2A-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF JOHNSTOWN,

Charging Party,

-and-

CASE NO. U-13222

JOHNSTOWN POLICE BENEVOLENT ASSOCIATION,

Respondent.

ROEMER AND FEATHERSTONHAUGH, P.C. (JAMES W. ROEMER, JR., and ELAYNE G. GOLD of counsel), for Charging Party

CAPUTO, AULISI & SKODA, ESQS. (RICHARD T. AULISI of counsel), for Respondent

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MURRY F. SOLOMON and MATTHEW R. FLETCHER for Cayuga-Onondaga Counties BOCES, Amicus Curiae

WILLIAM HERRMANN III, ESQ., for City of New York, Amicus Curiae

NANCY E. HOFFMAN, ESQ. (JEROME LEFKOWITZ of counsel), for Civil Service Employees Association, Inc., Local 1000, AFSCME, Amicus Curiae

ROBERT M. LAUGHLIN, for County of Chautauqua, Amicus Curiae

PROSKAUER, ROSE, GOETZ & MENDELSOHN (M. DAVID ZURNDORFER of counsel), for Metropolitan Transportation Authority, New York City Transit Authority and Triborough Bridge and Tunnel Authority, Amici Curiae

EDWIN L. CRAWFORD, for New York State Association of Counties, Amicus Curiae

MARK PETTIT and ALFRED T. RICCIO, for New York State Management Advocates for School Labor Affairs, Amicus Curiae

LOMBARDI, REINHARD, WALSH & HARRISON, P.C. (RICHARD P. WALSH, JR. and THOMAS J. JORDAN of counsel), for New York State Professional Firefighters Association, Inc., Amicus Curiae

JOHN F. O'REILLY, ESQ., for New York State Public Employer Labor Relations Association, Amicus Curiae

JAY WORONA, ESQ. (JOSEPH B. PORTER of counsel), for New York State School Boards Association, Inc., Amicus Curiae

DREYER, BOYAJIAN & TUTTLE, for Police Conference of New York, Inc., Amicus Curiae

ROBERT W. HOWARD, for Town of Colonie, Amicus Curiae

SONNY HALL, for Transport Workers Union, Local 200, Amicus Curiae

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Johnstown (City) to a decision by the Director of Public Employment Practices and Representation (Director). The City has charged that the Johnstown Police Benevolent Association (PBA) violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it refused to negotiate the City's demands to delete two provisions contained in the parties' expired 1990-91 contract from any successor to that contract. One provision concerns minimum staffing per shift; the other, health insurance for retirees.

The Director dismissed the charge because the City's demands embraced nonmandatory subjects of negotiation about which the PBA was not required to bargain.

Although the City concedes that its demands are nonmandatory according to their subject matter, it argues in its exceptions that the demands in "fairness, equity and logic" become or should

be treated as mandatory subjects of negotiation having been made a part of the parties' contract, but only as and to the extent they are embodied in that agreement.[1/]

The PBA argues in response that there is no sound basis for the City's "metamorphosis theory" of negotiability and that our existing precedents require dismissal of the charge.

Amicus curiae briefs have been filed by a number of interested entities and organizations, including the Civil Service Employees Association, Inc., Local 1000, AFSCME; New York State Professional Firefighters Association, Inc., and the Transport Workers Union, Local 100, which support the City's position, and Cayuga-Onondaga BOCES; City of New York; County of Chautauqua; Metropolitan Transportation Authority; New York City Transit Authority; New York State Association of Counties; New York State Management Advocates for School Labor Affairs; New York State Public Employer Labor Relations Association; New York State School Boards Association, Inc.; Police Conference of New York, Inc.; Town of Colonie; and the Triborough Bridge and Tunnel Authority, which support, on different grounds, the PBA's position.

The Board has held consistently that the scope of negotiations, which categorizes subjects as mandatory,

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[1/]The City's arguments would not, for example, make mandatory the negotiation of a demand to expand the staffing provision. According to the City's arguments, demands to delete or to continue that provision would be mandatorily negotiable, as would proposals to decrease the specified staffing level.

nonmandatory (permissive), or prohibited, is unaffected by the parties' bargaining regarding those subjects. The Board has held specifically on several occasions that neither a party's willingness to negotiate a nonmandatory subject nor its agreement to a nonmandatory subject transforms that subject into a mandatory subject of negotiation.[2/]

The City argues, however, that the enactment of §209-a.1(e) of the Act necessitates a reexamination and reversal of this line of cases. Section 209-a.1(e) of the Act makes it an improper practice for a public employer to refuse to continue all terms of an expired agreement until a new agreement is negotiated. Under existing precedent, neither a legislative imposition nor an interest arbitration award is a negotiated "agreement" for purposes of §209-a.1(e). Thus, it has been held that neither a legislative body[3/] nor an interest arbitration panel[4/] may make any changes in the terms of a union's expired contract without the union's consent. Therefore, the City not unreasonably assumes that §209-a.1(e) will be interpreted to require it to continue the nonmandatory subjects in its expired agreement with

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[2/]See, e.g., Troy Uniformed Firefighters Ass'n, 10 PERB ¶3015 (1977); State of New York, 6 PERB ¶3005 (1973); Bd. of Educ. of the City of New York, 5 PERB ¶3054 (1972).

[3/]Niagara County Legislature and County of Niagara, 16 PERB ¶3071 (1983), conf'd, 104 A.D.2d 1, 17 PERB ¶7021 (4th Dep't 1971), which discusses the legislative history in some detail.

[4/]City of Kingston, 18 PERB ¶3036 (1985), which again discusses the relevant legislative history.

the PBA even after the issuance of an interest arbitration award unless the PBA permits the nonmandatory subjects to proceed to compulsory interest arbitration.[5/] The City contends that so long as the nonmandatory contract terms remain nonmandatory subjects of bargaining, the union can both refuse to bargain those terms and avoid arbitration of them by filing a scope of negotiation improper practice charge.[6/] If the City's interpretation of §209-a.1(e) is correct, the PBA, and other similarly situated unions, can assure the continuation of all nonmandatory terms in an expired agreement simply by always proceeding to interest arbitration in each negotiating cycle. That result, argues the City, is contrary to the policy of the Act because it undermines collective bargaining and affords the union a virtual guarantee that nonmandatory contract terms will continue in effect, at the union's sole option, if not in perpetuity, then at least for so long as the statutory impasse procedures for police end with compulsory interest arbitration.

The Board considered the effect of §209-a.1(e) on the scope of negotiations in Peekskill City School District.[7/] The Board

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[5/]We have not to date been presented with a case in which it was necessary to decide the employer's obligations in relevant context. We have previously declined to speculate about an employer's obligations or a union's rights under §209-a.1(e) of the Act. See, e.g., Village of Mamaroneck Police Benevolent Ass'n, 22 PERB ¶3029 (1989).

[6/]A party may not pursue over objection a nonmandatory subject of negotiation in fact-finding or compulsory interest arbitration.

[7/]16 PERB ¶3075 (1983).

there held that §209-a.1(e) of the Act does not affect the negotiability of a demand. Under Peekskill, nonmandatory subjects contained in an expired agreement are not converted into mandatory subjects of negotiation by virtue of their incorporation into that agreement despite the existence of §209-a.1(e).

The question we must address in this case is whether there are sufficient reasons to reverse these several decisions. We have deliberated on this question with great care because of its importance to the process of collective bargaining and to the statutory impasse resolution procedures. We conclude that we should not adopt the test for negotiability sought by the City in this context[8/] at this time. Readers should understand, however, the reluctance with which we reach this conclusion and pay particular attention to the several observations and cautions we articulate which have been occasioned by the enactment of §209-a.1(e), its administrative and judicial interpretations and the lack of legislative action on the problems raised by the City.

Our jurisprudence for many years has recognized a distinction between mandatory and nonmandatory subjects of negotiation. Those categories were developed from a recognition

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[8/]Certain of the amicus participants have argued that we may effect this type of change only by rule-making. Our disposition of this charge makes it unnecessary for us to entertain that argument, but we will take it under advisement at such later date as may be appropriate.

that those subjects which primarily affect an employer's mission should not have to be bargained.[9/] The parties within our jurisdiction have fashioned their bargaining relationships over the years around the principle that negotiability is determined by the subject nature of the demand, not what the bargaining history of that demand may have been in any given bargaining relationship. Were we to adopt the City's position in this case, we would surely distort, after the fact, the collective bargaining relationships and the exchanges of promises which may have been made in reliance upon well-established principles of negotiability without affording the parties subject to a bargaining duty an opportunity to reshape their relationships and promises.

We are also concerned that the fundamental change in negotiability analysis which the City seeks from us would chill the parties' willingness to bargain nonmandatory subjects. Although the Board has not required bargaining about nonmandatory subjects, it has always encouraged parties to do so.[10/] Under our existing case law, a party may negotiate or agree to a nonmandatory subject with the certain knowledge that its actions will not cause it to incur any future bargaining obligation regarding that subject. Some have argued that making all

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[9/]See, e.g., City School Dist. of the City of New Rochelle, 4 PERB ¶3060 (1971).

[10/]Id.

contract terms mandatorily negotiable may actually foster the parties' willingness to negotiate nonmandatory subjects. We are persuaded, however, that in most cases the opposite result would be occasioned, despite the parties' ability to control the duration of the nonmandatory subject by the use of specific sunset language in the contract.

The genesis of the City's argument affords us yet another reason to reaffirm our existing precedents at this time. As noted, the City's entire rationale for a change in negotiability analysis hinges on an interpretation of §209-a.1(e) of the Act which has not yet been made or tested in any forum. If the City is incorrect in its assumption that §209-a.1(e) guarantees continuation of expired contract terms in perpetuity, then there is no reason for making the requested change in negotiability. We cannot now say with certainty that a union which refuses an employer's demand to bargain regarding the deletion or continuation of a nonmandatory contract term is necessarily entitled to a continuation of that term in perpetuity under all circumstances. Indeed, some amicus participants oppose the City's position on the theory that nonmandatory terms of expired agreements can be discontinued after the issuance of a legislative determination or an interest arbitration award. Furthermore, it is possible that a union which refuses to bargain a nonmandatory contract term may jeopardize its entitlements under §209-a.1(e) of the Act, just as an employer which refuses

to bargain the term at the union's demand may jeopardize any argument it may have regarding a right to discontinue the nonmandatory term of an expired agreement after exhaustion of the applicable impasse procedures. We make these observations so that negotiating parties are aware that there are various risks and costs associated with any given bargaining position and to encourage, once again, bargaining over all lawful subjects which affect the employment relationship, regardless of the category of negotiability into which they may fall.

We are aware that the result reached in this case is not finally dispositive of the concerns which have prompted the City's charge. The Legislature's enactment of a statutory provision which guarantees the continuation of all nonmandatory contract terms without statutory provisions mandating the negotiation of those terms, at least to the extent of proposals to delete or continue them, has, perhaps unintentionally, complicated the bargaining process.[11/] We also believe that to afford any union a perpetual continuation of the nonmandatory terms in an expired agreement, despite its refusal to bargain those terms in the context of negotiations for a successor

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[11/]For a detailed discussion of this issue, see Moses, Scope of Bargaining Under the Taylor Law: New York's Unique Situation (May 1992). The author's paper was presented at a conference commemorating the 25th Anniversary of the Act and is scheduled for publication in 56 Albany Law Review 53 under the title of Scope of Bargaining and the Triborough Law: New York's Collective Bargaining Dilemma.

contract, is to fundamentally undermine both the process of collective bargaining and the Act's impasse procedures. We do not believe, however, that the answer to these bargaining problems lies with us, through the adjudicatory process at this time.

There have been several legislative proposals addressing various aspects of the concerns raised by the City in this case.[12/] None of these proposals has yet been enacted. As made manifest in this case, there are fundamentally different points of view regarding the appropriate scope of collective bargaining given the existence of §209-a.1(e) of the Act. Whether, as a matter of public policy, the scope of bargaining should be expanded to include some or all of the terms of an expired agreement, and, if so, which ones, to what extent, and under what circumstances, are choices which are appropriately made by the Legislature. By declining the City's invitation to reverse our existing case law in this area, we give the Legislature an opportunity to consider the issues, to become more acquainted with the problems and to fashion a legislative solution. We do not believe at this time that we should effect by decision the changes sought by the City in our long-standing approach to

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[12/]S.8349 (1990); S.4856 (1991); S.7655 (1991); A.8123 (1991); A.10562 (1991); A.11578 (1991).

negotiability determinations. Future developments, however, may warrant or necessitate a reevaluation of our current view.

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

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

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2B-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AMALGAMATED TRANSIT UNION, DIVISION 1056, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12578

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

In the Matter of

AMALGAMATED TRANSIT UNION, DIVISION 726, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12579

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

GLADSTEIN, REIF & MEGINNISS (WALTER M. MEGINNISS, JR. and ELLEN DICHNER of counsel), for Charging Party

ALBERT C. COSENZA, ESQ. (JOYCE RACHEL ELLMAN of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by Amalgamated Transit Union, Division 1056, AFL-CIO (ATU 1056) and Amalgamated Transit Union, Division 726, AFL-CIO (ATU 726) (collectively ATU) to a decision by an Administrative Law Judge (ALJ). ATU 726, which represents the operating and maintenance employees in the Authority's Staten Island bus division, and ATU 1056, which represents employees in those titles in Queens, each allege that

the New York City Transit Authority (Authority) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally ceased giving paid release time to representatives of ATU's two units to participate in the Employee Recognition Program (ERP). The charges were consolidated and, after hearing, the ALJ dismissed both.

The ALJ dismissed the charge filed by ATU Local 1056 for lack of jurisdiction under §205.5(d) of the Act.[1/] The ALJ held in this respect that the contract, which expired by its terms on April 30, 1991, was continued in effect by operation of law under the Court of Appeals' decision in Association of Surrogates and Supreme Court Reporters within the City of New York v. State of New York[2/] (hereafter Surrogates). The ALJ then concluded that as the source of any ERP release time right was ATU 1056's contract with the Authority, the charge was beyond our jurisdiction.

The ALJ reached the merits of ATU 726's charge, however, because he found that it did not have contractual release time

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[1/]That section of the Act denies us jurisdiction over the enforcement or alleged violation of agreements which does not otherwise constitute an improper practice.

[2/]79 N.Y.2d 39, 25 PERB ¶7502 (1992). In that case, the Court held that §209-a.1(e) of the Act continued the parties' contract in effect, thereby affording the plaintiff unions protection against impairment of that contract under the Federal Constitution.

provisions. The ALJ dismissed this charge[3/] because he viewed the employees' participation in the ERP to be a work assignment, which the Authority could change unilaterally in an exercise of its dual managerial prerogatives to determine its staffing needs and to deploy staff in response to budget reductions.

ATU 1056 excepts to the ALJ's jurisdictional dismissal and joins with ATU 726 in excepting to the ALJ's merits dismissal. The Authority argues in response that the ALJ's decision is correct in both respects and must be affirmed.

For the following reasons, we reverse the ALJ's jurisdictional dismissal, but affirm his decision dismissing the charges on their merits.

The ERP recognizes Authority employees for longevity and meritorious service by awarding them testimonials of various types and values. The record does not show how the ERP was actually established. As the ALJ noted, however, we know that the ERP evolved from and is the successor to the Depot Assistance Team (DAT), which had existed from 1984 until the ERP was established in May 1987. DAT was a joint labor-management program consisting of a number of projects designed to improve the quality of work-life in the surface division of the Authority. One of DAT's projects, involving an incentive program for bus operators and maintenance employees, evolved into the ERP, which exists now as a

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[3/]Had the ALJ not dismissed ATU 1056's charge for lack of jurisdiction, he would have dismissed it on the merits for the same reasons he dismissed ATU 726's charge.

unit within the Authority's labor relations department. The ERP is funded entirely by the Authority and consists of representatives of various unions which represent Authority employees, including the ATU, and Authority management. ATU 1056's ERP representative is Roger Scales, a bus operator for the Authority. ATU 726's ERP representative is Michael Maloney, also a bus operator. Union ERP participants are selected by their union presidents. According to James Bromfield, the Director of ERP, and its only management representative at present, the selections are approved by the Authority, although ATU argues that it only need give notice of its selection to the Authority. It is undisputed, however, that Bromfield directs all of the assignments of ERP participants who have scheduled working hours.

As a result of budget reductions mandated by the Metropolitan Transportation Authority, the Authority, in addition to certain other personnel actions affecting the ERP, eliminated one of ATU's positions on the ERP. Instead of ATU 1056 and ATU 726 each having a full-time ERP participant, each participant is now assigned half-time to the ERP. When not assigned to the ERP, Scales and Maloney are reassigned to their duties as bus operators for the Authority. In dismissing ATU 1056's charge for lack of jurisdiction, the ALJ concluded that any right to release time for ERP participation stemmed from contractual release time

provisions[4/] and a provision concerning pay for participation in the ERP.[5/] ATU 1056's exception to the ALJ's jurisdictional determination reflects certain misunderstandings regarding our interpretation of the jurisdictional limitation in §205.5(d) of the Act. Even though we agree ultimately with ATU's conclusion regarding our jurisdiction, these deserve mention and correction for the further guidance of all parties.

It is not dispositive of the jurisdictional question that ATU 1056 has not alleged specifically in its charge that the Authority's action violated its contract. Similarly, its

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[4/]Section 1.14 of the contract between the Authority and ATU 1056 provides as follows:

> A. Joint Labor-Management Activities: Employees who are duly designated by the Union to act on matters relating to the interests of employees represented by such organization shall be permitted to engage in the following activities, subject to the conditions set forth herein and upon advance approval by the Authority, without loss of pay or other employee benefits, except as otherwise provided in subsection C, paragraph 6:
> 1) ...
> 2) ...
> 3) To participate in meetings of joint departmental labor-management committees ....

[5/]That section provides as follows:

> All employees assigned to the Employee Recognition Program will be compensated at their regular rate, plus twenty-five percent (25%) only for work performed on the Program. This additional payment is provided to fully compensate members for all other expenses incurred as a result of the nature of the Program activities.

allegation that the Authority unilaterally changed a noncontractual past practice is not conclusive of our jurisdiction nor does it end our jurisdictional inquiry. As the ALJ correctly observed, we are without jurisdiction whenever the contract is the source of right to the charging party with respect to the subject matter of its improper practice charge.[6/] There being no contract grievance filed, and, therefore, no opportunity to have the issue of contractual coverage decided by a third party, it is our responsibility to determine whether the charge is within our power to entertain.

Both of these charges allege that ATU's unit employees have a right to full-time assignment to the ERP. Having reviewed ATU 1056's contract, the record, and the parties' arguments, we do not agree that the contract arguably gives any unit employee an entitlement to an ERP assignment of any duration.[7/] The one contract section pertaining specifically to the ERP concerns only a wage rate. The specification of a contractual rate of pay cannot reasonably be read as a right to participate in the ERP. As to the provisions in the contract covering release time for joint labor-management activities, the Authority and ATU agree

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[6/]See, e.g., County of Nassau, 23 PERB ¶3051 (1990).

[7/]The ALJ found that ATU 726 did not have release time provisions in its contract with the Authority. In its exceptions, ATU notes that ATU 726's contract with the Authority is the same as ATU 1056's in relevant part. In view of our disposition of the jurisdictional question, we need not reach this question of fact. We would have jurisdiction over ATU 726's charge even if the facts were as they are alleged by ATU.

that it does not cover the ERP program. Nor do we read the references in the charge to release time as either an allegation or an admission by ATU 1056 that its contract in any way covers the subject of its charge. As we read the charge as filed, and as it was developed during the course of its processing, ATU 1056 merely characterized the employees' participation in the ERP as release time to elucidate its argument that the Authority was under a duty to bargain any changes in the extent of that participation.

Having determined that ATU 1056's contract with the Authority does not divest us of jurisdiction, we do not decide whether the alleged violation of the Act occurred during the stated term of the parties' contract or, if after the stated term of the contract, whether Surrogates extends the contract for purposes of affecting our jurisdiction under §205.5(d) of the Act.

ATU's arguments on the merits are centered on the fact that its participants in the ERP were "released" fully from their duties as bus operators and paid to participate in the ERP. From this release from bus duties, ATU concludes that its ERP participants may not be reassigned to those duties for any amount of time unless the Authority first bargains that decision to change their assignment. The issue, however, is not whether the employees were released from their normal assignments to work in the ERP. As the ERP is structured, union participation in that program necessitated a release of the employees from their regular job duties. The issue, as the ALJ correctly recognized, is

whether the participation in the ERP is in the nature of a job assignment. If it is, the Authority was plainly entitled to reassign the employees to duties consistent with those for which they were hired.[8/]

With respect to the controlling issue, we agree that although the ERP itself is a joint labor-management program, employee participation in that program is a job assignment. Other than the several unions' selection of their ERP representative, all other factors point to ERP participation being a job assignment. The only contract language on the ERP specifically refers to employees as being "assigned" to that program. Authority management directs the assignment of ERP personnel to and at the various award ceremonies within fixed work hours. The work of the ERP transcends bargaining unit lines, covering almost all Authority personnel, including managerial and other unrepresented employees.[9/] ATU's representatives on the ERP, for example, do not function for or on behalf of ATU unit personnel exclusively. Therefore, any analogy to ERP participation as release time from work for the pursuit of union business is not persuasive. Our conclusion in that respect is buttressed, and perhaps compelled, by the parties' mutual recognition that the contractual release

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[8/]The nonconsensual assignment of employees to the ERP might give rise to a viable charge, but not a reassignment from the ERP to a position to which the employees were hired. Neither ATU 1056 nor ATU 726, of course, challenged the reassignment of Scales or Maloney to the ERP from their bus operator duties.

[9/]It appears that only the Authority's police are not covered by the ERP.

time provisions covering joint labor-management activities do not apply to ERP participation. As noted, the ATU's argument is centered on the employees' release from their bus driving duties. Were it to argue that the ERP's status as a joint labor-management program prevented the Authority from reassigning Scales and Maloney, we might be constrained to affirm the ALJ's dismissal for lack of jurisdiction based upon the contract language covering that issue.

That the reassignment of Scales and Maloney to their bus operator duties may have reduced their pay is not relevant to the Authority's duty to bargain that reassignment. The twenty-five percent extra pay given ERP participants is to cover expenses while working in the ERP. It is plainly a payment conditioned upon service on the ERP, which is properly discontinued when service on the ERP is properly discontinued.

The statutory issue, therefore, is and remains only whether the Authority could unilaterally reassign employees from the ERP. Having concluded that ERP participation is a job assignment, we find that the Authority was entitled to fix unilaterally its staffing needs for that program in response to budgetary cuts and to redeploy its staff within that program and to positions for which the employee participants were hired.

Our several decisions relied upon by ATU in which we have held paid release time from work to be mandatorily negotiable[10/]

[10/] Local 2561, AFSCME, 23 PERB ¶3054 (1990); Local 343, IAFF, 17 PERB ¶3121 (1984).

are simply inapposite given our finding that employees' participation in the ERP is a job assignment. Neither Scales nor Maloney was ever released from work. Rather, they were released from one set of job duties to permit them to assume another and were then reassigned, part-time, to the duties for which they were hired.

In the context of this case, the Authority's decisions to reduce ERP staffing and to reassign Scales and Maloney from the ERP to the positions in which they were hired were not subject to any decisional bargaining obligation.

For the reasons set forth above, such of the exceptions as apply to the ALJ's jurisdictional determination in U-12578 are granted and the ALJ's decision in that respect in that case is reversed. In all other respects, the exceptions are denied and the ALJ's decision dismissing both charges is affirmed.

IT IS, THEREFORE, ORDERED that the charges must be, and hereby are, dismissed.

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

20-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CLARKSTOWN ADMINISTRATORS ASSOCIATION,

Charging Party,

-and-

CASE NO. U-12869

CLARKSTOWN CENTRAL SCHOOL DISTRICT,

Respondent.

BEVERLY R. HACKETT, ESQ., for Charging Party

LEXOW, BERBIT & JASON (BETH L. FINKELSTEIN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Clarkstown Administrators Association (Association) to a decision by the Director of Public Employment Practices and Representation (Director). After a hearing, the Director dismissed the Association's charge against the Clarkstown Central School District (District) which alleges that the District violated §209-a.1(e) of the Public Employees' Fair Employment Act (Act) when it failed to pay salary increases required by section 1 of Article XI of the parties' expired contract. The Director concluded from an examination of the language and history of Article XI and the District's salary payment history that the

salary increases were payable only during the three years covered by the parties' 1988-91 contract, which expired on June 30, 1991.

The Association argues that the contract language itself plainly extends the District's salary payment obligation beyond the contract term such that the Director erred by resorting to negotiating history in his interpretation of Article XI. It argues that the Director also erred by crediting the testimony of Jay F. Jason, the District's attorney and chief negotiator for the 1988-91 contract.

The District argues in its response that the Director's resort to negotiating history as an aid to the interpretation of Article XI, even though unnecessary in view of the alleged clarity of Article XI, was permissible and that his reliance upon Jason's testimony was correct.

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

Article XI of the parties' 1988-91 contract has four sections, only three of which are relevant to the present discussion.[1/] Section 1 states that "in each year" unit employees will receive a salary increase of $2,500 and an additional $2,000 or $3,750 depending upon the employee's individual merit rating. Section 2 fixes a minimum and maximum salary range for the three years of the contract, which are specifically identified. Section 3, which begins with the phrase

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[1/]Section 4 covering tuition reimbursement is not in issue.

"during the term of this agreement", calculates the salary payment for an individual when the payment exceeds the maximum of the salary range. In that event, and to that extent, the increases are paid as a bonus and not added to base salary.

The Association contends that the District is statutorily required to pay base and merit salary increases at the rate set forth in the 1988-91 contract during the 1991-92 school year and for each year thereafter until a new contract is reached. We do not agree.

Initially, we find no basis to ascribe any error to the Director's consideration of the parties' negotiating history nor any reason to disturb his credibility findings regarding Jason's testimony. It is clear to us from the language of Article XI, the parties' negotiating history, the District's nonpayment of salary increases after expiration of the predecessor contract and the elimination in the 1988-91 contract of the longevity system in the predecessor contract,[2/] that the parties intended to allocate a specific sum of money for each year of the contract and to limit the salary provisions in the 1988-91 contract to its three stated years.

The reference to "each year" in section 1 of Article XI is, as the Director held, most reasonably read to mean each of the three years of the agreement. To interpret that language as the

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[2/]That agreement paid unit employees a $1,200 salary increase at the start of their 19th, 22nd and 25th year of credited service with the District.

Association would have us do would require that we discredit Jason's testimony, which we have no reason to do. Moreover, the Association's interpretation would give section 1 of Article XI a meaning different from that in sections 2 and 3 of the same Article. We believe that sections 1 through 3 of Article XI must be read together because they constitute the parties' basic salary plan. Sections 2 and 3 are specifically limited to the term of the contract and "each year" in section 1 is most reasonably given a similar meaning.

For purposes of further clarity regarding these parties' intent to sunset the salary increases,[3/] it is helpful to discuss separately the base pay and merit salary provisions of the parties' contract.

For each year of the contract, which we have held was intended to tie the salary increases to the three-year duration of the contract, employees were to receive a $2,500 increase in salary irrespective of any other factor. We are unaware of any theory which would require the District under the expired terms of its contract to pay an additional $2,500 to unit employees every year after contract expiration until a new agreement is negotiated.[4/] That would be equivalent to holding that an employer which has negotiated a 3%, 4% and 5% salary increase for the first, second and third years of a three-year agreement is

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[3/]A sunset provision terminates or limits a contract term as of a certain date or upon a certain condition.

[4/]See Smithtown Cent. School Dist., 14 PERB ¶3072 (1981).

required to extend employees yet another 5% increase in salary after contract expiration. The parties' contract regarding base salary included a scheduled increase in a specific dollar amount for the three years of the contract which need not be continued post-expiration.[5/]

The additional salary payable according to an employee's performance evaluation warrants further analysis. To this extent, the District has established a performance-based system of compensation. An employer's refusal to advance unit employees' salaries to a specified amount or within a specified range pursuant to a wage or salary system arguably violates its status quo obligation under the Act.[6/] In this particular case, however, it is clear that the merit salary increases were specifically linked to the $2,500 guaranteed increases in base which are payable only for the three years of the contract. As we observed, the salary provisions in Article XI are most appropriately read as an integrated salary plan. We do not consider it a reasonable reading of this contract on the entirety of this record that the parties intended to have the merit salary increases continue beyond the stated duration of the contract when the $2,500 base salary increases were clearly intended to be paid only during the term of the contract.

[5/]See Hempstead Public School Dist., 25 PERB ¶3025 (1992).

[6/]See Cobleskill Cent. School Dist., 16 PERB ¶3057 (1983), petition to annul denied, 16 PERB ¶7023 (Sup. Ct. Albany Co. 1983), aff'd, 105 A.D.2d 564, 17 PERB ¶7019 (3d Dep't 1984), motion for leave to appeal denied, 64 N.Y.2d 1071, 18 PERB ¶7006 (1985).

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

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

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2D-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, SUFFOLK LOCAL 852, SMITHTOWN UNIT,

Charging Party,

-and-

CASE NO. U-12829

TOWN OF SMITHTOWN,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (MAUREEN SEIDEL of counsel), for Charging Party

JOHN B. ZOLLO, ESQ. (MECHEL M. BERTHOLET of counsel), for Respondent

BOARD DECISION AND ORDER

The Town of Smithtown (Town) excepts to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Suffolk Local 852, Smithtown Unit (CSEA). CSEA's charge alleges that the Town unilaterally subcontracted exclusive unit work[1/] in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act). On a stipulated record, the ALJ found a violation of the Act as alleged, denying each of the Town's several defenses.

[1/]The work involves the collection of white metal refuse such as refrigerators, washing machines and dishwashers.

In its exceptions, the Town argues only that it changed its level of service by requiring more frequent and faster collections of the subcontractor than of the CSEA unit employees. It equates this change in the level of service to a change in the tasks performed by the subcontractor which should occasion the application of a balancing test to determine a violation under our decision in Niagara Frontier Transportation Authority[2/], which the ALJ did not do. Under that balancing test, the Town argues that it should not be required to bargain the decision to subcontract what was admittedly exclusive unit work because unit employees were not personally affected by the subcontracting, which afforded Town residents better services.

CSEA argues in response to the exceptions that the amendment to the Town Code relied upon by the Town should not be considered because that document, although referenced in the stipulation of facts, was not a part of it. Assuming we consider the Town Code, CSEA argues that it only evidences what is required of the subcontractor, not what the subcontractor is actually doing. Therefore, CSEA argues that there is no record evidence of either a change in the level of service or a dissimilarity in tasks as they are performed by the contractor. CSEA otherwise endorses the ALJ's decision.

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

[2/] 18 PERB ¶3083 (1985)

Turning first to CSEA's arguments regarding the Town Code, we may properly notice the Town's local laws[3/] and find no prejudicial surprise to CSEA in our doing so because the Town Code was referenced in the parties' stipulation. Moreover, what is required of the subcontractor under the Town's Code is prima facie evidence of its performance. We will not assume noncompliance with law and, therefore, place the burden of proof with respect to nonperformance on the party alleging it, in this case, CSEA. There being no proof that the subcontractor is not in compliance with the Town's Code, we will presume that it is performing according to the specifications of that local law.

Turning to the Town's arguments, it basically contends that it need not bargain this subcontracting because collections are made by the private carter more often and faster than when unit employees did the work.[4/] We do not consider this argument to be persuasive. The tasks involved with white metal collection were unchanged on transfer to the subcontractor. Therefore, Niagara Frontier's balancing test is not triggered, even on the District's interpretation of that case.[5/] The service improvements derived

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[3/]State Administrative Procedure Act, §306.4 (McKinney 1984).

[4/]Unit employees collected the white metal refuse three or four times a year from April through October and during the winter on request, which was honored within approximately one week. The subcontractor collects 12 months a year and within 72 hours of a request for a collection.

[5/]The District's argument actually misconstrues Niagara Frontier. The balancing test mentioned in that case is invoked only when there has been a "significant change in the job qualifications." The job qualifications have not been changed on this record to any degree.

from the subcontracting also did not change the Town's basic mission.[6/] Although improved service is often a reason given by employers in justification of their unilateral subcontracting, it has not been considered a defense to a refusal to bargain allegation.

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

IT IS, THEREFORE, ORDERED that the Town:

1. Cease and desist from unilaterally subcontracting the white metal refuse collection work of employees within the bargaining unit represented by CSEA.
2. Restore all subcontracted white metal refuse collection work to CSEA unit employees.
3. Sign and post the attached notice at all locations ordinarily used to communicate with unit employees.

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[6/]See, e.g., City School Dist. of the City of New Rochelle, 4 PERB ¶3060 (1971).

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify the employees in the unit represented by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Suffolk Local 852, Smithtown Unit (CSEA), that the Town of Smithtown:

1. Will not unilaterally subcontract the white metal refuse collection work performed by employees within the bargaining unit represented by CSEA.

2. Will restore all subcontracted white metal refuse collection work to CSEA unit employees.

Town of Smithtown

.....

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

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.

2E-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNION-ENDICOTT MAINTENANCE WORKERS ASSOCIATION,

Charging Party,

-and-

CASE NO. U-12950

UNION-ENDICOTT CENTRAL SCHOOL DISTRICT,

Respondent.

PETER D. BLOOD, for Charging Party

COUGHLIN & GERHART (FRANK W. MILLER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Union-Endicott Central School District (District) to a decision by an Administrative Law Judge (ALJ). After a hearing, the ALJ held that the District had violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) as alleged by the Union-Endicott Maintenance Workers Association (Association) when it unilaterally changed the workweek of some of its custodians from Monday through Friday to Tuesday through Saturday.[1/]

The District excepts to the entirety of the ALJ's decision and order. It argues that the ALJ erred in rejecting its notice of claim and waiver defenses and its arguments that the schedule

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[1/]The ALJ dismissed the subparagraph (a) allegation for lack of proof and no exceptions have been taken to that aspect of his decision.

change was either not mandatorily negotiable or had been bargained. The District also argues that the remedial order is incorrect.

The Association has responded to each of the District's several exceptions and argues that the ALJ's decision is correct on the facts and law and should be affirmed.

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

The District first argues that the Association's failure to file a notice of claim pursuant to Education Law §3813 and General Municipal Law (GML) §50-e necessitates a dismissal of its charge. These statutes require a notice of claim to be filed with a school district within a certain time as a condition to the prosecution of an action or special proceeding against the school district. This defense is without merit for two reasons. First, the reference in these other statutes to an action or a special proceeding is to the two forms of judicial proceedings recognized by the State's Civil Practice Law and Rules (CPLR). An improper practice charge is not a judicial proceeding and the CPLR does not apply. Therefore, the notice of claim provisions of the Education Law and the GML have no application. Second, even assuming the notice of claim provisions were to apply to our proceedings, there is a recognized exception when there are procedures under other statutes which afford a school district

similar notice.[2/] The Act and the rules of procedure we have adopted relating to the filing, prosecution and defense of improper practice charges give a notice of claim to the District similar to that required by the other referenced statutes. Therefore, the purpose of those statutes has been satisfied.

The District's contract waiver defenses are based upon a management rights clause and a clause defining the workweek.

The management rights clause is general and does not address a right to change work schedules. As the ALJ correctly recognized, we have held such general management rights clauses to be insufficient[3/] to establish the necessary clear and unmistakable waiver of the statutory right to bargain.[4/]

The District argues, however, that the contract's definition of a workweek which begins "at 12:01 A.M. on Sunday" and ends on "Saturday at midnight" plainly gives it the right to schedule employees anytime during the stated week. As did the ALJ, we reject this interpretation of the contract, which we are necessarily empowered and required to make in conjunction with

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[2/]Grey v. Hudson Falls Cent. School Dist., 60 A.D.2d 361 (3d Dep't 1978).

[3/]See, e.g., County of Rensselaer, 13 PERB ¶3080 (1980); County of Onondaga, 12 PERB ¶3035 (1979), conf'd, 77 A.D.2d 783, 13 PERB ¶7011 (3d Dep't 1980).

[4/]CSEA, Inc. Local 1000, AFSCME v. Newman, 88 A.D.2d 685, 15 PERB ¶7011 (3d Dep't 1982), aff'd, 61 N.Y.2d 1001, 17 PERB ¶7007 (1984).

the disposition of the District's affirmative defense to the charge.

The contract's definition of workweek appears in a section captioned "CALL BACK AND OVERTIME". Even disregarding the Association's testimony regarding the history of this clause, which the District argues we should not consider, it is clear that the workweek definition is only for purposes of computing overtime eligibility and payments. Lacking any evidence regarding a contrary intent, we cannot find that the language of the call back and overtime clause alone clearly and unmistakably applies to the scheduling of employees within the workweek as defined. Therefore, the call back and overtime clause is no more a source of waiver of the Association's right to bargain regarding the work schedule change than is the management rights clause.

The District also argues in its exceptions that the Association has waived its bargaining rights based on its inaction in the face of notice from the District of an intent to change the work schedule. The record, however, clearly shows that the Association always expressed a right and interest in bargaining regarding the decision to change the schedules, which was met consistently by the District's denial of any obligation in that regard. If and to the extent the Association failed to come forward with "concrete bargaining proposals", as the District claims, that would, at best, subject it to a refusal to

bargain charge brought against it by the District. In rejecting the District's waiver defense, it is enough to find that the Association steadfastly asserted and preserved its right to bargain the decision to change the work schedules.

In that latter regard, the District also argues that the decision to change the work schedules is not mandatorily negotiable under our decision in Starpoint Central School District.[5/] In that case, we held that a change in an employee's work schedule from Monday through Friday, with overtime as necessary for weekend work, to a Wednesday through Sunday schedule, which eliminated the overtime opportunity, was mandatorily negotiable. Although we recognized in that case that the decision to work weekends was a managerial prerogative, we held that the selection of a specific means of accomplishing that prerogative, there the manipulation of work schedules, was mandatorily negotiable.[6/] Here, as in Starpoint, the Association is seeking to bargain regarding the schedule by which weekend work is to be effected. Having unilaterally determined what the work schedules would be and who would work them, the District refused to negotiate the manner and means by which weekend coverage would be provided, contrary to its duty to bargain as defined in Starpoint. We find no material differences

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[5/]23 PERB ¶3012 (1990).

[6/]Id. at 3027.

between this case and Starpoint and hold that the ALJ properly applied it in his decision.

The District's argument that it never refused to bargain is rejected because the violation pleaded and found is grounded upon the District's unilateral change in the work schedules. Even assuming that the parties met, and further assuming that the schedule change was the subject of negotiations during these meetings within the meaning of the Act, the District implemented the schedule change unilaterally before impasse was reached and without any compelling operational need to make that change. A party does not satisfy its statutory duty to bargain by negotiating on a subject for a time and then taking action unilaterally and prematurely regarding that subject.

To remedy the District's refusal to negotiate, the ALJ ordered a restoration of the prior work schedule and payment to the affected employees of any monies lost as a result of the institution of the new schedule. This order is entirely consistent with the make-whole relief customarily ordered in unilateral change cases and does not require, as the District alleges, the payment of any monies except those lost through the schedule change.

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

IT IS, THEREFORE, ORDERED that the District:

1. Forthwith restore the custodial schedules to those which existed before the July 1, 1991 change, and pay unit employees any lost wages or benefits suffered as a result of the creation of the work schedule announced on July 1, 1991, including any overtime lost by virtue of the schedule changes, plus interest at the maximum legal rate;

2. Post a notice in the form attached at all locations customarily used to post written communications to unit employees.

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

APPENDIX

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 in the unit represented by the Union-Endicott Maintenance Workers Association that the Union-Endicott Central School District will:

Forthwith restore the custodial schedules to those which existed before July 1, 1991 and pay unit employees any lost wages or benefits suffered as a result of the creation of the work schedule announced on July 1, 1991, including any overtime lost by virtue of the schedules, plus interest at the maximum legal rate.

Union-Endicott Central School District

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

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.

2F-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOUTHERN TIER SUBSTITUTE TEACHERS, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3865

WAVERLY CENTRAL SCHOOL DISTRICT,

Employer.

PAUL S. MAYO, for Petitioner

R. WHITNEY MITCHELL, for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Waverly Central School District (District) to a decision by the Director of Public Employment Practices and Representation (Director). The Director declined to set aside an election in which the Southern Tier Substitute Teachers, NYSUT, AFT, AFL-CIO (Petitioner) received a majority of the valid votes cast in a representation election. In finding the Petitioner eligible for certification as the exclusive bargaining agent for a unit of per-diem substitute teachers employed by the District, the Director rejected the District's argument that the election was not representative because only 20 of the 78 eligible employees voted[1/] and, of those voting, only 12 voted in favor of

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[1/]This is a 25.6% participation rate.

representation by the Petitioner.

In its exceptions, the District argues that we should not certify any union as the majority representative for a unit unless it receives a majority of the valid votes cast in an election in which at least 30% of the eligible voters have participated. The District finds support for a 30% election participation requirement in those sections of our Rules of Procedure (Rules) requiring a showing of interest from at least 30% of unit employees as a condition to the processing of a petition.

Having considered the District's exceptions, we affirm the Director's decision.

We have always certified unions which have garnered a simple majority of the valid votes cast in an election. The District asks us to adopt a fundamentally different approach, one rejected by most other labor relations agencies.[2/] In refusing to set aside this election, the Director adopted the National Labor Relations Board's (NLRB) decision in Lemco Construction, Inc.[3/], which represents the prevailing view of public and private sector agencies throughout the country. We similarly subscribe to the rationale expressed in that decision, which is quoted in material

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[2/]The Waterfront Commission of New York Harbor and the Port Authority of New York and New Jersey, however, each have a 30% election participation requirement.

[3/]124 LRRM 1329 (1987). Lemco involved an election in which only one voter had participated. The representative character of a one-person vote had previously troubled the NLRB.

part in the Director's decision. Thus, absent evidence that employees were denied a reasonable opportunity to vote, a low voter turnout, by itself, offers no ground upon which to invalidate an election. We believe that this approach best recognizes and accommodates the fundamental purposes of a representation election and the unit employees' right to refrain from voting, while best ensuring the speedy completion of representation proceedings in a manner which is entirely consistent with normal political processes.

The District relies upon our showing of interest rules to support its argument that we should impose a 30% election participation requirement as a condition to certification. The showing of interest rules, however, are intended to establish a threshold of employee interest and therefore a reasonable potential for the ultimate establishment of majority status and to guard against the waste of agency resources.[4/] An election participation rate below 30% does not mean that the union which wins the election is not the majority representative of the unit. It may merely mean that those employees who refrain from voting are content to be bound by the results obtained without their participation. Moreover, when, as here, there has been a reasonable opportunity to vote, there is no reason to suspect that the voting pattern, which resulted in a majority of the

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[4/]See, e.g., Bd. of Educ. of the City of Yonkers, 10 PERB ¶3100 (1977).

ballots being cast in favor of representation by the Petitioner, would not have prevailed in an election with more participants.

For the reasons set forth above, we deny the District's exceptions and affirm the Director's decision. Accordingly, we have this date certified the Petitioner as the exclusive bargaining agent for the unit stipulated to be appropriate.

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2G-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, SUFFOLK LOCAL 852,

Charging Party,

-and-

CASE NO. U-11895

TOWN OF BROOKHAVEN,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ and JANNA PFLUGER of counsel), for Charging Party

COOPER, SAPIR AND COHEN, P.C. (DAVID M. COHEN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Brookhaven (Town) and cross-exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Suffolk Local 852 (CSEA) to a decision by an Administrative Law Judge (ALJ). The ALJ held that the Town refused to reopen negotiations on a sick leave buy-back clause in the parties' 1989-91 contracts[1/] in violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act). In finding a violation, the ALJ reasoned that the Town had failed to fund the sick leave buy-back clause and that this funding failure amounted to the legislative

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[1/]CSEA represents white-collar and blue-collar units in the Town which have separate collective bargaining agreements.

body's disapproval of that clause, which rendered that term of the contracts nonbinding.[2/] The Town is under a continuing duty to bargain on demand mandatory subjects of negotiation, such as the item at issue, notwithstanding the existence of a contract, to the extent negotiations have not been foreclosed by agreement or otherwise waived. Therefore, the ALJ held that the Town was statutorily obligated to reopen negotiations about a sick leave buy-out, or an alternative, pursuant to CSEA's demand.

The Town excepts to the ALJ's finding that it had a duty to reopen negotiations on the sick leave buy-back, arguing that there was no legislative disapproval of that term of the agreements.

CSEA in its response to the Town's exceptions argues that the ALJ's controlling findings of fact and law are correct and that his decision finding the Town in violation of its duty to negotiate should be affirmed. If the ALJ's decision is reversed in this respect, CSEA argues in its cross-exceptions that the ALJ erred by denying CSEA's motion to amend the charge to include an allegation that the Town refused to negotiate the sick leave buy-

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[2/]Act §201.12. The ALJ's decision necessarily assumes that the sick leave buy-back required legislative approval. Our disposition of the charge makes it unnecessary for us to decide which terms of a contract are subject to legislative approval. See in this respect, however, Act §204-a.1, which refers to legislative approval being required as to any contract term "requiring legislative action to permit its implementation by amendment of law or by providing the additional funds therefor . . . ."

his earlier memorandum, Farber's testimony at the hearing establishes that the Town could have paid for a sick leave buy-back from the general "employee benefits" portion of the budget or from appropriations made for other purposes. The rest of the record, including the legislative body's ratification of the entire contract, is simply inconsistent with a conclusion that the Town's legislative body either intended to or did in fact disapprove the sick leave buy-back provisions. Because the record does not support the finding that the Town's legislative body disapproved the contractual buy-back provisions, it must be concluded that there is no continuing duty to negotiate regarding them or an alternative to them.[4/]

Our reversal of the ALJ's decision finding the Town in violation of its duty to negotiate necessitates a consideration of CSEA's cross-exceptions.

Without regard to the contested timeliness of CSEA's motion to amend, we find the motion to have been properly denied because the amendment, made at the end of the hearing, would have added a different cause of action against the Town than the one pleaded in the charge. The charge alleges only a refusal to renegotiate a mandatory subject of bargaining pursuant to demand, a per se violation of the Act if CSEA's allegations regarding legislative

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[4/]We express no opinion, of course, as to whether the Town's failure to buy back the sick leave on request violated the parties' contracts. That is an issue beyond our jurisdiction under §205.5(d) of the Act.

disapproval had been sustained. The Town's intent is immaterial under the charge as filed. In contrast, the amendment would have added a refusal to bargain allegation grounded entirely upon the Town's lack of good faith in entering into the sick leave buy-back agreement under which only the Town's intent would be in issue. Except as both allegations arise under §209-a.1(d) of the Act, the original and the amended causes of actions are completely different in nature and required proof. The amendment proffered by CSEA at the end of the hearing would not merely have formalized an issue already before the parties. Rather, it would have injected a new issue into the proceeding at a late date. We have previously noted several times that amendments adding new causes of action are properly denied[5/] and hold so here.

For the reasons set forth above, the Town's exceptions are granted and the ALJ's decision is reversed. CSEA's cross-exceptions are denied.[6/]

[5/]See, e.g., State of New York (Dep't of Transportation), 23 PERB ¶3005 (1990), conf'd, 174 A.D.2d 905, 24 PERB ¶7014 (3d Dep't 1991); Service Employees Int'l Union, Local 222, 16 PERB ¶3063 (1983); Public Employees Fed'n, 14 PERB ¶3036 (1981); Brookhaven-Comsewogue Union Free School Dist., 9 PERB ¶3012 (1976). See also Kings Park Cent. School Dist., 7 PERB ¶4520 (1974).

[6/]CSEA is no more advantaged if we were to characterize its amended cause of action as a contract repudiation. Under that theory, CSEA should have known of the alleged violation when Farber issued his memorandum in January 1990, making the proferred amendment plainly untimely.

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

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

back in good faith because it never had any intention to seek funding for that provision.[3/]

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

CSEA had a statutory right to reopen negotiations regarding the sick leave buy-back only if it could establish that the agreement in that respect was not binding because it was legislatively disapproved. The purported evidence of legislative disapproval, and the only evidence relied upon by the ALJ in finding a violation, is a memorandum from Frank Farber, Jr., the Town's Commissioner of Finance, denying requests for sick leave buy-backs for 1989 and 1990 because "there is no provision in the (1989) or (1990) budget to provide funds for this purpose."

Whatever else the purpose of this memorandum may have been, the Commissioner of Finance is not the legislative body, nor does his memorandum evidence the legislative body's disapproval of this term of the agreement. A legislative body is not required to appropriate monies pursuant to a particular line item in a budget. Indeed, the ALJ specifically found that the Town "does not make line item budget provisions." Therefore, the absence of a specific buy-back provision in the Town's budget does not evidence a legislative disapproval. Moreover, notwithstanding

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[3/]See, e.g., City of Newburgh, 24 PERB ¶3022 (1991).

2H 12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PHYLLIS A. SMITH,

Charging Party,

-and- **CASE NO. U-13217**

BALLSTON SPA EDUCATION ASSOCIATION and BALLSTON SPA CENTRAL SCHOOL DISTRICT,

Respondents.

PHYLLIS A. SMITH, pro se

RUBERTI, GIRVIN and FERLAZZO, P.C. (JAMES E. GIRVIN of counsel), for Respondent Ballston Spa Central School District

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Phyllis A. Smith to a decision by the Director of Public Employment Practices and Representation (Director). Smith alleges that the Ballston Spa Education Association (BSEA) violated §209-a.2(a), (b) and (c) of the Public Employees' Fair Employment Act (Act) and that the Ballston Spa Central School District (District) violated §209-a.1(a), (b), (c), (d), and (e) of the Act. The gravamen of her charge is that the District and BSEA entered into a collective bargaining agreement which bases teachers' salaries, in part, on earned credit hours in violation of the Act and the Americans With Disabilities Act of 1991 (ADA). Smith alleges that the agreement discriminates against her

because she earns less than her "peers" simply because they have earned more credit hours than she, who is otherwise qualified for her job.

The Director dismissed the charge as deficient without a hearing on several grounds. He found that we have no jurisdiction over alleged violations of other statutes, that Smith lacks standing to allege a refusal to bargain or a failure to continue expired contract terms, and that there was no evidence of improper motivation in the negotiation or application of the contract's terms, which themselves did not violate the Act in any respect.

It does not appear that the exceptions were served upon the parties as required by §204.10(c) of our Rules of Procedure. The District has raised this service failure in response to Smith's exceptions. Dismissal of the exceptions is, therefore, required on this basis.[1/] We note, moreover, that, even if properly served, the exceptions would necessarily have been denied on their merits. The entirety of the exceptions are directed to the BSEA's and the District's alleged noncompliance with the federal ADA. As the Director correctly held, our jurisdiction does not extend to the investigation, adjudication or remedy of alleged violations of the ADA.

[1/]United Fed'n of Teachers (Costabile), 25 PERB ¶3034 (1992); United Fed'n of Teachers (Thomas), 15 PERB ¶3030 (1982).

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

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

21-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROGER E. TOUSSAINT,

Charging Party,

-and-

CASE NO. U-11103

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

ROGER E. TOUSSAINT, pro se

ALBERT C. COSENZA, GENERAL COUNSEL (DANIEL TOPPER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Roger E. Toussaint to a decision by an Administrative Law Judge (ALJ). After a four-day hearing,[1/] the ALJ dismissed Toussaint's charge against the New York City Transit Authority (Authority) which alleges that the Authority violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it filed disciplinary charges against him, allegedly because he had filed grievances against the Authority.

Discrediting Toussaint's testimony to the limited extent it differed from the Authority's, the ALJ found that the record did not show that Toussaint was disciplined because he had filed

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[1/]Toussaint was then represented by counsel for the Amalgamated Transit Union, his bargaining agent. Toussaint has since assumed personal responsibility for this appeal.

grievances or had otherwise complained about actions taken by the Authority's management or supervisors. The ALJ held that the Authority had good cause to bring disciplinary charges against Toussaint for his arguably insubordinate actions involving recurring failures or refusals to follow his supervisor's orders.

In his exceptions, Toussaint argues that the ALJ's decision is inconsistent with arbitration awards which found him not guilty of certain of the insubordination charges. He argues that these awards bind us in this proceeding and necessitate a reversal of the ALJ's decision. Toussaint also argues that the ALJ erred by receiving a letter from the Authority regarding the res judicata and collateral estoppel effects of the arbitration awards which was filed after it had filed its post-hearing brief with the ALJ. Toussaint otherwise argues generally that the ALJ's decision is not supported by the record.

The Authority argues that the ALJ's decision is correct in all material respects and should be affirmed.

Having reviewed the record, we affirm the ALJ's decision.

The arbitration panel's dismissal of certain of the disciplinary charges[2/] is not dispositive as a matter of fact or law of the Authority's motivation for bringing them, the only issue which must be decided in the context of this particular

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[2/]Two of the charges were dismissed; the third, relating to Toussaint's wearing of a safety helmet, was sustained, although the requested penalty of dismissal was reduced by the arbitration panel to a warning.

improper practice charge. In that respect, the ALJ determined on review of the evidence, including a demeanor-based credibility resolution which we have no reason to disturb, that the Authority's disciplinary charges were not motivated by the grievances or complaints Toussaint had filed. Rather, the ALJ concluded that Toussaint filed grievances to give himself an opportunity to claim improper retaliation when the disciplinary charges, which he believed would be brought against him for job-related misconduct, were actually instituted by the Authority. In reaching these conclusions, the ALJ rejected any inference that the Authority disciplined Toussaint after he had grieved to dissuade him from filing other grievances.[3/] Having reviewed the record, we find that it fully supports the ALJ's determination.

We also deny Toussaint's remaining exception regarding the Authority's filing of a letter with the ALJ after the filing of its memorandum of law.[4/] The letter was not solicited by the ALJ, and there is no indication that it was made part of the record, that Toussaint was denied an opportunity to reply to it or that the ALJ relied upon it in reaching her decision. Therefore,

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[3/]Contrary to Toussaint's claim, the ALJ did not find that the Authority's disciplinary charges against him had merit nor did the ALJ reassess Toussaint's guilt or innocence on the disciplinary charges.

[4/]The letter simply transmitted a copy of another ALJ's ruling in other charges involving Toussaint and the Authority regarding the res judicata and collateral estoppel effects of arbitration awards in our administrative proceedings.

the ALJ's mere receipt of the letter was not prejudicial to Toussaint and we, therefore, deny this exception.

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

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

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2J-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE INSPECTION, SECURITY AND LAW ENFORCEMENT EMPLOYEES, DISTRICT COUNCIL 82, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12379

STATE OF NEW YORK (GOVERNOR'S OFFICE OF EMPLOYEE RELATIONS),

Respondent.

ROWLEY, FORREST, O'DONNELL & HITE P.C. (RICHARD R. ROWLEY and KEVIN S. CASEY of counsel), for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (RICHARD W. MCDOWELL of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Inspection, Security and Law Enforcement Employees, District Council 82, American Federation of State, County and Municipal Employees, AFL-CIO (Council 82) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing, after hearing, Council 82's charge against the State of New York (Governor's Office of Employee Relations) (State). The charge alleges that the State violated §209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it failed to tell Council 82, pursuant to its several inquiries during negotiations, whether it would pay the performance and

longevity increments in the parties' 1988-91 contract if a successor agreement was not reached before the 1988-91 contract expired on March 31, 1991. The State's repeated response to Council 82's inquiries was that the matter was under review and it did not then know which provisions of the 1988-91 agreement would be continued post-expiration. Finding no persuasive evidence that the State's responses were untrue, the Director dismissed the charge.

In its exceptions, Council 82 argues that proof of falsity is immaterial because the State had a duty to make a determination within a reasonable time of its receipt of Council 82's inquiries as to whether or not it would pay the increments. To whatever extent falsity of the State's response is material, Council 82 argues that it satisfied its burden of proof.

The State argues that it had no duty until the contract expired to decide which terms, if any, of the 1988-91 contract would be continued if there were no successor in place and that it gave an honest response to each of Council 82's several inquiries.

Having read the record and considered the parties' arguments, including those at oral argument, we affirm the Director's decision.

Council 82 was not seeking information from the State of the type which most often forms the basis for information-related improper practice charges. Usually these charges concern an

unsatisfied demand for documents or objective data. Nonetheless, we have held that an employer's general duty to provide information[1/] encompasses a duty to give a response to an inquiry if a response is reasonably relevant and necessary to contract negotiation or administration.[2/] In this case, the State responded to Council 82's inquiries. If we were to accept Council 82's primary argument and require not only a response to its inquiries but a determination on them, it would be tantamount to requiring the development and disclosure of information which does not then exist. We have never interpreted the duty to provide information so broadly and we are not persuaded that there is good reason here to do so.

On the other hand, to deliberately mislead a party in response to its specific inquiry is no more consistent with the concept of good faith bargaining than would be the fabrication and distribution of false information. Therefore, we agree with the Director that the pertinent inquiry in this case is whether, in fact, the State had made a decision at the date of any of Council 82's inquiries as to whether it would continue the performance and longevity increments after

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[1/] See, e.g., Bd. of Educ. of the City School Dist. of the City of Albany, 6 PERB ¶3012 (1973).

[2/] Village of Johnson City, 12 PERB ¶3020 (1979) (duty to advise as to whether employer would accept an arbitration award). The State in this case also disputes Council 82's need for the response it sought. Our disposition of this charge makes it unnecessary to consider that argument.

expiration of the 1988-91 contract. In that respect, we find, as did the Director, that there is insufficient evidence that a decision had been made at the dates of Council 82's inquiries.

For the reasons set forth above, Council 82's exceptions are denied and the Director's decision is affirmed.

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

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2K-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PUBLIC EMPLOYEES FEDERATION, LOCAL 4053, SEIU/AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-12557

STATE OF NEW YORK (STATE INSURANCE FUND),

Respondent.

JOHN J. CULKIN, pro se

WALTER J. PELLEGRINI, GENERAL COUNSEL (REBECCA L. CAUDLE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by John J. Culkin to a decision by an Administrative Law Judge. The improper practice charge in issue was filed by the Public Employees Federation, Local 4053, SEIU/AFT, AFL-CIO against the State of New York (State Insurance Fund) (State). PEF alleges that the State interfered with and discriminated against Culkin in violation of §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when its agent referenced Culkin's union activities in a cover letter transmitting Culkin's application for appointment to the position of Executive Director of the State Insurance Fund (Fund). The ALJ held that the reference to Culkin's union activities was improper and she ordered any

references in that respect redacted from the letter. The ALJ found, however, that Cecilia Norat, then the Fund's Deputy Executive Director, had been effectively appointed to the Executive Director's position before Culkin had applied for that position. Therefore, the ALJ held that the State's reference to Culkin's union activities did not taint the selection process or prejudice Culkin's opportunity for appointment to the Executive Director's position.

To the extent Culkin's exceptions are directed to the allegations in the charge,[1/] he argues only that the ALJ erred in concluding that Norat would have been appointed despite the State's references to his union activities which accompanied his application for the Executive Director's position.

In response, the State argues that Culkin merely repeats the arguments which were made below to the ALJ. The State submits that the ALJ's findings of fact and law are correct and that her decision should be affirmed.

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

[1/]Culkin, for example, questions the State's motivation for bringing certain disciplinary actions against him and for the Inspector General's investigation of him. The charge as filed, however, does not allege any impropriety in these respects. Culkin also alleges that the State is not complying with the posting order, but that is properly the subject of a compliance review, not exceptions.

Culkin is not a party to this charge,[2/] only its intended beneficiary and the person who would most immediately benefit from a remedy if a violation of the Act were found to have been committed. Under our Rules, exceptions may be filed only by a party.[3/] PEF, not Culkin, is the charging party and it was PEF's right to file exceptions, not Culkin's, which PEF has not done. To treat Culkin as a party without his having obtained that status would not only ignore the plain language of our Rules, it would also confuse and disrupt the prosecution, settlement, withdrawal and administrative and judicial appeal of our proceedings generally. As Culkin has no standing to file these exceptions, they are not properly before us and we reject them on that basis.

We would affirm the ALJ's decision, however, even if we were to consider the exceptions on their merits. We find no reason from our review of the exceptions and the record to disturb the ALJ's basic conclusion that PEF had not proven that the reference to Culkin's union activities affected the appointment of the Fund's Executive Director or his chances for appointment to that position.

[2/]A party is defined in relevant part in §200.5 of our Rules of Procedure (Rules) as the "person" or "organization" "filing a charge", or "named as a party in a charge" or "whose timely motion to intervene...has been granted". Culkin did not file this charge, he is not named as a charging party and he did not move to intervene.

[3/]Rules of Procedure, §204.10.

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

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3A-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COMMUNICATIONS WORKERS OF AMERICA/ GRADUATE STUDENT EMPLOYEES UNION, AFL-CIO,

Petitioner,

-and-

CASE NO. C-2894

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK),

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,[1/] 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 Communications Workers of America/Graduate Student Employees Union, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative

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1/ Upon inquiry of the parties, we have been advised, and are persuaded, that there is no impediment to the issuance of this Order at this time. See 20 PERB ¶4063, at 4082 n.1 (1987).

for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Graduate students holding State-funded positions as graduate assistants or teaching assistants.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Communications Workers of America/Graduate Student Employees Union, 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: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3R-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOUTHERN TIER SUBSTITUTE TEACHERS, NYSUT, AFT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3865

WAVERLY 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 Southern Tier Substitute Teachers, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All per diem substitute teachers who have received a reasonable assurance of continuing employment as referenced in Civil Service Law §201.7(d).

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Southern Tier Substitute Teachers, NYSUT, AFT, 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: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

30-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ALFRED S. LEONE,

Petitioners,

-and- **CASE NO. C-3986**

TOWN OF GATES,

Employer,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, LOCAL NO. 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 International Brotherhood of Teamsters, Local No. 118 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 regular full-time laborers, mechanical equipment operators, mechanics and working foremen in the Employer's Highway Department.

Excluded: Superintendent of Highways, Seasonal and all other employees of the Employer.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Local No. 118. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3D-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 294, IBT, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3988

COUNTY OF ALBANY AND ALBANY COUNTY SHERIFF,

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

Unit: Included: Full-time investigators and senior investigators.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294, IBT, 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: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3E-12/30/92

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HOURLY EMPLOYEES ASSOCIATION OF THE CITY OF LACKAWANNA,

Petitioner,

-and-

CASE NO. C-4001

CITY OF LACKAWANNA,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, DPW UNIT, LOCAL 815,

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 Civil Service Employees Association, Inc., Local 1000, DPW Unit, Local 815 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: Chief Mechanic (salary), Welder, Auto Mechanic & Auto Body Repairman, Heavy Equipment Operator, Maintainer, Signal Maintenance Man (Salary), Sanitation Division - Driver (MEO), Motor Equipment Operator, Janitor, Sanitation Man (Laborer), Laborer & Watchman, Recreation Laborer, Sign Painter (Salary), Timekeeper (Salary).

Excluded: 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, DPW Unit, Local 815. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 30, 1992
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

#4A-12/30/92

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

80 WOLF ROAD
ALBANY, NEW YORK 12205
(518) 457-2614

JOHN M. CROTTY
DEPUTY CHAIRMAN
AND
COUNSEL

M E M O R A N D U M

November 23, 1992

TO: Board

FROM: John M. Crotty

RE: Amendment to §204.1(d) of Rules of Procedure

Amend §204.1(d) as follows:

. . . The charge may be withdrawn by the charging party before the issuance of [a final] the dispositive decision and recommended order based thereon upon approval by the director. Thereafter, the charge may be withdrawn only with the approval of the board. Whenever the director or the board, as the case may be, approves the withdrawal of the charge, the case will be closed.

(Material in brackets to be deleted. New material is underlined.)

The amendment to §204.1(d) conforms to the current §201.2(c) regarding the withdrawal of representation petitions. The amendment will permit the necessary flexibility in considering whether to approve a withdrawal request and preserve the distinct roles of the Director and the Board at different stages of a proceeding.

JC:pn

#4A-12/30/92

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

80 WOLF ROAD
ALBANY, NEW YORK 12205
(518) 457-2614

JOHN M. CROTTY
DEPUTY CHAIRMAN
AND
COUNSEL

M E M O R A N D U M

December 1, 1992

TO: The Board

FROM: John M. Crotty

RE: Rule Changes

The following changes in the Rules are Proposed.

Delete §201.5(a)(4) requiring a petitioner to state whether it wants exclusive representation. The Act now makes the majority representative of a unit the exclusive bargaining agent for that unit as of right. Subparagraphs 5-11 would be renumbered accordingly.

Delete §201.5(b)(3) requiring a challenging labor union to state whether an incumbent is the exclusive representative. Subparagraphs 4-10 would be renumbered accordingly. Rationale is the same as above.

Amend §§207.4(b)(9), 208.2(b) and (c) and 209.2(a) and (b) to substitute "80 Wolf Road" for "50 Wolf Road".

Amend §208.2(c) to delete "without charge". Copies of existing documents are no longer distributed free of charge.

Amend §208.2(d) to delete the following introductory proviso: "Except as provided in subdivision (c) of this section,". This amendment is made necessary by the proposed deletion of "without charge" from §208.2(c). The exception referenced by current §208.2(d) would no longer apply with the adoption of the proposed amendment to §208.2(c).

#4A-12/30/92

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

80 WOLF ROAD
ALBANY, NEW YORK 12205
(518) 457-2614

JOHN M. CROTTY
DEPUTY CHAIRMAN
AND
COUNSEL

M E M O R A N D U M

December 17, 1992

TO: The Board

FROM: John M. Crotty

RE: Rule Change

The following amendment to §200.10 is proposed.

200.10 Filing; service. (a) The term "filing", as used in this Chapter, shall mean delivery to the board or an agent thereof, or the act of mailing to the board[.], or deposit of the papers enclosed in a properly addressed wrapper into the custody of an overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery.

(b) The term "service", as used in this Chapter, shall mean delivery to a party or the act of mailing to a party[.], or deposit of the papers enclosed in a properly addressed wrapper into the custody of an overnight delivery service for overnight delivery, prior to the latest time designated by the overnight delivery service for overnight delivery.

(c) "Overnight delivery service" means any delivery service which regularly accepts items for overnight delivery to any address in the state.