

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

In the Matter of

KENNETH BELLAMY,

Charging Party,

- and -

CASE NO. U-23418

**UNITED FEDERATION OF TEACHERS, LOCAL 2,
AFT, NYSUT, AFL-CIO,**

Respondent,

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

Employer.

KENNETH BELLAMY, *pro se*

**JAMES R. SANDNER, GENERAL COUNSEL (STUART LIPKIND of
counsel), for Respondent**

**ROBERT WATERS, SUPERVISING ATTORNEY (JASON LIMSON of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Kenneth Bellamy to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge alleging, as amended, that the United Federation of Teachers, Local 2, AFT, NYSUT, AFL-CIO

(UFT) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when one of its representatives yelled at him and when another of its representatives refused to allow him to be represented by private counsel at an arbitration hearing, did not call witnesses Bellamy requested to testify at the arbitration and did not handle his case in the manner he desired. Bellamy's employer at the time, the Board of Education of the City School District of the City of New York (District), is a statutory party to this proceeding.¹

After three days of hearing testimony before PERB's ALJ, during which Bellamy presented his direct case, UFT and the District both moved to dismiss for failure to prove a *prima facie* case. The ALJ reserved on the motions, and UFT and the District rested without calling witnesses or presenting any evidence. Briefs were then filed. The ALJ thereafter dismissed the charge in its entirety, finding that Bellamy had failed to present evidence of arbitrary, discriminatory or bad faith conduct by UFT sufficient to sustain the violation alleged.

EXCEPTIONS

Bellamy excepts to the decision of the ALJ, arguing that the ALJ erred by failing to subpoena a witness, Zaida Ortiz, requested by Bellamy, by failing to compel the District to comply with Bellamy's Freedom of Information Law (FOIL) request for documents, and by failing, in reaching her decision, to consider an arbitrator's decision

¹Act, §209-a.3.

in another case involving an employee similarly situated to Bellamy. UFT and the District support the ALJ's decision.²

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

FACTS

~~The facts are set forth in detail in the ALJ's decision³ and are repeated here only~~
as necessary to address Bellamy's exceptions.

Bellamy was a probationary teacher with the District when he was terminated on charges of corporal punishment of a student.⁴ A letter relating to the incident was placed in his file and it is that letter which was the subject of the grievance arbitration hearing about which Bellamy complains in his charge.⁵

Bellamy went to UFT offices in late January 2002 to obtain information about the status of the grievance which had been heard at Step III of the parties' contractual grievance procedure. Bellamy alleges that Linus James, the UFT representative

² Bellamy also filed a rebuttal to the UFT's response to the exceptions. UFT has objected to Bellamy's submission. PERB's Rules of Procedure, §213.3, do not allow for a rebuttal to a response, unless requested by the Board or filed with the Board's authorization. Therefore, Bellamy's submission has not been considered.

³ 37 PERB ¶14524 (2004).

⁴ The termination was not grieved; the appeal of the termination was being held in abeyance at the time of the hearing before the ALJ.

⁵ The June 26, 2001 letter is from the Office of the Superintendent and sets forth the details of Bellamy's disciplinary hearing and finds that he should be terminated.

handling the grievance, yelled at him. Shortly thereafter, Bellamy was seen by Robert Astrowsky, the UFT borough representative, who discussed his case with him.

The Step 3 decision denied Bellamy's grievance and it was assigned to James for the arbitration hearing. After Bellamy complained about James, he was replaced by Amelia Arcamone, who was assigned to represent Bellamy. When Arcamone declined Bellamy's request to call witnesses at the arbitration hearing, Bellamy retained private counsel.

Bellamy appeared at the arbitration hearing, with his private attorney, who was denied admittance, although Arcamone did discuss the case with him before going into the hearing with Bellamy and Gary Rabinowitz, director of the UFT's "letter in file" (LIF) grievance unit. Bellamy alleges that Rabinowitz also yelled at him. Bellamy spoke briefly during the arbitration; no witnesses were called. The arbitrator thereafter issued a decision finding that the placement of the letter in Bellamy's file did not violate the contract.

Bellamy requested that Arcamone call Ortiz as a witness at the arbitration hearing to have her testify about the underlying incident involving the student. Arcamone declined, explaining that witnesses were rarely called at LIF grievances, and, in fact, Ortiz had made a statement that she had seen Bellamy "drag a student by the arm."⁶ The ALJ denied Bellamy's request for a subpoena for Ortiz to appear at the PERB hearing.

⁶ ALJ's Exhibit 50.

DISCUSSION

In deciding the motion to dismiss, the ALJ assumed the truth of all the evidence in Bellamy's direct case and gave him the benefit of every reasonable inference to be drawn therefrom.⁷ In order to establish the violation alleged, a breach of the duty of fair representation, it was necessary for Bellamy to prove that UFT acted arbitrarily, discriminatorily or in bad faith.⁸ The ALJ found that Bellamy's proof, even if true, failed to establish that UFT had violated §209-a.2(c) of the Act. We agree.

Bellamy excepts to the ALJ's decision on only three grounds. First, he alleges that the ALJ erred by denying his request to subpoena Ortiz. As Ortiz had no testimony to offer relevant to the charge before the ALJ - the conduct of the arbitration hearing - we do not find that it was error to deny the subpoena request for Ortiz.

Second, Bellamy alleges that the ALJ erred in failing to consider that the District had not complied with his FOIL request at the time of the hearing. There is no evidence in the record that Bellamy ever requested the ALJ to consider this issue. Since it was not before the ALJ, we may not consider it as an exception.⁹ Additionally, PERB does not have jurisdiction over alleged violations of FOIL.

Finally, Bellamy alleges that the ALJ erred by not considering an arbitrator's decision in a matter where a probationary teacher was reinstated after charges alleging

⁷ *County of Nassau (Police Dep't)*, 17 PERB ¶3013 (1984).

⁸ *CSEA, Inc. v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024, at 7039 (3d Dep't 1987), *affirmed on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

⁹ *Margolin v PERB*, 130 AD2d 312, 20 PERB ¶7018 (3d Dep't 1987), *appeal dismissed*, 71 NY2d 844, 21 PERB ¶7005 (1988); *City of Niagara Falls*, 23 PERB ¶3039 (1990).

improper corporal punishment of two students were found by the arbitrator to be without merit. The issues raised in the arbitrator's decision, which is not binding on PERB, dealt with the underlying termination of that probationary teacher. Here, the issue before the ALJ was the conduct of UFT at the LIF grievance arbitration hearing. As the arbitrator's decision was not relevant to the case before the ALJ, she did not err by not considering it.

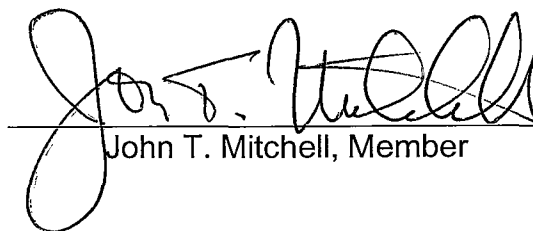
Based on the foregoing, we deny Bellamy's exceptions and affirm the decision of the ALJ.

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

DATED: July 8, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

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

In the Matter of

VICTOR MALTSEV,

Charging Party,

- and -

CASE NO. U-24927

**CIVIL SERVICE TECHNICAL GUILD, LOCAL 375,
DISTRICT COUNCIL 37, AFSCME,**

Respondent,

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

VICTOR MALTSEV, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions to the decision of the Director of Public Employment Practices and Representation (Director) dismissing an improper practice charge filed by Victor Maltsev against the Civil Service Technical Guild, Local 375, District Council 37, AFSCME (Local 375) and the New York City Transit Authority (Authority) alleging that Local 375 violated §209-a.2(c) of the Public Employees' Fair

Employment Act (Act) by failing to pursue to arbitration a grievance filed on behalf of Maltsev.¹

EXCEPTIONS

Maltsev excepts to the Director's decision on the grounds that "it was based upon the wrong assumptions"; those wrong assumptions being that the relief Maltsev sought could not be awarded in arbitration and that his grievance was "not connected to a violation of any provision of the collective bargaining agreement."

Neither Local 375 nor the Authority has filed a response to the exceptions.

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

FACTS

We adopt the Director's findings of fact,² together with these additional facts.

On May 30, 2002, the Authority sent Maltsev to the Authority's Medical Assessment Center #4 for evaluation. He was evaluated and, by report dated June 5, 2002, placed on restricted work status while he received follow-up psychotherapy.

On September 17, 2002, Local 375 filed a Step I grievance seeking the restoration of six sick days previously charged as a result of Maltsev's suspension from work and alleged due because of the Authority's delay in returning Maltsev to work after medical clearance. The grievance having been denied on January 15, 2003, Local 375 filed a Step II grievance seeking not only the restoration of the six days to Maltsev's sick bank but also "all the pertaining costs associated to involuntary leave of Mr. Maltsev".

¹ The Authority is made a party to these proceedings pursuant to §209-a.3 of the Act.

² 37 PERB ¶4540 (2004).

The Authority denied the grievance and on February 14, 2003, Local 375 proceeded to Step III, seeking the same remedy.

On or about June 11, 2003, Maltsev received a proposed stipulation of settlement from Local 375. Maltsev disagreed with the terms of the settlement because it released the Authority from all claims, in law or equity, and it failed to compensate him for his medical insurance co-payments and time attending psychotherapy sessions during the period of the alleged delay in returning him to work. On June 13, 2003, Local 375's legal department reviewed the proposed settlement stipulation and Maltsev's written concerns regarding it and opined that, since Maltsev was not satisfied with the proposed settlement, "he should pursue his claims in another forum, and not sign [the] agreement." On June 23, 2003, Maltsev responded to Local 375 and proposed that he be made whole for the six lost work days and that he be paid for his time for attending psychotherapy sessions and reimbursed for his medical insurance co-payments. If the Authority was not agreeable, Maltsev requested that Local 375 pursue the grievance to arbitration.

On June 27, 2003, Maltsev received the Step II decision which granted his grievance to the extent of restoring six sick days to his sick leave accruals but denied him reimbursement for co-payments and time used attending psychotherapy sessions because there existed no contractual basis for the remedy. Maltsev disagreed with the Step II Hearing Officer's recitation of the facts and insisted that Local 375 request that the six-day suspension be rescinded and that he be reimbursed for his co-payments and time spent attending psychotherapy sessions.

On July 16, 2003, Local 375 informed the Authority that Maltsev would not sign the settlement stipulation and, as a result, Local 375 would take the next appropriate step in the grievance process. On September 2, 2003, Local 375 Grievance Chair, Behrouz Fathi, forwarded the grievance step decisions to DC 37's legal department for arbitration. However, by memo dated October 7, 2003, DC 37's legal department informed Fathi that the grievance would not proceed to arbitration. Local 375's counsel advised Fathi that Maltsev was placed on medical leave of absence pursuant to §72 of the Civil Service Law (CSL) which is not covered by the parties' collective bargaining agreement. Furthermore, the memo noted that, even assuming the subject matter of the grievance was covered by the agreement, the remedy would be limited to the restoration of the six days to Maltsev's sick leave accruals. Local 375's counsel suggested that, with Maltsev's consent, the Authority's settlement should be reconsidered.

On October 21, 2003, Maltsev wrote to Local 375's counsel complaining about the October 7, 2003 memo to Fathi. Maltsev also advised that, on May 20, 2003, he filed a complaint with the New York State Division of Human Rights. On October 21, 2003, Local 375's counsel responded to Maltsev and informed him that the decision to proceed to arbitration resides with Local 375. On January 20, 2004, Local 375's Grievance Supervisor, David Grant, wrote to Maltsev and advised him that the union found no reason to proceed to arbitration.

On March 15, 2004, Maltsev filed the instant improper practice charge. On March 17, 2004, he was informed that the charge was deficient because it lacked facts that would arguably establish that Local 375's conduct was arbitrary, discriminatory or

taken in bad faith. On March 26, 2004, Maltsev filed an amended charge but failed to allege any relevant facts and merely attached the letter from Local 375's counsel that advised Maltsev that the decision to proceed to arbitration rested with Local 375. By decision dated April 7, 2004, the Director dismissed the charge.

DISCUSSION

~~Since we are loath to substitute our judgment for that of an employee~~
organization on matters concerning the administration of its internal affairs, we have established a limited basis upon which a breach of the duty of fair representation may be shown. Absent evidence that an action taken is arbitrary, discriminatory or in bad faith, a violation of the representation duty will not be found.³

The Assistant Director advised Maltsev of the deficiencies contained within his original charge. The amendment which followed did not address those deficiencies. Instead, Maltsev submitted documents which failed to specify how Local 375's conduct, as it relates to the charge, was arbitrary, discriminatory or in bad faith. On the contrary, Maltsev attached to his charge letters from Local 375 which advised him that in Local 375's opinion there were no grounds to proceed to arbitration. It is not our role to

³ See *CSEA, Inc., Local 1000, AFSCME, AFL-CIO (Heffelfinger)*, 32 PERB ¶3044 (1999); *Public Employees Fed'n, AFL-CIO and State of New York (Dep't of Health)*, 29 PERB ¶3027 (1996); *District Council 37, AFSCME and Bd. of Educ. of the City Sch. Dist. Of the City of New York*, 28 PERB ¶3062 (1995); *CSEA v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep't 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

search through documents in an effort to discern and articulate the existence of a charge.⁴

Upon our review of the pleadings, we find that Maltsev has failed to make a *prima facie* showing of arbitrary, discriminatory or bad faith conduct on the part of Local 375. While Maltsev alleges, in substance, that Local 375 was inept and ineffective in the manner in which it handled his grievance and that he disagrees with its counsel's opinions regarding the application of the CSL §72 to his grievance and the relief to which he might be entitled, we have held that such allegations do not evidence a breach of the duty of fair representation.⁵

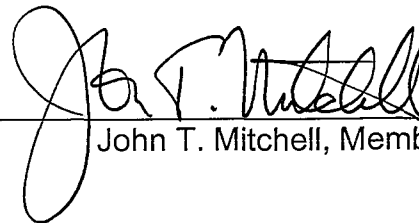
Based on the foregoing, Maltsev's exceptions are denied and the decision of the Director is affirmed.

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

DATED: July 8, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

⁴ See *State of New York (Workers' Compensation Bd.) and CSEA, Inc.*, 29 PERB ¶3054 (1996); *State of New York (Div. of Parole) and Security and Law Enforcement, Council 82, AFSCME, AFL-CIO*, 27 PERB ¶3016 (1994).

⁵ *Supra*, note 3.

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

In the Matter of

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

Charging Party,

- and -

CASE NO. U-24165

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

Respondent.

STEPHEN G. DE NIGRIS, ESQ., for Charging Party

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N. VOLFORTE
of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Division of State Police) (State) to a decision of an Administrative Law Judge (ALJ) finding that the State violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it issued an order prohibiting members of the Police Benevolent Association of the New York State Troopers, Inc. (PBA), the charging party herein, from wearing PBA membership pins while assisting the defense in a criminal trial.

The ALJ determined that the wearing of a union pin was a protected activity under the Act. He further held that the State's prohibition against off-duty officers in civilian attire wearing a PBA pin while on union business at a criminal trial violated

§209-a.1(a) because the State did not have a role in the regulation of such activity in a courtroom.

EXCEPTIONS

The State excepts to the ALJ's decision, arguing that the ALJ erred on the facts and the law. The PBA supports the ALJ's decision.

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

FACTS

The facts are set forth in detail in the ALJ's decision¹ and are repeated here only as necessary to address the State's exceptions.

In 2001, a trooper was involved in an incident in which an animal was shot. As a result of the internal investigation which followed, she resigned. Subsequently, she attempted to rescind her resignation. She was also charged by the Rensselaer County District Attorney with a misdemeanor arising out of the incident. A jury trial was held in Justice Court of the Town of Brunswick on September 30 and October 1, 2002. The trooper was acquitted of the charge.

While off-duty, the president and vice-president of the PBA, as well as several other PBA officials, attended the trial. They were dressed in business suits and were wearing on their lapels a PBA pin. It is roughly the size of a nickel and has a Stetson hat in the center. The lettering on the pin includes "Police Benevolent Association", "New York State Troopers" and "PBA". Both PBA President Daniel DeFredericis and Vice-president Don Postles testified that they attended the trial to show support for the former

¹ 37 PERB ¶4533 (2004).

trooper who was on trial and who was attempting to return to her position as a trooper and for the troopers who had been called as witnesses for the prosecution.

On the first day of the trial, DeFredericis spoke to the defense attorney during the trial and suggested a question for cross-examination. On the second day of the trial, Postles also spoke with the defense attorney about the State's internal administrative investigation process, about which the defense attorney was unfamiliar. Postles sat at the defense table for the questioning and spoke with both the defendant and the defense attorney. There was no objection from either the judge or the assistant district attorney during the trial.

After the trial's conclusion, by letter dated October 16, 2002, the then Rensselaer County District Attorney Kenneth Bruno wrote to DeFredericis and complained about the attendance and participation of DeFredericis and Postles at the trial while wearing pins that identified them as NYS troopers. A copy of the letter thereafter came into the possession of State Police Chief Counsel Glenn Valle who discussed it with the State Police Superintendent. On December 3, 2002, Valle attended a labor-management meeting where DeFredericis and Postles were present, as well as other representatives of both the PBA and the New York State Police.

Valle outlined his concerns regarding issues contained in the letter from Bruno and the trial and told those present that, while no one would be disciplined for what happened at the trial, there would be disciplinary action if, in the future, any representatives of the PBA sat at the defense table at a criminal trial wearing any PBA

“insignia connoting membership or affiliation with the New York State Police” because to him such insignia could mislead a jury.²

DISCUSSION

While we have not had occasion to decide this issue before, it is well-settled in the private sector that an employee has the protected right to wear union insignia in the workplace, while on duty, unless the employer can show special circumstances that outweigh the employee’s statutory rights.³ The Supreme Court’s decision is grounded in the notion that the right to wear union insignia is a “reasonable and legitimate form of union activity”.⁴

Likewise, a number of jurisdictions have found that public employees, including uniformed and law enforcement personnel, enjoy a similar right.⁵ We see no reason to hold otherwise here and find that such activity, absent special circumstances that outweigh the right, is protected by the Act. We also find that the wearing of a union insignia or pin while off-duty and out of uniform is no less protected by the Act.⁶

²Transcript, pp. 131-32.

³ *Republic Aviation Corp. v. NLRB*, 324 US 793 (1945).

⁴ *Id.* at 802.

⁵ *Sheriff of Worcester County v. Labor Relations Comm.*, 60 Mass. App. Ct. 632, 805 NE2d 46 (2004); *State of California (Dep’t of Corr.)*, 22 PERC ¶129100 (1998); *Orange-Seminole-Osceola Transit Auth.*, 11 FPER ¶16241 (1985).

⁶ The State’s right to regulate the wearing of the State Police uniform, the Stetson hat or any other article of official clothing that identifies the wearer as a member of the State Police, on or off-duty, is not at issue in this case and our holding herein does not impact on any statutory or contractual rights to do so.

Here, the PBA officials involved in the at-issue conduct wore a PBA pin, while in business attire and while off-duty. As such, they were engaged in a protected activity by expressing their membership in and support of the PBA.

The State's articulation of a ban on such activity, where no such restriction existed before, is the unilateral implementation of a rule that carries with it the threat of discipline. The State's new rule restricts the employees' off-duty conduct and establishes new grounds for the imposition of discipline, both subjects which we have held to be mandatorily negotiable.⁷

Finally, the State argues that it has an interest in maintaining its public image before a criminal court jury that outweighs the right of PBA officials to wear union insignia. It argues that a jury might be misled by seeing an individual affiliated with the State Police assisting the defense in a criminal trial when there are also troopers being called to testify by the prosecution. The State also argues, in reliance on Bruno's letter, that such activity by PBA officials undermines its relationship with district attorneys throughout the state.

As found by the ALJ, no objection was made during the trial by either the assistant district attorney or the trial judge to the pins worn by Postles and DeFredericis or to the assistance they rendered to defense counsel. It is, as noted by the ALJ, solely within the discretion and jurisdiction of the trial judge to determine such matters, upon his or her own motion, or objection of counsel.⁸ The State, as employer, does not have

⁷ *City of Glens Falls*, 24 PERB ¶3015 (1991), *petition for review demised*, 25 PERB ¶7016 (3d Dep't. 1992); *City of Buffalo*, 23 PERB ¶3050 (1990); *City of Newburgh*, 16 PERB ¶3030 (1983).

⁸ *Montgomery v. Muller*, 176 AD2d 29 (3d Dep't), *appeal denied*, 80 NY2d 751 (1992).

an interest in courtroom procedure that outweighs the protected right of public employees to participate in their union.⁹

Based on the foregoing, we find that the State violated §209-a.1(a) of the Act when it prohibited employees represented by the PBA from wearing PBA insignia while permissibly assisting the defense in a criminal jury trial.¹⁰

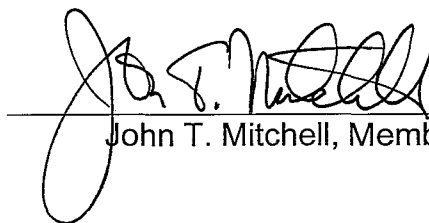
We, therefore, deny the State's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the State rescind its December 3, 2002 directive which prohibits employees from wearing PBA insignia while permissibly assisting the defense in a criminal jury trial and sign and post the attached notice at all locations customarily used to post notices to unit employees represented by the PBA.

DATED: July 8, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

⁹ See *Council No. 11 AFSCME, AFL-CIO v. Civil Service Comm.*, 87 Mich. App. 420, 274 NW2d 804 (1978).

¹⁰ As no exceptions were filed, we do not reach the ALJ's dismissal of the alleged §209-a.1(c) violation.

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 State of New York (Division of State Police) in the unit represented by the Police Benevolent Association of the New York State Troopers, Inc. that the State rescind its December 3, 2002 directive which prohibits employees from wearing PBA insignia while permissibly assisting the defense in a criminal jury trial.

Dated

By
(Representative) (Title)

State of New York (Division of State Police)
.....

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

**PATROLMEN'S BENEVOLENT ASSOCIATION OF
THE CITY OF NEW YORK, INC.**

Petitioner,

- and -

CASE NO. M2004-024

CITY OF NEW YORK,

Respondent.

**GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for
Petitioner**

GAIL I. AUSTER, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of New York (City) to a determination made by the Director of Conciliation (Director) in conjunction with impasse proceedings initiated by the Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) under §§209.2, 209.3 and 209.4 of the Public Employees' Fair Employment Act (Act) and Part 205 of our Rules of Procedure (Rules).

The City excepts to the Director's determination that an impasse exists in the negotiations for a successor collective bargaining agreement between the City and the PBA and to his appointment of a mediator.

The City contends that the appointment of a mediator is premature because the parties have not had sufficient opportunity for meaningful bargaining. Furthermore, the

City argues that it was not given an opportunity to review and respond to all of the evidence presented to the Director prior to his determination.

In response to the City's exceptions, the PBA contends that, since the expiration of the interest arbitration award on July 31, 2002, the PBA has been without an agreement for 22 months. Under the Act, the PBA has been without an agreement ~~more than two years after the 120-day statutory period for filing an impasse declaration.~~ The parties have held seven general negotiation sessions over this period of time. The PBA reached a tentative agreement with the City on health insurance and the PBA has modified its proposals in response to concerns raised by the City. Notwithstanding, the parties are at impasse over wages.

The parties are in a position similar to that which existed during the negotiations for the 2000-2002 agreement.¹ The City argues that its recent settlement with District Council 37² includes many productivity savings that enabled it to provide retroactive and prospective wage increases. The PBA contends that the City is at liberty to make the same proposals even though a mediator has been appointed. Furthermore, the mediator has the authority to hold his assistance in abeyance while the parties conduct voluntary negotiations.

We clearly have the authority to review the Director's appointment of a mediator³ and, having done so here, we determine, based upon our review of the record and our

¹ See, 34 PERB ¶3033 (2001).

² District Council 37 is the bargaining agent for approximately 117,000 NYC employees in a wide range of non-uniformed services titles.

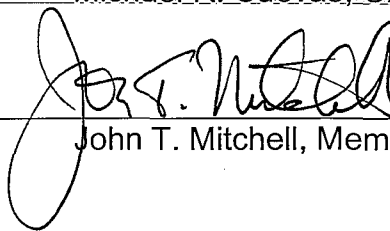
³ *Board of Educ. of the City Sch. Dist. of the City of New York*, 34 PERB ¶3016 (2001), and cases cited therein.

consideration of the parties' arguments, that the Director properly appointed the mediator.⁴ We, therefore, confirm the designation of a mediator by the Director in this matter. SO ORDERED.

DATED: July 8, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

⁴ *City of Newburgh v. PERB*, 97 AD2d 258, 16 PERB ¶7030 (3rd Dep't 1983), *aff'd*, 63 NY2d 793, 17 PERB ¶7017 (1984).

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

In the Matter of

**AMALGAMATED TRANSIT UNION
LOCAL 282,**

Petitioner,

- and -

CASE NO. C-5391

ORLEANS TRANSIT SERVICE, INC.,

Employer.

MATTHEW J. FUSCO, ESQ., for Petitioner

PETER J. SPINELLI, ESQ., for Employer

BOARD DECISION AND ORDER

On March 29, 2004, the Amalgamated Transit Union Local 282 (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Orleans Transit Service, Inc. (employer).

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

Included: All full-time and part-time drivers and office assistants.

Excluded: Manager and all other employees.

Pursuant to that agreement, a secret-ballot election was held on June 4, 2004,

at which a majority of ballots were cast against representation by the petitioner.

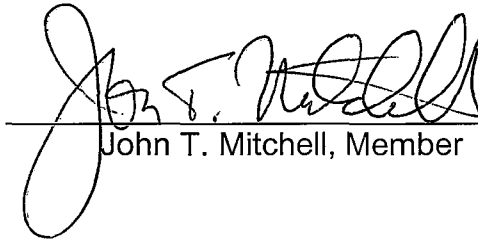
Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner,

~~IT IS ORDERED that the petition should be, and it hereby is, dismissed.~~

DATED: July 8, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL #264,

Petitioner,

-and-

CASE NO. C-5377

TOWN OF BIRDSALL,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local #264 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regular part-time Highway Department employees.

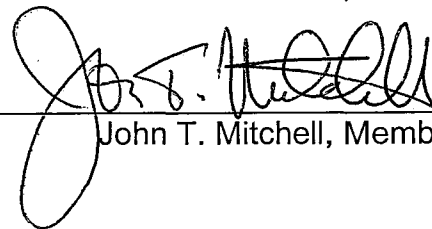
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the 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: July 8, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**CAYUGA COUNTY COMMUNITY COLLEGE
EDUCATIONAL SUPPORT PROFESSIONALS,**

Petitioner,

-and-

CASE NO. C-5371

**COUNTY OF CAYUGA AND CAYUGA
COUNTY COMMUNITY COLLEGE,**

Employer,

-and-

TEAMSTERS LOCAL #118,

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 Cayuga County Community College Educational Support Professionals 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: Full-time competitive civil service employees.

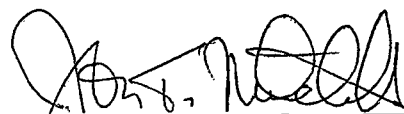
Excluded: Secretary to the President, Secretary to the Director of Personnel, Custodian, Senior Custodian, Building Maintenance I, Building Maintenance II.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Cayuga County Community College Educational Support Professionals. 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 8, 2004
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member