2A-11/30/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

Petitioner,

-and-

CASE NO. C-3996

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

Employer,

-and-

DISTRICT COUNCIL 37, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,

Intervenor.

NORMAN ROTHFELD, Esq., for Petitioner

DAVID BASS, Esq. (JERRY ROTHMAN of counsel), for Employer

ROBERT PEREZ-WILSON, GENERAL COUNSEL (MARY O'CONNELL of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Local 3, International Brotherhood of Electrical Workers, AFL-CIO (petitioner) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition to represent certain unrepresented computer service technicians and supervising computer service technicians employed by the Board of Education of the City School District of the City of New York (employer). The employer and District Council 37, American Federation of State, County and Municipal Employees (intervenor) opposed the petition on the ground that the at-issue employees

were most appropriately placed in the intervenor's existing bargaining unit, which includes certain computer titles. The Director added the unrepresented positions to the intervenor's unit because of the shared community of interest between them and the computer titles in the intervenor's unit and to avoid a further proliferation of bargaining units of the employer's employees.[1/]

The petitioner excepts to the Director's decision on the grounds that the at-issue titles do not share a community of interest with the employees in the intervenor's unit, that the Director made certain factual errors, and that the assigned Administrative Law Judge (ALJ) committed errors in his conduct of the hearing.[2/] The intervenor supports the Director's decision.

For the reasons set forth below, we affirm the decision of the Director.

The employer employs ten to twenty employees as computer service technicians or supervising computer service technicians

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1/ There are approximately 40 bargaining units.

2/ The conduct and ruling by the ALJ which the petitioner complains about is raised for the first time in its exceptions. Since the conduct and ruling complained of occurred at the hearing in this matter, the petitioner should have raised objection on the record (Rules of Procedure (Rules) §201.9(d)), could have made a motion to the ALJ to have him recuse himself (Rules of Procedure, §201.9(c)(3)), or could have objected to the Director. As the petitioner never raised any objection until in its exceptions, despite numerous opportunities to do so, we will not address this exception, there not being any extraordinary circumstances which would permit us to reach it.

in its Office of Technical Services, which is part of the Division of Computer Information Services (DCIS). There are two repair centers in Queens, two in Brooklyn and one each in the Bronx, Staten Island and Manhattan. The technicians maintain and repair the employer's computers in either these centers or, on occasion, at one of the schools. They may also supervise other personnel in routine maintenance of the computers. They are involved in some on-going projects, such as Automate the Schools, which is designed to link the local area networks at the employer's schools with its mainframe computer at its Metrotech Plaza in Brooklyn. In this project and in some repair work, the computer service technicians and the supervising computer service technicians interact with various other employees represented by the intervenor in computer and telecommunications titles.

The intervenor's unit consists of approximately 6,500 of the employer's employees, in the areas of computer personnel, accountants, statisticians, clerical and administrative, general service, motor vehicle and supervising clerical. Approximately 250 employees work in computer titles and are located in the DCIS. Additionally, the intervenor also represents the computer service technicians and supervising computer service technicians employed by the various mayoral and nonmayoral agencies of the City of New York (City). For titles common to both the City and the employer, economic bargaining is conducted between the City and a coalition of unions, led by the intervenor. The resulting salary agreement is adopted by the employer. The employer then

negotiates with the intervenor for an agreement which covers other terms and conditions of employment for the employees represented by the intervenor, including, inter alia, workday and workweek, holidays, overtime, health insurance, safety and grievance procedures. The last collective bargaining agreement expired in 1989 and the intervenor and the employer have continued negotiations for a successor agreement.

The technician titles are in the competitive class of the Civil Service and have an annual salary of approximately $24,000 for the computer service technicians and approximately $38,000 for the supervising computer service technicians. The computer and telecommunications titles represented by the intervenor are also in the competitive class of the Civil Service and have a salary range of $26,00 to $50,000.

The employer opposes the creation of an additional bargaining unit as sought by the petitioner because of the increased administrative burden on its staff that presently negotiates and administers forty collective bargaining agreements with the representatives of the employer's other employees.

The petitioner argues that the Director erred in including "skilled trade" employees in a unit of other employees and in "accreting" titles that were not in the unit from its inception. The petitioner also argues that there is no community of interest and no interaction between the petitioned-for employees and the employees represented by the intervenor, and that the intervenor should be estopped from representing these employees because it

refused to represent them at one time. Finally, the petitioner asserts that the Director erred in finding that another unit of employees would not be compatible with the employer's responsibilities to serve the public.

We have long held that in the creation of bargaining units, it is the most appropriate unit, not an appropriate unit, which must be established.[3/] We have also consistently favored the creation of the largest possible unit which permits for effective and meaningful negotiations and which will avoid a proliferation of bargaining units.[4/] Finally, the administrative convenience of the employer and its ability to meet its responsibility to serve the public is a factor to be considered in determining the most appropriate unit.[5/]

The record establishes a clear community of interest between the computer service technicians, the supervising computer service technicians and the employees in the unit represented by the intervenor. They share the same basic mission: the establishment, maintenance and further development of the employer's computer and telecommunications system. They are employed in the same division, under the same general supervision, with similar terms and conditions of employment and

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3/ State of New York, 1 PERB ¶399.85 (1968), aff'd sub nom. CSEA v. Helsby, 32 A.D.2d 131, 2 PERB ¶7007 (3d Dep't 1969), aff'd, 25 N.Y.2d 842, 2 PERB ¶7013 (1969).

4/ Onondaga-Cortland-Madison BOCES, 23 PERB ¶3014 (1990).

5/ Act, §207.1(c); Board of Educ. of the City Sch. Dist. of the City of Buffalo, 14 PERB ¶3051 (1981).

they frequently interact in the performance of their assignments in the schools. Any occupational differences which may arise, and the petitioner points to none, are far outweighed by these similarities; indeed, the petitioner presented no evidence of any actual or potential conflict of interest.

The employer opposes the creation of another unit of employees, arguing against the establishment of a forty-first unit of ten to twenty employees. The employer's position here is consistent with the policies of the Act and our prior decisions, where we weigh the employer's ability to provide service to the public against the creation of another bargaining unit. Such an analysis "takes into consideration the administrative convenience of the employer and perhaps suggests that an excessive number of units might be undesirable"[6/], as the Director here concluded.

For the reasons set forth above, we affirm the Director's decision. The computer service technician and the supervising computer service technician are most appropriately placed in the unit represented by the intervenor. Since the continuing majority status of the intervenor will not be affected by the addition of these employees to its unit of approximately 6,500 employees, no election is necessary.[7/]

6/ Board of Educ. of the City Sch. Dist. of the City of Buffalo, supra at 3083.

7/ New York Convention Center Operating Corp., 27 PERB ¶3034 (1994).

It is therefore ordered that the petitioner's exceptions are dismissed and the Director's decision is affirmed.

DATED: November 30, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2B-11/30/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WATERFORD TEACHERS ASSOCIATION, NYSUT, AFT, AFL-CIO,

Charging Party,

-and-

CASE NO. U-13859

WATERFORD-HALFMOON UNION FREE SCHOOL DISTRICT,

Respondent.

JAMES R. SANDNER, ESQ. (J. CHRISTOPHER MEAGHER and MITCHELL H. RUBINSTEIN of counsel), for Charging Party

BUCHYN, O'HARE, WERNER & GALLO (KATHRYN McCARY of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision by the Director of Public Employment Practices and Representation (Director) on an improper practice charge filed by the Waterford Teachers Association, NYSUT, AFT, AFL-CIO (Association) against the Waterford-Halfmoon Union Free School District (District). The Association alleges in its charge that the District discontinued the salary terms of the parties' expired collective bargaining agreement in violation of §209-a.1(e) of the Public Employees' Fair Employment Act (Act) when, after expiration, on August 31, 1992, of the parties' 1989-92 agreement, it did not compute a new salary schedule for the 1992-93 school year and

STATE OF NEW YORK
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BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision by the Director of Public Employment Practices and Representation (Director) on an improper practice charge filed by the Waterford Teachers Association, NYSUT, AFT, AFL-CIO (Association) against the Waterford-Halfmoon Union Free School District (District). The Association alleges in its charge that the District discontinued the salary terms of the parties' expired collective bargaining agreement in violation of §209-a.1(e) of the Public Employees' Fair Employment Act (Act) when, after expiration, on August 31, 1992, of the parties' 1989-92 agreement, it did not compute a new salary schedule for the 1992-93 school year and

when it did not pay eligible unit employees annual service increments provided by the 1991-92 salary schedule.

The Director dismissed the charge on the ground that the salary provisions of the parties' agreement were "internally sunsetted"[1/] and, therefore, were limited to the duration of the parties' 1989-92 contract. The Director accordingly held that the District did not violate §209-a.1(e) of the Act when it paid unit employees in 1992-93 the same salaries they had been paid in the preceding school year.

The Association argues in its exceptions that the terms of a contract cannot be sunsetted lawfully, that sunset agreements, if permissible, must be manifested by plain and clear language evidencing a waiver of rights under §209-a.1(e) of the Act and, notwithstanding the above, that there is no evidence establishing the parties' intent to sunset the salary provisions of the expired agreement. The District disagrees with the Association's arguments regarding sunset agreements and argues that the Director was correct in holding that the salary agreements sunsetted upon expiration of the 1989-92 contract.

Having reviewed the record and considered the parties' arguments, including those at oral argument, we affirm the Director's decision insofar as he held that the District was not

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[1/]A sunset provision, in relevant respect, is an agreement between the parties to a bargaining relationship under which one or more terms of a collective agreement are terminated at a specified time, typically upon expiration of the contract, or upon a specified condition.

required to compute new salary schedules for 1992-93, or thereafter, but reverse insofar as the Director held that the District did not have an obligation to advance unit employees on step in accordance with the 1991-92 salary schedule.

Initially, we address each of the Association's first two basic legal arguments concerning the nature and limits of §209-a.1(e) of the Act.

Section 209-a.1(e) of the Act requires an employer to continue all of the terms of an expired collective agreement pending negotiation of a successor agreement unless the union which represents the employer's employees violates the no-strike provisions of the Act. However, nothing in §209-a.1(e) restricts what the terms of those collective agreements may be or directs what they must be and nothing therein limits the parties' power and right to define the terms of their own agreement. If the parties to a bargaining relationship want to restrict the duration of a contract term, or to otherwise condition the continuation of that contract provision, they are free to do so as a matter of law and policy. Nothing in the many cases cited by the Association or in the legislative history of §209-a.1(e) of the Act compels or warrants a contrary conclusion. We conclude, therefore, that parties may sunset a given term in their collective bargaining agreement.

The Association's second basic argument is that the sunsetting of a term of an agreement, if permissible, must be

made manifest by plain and clear language evidencing an intentional relinquishment of rights because a sunset represents a waiver of the protections of §209-a.1(e). This argument proceeds, however, from a mistaken premise because a sunset agreement is simply not a waiver of §209-a.1(e). Section 209-a.1(e) of the Act continues the terms of an expired agreement, but only as those terms were negotiated by the parties. If the parties have agreed, for example, that a term of their agreement will end upon expiration of the contract, the employer's discontinuation of that term upon expiration of the contract is entirely consistent with §209-a.1(e), if not compelled by it. In that circumstance, §209-a.1(e) has not been waived; it never attached in a manner to require the continuation of a term of an expired agreement which the parties agreed to terminate at the end of the contract. To hold otherwise, and require the post-expiration continuation of a term of a contract which has ended by agreement upon expiration of that contract, would change the terms of the parties' agreement.

It is, therefore, the nature of the parties' specific agreement as to a given term of their contract which determines the employer's post-expiration obligations with respect to that term under §209-a.1(e) of the Act. In ascertaining the nature of the parties' agreement, the character of the evidence necessary to establish an agreement to a term of a contract for purposes of §209-a.1(e) is no different than the character of the evidence necessary to establish an agreement to any other term of an

agreement for any other purpose under the Act. The mutual assent essential to the formation of an agreement can be established by evidence short of that which would establish a waiver of statutory rights. As with any agreement, a sunset agreement can exist in any circumstance in which it can be concluded reasonably that the parties intended to restrict or condition a given term of their collective bargaining agreement. It is in this context which we assess the propriety of the District's conduct.

Article V of the parties' 1989-92 contract covers salaries. That provision of the parties' contract calls for the creation of salary schedules according to a formula for the three years covered by the agreement. Each salary schedule was to have 20 steps which corresponded to years of service. Steps 1, 5, 10, 15 and 20 were to be computed according to the mean of salaries in the contracts of certain specified school districts which had been ratified on or before January 30 of the years 1989, 1990 and 1991. All other steps on the salary schedule were to be the average difference between each of the meaned steps. The salary schedule for 1989-90 was appended to the parties' 1989-92 contract; the schedules for 1990-91 and 1991-92 were created thereafter using the formula in Article V.

This case is consistent with the analysis in Cobleskill Central School District[2/] (hereafter Cobleskill). Under Cobleskill, a salary schedule is not merely a device for the identification of a given employee's salary during the life of an agreement. A salary schedule reflects simultaneously both an individual's rate of pay for a given year and a wage system. The individual's rate of pay is represented by the dollar amounts assigned for a given year to each step of the schedule. The wage system exists in the calculation of wage rates based upon component factors. In Cobleskill, the component factors of that salary system were education and years of service; here, the component factor of the wage system is years of service only. The particular factors in a wage system may vary by employer, but it is the wage system in whatever its form which is the term of the agreement subject to continuation.

In examining Article V, we agree with the Director's conclusion that the parties did not intend the District to be under a continuing obligation after expiration of the 1989-92 contract to refashion new salary schedules for years other than those covered by the agreement. The refashioning of those schedules could change, at most, only the dollar amounts assigned to the step schedule. It is apparent to us that the parties in this case intended the rates of pay assigned to any given step to

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[2/]16 PERB ¶3057 (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 610, 1071, 18 PERB ¶7006 (1985).

change only during the three years of their agreement. This aspect of the parties' salary schedule is properly viewed no differently than if they had agreed, for example, to fixed percentage salary or flat wage increases for each of the years covered by their contract. Upon expiration of the contract, the unit employees would not be entitled under §209-a.1(e) to additional annual percentage or flat increases in base pay until a new agreement was negotiated because it would be manifest in that circumstance that the salary or wage increases were intended to be granted during the term of the agreement only. Here, too, the parties effected wage increases for unit employees formulaically for the years covered by their contract. The salary schedules for each of three specified school years were to be based on data from surrounding districts as of the prior January 30, e.g., January 30, 1991 for the 1991-92 salary schedule. It is not reasonable to conclude from this language that these parties intended to have the District create a schedule for 1992-93 from January 30, 1992 data or from the data from any preceding or subsequent year for that matter. A fair reading of Article V leads us to the conclusion that the District's obligation to fashion new salary schedules was limited to the duration of the 1989-92 contract, that that obligation was satisfied by its fashioning of the three salary schedules and that it owed the Association no duty under §209-a.1(e) of the Act to create a new salary schedule for 1992-93, or any school year

thereafter, until the parties reached a new agreement imposing that obligation.

This leaves for consideration the separate issue of whether the District was required to advance unit employees on the steps under the 1991-92 salary schedule. Cobleskill controls the analysis of this issue as well. In that case, the Board held that the employer was obligated to make service advancements on a salary schedule contained in an expired agreement. In reaching that conclusion, the Board rejected the employer's argument that a reference to the years the salary schedules covered sunsetted the wage system represented by the two component parts of those salary schedules. Relying on the Board's decision in Suffolk County,[3/] the Director reached a contrary conclusion in this case. In Suffolk County, a reference to salaries being determined for "the four academic years covered by this agreement" was held to have sunsetted the employer's obligation to pay service increments after expiration of the contract.

Having reexamined Suffolk County and Cobleskill, we conclude that Suffolk County is not reasonably distinguishable from Cobleskill, and to the extent Suffolk County is inconsistent with Cobleskill, we reverse Suffolk County. In Cobleskill, we held that the reference to the years covered by the salary schedules

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[3/]18 PERB ¶3030 (1985), appeal dismissed as moot sub nom. Faculty Ass'n of Suffolk Community College v. PERB, 18 PERB ¶7016 (Sup. Ct. Suffolk Co. 1985), aff'd, 125 A.D.2d 307, 20 PERB ¶7002 (2d Dep't 1986).

was most reasonably viewed as a reference to the dollar amounts associated with the several service and education steps. That is the most reasonable construction of such a reference in the context of a salary schedule absent evidence of a mutual intent to also abolish or sunset the salary system itself. We cannot conclude that a simple reference to the years covered by salary schedules reflects an intent to terminate the wage system embodied therein without similarly concluding that a contract's general duration clause serves to sunset all of the terms of the contract upon expiration. The former is merely a more particularized version of the latter and to have a contract's duration clause sunset all terms of that contract obviously defeats the very purpose of §209-a.1(e) of the Act. Moreover, the abolition of a wage system upon expiration of a contract leaves no methodology for the calculation and payment of wages, certainly as to new hires. Such a change in the terms of the parties' last agreement cannot be assumed.

The District argues, however, that it had no statutory obligation to advance teachers from one step to another on any salary schedule in the absence of a new, recomputed schedule. But this argument entirely ignores that service steps in a salary schedule such as the District's, as in Cobleskill, are a component part of a wage system and it is the wage system which must be maintained upon expiration of the collective agreement. The parties admittedly did not discuss the consequences of an expired agreement generally or the effect of the contract's

expiration on the parties' salary agreement. There being nothing in this record to establish that the parties intended that upon expiration of the 1989-92 contract their agreement to a service-based system of compensation would expire, the District was required under §209-a.1(e) of the Act to advance unit employees one step annually on the 1991-92 salary schedule and to pay them at the rate specified on that schedule.

For the reasons set forth above, the District violated §209-a.1(e) of the Act by not advancing unit employees on the steps set forth in the 1991-92 salary schedule and by not paying unit employees at the rate specified for those steps. The charge is dismissed in all other respects.

IT IS, THEREFORE, ORDERED that the District:

1. Advance unit employees annually, commencing with the 1992-93 school year, on the steps set forth in the 1991-92 salary schedule and pay to each unit employee so advanced the difference between the salary actually paid to such employee and the salary that would have been paid to the employee had the employee been advanced on the 1991-92 salary schedule in accordance with this decision, such advances and payments to continue until such time as a successor to the 1989-92 agreement is negotiated, with interest at the currently prevailing maximum legal rate.

2. Sign and post notice in the form attached in all locations normally used to post notices of information to unit employees.

DATED: November 30, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify employees in the unit represented by Waterford Teachers Association, NYSUT, AFT, AFL-CIO that the Waterford-Halfmoon Union Free School District will:

Advance unit employees annually, commencing with the 1992-93 school year, on the steps set forth in the 1991-92 salary schedule and pay to each unit employee so advanced the difference between the salary actually paid to such employee and the salary that would have been paid to the employee had the employee been advanced on the 1991-92 salary schedule in accordance with the PERB decision, such advances and payments to continue until such time as a successor to the 1989-92 agreement is negotiated, with interest at the currently prevailing maximum legal rate.

Dated . . . . . .

By . . . . . .
(Representative) (Title)

Waterford Halfmoon UFSD

. . . . . .

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.

2C-11/30/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORANGE COUNTY DEPUTY SHERIFF'S ASSOCIATION, INC.,

Petitioner,

-and-

CASE NO. C-4268

COUNTY OF ORANGE and SHERIFF OF ORANGE COUNTY,

Joint Employer,

-and-

ORANGE COUNTY CORRECTION OFFICERS BENEVOLENT ASSOCIATION,

Intervenor.

KENNETH J. FRANZBLAU, ESQ., for Petitioner

KAUFF, McCLAIN & McGUIRE (HARLAN J. SILVERSTEIN of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Orange County Deputy Sheriff's Association, Inc. (Association) to a decision by the Director of Public Employment Practices and Representation (Director). The Association filed a petition on May 5, 1994, seeking to represent a unit of certain employees, jointly employed by the County of Orange and the Sheriff of Orange County (County/Sheriff), who are currently represented by the Orange County Correction Officers Benevolent Association

(COBA).[1/] The Director dismissed the Association's petition as untimely. He held that a collective bargaining agreement between the County/Sheriff and COBA, which expires December 31, 1995, barred the Association's petition. Although this contract, which was executed on May 14, 1993, provides retroactive wage increases for unit employees for 1990, 1991 and 1992, the Director held that the contract was of three-years' duration, covering only calendar years 1993, 1994 and 1995. On that interpretation, a petition would not be timely under §201.3(d) of our Rules of Procedure (Rules) until May 1995, the month preceding expiration of COBA's period of unchallenged representation status under §208.2 of the Public Employees' Fair Employment Act (Act). Alternatively, the Director determined that even if the contract were held to be of six years' duration, it should be treated as two successive three-year agreements for purposes of assessing the timeliness of the Association's petition. This alternative interpretation also permits a petition to be filed by the Association in May 1995, but not May 1994, when the Association filed its petition.

The Association argues in its exceptions that the contract between the County/Sheriff and COBA must be held to be a six-year agreement because its wage terms cover that period of time. It also argues that the Director's alternative basis for dismissal

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[1/]COBA was certified by us on August 25, 1992, pursuant to a petition it filed in May 1991, replacing the Association as the bargaining agent for this unit.

of its petition constitutes rule-making, which can only be done in accordance with the procedures in the State Administrative Procedure Act. COBA argues in response that the Director was correct in both of his constructions of its contract with the County/Sheriff and in dismissing the Association's petition as untimely.

For the reasons set forth below, we affirm the Director's dismissal of the petition.

In dismissing the Association's petition as untimely, we do not agree with the Director's conclusion that the agreement between COBA and the County/Sheriff is of three years' duration. In reaching his conclusion in this respect, the Director deferred completely to the parties' intent as to the contract's duration as expressed in the contract's duration clause. Although recognizing the duration of the wage terms of the parties' agreement, the Director concluded that holding the contract to be of six-years duration would necessarily make all contracts retroactive anytime the parties to those contracts were to correct any error which may have been made before the contracts were executed. However, we consider there to be a clear difference between the ministerial correction of an error, which might not affect the duration of a contract, and the deliberate negotiation of a major term of a collective bargaining agreement.

In this case, the last agreement for this unit expired in December 1989. The agreement expiring December 31, 1995 provides for retroactive wage increases for 1990, 1991 and 1992. Parties

to a negotiating relationship are unable by merely labeling their agreement as being of a certain duration to cause us to disregard the reality of their collective bargain. The reality of the bargain in this case is that the County/Sheriff and COBA reached an agreement in May 1993, within one year of COBA's certification, which was prospective to December 31, 1995 and retroactive in major respect to January 1, 1990, a date coincident with the expiration of the last agreement covering this unit.

Having concluded that COBA and the County/Sheriff have a contract of six years' duration leaves for decision the question of how that agreement is to be interpreted for purposes of assessing the timeliness of the Association's May 1994 petition.

The Association argues that its petition must be timely because §208.2(b) of the Act provides that an agreement "having a term in excess of three years shall be treated as an agreement for a term of three years . . . ." It argues that the contract between COBA and the County/Sheriff must be deemed to have expired under §208.2(b) of the Act on December 31, 1992, making its petition timely under §201.3(e) of our Rules, which allows petitions to be filed 120 days after expiration of a collective agreement.

The conclusion advanced by the Association is exactly the one the Board rejected in Kenmore-Town of Tonawanda Union Free

School District.[2/] In that case, the Board held that a six-year agreement is to be treated as two, three-year agreements for contract bar purposes. The decision in that case, and ours here, represent an interpretation and application of §208.2 of the Act. They do not, as argued by the Association, in any way constitute rule-making. Therefore, the State Administrative Procedure Act has no application.

We believe that Kenmore-Town of Tonawanda Union Free School District reasonably balances the Act's purposes to promote stability in labor relations and the employees' right to periodically reassess their selection of a bargaining agent. On this interpretation, the Association is afforded two opportunities during the term of the contract between the County/Sheriff and COBA to seek the representation of unit employees. Whether that decision is applicable in all circumstances involving multi-year agreements need not be decided. We hold only that in the circumstances presented here, the Director was correct in concluding, under Kenmore-Town of Tonawanda Union Free School District, that the next available filing period under the agreement between COBA and the County/Sheriff is May 1995.

We would reach the same result on an alternative interpretation of §208.2(b) of the Act. A main purpose of that section of the Act is to preclude the parties to a negotiating

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[2/]12 PERB ¶3055 (1979), aff'g 11 PERB ¶4569 (1978).

relationship from preventing challenges to the majority status of the incumbent union for an unreasonable period of time. Section 208.2(b), therefore, guarantees one period for representation challenge at least every three years. From 120 days after expiration of a contract between a public employer and an employee organization until those parties negotiate a new agreement, however, an incumbent union's majority status is at all times challengeable by representation petition filed under §201.3(e) of the Rules by either public employees or another employee organization. If the "term" of the agreement in §208.2(b) were to be read to include the period of a contract's retroactivity, it would often open the incumbent employee organization to challenge immediately upon the conclusion of collective negotiations, for it is often the case that successor agreements are not reached until long after expiration of the prior agreement. As such, the reference to the "term" of the agreement in §208.2(b) is most reasonably read to mean the prospective term of the agreement, excluding any period of retroactivity. The Legislature's intent to establish a balance between the stability of bargaining relationships and the right of employees to choose their bargaining agent is thus preserved.

The contrary interpretation of §208.2(b) advanced by the Association is destructive of the stability in labor relations which §208.2(b) of the Act intends to promote and is unnecessary to preserve to employees a reasonable opportunity to reassess their selection of a bargaining agent. Moreover, the

Association's interpretation produces illogical results. The Association would have us interpret §208.2(b) of the Act in a way which would permit it to file a petition questioning COBA's majority status at any time on and after May 1992, even though COBA was not certified until August 1992. The facts of this particular case, therefore, clearly demonstrate why the calculation of the filing periods for representation petitions in relevant context can only reasonably be made based upon the prospective term of a collective bargaining agreement. The prospective term of the agreement between the County/Sheriff and COBA is less than three years and, as calculated by reference to that term, the next available representation filing period is May 1995.

The Association's petition is, therefore, untimely under either analysis and the Director properly dismissed it.

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

DATED: November 30, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROY B. REYNOLDS, et al.,

Charging Parties,

-and-

CASE NO. U-15476

STATE OF NEW YORK (DEPARTMENT OF SOCIAL SERVICES),

Respondent.

ROY B. REYNOLDS, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Roy B. Reynolds to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his charge that the State of New York (Department of Social Services) (State) violated §209-a.1(b) and (c) of the Public Employees' Fair Employment Act (Act). He alleges that the State, in February 1994, after the issuance of a decision by the Director adding him and ten other physicians to a unit of State employees,[1/] reduced certain benefits which they had previously received as unrepresented employees to the level provided for in the contract covering the negotiating unit into which they were placed. Reynolds further

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[1/] See State of New York, 26 PERB ¶4063 (1993).

alleges that other physicians in the same title who were not placed in the unit continue to receive the higher benefits.

Reynolds was then informed by the Assistant Director of Public Employment Practices and Representation (Assistant Director) that the charge was deficient as the allegations did not constitute a violation of the Act. On May 9, 1994, he filed an amendment to the charge asserting that the State's conduct violated §209-a.1(a) and (c) of the Act because it was in retaliation for the physicians becoming represented employees. The Director thereafter dismissed the charge, holding that there were no facts evidencing any improper motivation.

Reynolds asserts in his exceptions that unrepresented employees who are added to a bargaining unit cannot have their benefits reduced, that it is a violation of the Act for represented employees to receive a level of benefits different from unrepresented employees in the same title, and that the Director was biased in deciding this case because he also decided the earlier representation matter.

For the reasons set forth below, we affirm the Director's decision.

Reynolds does not here challenge his unit placement, nor could he in the context of this improper practice charge. He only questions the legality of an employer having different benefit levels as between represented and unrepresented employees. The Act does not regulate nor govern benefits or relationships between an employer and unrepresented employees.

The employer is, therefore, under no statutory obligation to conform the terms and conditions of unrepresented employees to those of represented employees. That some nonunit employees in the same or similar titles might enjoy a different salary schedule or level of benefits does not, in and of itself, violate the Act.[2/]

Finally, we conclude that the Director was not precluded from deciding the instant matter. Our Rules of Procedure (Rules) require the Director to review each charge initially to determine if the facts as alleged may constitute a violation of the Act.[3/] To accept the charging party's argument that once the Director has decided a representation matter, as he is also required by our Rules to do,[4/] he may not decide a subsequent improper practice charge involving the same unit, would preclude the Director from fulfilling the obligations imposed upon him by our Rules. There being no evidence of bias in fact, there is no ground for the Director's recusal or disqualification.

The exceptions are, therefore, dismissed and the Director's decision is affirmed.

[2/]New York City Transit Auth., 26 PERB ¶3081 (1993).

[3/]Rules, §204.2.

[4/]Rules, Part 201.

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

DATED: November 30, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2E-11/30/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RAYMOND R. SWANNO,

Petitioner,

-and- **CASE NO. CP-335**

STATE OF NEW YORK (DEPARTMENT OF EDUCATION),

Employer,

-and-

PUBLIC EMPLOYEES FEDERATION,

Intervenor.

RAYMOND R. SWANNO, pro se

BOARD DECISION AND ORDER

Raymond R. Swanno excepts to a decision by the Director of Public Employment Practices and Representation (Director) dismissing a petition he filed seeking the placement of his position[1/] with the State of New York (Department of Education) (State) into a unit of employees which is currently represented by the Public Employees Federation (PEF). The Director dismissed the petition because §201.2(b) of our Rules of Procedure (Rules) does not permit individuals to file unit placement petitions. The Director noted, moreover, that Swanno's position is also

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[1/]Swanno has been designated managerial or confidential in his title of Associate Vocational Rehabilitation Counselor.

neither newly created nor substantially altered, as §201.2(b) of the Rules requires.

In his exceptions, Swanno essentially argues that the Director's dismissal of his petition was unfair because he could not present arguments regarding his employment status and the appropriateness of his uniting within PEF. Our Rules, however, specifically and intentionally do not permit an employee to file a unit placement petition. Unit placement questions may be raised by either a union or an employer only. The Director's decision, therefore, is affirmed for the reasons stated therein.

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

DATED: November 30, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2F-11/30/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GEORGINE ASSANTE,

Charging Party,

-and- **CASE NO. U-15529**

CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK and UNITED FEDERATION OF TEACHERS,

Respondents.

GEORGINE ASSANTE, pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Georgine Assante to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her charge that the City School District of the City of New York (District) and the United Federation of Teachers (UFT) violated, respectively, §209-a.1(a) and (d) and §209-a.2(b) and (c) of the Public Employees' Fair Employment Act (Act). Assante alleges that, in 1990, the District had her improperly physically restrained and confined, that thereafter she was improperly examined by District doctors and that, despite repeated requests, she had been unable to obtain from the District copies of certain medical reports and records relating to these events. She

further alleges that, in 1990, UFT denied her representation and denied her an explanation of her rights.[1/]

Assante was informed by the Assistant Director of Public Employment Practices and Representation (Assistant Director) that her charge was deficient because she had no standing to allege violations of §209-a.1(d) or §209-a.2(b) of the Act, the acts complained of occurred more than four months prior to the filing of the charge and were, therefore, untimely,[2/] and that insufficient facts were pled with respect to the §209-a.1(a) and §209-a.2(c) allegations. Assante thereafter filed an unsworn amendment alleging that she had been in touch with the District and UFT on a regular basis during the four-month period immediately preceding the filing of the charge. The Assistant Director informed Assante that the amendment could not be accepted because it was not sworn to and that her charge could not be processed until she submitted facts in support of her allegations.

Assante filed a second, notarized amendment, again with general allegations of misconduct by the District and UFT. Her allegations against the District still centered on its reliance on certain medical reports and its refusal to release medical records to her, pursuant to requests she had made after the charge was filed. Her allegations against UFT remained

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[1/]Assante also alleges that she was not given adequate representation during a grievance hearing in 1992.

[2/]Rules of Procedure (Rules), §204.1(a).

generalized, complaining of bad faith in its representation of her.

The Director then dismissed the charge for lack of standing to allege §209-a.1(d) and §209-a.2(b) violations, as untimely with respect to some of the allegations, and for failing to provide supporting facts for her remaining allegations.

Assante's exceptions repeat the allegations in her charge and amendments and add additional complaints against the District.

We affirm the Director's determination that Assante has no standing to allege violations of §209-a.1(d) and §209-a.2(b) of the Act as we have previously held that an individual employee has no standing to allege a violation of the duty to negotiate in good faith.[3/]

The charge was filed on April 8, 1994. Therefore, only actions which occurred on or after December 8, 1993 are within the four-month filing period specified by §204.1(a) of the Rules. Assante refers to no specific events during that time frame, making only generalized statements about her ongoing contacts with the District and UFT. Therefore, her charge cannot be regarded as timely.

Finally, any of the remaining allegations in the charge and the amendment which might relate to events which occurred within the four months preceding the filing of the charge, are not

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[3/]See, e.g., Local 100, Transport Workers Union of America, 27 PERB ¶3008 (1994); City Sch. Dist. of the City of New York, 22 PERB ¶3012 (1989).

factually supported as required by §204.1(b)(3) of our Rules and must be dismissed.

For the reasons set forth above, we affirm the decision of the Director and dismiss the exceptions.

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

DATED: November 30, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

2G-11/30/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of the Impasse Between

STATEN ISLAND RAPID TRANSIT OPERATING AUTHORITY,

-and-

CASE NOS. TIA94-001; M93-260

UNITED TRANSPORTATION UNION, LOCAL 1440.

CERTIFICATION

In accordance with the provisions of §209.5(a) of the Public Employees' Fair Employment Act (Act) and based upon an investigation into the status of the above entitled impasse conducted under §205.15 of the Board's Rules of Procedure (Rules), it is hereby certified that a voluntary resolution of the contract negotiations between the Staten Island Rapid Transit Operating Authority and the United Transportation Union, Local 1440 cannot be effected. The dispute between the parties is accordingly referred to a public arbitration panel designated in accordance with the provisions of §209.5(a) of the Act and §205.18 of the Rules.

DATED: November 30, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

3A-11/30/94

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-4088

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

Unit: Included: Food service helper, bus driver, health aide, teacher's aide, cafeteria monitor, guidance secretary, study hall aide, cook, teacher aide/library, driver, school monitor, teaching

assistant, custodian, senior typist, bus monitor, cleaner, typist, mechanic and account clerk.

Excluded: Head custodian, head mechanic, cook manager and all other employees.

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

DATED: November 30, 1994
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member