment Clause of the First Amendment to the United States Constitution.

The District excepts only to the ALJ's decision that its practice as stipulated is constitutional and, therefore, mandatorily negotiable. CSEA argues in response that the ALJ's decision should be affirmed.

After consideration of the parties' arguments, including those at oral argument, we reverse the ALJ and dismiss the charge upon the ground that the practice the District rescinded is unconstitutional and, therefore, not a mandatory subject of negotiations.

We begin our discussion by stating that we are extremely reluctant to decide the constitutional question raised in defense to this charge. Constitutional analysis is beyond our claimed and recognized expertise and our decision on the constitutionality of the District's practice is not entitled to any judicial deference. Our reluctance is all the greater because Establishment Clause cases have occasioned perhaps more split and arguably irreconcilable decisions than any other jurisprudential question. The many cases cited and discussed in the parties' briefs and the ALJ's decision amply demonstrate that point. We realize, however, that we are obligated to reach constitutional questions to the extent necessary to decide improper practice charges within our jurisdiction just as we are often required to construe various federal and state statutes in making decisions on negotiability questions and other issues

arising under the Act. In this case, the constitutional question raised by the District is entirely dispositive of the negotiability determination, which in turn is entirely dispositive of the charge. The practice the District admittedly rescinded unilaterally is granting paid release time from work, unquestionably and admittedly a mandatory subject of negotiation but for the constitutional question presented. If the practice is constitutional, then the District violated the Act as alleged; if the practice is unconstitutional, then it does not embrace a mandatorily negotiable term and condition of employment and the District's unilateral rescission of that practice did not and could not violate its duty to negotiate. Although we believe that the parties would have been better advised to pursue the constitutional issue in a judicial forum, this charge is properly before us and our exclusive nondelegable jurisdiction[1/] over improper practice charges compels us to decide it.

We rest our determination that the District's religious release time practice is unconstitutional upon the June 11, 1996 decision of the New York Court of Appeals in Griffin v. Coughlin[2/] (hereafter Griffin), which contains a lengthy analysis of Establishment Clause doctrine before and after the United States Supreme Court's controlling decision in Lemon v.

[1/]Act §205.5(d).

[2/]___ N.Y.2d ___ (1996).

Kurtzman.[3/] In Griffin, the Court held, in a 5-2 decision, that the State's grant of family visitation privileges conditioned upon an atheist or agnostic inmate's participation in a drug rehabilitation program, which adopted in major part what the majority concluded were the religious-oriented practices and precepts of Alcoholics Anonymous, violated the Establishment Clause.

The District permitted employees who practice a religion paid time off from work upon demand to practice that religion. These paid days off from work were in addition to the several days off from work which all employees then and still receive. The District's practice had the result of denying its agnostics, atheists and religious nonpractitioners the benefit of additional days off with pay and without charge to leave credits, while granting only its religious practitioners such benefits.

Although there is in the District's practice an element of accommodation of religious beliefs missing in Griffin, that is true only for those in its employ who currently adhere voluntarily to some religion and continue to do so. Those

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[3/]403 U.S. 602 (1971). In Lemon, the Supreme Court synthesized its Establishment Clause cases into a three-pronged test centering around the concept of government neutrality. For governmental action to escape constitutional invalidation under the Establishment Clause, it must: (1) have a secular purpose which neither endorses nor disapproves of religion; (2) have an effect that neither advances nor inhibits religion; and (3) avoid creating a relationship between religion and government which entangles either in the internal affairs of the other. A violation of any one Lemon prong renders the governmental action unconstitutional.

District employees who do not now hold any religious beliefs or who do not actively practice their religion or those who in the future abandon those beliefs and practices are no differently situated in relevant respect than was the inmate in Griffin.

The coercion in Griffin which was central to the majority's opinion was found in the government's conditioning of a benefit upon the inmate's participation in what the majority concluded was a religious activity. The District's practice similarly conditions a substantial monetary benefit upon an employee having or acquiring and maintaining some religious belief and practice. Paid time off from work upon demand can only be seen as a highly desirable employment related benefit, surely no less desirable to an employee than the visitation privileges denied the inmate in Griffin. We see no relevant distinction between Griffin and this case.

As the majority in Griffin was careful to articulate, the Establishment Clause is violated by any governmental action, whether subtle or overt, which coerces, pressures or influences a person's choices regarding religious belief or practice. Even if not coercive, the District's practice at the very least influences an employee's choice as to whether to adopt and maintain a set of unquestionably religious beliefs and practices by conditioning a substantial economic benefit solely on religious exercise. The District's practice did not simply remove an impediment to the free exercise of religion. That goal could have been accomplished by various alternatives necessary to

reasonably accommodate the exercise of religious beliefs as required by Title VII of the 1964 U.S. Civil Rights Act as amended. Without addressing the constitutionality of any of the various possible alternatives, such as unpaid leave or leave with charge to accruals, we conclude only that paid leave from work upon request conditioned exclusively upon participation in religious activity is unconstitutional under Griffin. The District's practice, therefore, is not mandatorily negotiable and the rescission of that practice did not violate the Act.

For the reasons set forth above, the District's exceptions are granted and the ALJ's decision is reversed.

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

DATED: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MIDDLE MANAGEMENT ASSOCIATION OF THE SCHENECTADY CITY SCHOOL DISTRICT,

Petitioner,

-and-

CASE NO. CP-349

CITY SCHOOL DISTRICT OF THE CITY OF SCHENECTADY,

Employer.

DECATALDO and DECATALDO (ROBERT T. DECATALDO of counsel), for Petitioner

MCCARY & HUFF, LLP (KATHYRN MCCARY of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the Middle Management Association of the Schenectady City School District (MMA) and the City School District of the City of Schenectady (District) to a decision by an Administrative Law Judge (ALJ) as adopted and confirmed by the Director of Public Employment Practices and Representation (Director).[1/] MMA filed a petition seeking to place the following positions into its existing unit: Development Officer; Architect; Personnel Assistant; and Clerk of the Works (Clerk).

[1/]The decision was issued by both the ALJ and the Director in response to a decision by Supreme Court in Union-Endicott Cent. Sch. Dist. v. PERB, 29 PERB ¶7004 (Sup. Ct. Alb. Co. March 1996)(appeal pending). In relevant part, the Court held that a decision in a representation case must be made by the person who conducted the hearing, in this case the ALJ.

The petition was dismissed as to all but the Clerk, which was placed into MMA's unit.

MMA excepts only to the dismissal of the petition as to the Development Officer. Specifically, MMA argues that the Development Officer is not a confidential employee as held. The District cross-excepts only to the placement of the Clerk into MMA's unit. The District argues that the Clerk does not share a community of interest with employees in MMA's unit.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ/Director decision.

MMA argues in part that the ALJ/Director erred in excluding the Development Officer from its unit because there is another similar title currently included in a different unit in the District. The inclusion in a different unit of an arguably confidential title with duties arguably similar to those of the Development Officer is not dispositive of this unit placement petition because that position, and the appropriateness of its unit placement, are not before us. The appropriateness of a placement of the Development Officer into MMA's unit must be decided on its own merits. If the Development Officer is confidential, as the ALJ/Director found, its placement into MMA's unit is inappropriate as a matter of law because the incumbent of such title is ineligible for representation without regard to the placement of other titles.

The basis for the ALJ's/Director's finding that the Development Officer is confidential is that the incumbent is

occasionally given information regarding staffing plans, staffing reductions or other work force changes before that information is shared with employees, their union representatives, or the public generally.

The Development Officer's basic job is to obtain grant money to support District programs and staff. The Development Officer is given the information which the ALJ/Director determined made the Development Officer position confidential because grant applications can impact the District's staffing decisions and vice versa.

Confidential employees are defined in the Act as those "who assist and act in a confidential capacity" to managerial employees who have responsibility for the employer's labor negotiations, contract or personnel administration. We have previously held that persons whose duties make them privy to contemplated reductions in staffing or other personnel changes are confidential employees.[2/] According to the unrebutted testimony, the Development Officer is exposed to personnel information as part of the grant application process, which often calls for commitments of personnel for various periods of time. Knowledge of short-term and long-term personnel deployment plans is, accordingly, part of the information needed to perform the Development Officer's job.

[2/]Board of Educ. of the City Sch. Dist. of the City of New York, 18 PERB ¶3025 (1985)(staff reductions); City of White Plains, 14 PERB ¶3052, aff'g 14 PERB ¶4024 (1981)(promotions, transfers, layoffs and other personnel movements).

If the information given to the Development Officer was merely of personnel decisions already made and which were certain to go into effect, then the Development Officer's simple receipt of that information before others who might be interested in it might not warrant exclusion from MMA's unit. The nature of that information in that circumstance, with or without identifying particulars, is not necessarily confidential in any relevant respect. The record fairly discloses, however, that the Development Officer has information shared with her by the District's Superintendent about contemplated or potential staffing and personnel decisions and changes. It is the Development Officer's exposure to information pertaining to these nonfinal staffing issues which warrants the ALJ's/Director's confidential determination and the Development Officer's continuing exclusion from MMA's unit.

In placing the Clerk into MMA's unit, the ALJ/Director relied upon a similarity in salary, the Clerk's independence in working during the day, and a job content similar in certain respects to others in MMA's unit. The inability of the Clerk to bind the District to obligations in the course of his employment and the absence of supervisory authority over others were held not controlling because others in MMA's unit do not have these powers or responsibilities.

The MMA unit includes employees who oversee and manage support operations for major District programs such as transportation, data processing, buildings and grounds,

accounting, electronics and audio/visual, and purchasing. All, however, have primary responsibility for a major program area. Similar to other MMA unit positions, the Clerk, reporting to the Architect, a title which the ALJ/Director excluded from MMA's unit, oversees the District's capital construction projects.

The titles included in MMA's units are as varied as their employment conditions. Although the Clerk's position is dissimilar in certain ways to others in MMA's unit, this is not unexpected given the variety of job titles which are in MMA's unit. These dissimilarities, most markedly in respect to the degree of authority exercised over others, are unlikely, however, to produce any conflicts in contract negotiation or administration for they are unlikely to be subjects for negotiation. Although the Clerk's salary is admittedly at the low end of the broad salary range for this unit, it is approximately the same as that of another unit employee and not substantially different from at least one other unit employee. Moreover, the Clerk and one other unit employee report directly to the Architect, with whom they regularly consult regarding their job duties. At least one other unit employee has no supervisory responsibility over other District employees.

In summary, as the ALJ/Director found, there is demonstrated a community of interest between the Clerk and others in MMA's unit arising out of similar program responsibilities, shared supervision by management personnel, a not dissimilar salary relationship, and common methods and conditions of job

performance. These provide a basis sufficient to place the Clerk into MMA's unit.

For the reasons set forth above, the ALJ/Director decision and order is affirmed and the exceptions and cross-exceptions are denied.

IT IS, THEREFORE, ORDERED that the Clerk of the Works is hereby placed into MMA's unit and that the petition must be, and it hereby is, dismissed in all other respects.

DATED: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, ERIE COUNTY LOCAL 815, ERIE COUNTY WHITE COLLAR EMPLOYEES,

Charging Party,

-and-

CASE NO. U-16452

COUNTY OF ERIE,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK of counsel), for Charging Party

MICHAEL A. CONNORS, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Erie County Local 815, Erie County White Collar Employees (CSEA) to a decision by an Administrative Law Judge (ALJ). CSEA's charge alleges that the County of Erie (County) violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it subcontracted for the provision of medical services for residents of the Erie County Home and Infirmary (Home) with University Medical Services (UMS), a professional corporation offering medical services through the Erie County Medical Center

(ECMC).[1] After a hearing, the Administrative Law Judge (ALJ) dismissed the charge upon an application of the test articulated in Niagara Frontier Transportation Authority[2] (hereafter Niagara Frontier). The ALJ determined that although the work in issue had been exclusively bargaining unit work and the tasks performed (i.e., provision of medical services at the Home) were substantially similar, the County had changed the qualifications of the treating medical personnel and had thereby and otherwise substantially changed the health care delivered to the Home's residents. The ALJ concluded that the County's interests in determining the type and level of health care for the Home's residents outweighed those of the Association, despite the loss of seven unit positions and the layoff of five unit physicians.

CSEA argues in its exceptions that the ALJ misapplied Niagara Frontier either because its balancing test should not have been invoked or because the balance was struck inappropriately. The District argues in response that the ALJ's decision is correct on the facts and law and should be affirmed.

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[1]The contract between the County Home and ECMC may not be one properly characterized as a subcontract because both the Home and ECMC are departments of the County. The services in dispute, however, are rendered by physicians of UMS, a separate corporate entity, under UMS' agreement with ECMC. Although the exact status of the UMS physicians is unclear, the parties stipulated that they are nonunit employees in their capacity as UMS service providers to the County. Whether directly or indirectly, by subcontract or otherwise, the County has transferred work from CSEA's unit to nonunit personnel, and we have analyzed the case accordingly.

[2]18 PERB ¶3083 (1985).

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision.

The Home is a long-term nursing care facility. Of its approximately 640 residents, 80% are over the age of 65. The other residents suffer from a variety of medical illnesses such as multiple sclerosis or from trauma-related conditions.

Before subcontracting the medical care, the County treated the Home's elderly and infirm residents through full-time and regular part-time staff physicians. These unit physicians were assigned a specific group of patients and they were present, for at least a few hours, each weekday. Weekends were covered by one of the regular part-time physicians. The staff physicians did not have certification in any specialty and they did not have admitting privileges at ECMC, where the Home's residents receive medical care either on an in-patient or out-patient basis as necessary.

Commencing January 1, 1995, medical care for the Home's residents has been provided by UMS with physicians from an acute geriatrics medical services group. Four of the five physicians in this group who provide services to the County are certified gerontologists who have admitting privileges at ECMC; the fifth physician is an internist who treats patients at the Home, but not at ECMC. Each of the physicians is permanently assigned specific patients at the Home. One physician is scheduled to be at the Home each weekday; the others are always on call. A full-

time nurse practitioner is provided at the Home forty hours per week on a two-week rotation from ECMC.

In subcontracting for medical services, the County decided that care for the Home's residents would be or might be improved under a medical delivery system which used a group of physicians and allied professionals with specialized training and which helped to ensure, through the physicians' admitting privileges at ECMC, continuity of care for patients both in residence and, when necessary, at ECMC.[3/] Having concluded that the County changed qualifications with respect to medical specialty and hospital admitting privileges by its decision to subcontract, the ALJ properly reached the balancing of interests under Niagara Frontier, and we agree that the ALJ reached the correct balance in this case.

Health care for the elderly and infirm, as the ALJ correctly recognized, is central to the County's mission. It is at least as much mission-related as the concern articulated by the employer in West Hempstead Union Free School District[4/] for student safety and protection of property, which exempted the employer from a duty to negotiate the decision to substitute teachers for teacher aides to provide cafeteria supervision, notwithstanding that the teacher aides thereby lost their jobs.

[3/]Patients from the Home are treated by their assigned physician when hospitalized approximately 60% of the time, and the balance of hospital cases are treated by another member of the geriatric services group.

[4/]14 PERB ¶3096 (1981).

In this case, in addition to a significant change in the qualifications required of the treating physicians (i.e., from nonspecialty to medical Board-certified gerontology specialty), the County has restructured its medical delivery system between Home and hospital by contracting for services to be rendered by physicians possessing admitting privileges at ECMC, where the Home's residents are treated, privileges which the unit physicians did not have.

In assessing the negotiability of the County's decision, the issue is not whether the care provided to the Home's residents is in fact better than before the subcontract, as the County alleges, or whether it is unchanged or worse than before, as CSEA alleges.[5/] Under this proposed analysis, we would be required to decide whether the Home's health care was in fact improved under the subcontract and find the County in violation of the Act if it was not. The Board has never undertaken such a role in deciding whether an employer has violated its duty to negotiate with respect to any subject. The very reason certain decisions embrace managerial prerogatives is because those decisions are for management to make whether or not they are ultimately proven to have been correct or wise. Our inquiry is only as to whether

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[5/]The record shows that, after contracting with UMS, hospital admissions of the Home's residents decreased as did the number of visits to ECMC for out-patient clinical services and the length of stay in hospital. Although not disputing the statistics, CSEA argues that they do not necessarily evidence an improved quality of care, rather medical conditions which might be going unobserved.

the County's action constitutes the exercise of a managerial right.

Here, the County exercised its prerogative to determine the qualifications of the physicians treating its elderly and infirm by requiring a medical specialty of them. It exercised its right to determine the type and level of medical service it would offer by requiring that treating physicians at the Home have admitting privileges at ECMC for the purpose of providing the Home's residents a large measure of continuous care previously lacking. Having made those determinations, the balance of competing interests must weigh in the County's favor in the circumstances of this case, notwithstanding the loss of unit positions and employees. The ALJ's credibility determination that the economic savings generated by the elimination of unit positions and staff were only a secondary factor in the County's decision to subcontract lends further support to what is already a compelling argument favoring a balance of interest in the County's favor.

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

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

DATED: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEWBURGH FIREFIGHTERS ASSOCIATION, LOCAL 589, IAFF,

Charging Party,

-and-

CASE NO. U-15449

CITY OF NEWBURGH,

Respondent,

-and-

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

Intervenor.

THOMAS F. DE SOYE, ESQ., for Charging Party

HITSMAN, HOFFMAN & O'REILLY, ESQS. (ALISON FAIRBANKS of counsel), for Respondent

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the Newburgh Firefighters Association, Local 589, IAFF (Association), the City of Newburgh (City) and the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), to a decision by an Administrative Law Judge (ALJ). The Association's charge, as amended, alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred fire

dispatching duties previously performed by the fire fighters in the Association's unit to civilians who are in CSEA's unit. After a hearing, the ALJ dismissed the Association's charge. The ALJ held that the unit work was fire dispatching, not dispatching of emergency services generally, and that the Association had exclusivity over that work. Relying upon our decision in State of New York (DOCS),[1] and our three "civilianization" cases,[2] the ALJ also concluded that the substitution of fire dispatchers in CSEA's unit for the fire fighters in the Association's unit represented a per se change in job qualifications, triggering the balancing of interests under our decision in Niagara Frontier Transportation Authority.[3] Finding that the City's interests in redeploying the fire fighters to professional fire-fighting duties clearly outweighed the interests of the Association and the fire fighters, the ALJ held that the City had not violated the Act by using CSEA's fire dispatchers for fire dispatching.

The Association argues in its exceptions that the ALJ misapplied the several decisions previously referenced. It argues that our decisions require an employer which has civilianized its uniformed services to plead and prove that it affirmatively determined certain qualifications were not needed

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[1]/27 PERB ¶3055 (1994), aff'd, ___ A.D.2d ___, 29 PERB ¶7008 (3d Dep't 1996).

[2]/City of New Rochelle, 13 PERB ¶3045 (1980); City of Albany, 13 PERB ¶3011 (1980); County of Suffolk, 12 PERB ¶3123 (1979).

[3]/18 PERB ¶3083 (1985).

to perform the work which it transferred and that the transfer of that work was based primarily, or at least in part, upon that determination. It argues also that the ALJ erred in holding that a change in job qualifications is, per se, a change in services. According to the Association, our existing precedent requires an employer to prove factually a change in the services offered with respect to the work which has been transferred from the charging party's negotiating unit. In this case, the Association argues that fire dispatching duties were not changed at all in conjunction with the transfer of those duties to fire dispatchers in CSEA's unit. The Association also disputes the ALJ's finding that the detrimental effects of the transfer upon it and its unit employees were de minimis.

In its cross-exceptions, the City argues that the ALJ erred in concluding that the unit work is fire dispatching and that the Association has exclusivity over that work. The City also argues that the ALJ erred in ruling that the Association's unit composition and its membership policies are irrelevant to any required balancing of interests, in failing to find that the Association's agreement to a management rights clause waived any further right it had to negotiate transfers of work from its unit, and in not accepting evidence regarding police dispatching and certain of the benefits it allegedly derived from the transfer of fire dispatching to the fire dispatchers in CSEA's unit.

In its cross-exceptions, CSEA, like the City, argues that the Association's refusal to admit civilian employees to membership in its unit disqualifies it from representing civilian dispatchers.

Both the City and CSEA argue in the responses they filed to the Association's exceptions that the ALJ correctly applied existing precedent and that the Association's charge was properly dismissed.

For the reasons set forth below, we affirm the ALJ's dismissal of the charge, but we do so primarily on the ground that the Association did not on the facts of this case have exclusivity over fire dispatching.

For many years, CSEA and the City have been parties to collective bargaining agreements in which CSEA is specifically recognized as the bargaining agent for the title of fire dispatcher. The Association does not represent the title of fire dispatcher. The fire fighters' job description does not reference dispatching duties. The qualifications for a fire fighter are admittedly much higher than those for a fire dispatcher.

From the early 1960s until the mid to later 1970s, fire dispatching in the City was done by fire dispatchers in CSEA's unit and by disabled fire fighters who were assigned dispatching as light duty under §209-a of the General Municipal Law. The City stopped employing fire dispatchers some time during the term of the CSEA-City contract covering 1973 through 1976.

Thereafter, the City assigned all fire dispatching duties to fire fighters in the Association's unit, apparently without objection from CSEA or the Association. The City did not, however, abolish the fire dispatcher position and CSEA and the City always retained that title within CSEA's unit. The City did not again employ a person in the title of fire dispatcher until January 1994, when it hired four employees into that title. It was that event which led to this charge being filed.

Although only fire fighters have done fire dispatching for approximately eighteen years, we do not consider the Association to have acquired exclusivity over all fire dispatching under all circumstances due to the special circumstances present in this case. CSEA unit dispatchers had always done fire dispatching whenever there was an incumbent in the title of fire dispatcher. In that circumstance, fire fighters were only assigned the work as light duty, not as a part of their regular assignments. To find the City in violation of the Act by hiring fire dispatchers to fill an existing unit position and giving them the work of that position would mean that the unit title which CSEA and the City have maintained within CSEA's unit for many years would be effectively removed from CSEA's unit. CSEA would retain a paper claim to the position, but the City could not realistically hire anyone into that position because it could not assign any dispatching work to the incumbents of that position without risking the very type of charge the Association has filed against it.

When the City again employed persons in the title of fire dispatcher, dispatching once again became work which could be assigned to the employees in CSEA's unit without violating the Association's bargaining rights. The Association simply never has had exclusivity over fire dispatching when there has been a civilian dispatcher employed. Therefore, by again hiring fire dispatchers and assigning them the work required of that position, the City did not violate any bargaining duty owed to the Association.[4/]

For the reasons set forth above, we grant the City's cross-exception to the extent it claims that the ALJ erred by holding that the Association had exclusivity over all fire dispatching. Our dismissal of the charge on this ground makes it unnecessary to consider any of the parties' other arguments, exceptions or cross-exceptions. We note, however, that our decision this date in Fairview Fire District,[5/] which we incorporate herein by reference, is dispositive of the Association's other exceptions and would itself require affirmance of the ALJ's decision in this case.

[4/]We are not called upon and do not decide whether CSEA has exclusivity over all fire dispatching so long as the City employs a civilian dispatcher. Whether the City's assignment of a fire fighter to dispatch duty would violate CSEA's bargaining rights is simply not before us. Similarly, we do not decide whether the Association could object to an assignment of fire dispatching to persons other than fire fighters under any circumstances different from those presented here.

[5/]29 PERB ¶3042 (1996).

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

DATED: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ONONDAGA COUNTY SHERIFFS POLICE ASSOCIATION,

Charging Party,

-and-

CASE NO. U-16853

COUNTY OF ONONDAGA and SHERIFF OF THE COUNTY OF ONONDAGA,

Respondents.

MACKAY, CASWELL & CALLAHAN, P.C. (WILLIAM F. BAKER of counsel), for Charging Party

JON A. GERBER, COUNTY ATTORNEY (LAWRENCE R. WILLIAMS of counsel), for Respondents

BOARD DECISION AND ORDER

This case comes to us on exceptions and cross-exceptions filed, respectively, by the Onondaga County Sheriffs Police Association (Association) and the County of Onondaga and the Sheriff of the County of Onondaga (County) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing the Association's charge that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when work from the Association's unit was assigned to an employee in a different unit represented by the Deputy Sheriffs Benevolent Association (DSBA).

The parties submitted the matter to the Director for decision on a stipulated record. Pursuant to that stipulation

the Director found that until April 1, 1994, all Sheriff's Department employees, including those in the police division and the custody division, were represented in one unit by the DSBA. On April 1, 1994, the Association became the exclusive bargaining agent for a unit consisting of only the employees of the police division.[1/] The DSBA continued as the representative of the employees in the custody division.[2/] At all times thereafter, the 1992-95 collective bargaining agreement as negotiated by the DSBA and the County remained in effect and was made applicable to both units. That agreement contains the following management rights clause:

> Article IV
> County Management
>
> The Association agrees that the County of Onondaga and/or the County Legislature and the Sheriff, hereinafter known as the Employer, shall retain complete authority for the policies and administration of all County departments, offices or agencies which it exercises under the provisions of law and the Constitution of the State of New York and/or the United States of America and in fulfilling its rights and responsibilities under this agreement. Any matter involving the management of governmental operations vested by law in the Sheriff and not covered by this agreement is in the province of the Sheriff.

[1/]Those titles include deputy sheriff patrol, deputy sheriff sergeant and deputy sheriff lieutenant.

[2/]The titles represented by DSBA include, as here relevant, deputy sheriff jail, deputy sheriff sergeant jail and deputy sheriff lieutenant jail.

> The rights and responsibilities of the employer include, but are not necessarily limited to the following: (1) to determine the standards of service to be offered by its offices, agencies and departments; (2) to direct, hire, promote, appraise, transfer, assign, retain employees and to suspend, demote, discharge or take disciplinary action against employees; (3) to relieve employees from duties because of lack of work or for other legitimate reasons; (4) to maintain the efficiency of government operations entrusted to them; (5) to determine the methods, means and personnel by which such operations are to be conducted; (6) to take whatever actions may be necessary to carry out the mission, policies or purpose of the department, office or agency concerned; (7) to establish any reasonable rules or regulations; (8) to establish specifications for each class of positions and to classify or reclassify and to allocate or reallocate new or existing positions.
>
> The Association further agrees that the provisions of this Article are not subject to grievance procedures as set forth herein unless in the exercise of said rights and responsibilities the employer has violated a specific term or regulations of this agreement. (emphasis added)

The County had always assigned certain duties characterized as the duties of the "Fleet Manager" to a member of the overall unit.[3/] At the time the Association became the bargaining agent for the employees in the police division the Fleet Manager duties were performed by a deputy sheriff in the police division. That individual continued to perform the duties until March 13, 1995, when the duties were reassigned by the Sheriff to a deputy sheriff jail, a title in the remainder of the former unit which continued to be represented by DSBA.

[3/]Fleet Manager is not a job title in either the original unit or in the two units created therefrom.

The Director held that the Association had established exclusivity over the Fleet Manager duties.[4/] However, he dismissed the charge upon finding a waiver of any right of the Association to negotiate transfers of work to any personnel within the Sheriff's department in either its unit or DSBA's unit, based on the language of the management rights clause in Article IV of the 1992-95 agreement.

The Association excepts to the Director's finding of a waiver. The County supports the Director's dismissal of the charge and his finding of waiver, but cross-excepts to the Director's finding that the Fleet Manager duties were exclusive to the Association's unit and his failure to find that the Sheriff could assign work not only to any personnel in the Sheriff's Department, but also to any other County employees or to the employees of a private contractor.

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

[4/]The stipulation is not clear on this point. It provides that the Fleet Manager duties were performed by a deputy in the police division prior to the appointment of a deputy sheriff jail on March 13, 1995. It also provides that prior to the fragmentation of the overall unit represented by DSBA, the Fleet Manager duties had been performed by members of that unit. The Association argues, and the Director so held, that the deputies in the police division had historically performed the Fleet Manager duties, even when they were in the former unit represented by DSBA. The County argues that since the duties were performed by any member of the former unit, the fact that a deputy sheriff in the police division was performing the duties at the time of the fragmentation and continued to perform those duties for some months thereafter does not establish exclusivity. Because of our ultimate finding, we need not reach this issue.

It is clear from the language of Article IV (5) that the County has, at least, reserved the right to assign duties performed by employees in the job titles in the overall unit to any of the job titles that were in the unit at the time the management rights clause was negotiated. Indeed, the Association concedes that the contract language would have enabled the County to assign to any member of the former, overall, unit the Fleet Manager duties if that unit had continued unchanged. The split of that unit, however, is immaterial to the nature and extent of the County's retained management rights. These rights did not change when the unit was divided. To the contrary, the contract was specifically carried over unchanged and made applicable to both units.

Our decision finding that the County did not violate the Act by assigning the Fleet Manager duties to a deputy sheriff jail makes it unnecessary to reach the cross-exceptions.

Based upon the foregoing, the Association's exceptions are denied and the decision of the Director is affirmed.

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

DATED: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

EAST HAMPTON POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-15844

TOWN OF EAST HAMPTON,

Respondent,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 862, EAST HAMPTON TOWN UNIT,

Intervenor.

SCHLACHTER & MAURO (REYNOLD MAURO of counsel), for Charging Party

VINCENT TOOMEY, ESQ. and CHRISTINE GAETA, ESQ., for Respondent

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the East Hampton Police Benevolent Association (PBA) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the Town of East Hampton (Town) violated §209-a.1(c), (d) and (e) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred exclusive bargaining unit work[1/] to

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[1/]As amended, PBA's charge alleges that the Town transferred the issuance of summonses and tickets in the beach parking area, patrolling the Town beaches and responding to both vehicle and traffic and domestic violence incidents.

harbor masters and bay constables, who are represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 852, East Hampton Town Unit (CSEA).

The ALJ held that the in-issue work had not been exclusively performed by employees represented by the PBA. The PBA excepts to the ALJ's decision, arguing that it is not supported by the record. Both the Town and CSEA support the ALJ's decision.

Having reviewed the record and considered the parties' arguments, we affirm the decision of the ALJ.

The PBA is the exclusive bargaining agent for a unit of all police officers, detectives, sergeants, detective sergeants, lieutenants, radio dispatchers and captains employed by the Town. The police officers have many duties, including patrolling the Town, issuing tickets and summonses and responding to calls for assistance in vehicle and traffic and domestic violence incidents.

The ALJ found that, prior to 1989, the Town maintained a marine division as part of its Police Department.[2/] The marine division was abolished in 1989, and a new Department of Harbors and Docks was created and the harbor masters and bay constables were placed within that department. The harbor masters were

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[2/]The PBA excepts to the ALJ's finding that the marine division was abolished pursuant to a compulsory interest arbitration award. That division was abolished while the PBA and the Town were engaged in contract negotiations. Reference to the division was thereafter removed from the PBA-Town contract by virtue of the arbitration award. The means by which the abolition was effected is not material to the decision in this case.

responsible for the orderly flow of harbor traffic and bay constables patrolled the Town's waterways, enforcing federal, state and local regulations governing game fish and shellfish. Crediting the testimony of William Taylor, a senior harbor master, and Todd Sarris, a captain in the Police Department,[3/] the ALJ found that since 1989, the patrolling of Town beaches, which had always been a job duty of the bay constables, was also assigned to the harbor masters. Beach patrol also includes the duties of ensuring that vehicles which are operating on the beach are doing so properly, enforcing all ordinances relating to the beaches, and issuing tickets for violations.

The ALJ also found that, between Memorial Day and Labor Day, the Town employs Traffic Control Officers (TCOs) who are responsible, as here relevant, for issuing summonses in beach parking areas. These employees are characterized as seasonal employees and are unrepresented. Since 1989, the Town has also employed both part-time and seasonal police officers who have issued summonses in beach parking areas.

Finally, the ALJ found that there was no evidence that the Town ever dispatched the harbor masters or bay constables to

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[3/]There is nothing in the record to support the PBA's assertion that the ALJ erred in crediting the testimony of these two witnesses, which is largely unrebutted.

respond to vehicle and traffic incidents or domestic violence incidents.[4/]

As we made clear in Niagara Frontier Transportation Authority[5/], there is a duty to negotiate a transfer of work if that work has been performed exclusively by employees in the charging party's bargaining unit, the tasks as reassigned are substantially similar to those performed by unit employees before the transfer and there has not been a significant change in qualifications. Here, the record makes clear that beach patrol and the issuance of summonses and tickets in beach parking areas is not and has not been the exclusive work of employees in the PBA's unit. TCOs, bay constables and harbor masters[6/] have performed these duties in an open and ongoing manner since at least 1991 and, in some instances, since 1989. The PBA's

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[4/]On one occasion, a harbor master pursued a vehicle off the beach to issue a ticket and on another occasion, the senior harbor master responded to a police officer's call for assistance in a domestic violence incident when he became aware that no other back-up was available.

[5/]18 PERB ¶3083 (1985).

[6/]While the PBA alleges in its exceptions that the part-time police officers, who also performed some of the duties in issue, are unit employees, no evidence was introduced by the PBA in support of this claim. Further, the ALJ did not reach the question of their unit inclusion because he found that TCOs, bay constables and harbor masters had issued tickets and summonses in beach parking areas for some time prior to the filing of the charge and that this was sufficient to deny the PBA exclusivity over the work in issue. We, therefore, do not address the inclusion of the part-time and seasonal police officers in the PBA's unit.

assertion that it was unaware of some of these assignments does not warrant a contrary conclusion. As we have previously held:

> To hold that a union's ignorance of an employer's open assignment of nonunit personnel to work also done by unit personnel establishes or maintains the union's exclusivity over the work would be inconsistent with the approach we have taken in cases involving the transfer of unit work.[7/]

The allegation that the Town had improperly reassigned response to vehicle and traffic incidents and domestic violence incidents to the harbor masters and bay constables was dismissed by the ALJ because there was no evidence in support of the allegation that such reassignments have taken place. In affirming that finding, we do not decide whether such reassignments, if made, would violate the Act.

Based on the foregoing, the PBA'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: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[7/] State of New York (Div. of Military and Naval Affairs), 27 PERB ¶3027, at 3067-68 (1994).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Charging Party,

-and-

CASE NO. U-15718

TOWN OF LLOYD,

Respondent.

THOMAS P. HALLEY, ESQ., for Charging Party

DI STASI and MORIELLO, P.C. (LEWIS C. DI STASI and SEAN MURPHY of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United Federation of Police Officers, Inc. (Federation) to a decision of an Administrative Law Judge (ALJ) dismissing its charge that the Town of Lloyd (Town) violated §209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred the investigation of serious motor vehicle and/or industrial accidents from Town police officers represented by the Federation to the New York State Police (State Police).

The ALJ determined that the investigation of such cases had never been the exclusive work of employees of the Town of Lloyd Police Department and he, therefore, dismissed the charge. The Federation excepts to the ALJ's factual and legal conclusions. The Town supports the ALJ's decision.

After reviewing the record and considering the parties' arguments, we affirm the decision of the ALJ.

On May 25, 1994, the Town Chief of Police issued a memorandum to all police officers and dispatchers directing that all accidents involving either an immediate or potential fatality be turned over to the State Police. Town police were further directed to provide assistance and support to the State Police. The instant charge followed after the Town failed to respond to the Federation's demand to rescind the memorandum and negotiate any transfer of bargaining unit work.

The ALJ found, based upon the uncontroverted testimony offered by both the Federation and the Town[1/], that for at least twenty-five years, Town police officers, Ulster County deputy sheriffs and members of the State Police have responded to accident or crime scenes interchangeably, depending on which agency was called or happened upon the scene.[2/] Even when the Town police officers were first on the scene of an accident or crime, the Town frequently requested the State Police to take over the investigation. The Town's practice was to have the police officer on the scene call a supervisor who would notify the officer in charge. That officer would then determine, based

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[1/]The Federation called as its only witness George Rebhan, the Chief of Police since January 1, 1994. The Town's only witness was Gary Gaetano, who, as a lieutenant, was the officer in charge from January 1992 to June 1993.

[2/]The Town instituted a 911 system, which directs calls to any of these three police agencies, at some time before the Chief's May 25 memorandum.

on staffing, resources and the seriousness of the incident, whether to hand the matter over to the State Police.

An employer violates the Act when it unilaterally transfers work which has been performed exclusively by bargaining unit members, where the tasks reassigned are substantially similar to those performed by the unit and there has been no change in qualifications.[3/] The record in this case makes clear that response to and further handling of accidents within the Town was never the exclusive work of the police officers represented by the Federation, but rather was determined initially by which officers - police officers, deputy sheriffs or members of the State Police - arrived at the scene first. Even when the Town's police officers were the first to respond, a determination was then made by the Town as to whether the State Police would be called in to handle the case.

The Federation argues in its exceptions that a discernible boundary may be drawn around the exercise of discretion by the police department to determine whether a case would be turned over to the State Police and that the Chief's memo unilaterally removed that discretion from police officers and their supervisors.[4/] The record, however, supports the ALJ's determination that the decision to assign a case to other than the Town's police officers was made by the officer in charge or

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[3/]Niagara Frontier Transp. Auth., 18 PERB ¶3083 (1985).

[4/]See City of Rochester, 21 PERB ¶3040 (1988), conf'd, 155 A.D.2d 1003, 22 PERB ¶7035 (4th Dep't 1989).

the Chief of Police. To the extent that any discretion to turn cases over to the State Police rested in the Town's police department, that discretion was usually exercised by the management of the department, certainly not exclusively by unit members. Accordingly, the ALJ correctly found that the work of investigating fatal or potentially fatal accidents was not exclusively unit work, and that the decisions concerning such jurisdiction were not exclusively within the control of the unit.[5/]

Based upon the foregoing, the Federation'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: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[5/]Cf. Bd. of Educ. of the City Sch. Dist. of the City of Long Beach, 26 PERB ¶3065 (1993).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, NEW YORK COUNCIL 66 and its affiliated AFSCME LOCAL 1095, ERIE COUNTY BLUE COLLAR EMPLOYEES UNION,

Charging Party,

-and-

CASE NO. U-15902

COUNTY OF ERIE,

Respondent.

JOEL POCH, ESQ., for Charging Party

MICHAEL A. CONNERS, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the American Federation of State, County and Municipal Employees, New York Council 66 and its affiliated AFSCME Local 1095, Erie County Blue Collar Employees Union (AFSCME) to a decision of an Administrative Law Judge (ALJ) dismissing its charge alleging that the County of Erie (County) violated §209-a.1(a), (d) and (e) of the Public Employees' Fair Employment Act (Act) when it unilaterally subcontracted cable pulling,[1/] which was exclusive bargaining unit work.

[1/]Cable pulling is the process of running cable through conduits in the floors of County buildings, without installing the cable at either end. The conduits are designed to hold cable, electrical wire, or telephone lines, separately or together.

The ALJ found that, in August 1994, the County contracted with GTE to install, pull and connect cables in two County buildings in downtown Buffalo as part of the County's program for replacement of its computer systems, the largest such project undertaken by the County in twenty-five years. In January 1995, the County contracted with FASPAK, another private contractor, to perform similar work. AFSCME represents County employees in the titles of telephone technician, building maintenance mechanic - electrician, and assistant supervisor maintenance mechanic - electrician who have, in the past, pulled cable used for voice and data operations within the County buildings. The ALJ determined that the work in issue was not exclusive to the unit represented by AFSCME, finding that pulling of cable for voice and data transmission had previously been performed by both non-unit employees of the County and by private contractors. As AFSCME had failed to establish exclusivity over the work in-issue, the ALJ dismissed the charge.

AFSCME argues in its exceptions that the ALJ's decision rests erroneously on a theory of implied waiver of exclusivity and that the ALJ erred both in determining the boundaries of the unit work and in his analysis of the facts of the case. The County supports the ALJ's decision.

Having reviewed the record and considered the parties' arguments, we affirm the decision of the ALJ.

AFSCME's case hinges on distinguishing the cable pulling done by unit employees from that done by nonunit employees and private

contractors. While AFSCME alleged that pulling Level 3 cable for hookup to computers was exclusive bargaining unit work,[2/] the record clearly establishes, and the ALJ so found, that other County employees and private contractors have regularly pulled Level 3 cable in County facilities, for both voice and data transmission. AFSCME sought to establish a discernible boundary exclusively encompassing bargaining unit work by asserting that unit employees have exclusively pulled Level 3 cable for computer hookup.[3/] The ALJ found that no discernible boundary could be drawn around the pulling of Level 3 cable for computers and the pulling of Level 3 cable for other purposes. As the record clearly establishes, the point of hookup has no impact at all on the cable-pulling operation. Indeed, AFSCME witnesses testified that they simply run the cable through conduits from one point to another. They play no role in the hookup of the cable, whether to computers, telephones or other devices. Level 3 cable has been pulled by nonunit employees and outside contractors on numerous occasions and for a variety of purposes, including computer hookup. Therefore, no discernible boundary can be drawn

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[2/]Level 3 is the standard that defines cable performance to support network, data and voice applications.

[3/]AFSCME concurred with the ALJ's description of the charge at the hearing as alleging only "that pulling cable three wire for the purpose of connection to computers was exclusive bargaining unit work".

around the pulling of cable for computer hookup.[4] The work performed by unit employees is the same as work performed by other, nonunit County employees and outside contractors. AFSCME has failed to establish the exclusivity necessary to determine that the County's use of outside contractors violated the Act.

AFSCME further asserts that it did not waive exclusivity because it was unaware of some of the instances in the past when the County utilized nonunit employees or private contractors to pull cable. The issue in this context is not a waiver of exclusivity but rather whether AFSCME had exclusivity in fact over the work at the time of the alleged transfer. As we noted in State of New York (Division of Military and Naval Affairs)[5],

> To hold that a union's ignorance of an employer's open assignment of nonunit personnel to work also done by unit personnel establishes or maintains the union's exclusivity over that work would be inconsistent with the approach we have taken in cases involving the transfer of unit work. It would test exclusivity over unit work only by the extent of the union's knowledge of assignments, forcing repeated inquiries into and determinations about the reasonableness of the union's ignorance. An employer's utilization of nonunit personnel in fact would be irrelevant, except as it bore upon the reasonableness of the union's asserted unawareness of that utilization. This would effectively remove from the union any burden to establish exclusivity in fact over the work and shift to an employer a burden to rebut the union's claim that it did not know and could not have known that nonunit

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[4]See Union-Endicott Cent. Sch. Dist., 26 PERB ¶3075 (1993) where we rejected a definition of unit work similar to the definition urged by AFSCME in this case.

[5]27 PERB ¶3027, at 3067-68 (1994).

> personnel were being used to do work over which the union claims exclusivity. Were we to focus on a union's knowledge of employee utilization to establish exclusivity, we would effectively alter the respective burdens of proof in transfer of work cases and, thereby, distort the balance of competing rights and interests we struck in Niagara Frontier Transportation Authority. [18 PERB ¶3083 (1985)] We believe that the standards we established in Niagara Frontier Transportation Authority reasonably protect the rights and interests of unions and employers alike and promote the purposes and policies of the Act.

AFSCME concedes that it was aware of at least some of the instances in which the County openly utilized nonunit employees or private contractors to pull cable. With that concession, AFSCME does not have exclusivity in fact over the at-issue work. Lacking exclusivity, AFSCME cannot prevail in its charge that the County violated the Act when it assigned pulling of Level 3 cable to outside contractors.

Based on the foregoing, the 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: July 31, 1996
Albany, New York

Pauline R. Kinsella

Pauline R. Kinsella, Chairperson

Eric J. Schmertz

Eric J. Schmertz, 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-4418**

VILLAGE OF ATLANTIC BEACH,

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

Unit: Included: All full-time and part-time workers of the Department of Public Works.

Excluded: The Superintendent of Public Works and all other 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: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF EAST FISHKILL POLICE BENEVOLENT ASSOCIATION, INC.,

Petitioner,

-and-

CASE NO. C-4536

TOWN OF EAST FISHKILL,

Employer,

-and-

NEW YORK STATE FEDERATION OF POLICE, INC.,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Town of East Fishkill Police Benevolent Association, Inc. 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.

Unit: Included: All full-time and part-time police officers, including patrolmen, detective, sergeant, lieutenant and detective lieutenant.

Excluded: Chief of Police.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Town of East Fishkill Police Benevolent Association, 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: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, 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-

NATIONAL EDUCATION ASSOCIATION/NEW YORK,

Case Nos. C-4547 and C-4563

Petitioner,

-and-

CHAUTAUQUA LAKE CENTRAL 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 National Education Association/New York 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.

Unit: Included All full-time and part-time employees in the following job titles: bus driver, monitor, utility worker, typist, custodian,cook, food service helper, mechanic, mechanic helper, cleaner, clerk, school secretary, and office aide.

Excluded: Teacher assistant, claims adjuster, district clerk, district treasurer, business executive 1, business executive secretarial assistant, head custodian, head bus driver, cook manager, superintendent of buildings & grounds, school nurse, secretary to the Superintendent, public relations specialist, and all other titles employed by the District.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the National Education Association/New York. 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: July 31, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member