STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF BUFFALO,

Charging Party,

-and-

CASE NO. U-11347

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 71-71A,

Respondent.

SAMUEL F. HOUSTON, ESQ., Corporation Counsel (DAVID R. MIX, ESQ., of Counsel), for Charging Party

KENNETH D. ARMES, for Respondent

BOARD DECISION AND ORDER

The City of Buffalo (City) excepts to the portion of an Administrative Law Judge (ALJ) decision which finds a demand made by the International Union of Operating Engineers, Local 71-71A (Engineers) to be a mandatory subject of negotiation.[1/]

At issue before us is a demand (Demand Number 3) submitted by the Engineers to a fact finder, which provides:

[1/] The charge before the ALJ related to three demands made by the Engineers. The ALJ held two of the demands to be nonmandatory subjects of negotiation and one to be a mandatory subject. Because no exceptions were filed to the portion of the ALJ decision holding two subjects to be nonmandatory, we make no finding with respect to them and our review is accordingly limited to the one which is the subject of the City's exceptions.

> Employees shall receive a minimum of five day notice relative to shift or building assignment change.

The City argues that the demand is not mandatorily negotiable because it does not provide for emergency situations in which five days advance notice of shift or building assignment changes cannot reasonably be made, and, therefore, the demand improperly impinges upon its prerogative to establish staffing levels on shifts and in buildings. The ALJ determined, however, based upon testimony and documentary evidence, that both parties specifically understood that emergency situations would constitute an exception to the five-day notice contained in the demand. The ALJ further concluded that the five-day notice requirement contained in the demand was not reasonably construed to absolutely and in all cases preclude a change in building assignment or shift without five days notice, pointing to evidence that the City negotiators understood the demand to mean that in cases in which five days advance notice was not given, changes could be made, but overtime compensation might be required. Based upon these findings, the ALJ determined that the notice requirement contained in the demand does not unreasonably impinge upon the City's ability to meet its staffing needs and that it is mandatorily negotiable.

In view of the parties' understanding of the meaning and effect of the demand, we affirm the ALJ's determination that the at-issue demand is a mandatory subject of negotiations. In this regard, we distinguish our holding in City of Schenectady, 21 PERB ¶3022 (1988), where a demand concerning assignments and maintenance of shift schedules was held to be nonmandatory because we were unable to determine from the mere language of the demand or parol evidence concerning its intent, that the demand would not interfere with the employer's right to determine staffing needs. Here, as found by the ALJ, both parties understand that the demand is intended to apply in nonemergency situations, and that alternatives, such as the payment of overtime compensation, are still available to meet emergency staffing needs. Under these circumstances, the demand is mandatorily negotiable, and the City's charge of improper insistence by the Engineers upon its submission to factfinding should accordingly be dismissed.

IT IS THEREFORE ORDERED that the charge be, and it hereby is, dismissed insofar as it relates to the Engineers' Demand Number 3.

DATED: October 22, 1990
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COPIAGUE UNION FREE SCHOOL DISTRICT,

Charging Party,

-and-

CASE NO. U-10329

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondent.

INGERMAN, SMITH, GREENBERG, GROSS, RICHMOND, HEIDELBERGER & REICH, ESQS. (JOHN J. GROSS, ESQ., of Counsel), for Charging Party

NANCY E. HOFFMAN, ESQ. (JEROME LEFKOWITZ, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Civil Service Employees Association, Inc. (CSEA) and cross-exceptions of the Copiague Union Free School District (District) to an Administrative Law Judge (ALJ) decision which found that CSEA violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when, at a July 27, 1988 CSEA ratification meeting, its chief negotiator failed to adequately recommend ratification of a memorandum of understanding reached between the parties, but which dismissed the charge in all other respects.

CSEA's exceptions assert that the ALJ's finding that the chief negotiator's disclosure of a two-to-two deadlock within the CSEA negotiating team at the ratification meeting constitutes a failure to recommend ratification is erroneous. It supports this claim by asserting that notwithstanding disclosure of the deadlock within the negotiating team, the chief negotiator and the then-president of the unit both affirmatively urged ratification, and that such support fulfilled CSEA's obligations under the Act.

The District's cross-exceptions assert that the ALJ erred in failing to find a violation of the Act in the silence of the remaining members of the CSEA negotiating team prior to and during the ratification meeting based upon the factual circumstances there present. The District's argument relies upon decisions of this Board which have held that the duty to negotiate in good faith includes a duty on the part of individual negotiating unit members to affirmatively support ratification.

Certain facts, found by the ALJ and not in dispute before us, are particularly relevant to our consideration of the exceptions and cross-exceptions in this matter. These facts are as follows.

On July 25, 1988, following a lengthy negotiation session, representatives of the District and the entire CSEA

negotiating team then present[1/] entered into and executed a memorandum of agreement for a three-year term. The ALJ further found that at the time of finalization and execution of the memorandum of agreement, no CSEA negotiating team member voiced any opposition to any portion of the agreement or reserved, either orally or in writing, the right to express opposition to any portion of the agreement, or indicated any intention not to support ratification.

Thereafter, on July 27, 1988, both CSEA's chief negotiator, Patrick Curtin, and its then unit president, Howard Spielman, conducted a ratification meeting, at which the remaining members of the CSEA negotiating team were present. Curtin testified that at the outset of the ratification meeting he informed the membership that the negotiating team had been deadlocked, and amplified his statement as follows:

> Q. So you told the membership that - you explained - did you explain what you meant by "deadlocked"?
>
> A. That it was a two-to-two vote.
>
> Q. Two in favor and two opposed?
>
> A. I didn't identify who was or wasn't.
>
> Q. You said there was two opposed and two in favor; is that right?

1/ One team member was not present at all during the session and a second team member, who was present during the negotiating session, had to leave for personal reasons prior to execution of the memorandum of agreement.

A. (witness nods.)

Judge Comenzo: You have to answer.

A. Yes.

Curtin further testified that he urged ratification, advised the members present of the delay and other consequences of rejecting the agreement, and advised the members that the agreement compared favorably to other agreements being negotiated in the area. According to the testimony, Spielman also urged ratification of the agreement. None of the other members of the negotiating team made any statements prior to the ratification vote. A ratification vote, conducted by secret ballot, resulted in a 19 to 4 rejection of the agreement. Thereafter, Curtin reviewed the memorandum of agreement with the members item by item, obtaining a vote concerning those specific issues rejected by the membership for purposes of further discussion with the District.

The ALJ found that the disclosure by the chief negotiator of the even split between the members of the negotiating team concerning acceptance or rejection of the agreement established, at best, a neutral position on the part of the negotiating team, in contravention of its duty under the Act to affirmatively support ratification. We agree. An evenly divided vote represents, at the most, no position at all with respect to ratification and, as we have

previously held:[2]

> [T]he failure of negotiators affirmatively to support an agreement is a violation of the Taylor Law unless the negotiators had advised the other party in advance that they would not give such support. [footnote: Wappingers CSD, 5 PERB ¶3074 (1972); Union Springs CSD, 6 PERB ¶3074 (1973); Harpursville CSD, 14 PERB ¶3003 (1980); and Jeffersonville-Youngsville CSD, 16 PERB ¶3106 (1983)]

We accordingly find that the establishment, at the outset of the ratification meeting conducted by CSEA, of a neutral or "no position" position of its negotiating team violated §209-a.2(b) of the Act.

We now turn to the District's cross-exceptions concerning the dismissal of so much of its charge as alleges a violation of §209-a.2(b) of the Act based upon the failure of the negotiating team members individually to support ratification at the ratification meeting.

CSEA witnesses testified, without contradiction, that the practice followed by CSEA at ratification meetings has consistently been to have the unit president, acting as the spokesperson for the negotiating team, present the agreement to the membership for ratification. As we have previously held[3], such a procedure, as a general proposition, establishes no violation of the Act. We have also held that

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[2]Town of Putnam Valley, 17 PERB ¶3041, at 3066 (1984).

[3]Id.

the member of a negotiating team who specifically advises the other party, in advance, that he or she will not support the agreement is relieved thereby of the statutory duty to affirmatively support ratification.[4/] However, neither of these principles applies to the facts of the instant case. The two team members opposed to the agreement failed to communicate their opposition or assert their right to be relieved of the duty to affirmatively support ratification at the time that the memorandum of agreement was executed. Furthermore, the silence of the team members in the face of the disclosure by the chief negotiator of the existence of a two-to-two vote by the negotiating team on the agreement constitutes, in essence, an admission of failure to support for ratification. Thus, while the unit president's call for ratification might normally be construed as affirmative support expressed on behalf of the entire negotiating team, such an inference could not reasonably be drawn from the team members' silence following the announcement of a "deadlock". Accordingly, we grant the cross-exceptions of the District and find that CSEA violated §209-a.2(b) of the Act when its negotiating team failed to affirmatively support ratification of the memorandum of agreement executed on July 25, 1988.

[4/] Id.

Notwithstanding the exceptions of CSEA, we affirm the ALJ decision with respect to the remedial relief recommended in view of our prior holdings that the appropriate remedy for violation of the Act in the conduct of ratification procedures, or in the failure to conduct proper ratification procedures, is the waiver of the right to ratify.[5/]

IT IS THEREFORE ORDERED that CSEA execute, upon the request of the District, a collective bargaining agreement embodying the agreements reached by the parties on July 25, 1988 and set forth in the parties' memorandum of understanding of that date.

IT IS FURTHER ORDERED that CSEA sign and post the attached notice at all locations used by it for written communications to District employees within the bargaining unit represented by CSEA.

DATED: October 22, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

[5/] See Jamesville-Dewitt CSD, 22 PERB ¶3048, at 3112 (189); City of Saratoga Springs, 20 PERB ¶3031 (1987); and Union Springs Central School Teachers Ass'n, 6 PERB ¶3074 (1973).

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 of the Copiague Union Free School District in the unit represented by the Civil Service Employees Association, Inc. that the Civil Service Employees Association, Inc. will execute, upon the request of the District, a collective bargaining agreement embodying the agreement reached by the parties on July 25, 1988 and set forth in the parties' memorandum of understanding of that date.

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.

.....

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.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT CHIEF & HEAD SUPERVISORY UNIT OF SUFFOLK EDUCATIONAL LOCAL 870, CSEA, LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-10296

MIDDLE COUNTRY CENTRAL SCHOOL DISTRICT,

Respondent.

NANCY E. HOFFMAN, ESQ. (MIGUEL ORTIZ, ESQ., of Counsel), for Charging Party

RAINS & POGREBIN, P.C. (ERNEST R. STOLZER, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Middle Country Central School District Chief & Head Supervisory Unit of Suffolk Educational Local 870, CSEA, Local 1000, AFSCME, AFL-CIO (CSEA) and the cross-exceptions of the Middle Country Central School District (District) to an Administrative Law Judge (ALJ) decision finding that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, in May 1988, the District unilaterally subcontracted out certain unit work. The District's cross-exceptions challenge the finding of violation of the Act and the scope of the remedial relief recommended as overly broad, while CSEA's exceptions challenge the scope of remedial relief recommended as unduly narrow.

Additionally, following the filing of the District's cross-exceptions, CSEA filed before this Board a motion to amend its improper practice charge to allege continuing subcontracting since May 1988. The motion is opposed by the District.

FACTS

The record before the ALJ in this matter consists of CSEA's charge, the District's answer, the parties' collective bargaining agreement, and a five-paragraph stipulation of fact. The charge alleges, in essence, that on or about May 25, 1988,[1] the District "contracted out work that has been historically and exclusively the work performed" by bargaining unit members, in that the District "had an outside contractor open one or more buildings for a Memorial Day Parade," in violation of §§209-a.1(a) and (d) of the Act.[2]

The District's answer denies the material allegations of the charge, except admits "that on or about May 28, 1988, the District assigned an individual other than a member of the bargaining unit represented by the charging party to unlock and lock a District building." The District's answer also

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[1] Although the charge alleges an occurrence of May 28, 1988, the stipulation of the parties discloses that the date in issue was in fact May 25, 1988.

[2] The ALJ dismissed so much of the charge as alleges that the unilateral contracting out of bargaining unit work establishes coercion of unit members in the exercise of their rights under §209-a.1(a) of the Act. The dismissal of that portion of the charge is not the subject of exceptions before us, and we accordingly do not address it here.

asserts, as an affirmative defense, that the subject raised by the improper practice charge is a matter covered by the parties' collective bargaining agreement, that deferral to arbitration is accordingly appropriate, and that the charge should be dismissed.

The stipulation of fact submitted by the parties provides, in its entirety, as follows:

1. The CSEA is the exclusive bargaining representative for those employed by the District as Chief Custodians and Head Custodians.

2. That the bargaining unit has been in existence for approximately 20 years.

3. For the past 20 years, Head and Chief Custodians were called in on holidays and on days off to open the buildings for such purposes as parades, football games, etc., and would receive extra or overtime pay in instances where they were called in to open the buildings.

4. The opening of the buildings in the above instances was work performed exclusively by members of the Head and Chief Custodial Unit.

5. On May 25, 1988, the District used a private security agency, the L & M Security of Long Island to come in and open the school buildings being used for participants in the Memorial Day parade.

The final piece of record evidence before the ALJ consists of the collective bargaining agreement, executed by the parties for the period "July 1, 1987 to June 30, 1990." The District asserts that Clause 97 thereof establishes a waiver by CSEA of the right to negotiate concerning

subcontracting, or that this Board should defer to arbitration or that the Board is without jurisdiction to entertain CSEA's charge pursuant to §205.5(d) of the Act.[3/] Clause 97 provides as follows:

> Work Rules
>
> 97. The District reserves the right to promulgate and enforce work rules related to the employees' working relationship with the District, provided such work rules do not conflict with a specific provision of this agreement.
>
> The Association agrees that the District shall have the right to alter any "terms and conditions of employment" not specifically covered herein after prior notification and discussion with the Association.
>
> The Employer agrees that the provisions of this agreement shall supersede any work rules which may be in conflict with this agreement.

The ALJ determined that the District failed to meet its burden of establishing that CSEA, by its agreement to Clause 97, waived the right to negotiate the loss of unit work. The ALJ further held that deferral to arbitration was not appropriate because, having found that the clause does not cover the subject of the charge, and that the right asserted by CSEA is based solely upon its rights under the Act, and because CSEA had not filed a grievance, no purpose would be achieved by such deferral. The ALJ accordingly

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[3/] Section 205.5(d) provides, in relevant part, that "the board shall not have authority to enforce an agreement between an employer and an employee organization and shall not exercise jurisdiction over an alleged violation of such an agreement that would not otherwise constitute an improper employer or employee organization practice."

found a violation of §209-a.1(d) of the Act by virtue of the District's subcontracting of unit work without negotiation with CSEA.

With respect to the issue of remedial relief, the ALJ recommended the following:

1. Cease and desist from assigning to nonunit personnel the duties of the Head and Chief custodian, as performed up to May 25, 1988;

2. Make unit employees whole for any lost wages owing to the performance of unit work by L & M Security of Long Island, with interest at the maximum legal rate;

3. Negotiate in good faith with the CSEA concerning unit members' terms and conditions of employment; and

4. Sign and post the attached Notice at all locations customarily used to post notices to unit members.

The District excepts to the breadth of paragraphs 1 and 3 of the recommended order, while CSEA excepts to the assertedly narrow scope of paragraph 2 of the recommended order.

We will address first the parties' arguments relating to the violation found, and will then turn to their exceptions relating to the appropriateness of the relief recommended, as well as CSEA's motion to amend the charge.

VIOLATION FOUND

As the ALJ correctly points out in her decision, a violation of §209-a.1(d) of the Act is here made out unless the District is correct in its position that either CSEA has

waived its right to negotiate the subject matter, or it has in fact negotiated the subject matter and the scope and extent of CSEA's rights with respect to subcontracting are defined by Clause 97 of the collective bargaining agreement, in which case the Board would be without jurisdiction over the charge.

There is no doubt that the District bears the burden of proving its affirmative defense[4/] and that its burden of establishing a waiver by CSEA of the right to negotiate the loss of unit work must be met by proof that the waiver was knowing, unmistakable, and unambiguous.[5/] To the extent that the District argues that Clause 97 constitutes a waiver of CSEA's right to negotiate terms and conditions of employment not specifically covered by the agreement and substitutes therefor prior notification and discussion, it must establish that the paragraph applies to more than the section in which it appears and which is entitled "Work Rules". In other words, the District has the burden of proving that CSEA clearly and unmistakably agreed to confer upon the District the right to alter any and all terms and conditions of employment not specifically covered by the collective

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[4/] See, e.g., NYC Transit Authority, 20 PERB ¶3037 (1987), conf'd sub nom. NYC Transit Authority v. PERB, 147 A.D.2d 574 and 156 A.D.2d 689, 22 PERB ¶7001 (2d Dep't 1989).

[5/] See CSEA 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).

bargaining agreement, and not merely those relating to "work rules", when it agreed to the work rules clause.

The ALJ found that the relied-upon second sentence of Clause 97, placed as it is between two sentences specifically relating to work rules, fails to establish such a clear, unambiguous and unmistakable waiver of the right to negotiate all noncovered terms and conditions of employment, including subcontracting of unit work, which does not fall within the rubric of "work rules" as the term is commonly understood. In the absence of affirmative evidence that CSEA's agreement to the second sentence of Clause 97 was clearly intended by both parties to apply to more than work rules, the ALJ finding is in conformity with this Board's decision in Sachem Central School District, 21 PERB ¶3021 (1988). In that case, we held broad contract language to constitute a waiver of the right to negotiate assignment of teaching duties to guidance counselors, where the language clearly and explicitly waived, without limitation, the right to negotiations concerning terms and conditions of employment.[6/]

[6/]The at-issue language in Sachem CSD, supra, provided as follows:

> All terms and conditions of employment not covered by this agreement shall continue to be subject to the Board's direction and control and shall not be the subject of negotiations until the commencement of the negotiations for a successor to this agreement.

See also Bd. of Ed. of the CSD of the City of New York, 8 PERB ¶3011 (1975).

We affirm the ALJ's finding that the affirmative defense of waiver has not been established here, because a substantial ambiguity exists concerning the scope and purpose of Clause 97 (Work Rules). In so finding, we note that in proceedings before the ALJ (although not before us), the District contended on one hand that Clause 97 applies as a waiver concerning all matters (including subcontracting) not covered by the agreement, and on the other hand that other clauses of the agreement cover the issue. Thus, the applicability of Clause 97 to the issue of subcontracting is less than clear even from the District's standpoint.

The District further contends that this Board is without jurisdiction over the instant charge by virtue of §205.5(d) of the Act. However, having concluded that the District has failed to meet its burden of proving that the collective bargaining agreement covers the issue of subcontracting, it follows that the charge is not appropriately construed as one seeking enforcement of the collective bargaining agreement or one which would require the exercise of jurisdiction over an alleged violation of the agreement. This portion of the District's exception is accordingly also denied.

Finally, we affirm the ALJ determination that deferral to arbitration is not appropriate under the circumstances of this case, since contractual coverage of the subcontracting

issue has not been established and since there is no pending grievance to which we could defer in any event.[7/]

MOTION TO AMEND CHARGE

On or about May 31, 1990, apparently following its receipt of the District's cross-exceptions and response to CSEA's exceptions, CSEA filed a motion for leave to amend its charge to allege that, in addition to the subcontracting alleged to have occurred on or about May 25, 1988 in connection with a Memorial Day parade, the District continually, from that date until March 30, 1990, "violated the Act by unilaterally subcontracting and removing bargaining unit work that prior to May 25, 1988 had previously been exclusively performed by the bargaining unit employees represented by the Charging Party." In its motion papers, but not in its proposed amended charge, CSEA alleges specifically that the District:

> Has continued to assign bargaining unit work specifically, the task of the opening of school buildings on holidays and/or days off for such purposes as parades, football games, etc. to the security guard agency and other nonunit employees, continuing from on or about May 25, 1988 to March 20, 1990, the date that the Administrative Law Judge ordered the employer to restore the tasks to the bargaining unit employees.

[7/] Compare Herkimer County BOCES, 20 PERB ¶3050 (1987), wherein deferral of the determination concerning the Board's jurisdiction was found appropriate pending the outcome of a grievance which was filed. See also Elmira Heights CSD, 21 PERB ¶3031 (1988).

Thus, CSEA now alleges that in addition to the violation of May 25, 1988, violations of the Act occurred on numerous unspecified occasions, by use of a security guard agency (perhaps intended to refer to L & M Security, which is the subject of the May 25 allegation) and other unidentified nonunit employees for unit work. At the outset, we note that the proposed amendment lacks particularity, as required by §204.1(b) of our Rules of Procedure (Rules). More significant is the fact that the allegations in the proposed amendment make it untimely on its face, unless the amendment properly relates back to the original filing date. Relation back of a proposed amendment is appropriate only if procedural and due process requirements are met. However, the proposed amendment is presented to us, without explanation therefor, rather than to the ALJ when due process considerations could have been addressed.[8/] Indeed, the prejudice to the District in permitting the filing of such an amended charge would be substantial, since it is clear that the record in this matter was established upon the understanding of both parties that their litigation involved a single incident of alleged contracting out on May 25, 1988.

[8/]Section 204.1(d) Rules provides, in pertinent part:

> The director or administrative law judge designated by the director may permit a charging party to amend the charge before, during or after the conclusion of the hearing upon such terms as may be deemed just and consistent with due process.

CSEA argues that it is entitled to broad remedial relief which would encompass contracting out occurring following the May 25, 1988 incident. However, a determination of the appropriate scope of the relief must, of necessity, rest upon the scope of the violation alleged and proven and CSEA may not now come before us and allege the existence of numerous other and continuing bases for violations in an effort to broaden the remedial relief appropriate to the original charge. The motion for leave to file an amended charge is denied.

SCOPE OF REMEDIAL RELIEF

The District argues, in its cross-exceptions, that the first paragraph of the remedial relief recommended by the ALJ is unduly broad, because it directs the District to "cease and desist from assigning to nonunit personnel the duties of the head and chief custodian . . ." (emphasis added). The District contends that the phrase "L & M Security" should be substituted for the phrase "nonunit personnel" in order to properly apply the scope of remedial relief to the facts of the case. While we agree that the scope of the cease and desist order should closely relate to the violation found, we nevertheless find that it is appropriate to refer generally to nonunit personnel rather than to the particular contractor involved in the incident of May 25, 1988, because prospective relief in the nature of a cease and desist order keys to the

nature of the violation found, rather than to the particular entities or persons involved in the violation, and is therefore appropriately broader in scope.[9/] Because the scope of the remedial relief recommended by the ALJ is before us in its entirety, however, we determine that the cease and desist order should be limited to the assignment of duties found to have violated the Act, rather than to all of the duties of the head and chief custodians. Accordingly, we will modify so much of paragraph 1 of our Order as to refer to the duty "to open District buildings on holidays and days off." By this modification, we focus not upon the particular entity to whom the unit work was assigned (as proposed by the District), but upon the nature of the work assigned for purposes of assuring prospective compliance with the Act in the manner in which it has been found to have been violated. By doing so, unnecessary future litigation of the same issue may be avoided.

Conversely, CSEA contends that paragraph 2 of the ALJ's recommended remedial order is unduly narrow, because it limits backpay relief to persons adversely affected by the

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[9/]For example, were the District to contract with "M & L Security" rather than "L & M Security" for the same unit work, it would be inappropriate to compel CSEA to file and prove a new charge, rather than obtain enforcement of the order issued on the basis of the charge already litigated. It is the act of contracting out the work determined to be exclusively unit work which is significant; the identity of the nonunit personnel to whom it is assigned is not significant for purposes of prospective relief.

subcontracting to L & M Security only, and not to other nonunit personnel who may have performed unit work. We adopt the recommendation of the ALJ in this regard because the District's backpay liability is appropriately limited to the consequences of the particular violation found. In the instant case, the proof is limited to contracting out of building opening service to L & M Security and not to other persons or entities. The policy considerations supporting our determination that prospective relief is appropriately somewhat broad in scope do not apply to retroactive relief, which must be firmly founded in the violation alleged and proven. CSEA, by this exception, in fact seeks to achieve through very broad remedial relief that which it cannot now achieve, i.e., relief for other violations of the Act not timely alleged and proven.[10/] The exception is denied.

The third paragraph of the ALJ's recommended order is also the subject of cross-exceptions by the District. The District alleges, in this regard, that the language of the third paragraph is unduly broad, and should have been limited to the contractual requirement of notification and discussion contained in Clause 97 of the parties' agreement. For reasons outlined infra, we have determined that Clause 97 has

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[10/] See County of Broome, 22 PERB ¶3019 (1989), for discussion concerning the fact that while proof of entitlement to a particular remedy is not required, the remedy should be, and typically is, apparent from the violation found.

not been established to apply to the subcontracting in the instant case, and, having so found, it would be inappropriate for us to refer back to that clause or to fashion remedial relief based upon it. Had we found that CSEA waived its right to negotiate by accepting instead a contractual right to notice and discussion, we would have dismissed the charge on its merits and no remedial relief would have been appropriate. The District's exception in this regard is denied.

The language of paragraph 3 of the remedial order having been placed in issue before us, we have considered it in detail and determine that the "cease and desist" language contained in paragraph 1 of the remedial relief affords appropriate prospective make-whole relief. In view of the fact that the imposition by remedial order of a general duty to negotiate in good faith is not required since it, in essence, does nothing more than reiterate the obligation found in §209-a.1(d) of the Act, deletion of paragraph 3 of the recommended remedial order is appropriate.

IT IS THEREFORE ORDERED that the District:

1. Cease and desist from assigning to nonunit personnel the duties of the head and chief custodians to open District buildings on holidays and days off, as performed up to May 25, 1988;
2. Make unit employees whole for any lost wages owing to the performance of unit work by L & M Security

of Long Island, on May 25, 1988, with interest at the maximum legal rate;

3. Sign and post the attached notice at all locations customarily used to post notices to unit members.

DATED: October 22, 1990
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, 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 Middle Country Central School District Chief & Head Supervisory Unit of Suffolk Educational Local 870, Local 1000, CSEA/AFSCME, AFL-CIO that the Middle Country Central School District:

1. Will not assign to nonunit personnel the duties of the head and chief custodians to open District buildings on holidays and days off, as performed up to May 25, 1988;

2. Will make unit employees whole for any lost wages owing to the performance of unit work by L & M Security of Long Island, on May 25, 1988, with interest at the maximum legal rate.

Middle Country 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.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF BUFFALO,

Charging Party,

-and-

CASE NO. U-11211

PIPE CAULKERS AND REPAIRMEN'S LOCAL NO. 18029, AFSCME, AFL-CIO,

Respondent.

DAMON AND MOREY, ESQS. (MELINDA G. DISARE, ESQ., of Counsel), for Charging Party

SARGENT, REPKA AND PINO, P.C., (NICHOLAS J. SARGENT, ESQ., of Counsel), for Respondent

BOARD DECISION AND ORDER

The City of Buffalo (City) has filed exceptions to an Administrative Law Judge (ALJ) decision which finds that the Pipe Caulkers and Repairmen's Local No. 18029, AFSCME, AFL-CIO (Local) violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it submitted to fact-finding certain demands found to be nonmandatory, but which dismissed the charge in other respects. In particular, the City excepts to ALJ findings that a demand entitled "Reserve Notification" is a mandatory subject of negotiation, and that the City failed to meet its burden of proving that four articles contained in the parties' expired agreement (alleged by the City to be nonmandatory subjects of negotiation) were submitted to fact-finding in violation of the Act. The City

also excepts to the ALJ decision on procedural grounds, because the decision was issued before the City received a copy of the Local's brief to the ALJ. We will address the procedural exception first, and then address the substantive exceptions.

PROCEDURAL EXCEPTION

By letter dated March 21, 1990, both parties were directed by the assigned ALJ to submit briefs, if any, with proof of service upon the other party, on or before April 20, 1990. Apparently, the Local's counsel timely forwarded the appropriate number of copies of its brief to the ALJ, but, instead of submitting proof of service of an additional copy upon opposing counsel, forwarded the additional copy to the ALJ for the purpose of having the ALJ forward the additional copy to opposing counsel. Thereafter, on April 24, 1990, upon receipt of a complaint from the City's counsel that it had not received a copy of the Local's brief, the ALJ directed the Local's counsel to forward a copy of its brief to the City's counsel.

Apparently assuming that the Local's counsel had complied with his directive, the ALJ issued a decision on May 7, 1990.

The City is completely correct in its assertion that it was entitled to receive from the Local's counsel a copy of the Local's brief, and that the Local had an obligation under

§204.8 of our Rules of Procedure (Rules) to accompany the brief submitted to the ALJ with proof of service of a copy thereof upon the City. This the Local clearly did not do. However, notwithstanding the Local's failure to comply with our Rules of Procedure in this regard, the City has established no prejudice to it in the failure to obtain a copy of the Local's brief before the ALJ decision was issued. No representation is made to us that the City would have requested the opportunity to file a reply brief to the ALJ in response to the Local's brief, nor is any claim made that the Local's brief contained material which should not have been considered by the ALJ, and would not have been if the City had had the opportunity to timely object to it. Furthermore, the ALJ's directive to the parties to simultaneously file briefs establishes that the City was not automatically to be accorded the opportunity to review the Local's brief before submitting its own. Because no prejudice to the City has been shown, the Local's violation of our Rules of Procedure under the specific circumstances of this case is not an adequate basis for setting aside the ALJ decision. However, the importance of compliance with our Rules of Procedure, particularly those relating to the provision of immediate access to all parties of any communication to any party or the ALJ, cannot be overstated. Although the exception in this instance is denied, the Board reminds this

Local and, indeed, all other parties appearing before the Board, that our Rules of Procedure should be carefully reviewed to assure full compliance therewith.

EXCEPTION NO. 1

The City excepts, on substantive grounds, to the portion of the ALJ decision which finds the following language to constitute a mandatory subject of negotiation:

> 4. Reserve Notification.
>
> Article III.2(D) Second Paragraph - make new second sentence to read: "Employees on reserve shift who cannot work overtime beyond their reserve shift shall notify their immediate supervisor at the beginning of their reserve shift."

Reviewing this language in the context of other language contained in the expired agreement at Article III.2 thereof, the ALJ determined that the demand constitutes nothing more than "a reasonable notification as to unavailability for work beyond that otherwise scheduled". In its exceptions, the City asserts that the demand is intended to assert a right to refuse overtime merely by the giving of advance notification. For the reasons which follow, while we agree with the City's characterization of the demand, we nevertheless affirm the ALJ's decision that the demand is a mandatory subject of negotiation.

In the first instance, if the demand were nothing more than a demand for advance notification of unavailability for overtime work, and not a demand for the right to refuse

overtime work, one would expect that the demand would be an employer rather than an employee organization demand. However, it is unnecessary for us to speculate about why an employee organization would seek to negotiate imposition of an advance notification requirement upon its members, because, in its brief to us in response to the City's exceptions, the Local readily acknowledges the purpose and intent of its demand, stating:

> [U]nder the current Article III, 3-2(D), employees who are on "regular shifts" have the option of refusing to work overtime. The above [reserve notification] proposal would also permit employees who work the "reserve shift" to refuse to work overtime.

Thus, the City and the Local are in accord concerning their understanding that the reserve notification demand constitutes an assertion of the right to refuse overtime based upon the giving of advance notification thereof. As such, it constitutes a demand which seeks to limit the hours of work of specified employees at their option. The City argues that such a demand might potentially impact upon its ability to obtain adequate coverage in an emergency situation, and that the demand should therefore be held nonmandatory. However, the City's concern is not based upon any record evidence and is speculative at best. Furthermore, as is made clear at §204.3 of the Act, the duty to negotiate collectively "does not compel either party to agree to a proposal or require the making of a concession." We hold

that the instant demand relates to hours of work and is accordingly a mandatory subject of negotiation pursuant to §201.4 of the Act.[1/] In doing so, we are cognizant of the holdings of this Board which have held decisions concerning the level of services to be provided and number of persons required to be on duty to be management prerogatives and therefore not mandatorily negotiable. See, for example, City School District of the City of New Rochelle, 4 PERB ¶3060 (1971), City of White Plains, 5 PERB ¶3008 (1972), Town of Blooming Grove, 21 PERB ¶3032 (1988). However, we do not construe the management prerogative there found of determining the number of persons necessary to perform the employer's mission to preclude a duty to negotiate concerning the number of hours which employees may be required to work in furtherance of that mission. In the instant case, there is no showing that a demand to limit the number of hours to be required of an employee necessarily precludes the City from carrying out its mission, nor is the City prevented from presenting counterproposals which would address its concerns

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[1/] Section 201.4 Act provides:

> The term 'terms and conditions of employment' means salaries, wages, hours, agency shop fee deduction and other terms and conditions of employment . . . .

in this regard.[2/]

Based upon the foregoing, the ALJ determination that the Local's reserve notification demand is a mandatory subject of negotiation is affirmed.

EXCEPTION NO. 2

The City's second exception asserts that the ALJ erred in failing to find that the Local improperly insisted upon the continuation of assertedly nonmandatory provisions of the parties' expired collective bargaining agreement.

The ALJ found, and we agree, that there is no record evidence that the Local affirmatively submitted to fact-finding or insisted upon negotiation at the fact-finding stage concerning four provisions of the expired agreement which the City contends are nonmandatory subjects of negotiation. Instead, the City asserts that the Local's violation of §209-a.2(b) of the Act lies in its failure to acknowledge, upon the City's demand, that it has abandoned the four at-issue provisions and/or does not seek their continuation.

As we held in Village of Mamaroneck PBA, 22 PERB ¶3029 (1989), we will not find a violation of §209-a.2(b) of the Act in the absence of evidence that an employee organization

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[2/]While, in reaching this conclusion, it is unnecessary for us to address the context in which the demand language is proposed to be added to the language in the parties' expired agreement, we note that other language of Article III.2 appears to address assurance of coverage in emergency situations.

is pursuing to interest arbitration, or is insisting upon negotiating, nonmandatory subjects of bargaining. This is so even where the employee organization makes plain its legal opinion that terms of the parties' expired agreement, including nonmandatory terms, may continue by operation of law. See also Dobbs Ferry Police Association, Inc., 22 PERB ¶3039 (1989), where this Board held that an employee organization which in fact sought to obtain an interest arbitration award which would include provisions of the expired agreement asserted by the employer and found by us to be nonmandatory did violate §209-a.2(b) of the Act. See also City of Buffalo, 23 PERB ¶3036 (1990).

The burden of proving a violation of §209-a.2(b) of the Act rests with the City, as the charging party. In order to meet this burden, the City must establish that the Local has insisted upon continued negotiations or has submitted to fact-finding nonmandatory subjects of negotiation, whether those nonmandatory subjects constitute new demands or seek continuation of language in an expired agreement. By asserting that the Local has violated the Act by its failure to affirmatively deny insistence upon negotiation or submission to fact-finding of nonmandatory subjects, the City seeks to shift the burden of proof to the Local to establish no violation. We decline to adopt the City's argument in this regard, and deny the exception accordingly.

Finally, we address the City's assertion in support of its claim of improper insistence in which it charges that by referencing provisions in the parties' expired agreement as part of affirmative demands submitted to fact-finding, the Local has also submitted the referenced provisions to fact-finding.[3/] As we held in City of Buffalo, supra, at 3073 (1990):

> Because there is no evidence whatsoever that the Association has included in its petition for interest arbitration nonmandatory subjects of negotiation over the objection of the City, the instant charge must be dismissed. This is so even though the petition contains some demands, not at issue before us, which purport to 'amend' articles of the parties' expired agreement in specified respects. The fact that the Association contends that items in the expired agreement continue in effect following issuance of the interest arbitration award unless modified by the award has no bearing upon our disposition of a charge by the City alleging that nonmandatory subjects have been submitted, over its objection, to interest arbitration, because our review is limited to those matters actually placed before the arbitration panel. [footnote omitted]

The holding in City of Buffalo is equally applicable to

[3/] In the exceptions before us only the "Reserve Notification" demand refers to the expired agreement. That demand is separately cognizable without reference to the language of the expired agreement. A different result might apply, however, to a demand insisted upon at fact-finding which has no meaning except in the context of nonmandatory language in the expired agreement.

the instant charge, insofar as it asserts that reference to provisions of the expired agreement in negotiating proposals constitutes submission of the referenced articles of the expired agreement to fact-finding. As we rejected that argument with respect to submissions to interest arbitration, we reject it with respect to submissions to fact-finding.

Based upon the foregoing, the City's exceptions are denied, and the ALJ decision is affirmed for the reasons set forth herein.

DATED: October 22, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE NURSES ASSOCIATION,

Petitioner,

-and- CASE NO. C-3687

FULTON COUNTY,

Employer,

-and-

FULTON COUNTY NURSES UNIT, CSEA, INC., LOCAL 818,

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 Fulton County Nurses Unit, CSEA, Inc., Local 818 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: Registered Nurses, Public Health Nurses,

Excluded: Elected officials and all other county employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Fulton County Nurses Unit, CSEA, Inc., Local 818. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: October 22, 1990
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

#3B-10/22/90

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

FULTON COUNTY DEPUTY SHERIFF'S BENEVOLENT ASSOCIATION, INC.,

Petitioner,

-and-

CASE NO. C-3707

COUNTY OF FULTON and the FULTON 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 Fulton County Deputy Sheriff's Benevolent Association, Inc. has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described

below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All employees of the Fulton County Sheriff's Department,

Excluded: The Sheriff and the Undersheriff.

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

DATED: October 22, 1990
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

#3C-10/22/90

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FOOD SERVICE WORKERS OF BAY SHORE, NYSUT,

Petitioner,

-and-

CASE NO. C-3702

BAY SHORE UNION FREE SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Food Service Workers of Bay Shore, NYSUT 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 employees in the following titles who work more than 15 hours per week: cashier, cook, food server, food service worker,

Excluded: All other employees.

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

DATED: October 22, 1990
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

#3D-10/22/90

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF MARLBOROUGH POLICEMEN'S BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-3686

TOWN OF MARLBOROUGH,

Employer,

-and-

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Town of Marlborough Policemen's Benevolent Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described

below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All full-time police officers,

Excluded: Chief of Police.

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

DATED: October 22, 1990
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

#5A-10/22/90

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

CERTIFICATION

I, Harold R. Newman, Chairman of the Public Employment Relations Board, hereby certify that, by the unanimous vote of the Board members present at a meeting held in Albany, New York, on October 22, 1990, the attached amendments to Parts 201, 203, 204, 205, 206 and 207 of Title 4 of the Official Compilation of Codes, Rules and Regulations of the State of New York were duly adopted pursuant to Executive Order Number 131 and the authority vested in the Board by Article 14, Section 205.5(1) of the Civil Service Law.

There were no substantive changes in the rules and these amendments are effective upon publication of this notice in the State Register.

A notice of proposed agency action was published in the State Register on August 8, 1990. No other prior notice of this action was required by statute.

October 22, 1990
Dated

Harold R. Newman
Chairman

STATE OF NEW YORK

Public Employment Relations Board

Text of New Rules:

1. Section 201.2(d) is hereby amended to read as follows:

201.2(d). Objection. A party who objects to the processing of a petition on the ground that it was filed earlier than the times provided for filing under section 201.3 of this Part [may file an original and four copies of such objection, with proof of service upon all other parties within 10 working days after receipt from the director of a copy of the petition. The objection] shall include a specific, detailed statement of why the petition is untimely in its response filed in accordance with section 201.5(d) of this Part. Such objection to the processing of the petition, if not duly raised, may be deemed waived.

2. Section 201.3(d) is hereby amended to read as follows:

201.3(d). A petition for certification or decertification may be filed [within 30 days] during the month before the expiration, under section 208.2 of the act, of the period of unchallenged representation status accorded a recognized or certified employee organization. Unless filed by a public employer, such a petition shall be supported by a showing of interest of at least 30 percent of the employees in the unit already in existence or alleged to be appropriate by the petitioner.

3. The title to section 201.5 is hereby amended to read as follows:

201.5 Contents of petition for certification; contents of petition for decertification; contents of petition to clarify existing

unit or to determine unit placement of new or substantially altered positions; response to petition.

4. A new subdivision (d) is hereby added to section 201.5 to read as follows:

201.5(d). Response. Except for the petitioner, all parties shall file with the director within 10 working days after receipt of a copy of the petition from the director, an original and four copies of a response to the petition containing a signed declaration of its truthfulness by an identified representative of the responding party, with proof of service of a copy thereof upon all other parties. The response shall include a specific admission, denial or explanation of each allegation made by the petitioner, a description of the unit claimed to be appropriate by the responding party for the purpose of collective negotiations and a clear and concise statement of any other facts which the responding party claims may bear on the petition.

5. Paragraph (3) of subdivision (c) of section 201.9 is hereby renumbered to paragraph (4) of subdivision (c) of section 201.9.

6. A new paragraph (3) of subdivision (c) of section 201.9 is hereby added to read as follows:

201.9(c)(3). Motion for recusal. Any party to a proceeding may move that the administrative law judge assigned to that proceeding recuse himself/herself from further participation in that proceeding. Except upon a showing of extraordinary circumstances, a motion for recusal shall be made as soon as reasonably possible after the basis for such motion becomes known to the party making it. Unless made at a hearing, such motion shall be made in writing to the administrative law judge, shall set forth all of the known grounds for the motion and

shall be accompanied by proof of service of a copy thereof upon all other parties and the director. Unless such motion is made at a hearing, any party may file with the administrative law judge a response to such motion within three working days of its receipt of a copy thereof, with proof of service of a copy of the response on all other parties and the director, unless otherwise directed by the administrative law judge. Motions for recusal made at a hearing, and responses thereto, shall be made upon such terms as the administrative law judge shall direct. The administrative law judge's ruling on the motion shall be made either in writing or on the record at the hearing and the ruling, the recusal motion and any response shall be part of the record of the proceeding.

7. Subdivision (i) of section 201.10 is hereby repealed.

8. Subdivisions (e), (f), (g) and (h) of section 201.10 are hereby renumbered to subdivision (f), (g), (h) and (i) of section 201.10.

9. A new subdivision (e) of section 201.10 is hereby added to read as follows:

201.10(e). Response. The parties, as defined by section 201.10(a)(2) of this Part, except the applicant, shall file with the director within 10 working days after receipt of a copy of the application from the director, an original and four copies of a response to the application containing a signed declaration of its truthfulness by an identified representative of the responding party, with proof of service of a copy thereof upon all other parties. The response shall include a specific admission, denial or explanation of each allegation made by the applicant and a clear and concise statement

of any other facts which may bear on the application. If a responding party objects to the processing of an application on the ground that it was filed earlier than the time provided under section 201.10(b) of this Part, the response shall include a specific, detailed statement of why the application is untimely. Such objection to the processing of the application, if not duly raised, may be deemed waived.

10. Subdivision (h) of section 201.12 is hereby amended to read as follows:

201.12(h). The Board shall [may] designate an employee organization as the exclusive representative of public employees within a negotiating unit if the employee organization has demonstrated that it has majority status among [represents a majority of] the employees within the negotiating unit. [and there has been prior agreement between the public employer and such employee organization that such organization should be accorded exclusive rights of representation.]

11. Subparagraph (iii) of paragraph (3) of subdivision (g) of section 203.8 is renumbered to subparagraph (iv) of paragraph (3) of subdivision (g) of section 203.8.

12. A new sub-paragraph of paragraph (iii) of paragraph (3) of subdivision (g) of section 203.8 is hereby added to read as follows:

203.8(g)(3)(iii). Motion for recusal. Any party to a proceeding may move that the administrative law judge assigned to that proceeding recuse himself/herself from further participation in that proceeding. Except upon a showing of extraordinary circumstances, a motion for recusal shall be made as soon as reasonably possible after the basis for such motion becomes known to the party making it. Unless made at a hearing, such motion shall be made in writing to the administrative law

judge, shall set forth all of the known grounds for the motion and shall be accompanied by proof of service of a copy thereof upon all other parties and the director. Unless such motion is made at a hearing, any party may file with the administrative law judge a response to such motion within three working days of its receipt of a copy thereof, with proof of service of a copy of the response on all other parties and the director, unless otherwise directed by the administrative law judge. Motions for recusal made at a hearing, and responses thereto, shall be made upon such terms as the administrative law judge shall direct. The administrative law judge's ruling on the motion shall be made either in writing or on the record at the hearing and the ruling, the recusal motion and any response shall be part of the record of the proceeding.

13. Subdivision (h) of section 204.7 is hereby renumbered to paragraph (2) of subdivision (h) of section 204.7.

14. A new paragraph (1) of subdivision (h) of section 204.7 is hereby added to read as follows:

204.7(h)(1). Any party to a proceeding may move that the administrative law judge assigned to that proceeding recuse himself/herself from further participation in that proceeding. Except upon a showing of extraordinary circumstances, a motion for recusal shall be made as soon as reasonably possible after the basis for such motion becomes known to the party making it. Unless made at a hearing, such motion shall be made in writing to the administrative law judge, shall set forth all of the known grounds for the motion and shall be accompanied by proof of service of a copy thereof upon all other parties and the director. Unless such motion is made at a hearing, any

party may file with the administrative law judge a response to such motion within three working days of its receipt of a copy thereof, with proof of service of a copy of the response on all other parties and the director, unless otherwise directed by the administrative law judge. Motions for recusal made at a hearing, and responses thereto, shall be made upon such terms as the administrative law judge shall direct. The administrative law judge's ruling on the motion shall be made either in writing or on the record at the hearing and the ruling, the recusal motion and any response shall be part of the record of the proceeding.

15. Subdivision (a) of section 205.4 is hereby amended to read as follows:

205.4(a). Filing. [A] An original and three copies of a petition requesting the board to refer an impasse to a public arbitration panel may be filed by an employee organization or public employer after 15 days have elapsed following appointment by the board of a mediator to such impasse. [It shall] A copy of the petition shall also be served upon the other party to the impasse [immediately.] simultaneously.

16. Subdivision (a) of section 205.5 is hereby amended to read as follows:

205.5(a). Filing. [A] An original and three copies of a response shall be filed within 10 working days of receipt of the petition requesting arbitration. [It shall] A copy of the response shall also be served upon the petitioning party simultaneously.

17. Subdivision (b) of section 205.5 is hereby amended to read as follows:

205.5(b). Contents. Such response shall contain respondent's position specifying the terms and conditions of employment that were

resolved by agreement, and as to those that were not agreed upon, respondent shall set forth its position. Proposed contract language may be attached. If the respondent has filed an improper practice charge related to compulsory interest arbitration under section 205.6 of this Part, the response shall contain a reference to such charge. The response must include proof of service upon the petitioning party.

18. Paragraph (2) of subdivision (c) of section 206.6 is hereby renumbered to paragraph (3) of subdivision (c) of section 206.6.

19. A new paragraph (2) of subdivision (c) of section 206.6 is hereby added to read as follows:

206.6(c)(2). Motion for recusal. Any party to a proceeding may move that the administrative law judge assigned to that proceeding recuse himself/herself from further participation in that proceeding. Except upon a showing of extraordinary circumstances, a motion for recusal shall be made as soon as reasonably possible after the basis for such motion becomes known to the party making it. Unless made at a hearing, such motion shall be made in writing to the administrative law judge, shall set forth all of the known grounds for the motion and shall be accompanied by proof of service of a copy thereof upon all other parties and the director. Unless such motion is made at a hearing, any party may file with the administrative law judge a response to such motion within three working days of its receipt of a copy thereof, with proof of service of a copy of the response on all other parties and the director, unless otherwise directed by the administrative law judge. Motions for recusal made at a hearing, and responses thereto, shall be made upon such terms as the administrative law judge shall direct. The administrative law judge's ruling on the

motion shall be made either in writing or on the record at the hearing and the ruling, the recusal motion and any response shall be part of the record of the proceeding.

20. Subdivision (a) of section 207.13 is hereby amended to read as follows:

207.13(a). The award shall be in writing, signed and [acknowledged] affirmed by the arbitrator, and shall be delivered to the parties either personally or by registered or certified mail, return receipt requested. If no period of time for the rendition of an award has been specified in the agreement and the parties have not mutually agreed to an expedited rendition of the award, as provided in section 207.12 of this Part, an award shall be rendered within 30 days after the arbitrator has declared the hearing closed, unless this time period has been extended by the parties and so confirmed by them in writing.

21. Subdivision (a) of section 207.15 is hereby amended to read as follows:

207.15(a). [There is no administrative fee] An administrative fee of forty dollars per party shall be charged by the board for its administrative services.