STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party,

- and -

Case No. U-11238

STATE OF NEW YORK (OFFICE OF MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES)

Respondent.

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ROGER L. SCALES, for Charging Party

WALTER J. PELLEGRINI, ESQ. (MARIE D. DUKES of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Public Employees Federation, AFL-CIO (PEF) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director). The Assistant Director dismissed PEF's charge against the State of New York (Office of Mental Retardation & Developmental Disabilities) (State or OMRDD) which alleges in relevant part that the State violated §209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it abolished a position at its Monroe Developmental Center (Monroe Center) because the incumbent, James Hooper, had exercised speech rights protected by the Act.

PEF's exceptions are addressed to that part of the Assistant Director's decision[1/] concerning the participation by Michael Raha, Monroe Center's Deputy Director of Developmental Services, in the process which lead to the decision to abolish Hooper's position. The Assistant Director dismissed PEF's allegation that Raha selected Hooper's position for abolition in 1989 because Hooper spoke at a labor-management meeting in late 1985 or early 1986 in opposition to a certain patient treatment program championed by Raha. After hearing, the Assistant Director held that PEF's allegations of impropriety were not proven, noting, incidentally, that the abolition of Hooper's position was consistent with the criteria applied to other abolished positions.

PEF alleges in its exceptions that the Assistant Director failed to draw the correct conclusions from the facts in the record and argues that the record proves that Hooper's position was abolished because he spoke in opposition to Raha's patient treatment program.

The State urges us to affirm the Assistant Director's decision.

PEF's exceptions allege no mistake of material fact in the Assistant Director's decision. Rather, PEF contests the Assistant Director's interpretations of the facts and it urges us

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[1/] PEF did not file exceptions to the Assistant Director's dismissal of allegations that OMRDD's approval of Monroe Center's decision to abolish Hooper's position was due to remarks made by Hooper which were critical of OMRDD.

to adopt inferences of impropriety rejected by the Assistant Director under the same facts as were presented to him. Having reviewed the record, we affirm the Assistant Director's decision.

Monroe Center was required by OMRDD to abolish several positions. Raha recommended four positions within middle to senior management for abolition, including Hooper's, under instructions that the positions should be targeted based upon an assessment of need and the incumbents' involvement with direct client services. The Director of Monroe Center approved the abolitions as unanimously recommended by the six members of his cabinet which included Raha, and, as the Assistant Director noted, there is no claim or showing by PEF that any of those individuals, other than Raha, held any animus towards Hooper or that the recommendations deviated from the targeting instructions.

Against this background, we are unable to conclude that Hooper's having spoken in opposition to a patient treatment program favored by Raha years before the abolition in issue was even a factor in Raha's recommendation to abolish Hooper's position despite Raha's anger about the denigration of the treatment program and his acknowledged inability to interact well with people, including union representatives. Nothing contained in the record establishes or suggests that Raha's dealings with PEF representatives differ from his dealings with others. Neither the necessary improper motivation nor the necessary causation between Hooper's statements and the abolition of his

position is established by the facts offered by PEF that Hooper's comment was protected, that his on-the-job relationship with Raha was almost exclusively through his PEF office, that not everyone agreed with Raha's recommendation regarding Hooper, that Hooper continues to do similar work at Monroe Center[2/], or that others in middle or upper management positions did not have their jobs abolished.

PEF argues, however, that the abolition necessarily violated the Act because Hooper's statement was protected and Raha did not know whether Hooper was expressing his personal views about the treatment program or only PEF's. This argument necessarily assumes that Raha recommended Hooper's position for abolition because of the comments he made at the labor-management meeting and we have already decided that the record does not support this conclusion. However, even on the stated assumption, PEF's argument does not have merit.

Although Hooper is protected in his articulated opposition to the program, if commitment to the treatment program was a reasonable and necessary part of Hooper's job, as seen by Raha, then, for purposes of the Act, Raha could base his job recommendation on Hooper's opposition to the program. That Raha

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[2/]Monroe Center's Director instructed staff that efforts were to be made to "find something" for anyone who wanted to stay at Monroe Center. On abolition of his former position, Hooper was appointed to a newly created position at Monroe Center which, although lower paid, involved essentially the same duties as his former position. Hooper chose to stay at Monroe Center for personal reasons rather than exercise his bumping rights to an equivalent position in a different facility.

learned of Hooper's feelings about the treatment program from comments made in Hooper's capacity as a PEF officer is immaterial. The Act protects the statement and the speaker for making the statement, but it does not, as the Assistant Director observed, necessarily and always insulate the speaker against all on-the-job consequences of the statement.[3/]

As to the second aspect of PEF's argument, even assuming that Raha's recommendation was premised upon a mistaken understanding of Hooper's disagreement with the behavior modification program, that would not make the recommendation a violation of the Act because the recommendation in that event would not have been made because of any exercise of protected right. Rather, Hooper's position then would have been recommended for abolition because of Raha's belief, however incorrect, that Hooper would not or could not perform all of the duties Raha believed should be required of the incumbent of that position.[4/] A mistake may be relevant in the context of the parties' grievance procedure or for other internal or external sources of review, but not for purposes of PEF's interference and discrimination allegations.

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[3/] See Brunswick Cent. School Dist., 19 PERB ¶3063, at 3126 n. 3 (1986).

[4/] See City of Rochester, 19 PERB ¶3081 (1986), in which we held that an employee does not have an entitlement to a job if the employee's exercise of a protected right interferes with the performance of all of the required job duties.

Our decision in State of New York (SUNY),[5] is not, as PEF argues, to the contrary. In that case, we concluded that the employer, however unintentionally, had punished an employee for having filed a grievance, a protected activity. In that case, therefore, there was retaliation for the exercise of a protected right. Here, in contrast, we cannot find that Hooper's position was abolished because he spoke at the labor-management meeting. An abolition premised upon a perceived, but perhaps mistaken, negative attitude by Hooper about duties associated with his position, which was revealed by the statements he made, does not violate the Act.

For the reasons set forth above and those in the Assistant Director's decision, we deny PEF's exceptions and affirm the Assistant Director's decision.

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

DATED: October 8, 1991
Albany, New York

Pauline Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

[5] 12 PERB ¶3009 (1979).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200B, AFL-CIO,

Charging Party,

- and -

Case No. U-11689

WEST GENESEE CENTRAL SCHOOL DISTRICT,

Respondent.

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LAWRENCE E. DALE, for Charging Party

GARRY A. LUKE, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Service Employees International Union, Local 200B, AFL-CIO (SEIU) to a decision by an Administrative Law Judge (ALJ). The ALJ dismissed SEIU's charge against the West Genesee Central School District (District) which alleges that the District violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act) when it retaliated against five employees because they exercised statutorily protected rights and when it unilaterally changed certain established working conditions of unit employees.

The ALJ dismissed the subsection (a) and (c) allegations on findings that the District did not interfere with or discriminate against any employees because of any exercise by them of protected rights. He dismissed the unilateral change

allegations, to the extent he found them within our jurisdiction, on a finding that the District had the contractual right to make the changes under a broad management rights clause.

SEIU's exceptions allege that the ALJ made several procedural and substantive errors during the hearing and in his decision. It is unnecessary to specify each of these exceptions because the first of them concerning the ALJ's ruling on the competency of a witness necessitates that we remand the case to the ALJ.

Lawrence Dale, who is not an attorney, presented SEIU's case during the hearings on the charge. Before the close of SEIU's direct case, Dale sought to be a witness on behalf of SEIU. The ALJ refused Dale permission to testify, either in the narrative or pursuant to questioning by others, ruling that Dale was disqualified because he had served as the prosecutor of the charge on behalf of SEIU.

We have no rule or practice which disqualifies a person from being a witness for a party in an administrative proceeding because that person has served as the representative for that party in that case. Even the attorneys' Code of Professional Responsibility is not absolute in its advocate-witness restrictions.[1/] As Dale may have offered material and relevant evidence, and as such evidence may have influenced the disposition of the charge in some respect, it is necessary that

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[1/] See DR 5-101 & 5-102 in N.Y. Jud. Law (McKinney Supp. 1991 Appendix).

the case be remanded to the ALJ for the limited purpose of permitting Dale an opportunity to testify, with such subsequent decision by the ALJ as is then appropriate.

THEREFORE, IT IS ORDERED that the case be, and it hereby is, remanded to the ALJ for further proceedings in accordance with the terms of this decision.

DATED: October 8, 1991
Albany, New York

Pauline Kinsella, Chairperson

Walter Eisenberg, Member

Eric Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

NEWARK VALLEY CARDINAL BUS DRIVERS,
NYSUT/AFT/AFL-CIO, LOCAL 4360,

Charging Party,

- and - Case No. U-11519

NEWARK VALLEY CENTRAL SCHOOL DISTRICT,

Respondent.

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JOHN M. CALLAHAN, for Charging Party

HOGAN AND SARSYNSKI (JOHN B. HOGAN of counsel),
for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Newark Valley Central School District (District) to a decision by an Administrative Law Judge (ALJ). In relevant part,[1] the ALJ held that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally banned smoking at all times in its school buses. The ALJ held that the smoking ban was neither authorized nor required by either state statutes or by the decision of the Appellate Division, Fourth Department in Rush-Henrietta Central School District v. Newman (Rush-Henrietta).[2]

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[1] The ALJ also held that the District improperly restricted smoking privileges in the bus drivers' lounge and refused to negotiate its smoking policy pursuant to demand. No exceptions have been taken to these determinations.

[2] 151 A.D.2d 1001, 22 PERB ¶7016 (4th Dep't 1989), leave to appeal denied, 75 N.Y.2d 704, 23 PERB ¶7006 (1990).

The District argues in its exceptions that a reversal of the ALJ's decision is required by Education Law §3624 as implemented by the Commissioner of Education's (Commissioner) regulation,[3] by Public Health Law §1399-r(3), by Rush-Henrietta, and by the District's inherent right to protect students from the dangers of passive smoke. The Newark Valley Cardinal Bus Drivers, NYSUT/AFT/AFL-CIO, Local 4360 (Local) argues that the ALJ's decision is correct and should be affirmed.

We consider first the state statutes and administrative regulation relied upon by the District.

Education Law §3624 and the Commissioner's implementing regulation both cover bus drivers during the operation of school buses while the buses are "actually being used for the transport of pupils". Neither of these provisions prohibits smoking by anyone when the bus is not transporting students and, therefore, neither authorizes nor requires the District's ban on smoking at all times.

Public Health Law §1399-r(3) is part of the State's Clean Indoor Air Act (Clean Air Act). That section of the Clean Air Act simply provides that smoking may not be permitted where it is prohibited by law or rule. Section 1399-r(3) cannot authorize or require the District's total ban on smoking in its buses because neither law nor regulation prohibits smoking in buses by all persons at all times under all circumstances.

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[3] 8 NYCRR 156.3(g)(5).

We consider the existing state statutes and regulations which prohibit or restrict smoking in a number of different circumstances to reflect the entirety of the State's current public policy regarding the health risks associated with passive smoke. The District's contention that there nonetheless exists in this case an inherent, residual core of policy or right which permits it to avoid a bargaining duty if it acts in the name of the students' health and safety must be rejected.[4/] Moreover, there are no facts in the stipulated record which would support a conclusion that smoking in a bus necessarily presents a health hazard when there are no passengers in the bus.

Turning to the Appellate Division Fourth Department's decision in Rush-Henrietta, we agree with the ALJ's rationale which distinguishes that case and finds it inapplicable. We do not believe that the Court intended to hold that a limited administrative regulation preempts all negotiations otherwise required by state statute about smoking in circumstances not covered at all by the regulation. The history of Rush-Henrietta as described by the ALJ and the case cited by the Court do not support such an interpretation of the Court's decision.

If Rush-Henrietta is read to embody, under either Education Law §3624 or the Commissioner's regulation, a general and total preemption of all bargaining related to smoking in school buses, we must respectfully decline to follow that decision. As

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[4/] See Board of Education of the City School Dist. of the City of New York v. PERB, 75 N.Y.2d 660, 23 PERB ¶7012 (1990).

explained by the ALJ, PERB is an administrative agency with state-wide jurisdiction charged with the development and implementation of a state-wide labor policy. By necessity and reason, we can be bound on issues involving the application or interpretation of the Act only by decisions of the New York Court of Appeals or the Supreme Court of the United States should that Court ever be presented with a question involving the Act.[5/] Although the Court of Appeals denied leave to appeal from the Appellate Division, Fourth Department's decision in Rush-Henrietta, that denial does not have the effect, as the District argues, of making the Appellate Division's decision the Court of Appeals' decision. The denial of a motion for leave to appeal is not an affirmance of the decision below and it has no precedential value.[6/]

Lastly, we agree, for the reasons stated by the ALJ, that Rush-Henrietta is not properly afforded stare decisis effect.

For the reasons set forth above, and those in the ALJ's decision, we deny the District's exceptions and affirm the ALJ's decision and order.

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[5/]Decisions of lower courts can be instructive, but we cannot be bound by the decisions of those courts without sacrificing the uniformity which is essential to the administration of the Act on a state-wide basis.

[6/]Brownstone Publishers, Inc. v. New York City Dep't of Finance, 75 N.Y.2d 791 (1990).

THEREFORE, IT IS ORDERED that the District:

1. Rescind its policy, approved February 12, 1990, and effective March 1, 1990, insofar as said policy prohibits smoking in buses which are not in operation transporting students and which either contain no more than one nonstudent occupant or contain two or more nonstudent occupants, all of whom consent to smoking therein.
2. Negotiate with the Local pursuant to the Local's demand on the issue of smoking in buses which are not in operation transporting students and which either contain no more than one nonstudent occupant or contain two or more nonstudent occupants, all of whom consent to smoking therein.
3. Sign and post notice in the form attached at all locations ordinarily used to post notices of information to employees in the Local's unit.

DATED: October 8, 1991
Albany, New York

Pauline Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

APPENDIX

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

**THE DECISION AND ORDER OF THE**

## NEW YORK STATE
## PUBLIC EMPLOYMENT RELATIONS BOARD

**and in order to effectuate the policies of the**

## NEW YORK STATE
## PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

**we hereby notify** the employees of the Newark Valley Central School District in the unit represented by the Newark Valley Cardinal Bus Drivers, NYSUT/AFT/AFL-CIO, Local 4360, that the District:

1. will rescind its policy, approved February 12, 1990, and effective March 1, 1990, insofar as said policy prohibits smoking in buses which are not in operation transporting students and which either contain no more than one nonstudent occupant or contain two or more nonstudent occupants, all of whom consent to smoking therein; and

2. will negotiate with the Local pursuant to the Local's demand on the issue of smoking in buses which are not in operation transporting students and which either contain no more than one nonstudent occupant or contain two or more nonstudent occupants, all of whom consent to smoking therein.

NEWARK VALLEY 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

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In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, COLUMBIA COUNTY LOCAL 811, HUDSON CITY SCHOOL DISTRICT UNIT,

Charging Party,

CASE NO. U-11809

-and-

HUDSON CITY SCHOOL DISTRICT,

Respondent.

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NANCY E. HOFFMAN, ESQ. (WILLIAM A. HERBERT of counsel), for Charging Party

ANDERSON, BANKS, CURRAN & DONOGHUE (ROCHELLE J. AUSLANDER of counsel), for Respondent

BOARD DECISION AND ORDER

The Hudson City School District (District) excepts to a decision by the Director of Public Employment Practices and Representation (Director). The Director held that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it transferred work exclusive to the aides' unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Columbia County Local 811, Hudson City School District Unit (CSEA) to personnel in the clerical unit, which is also represented by CSEA.

The work in issue is the record-keeping associated with the taking of attendance at the middle school. Although both aides and clericals have done attendance work in certain of the

District's schools, the Director found that there was a discernible boundary[1/] for the attendance work at the middle school and that the aides had exclusivity over that work at that school.

The District alleges in its exceptions that the charge should have been deferred to the parties' contractual grievance procedure and that the Director erred when he found that there was a discernible boundary to the attendance work at the middle school.

CSEA argues in response that the Director's decision was correct in all respects and should be affirmed in its entirety.

The District's procedural exception is dismissed. Deferral to the parties' grievance procedure is not appropriate because the transfer of unit work was not grievable. There is no contractual provision even arguably covering the subject matter of this charge.[2/]

On the merits, we affirm the Director's decision. As the concepts of unit work, exclusivity and discernible boundaries so often identified in our transfer-of-work cases are necessarily

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[1/] See generally Town of West Seneca, 19 PERB ¶3028 (1986), where we first recognized the concept of a discernible boundary to the definition of unit work.

[2/] The parties' grievance procedure does not end in binding arbitration but with a final and binding decision by a review panel consisting of unit employees, members of the District's board of education, citizens, an administrator and a nonvoting chair. Our disposition of the deferral question makes it unnecessary for us to decide whether this step in the parties' grievance procedure would satisfy our deferral criteria.

fact-specific, any analogy to precedent will rarely, if ever, be perfect. We believe, however, that our decision in City of Rochester[3/] is closely analogous to this case. In City of Rochester, we held that a police officers' unit had established and maintained exclusivity over traffic control at a particular construction site after 13 months although nonunit personnel regularly performed that function at other job sites. City of Rochester necessarily endorses the very proposition the District now asks us to reject: that job location can form a discernible boundary to unit work within which a union may maintain its exclusivity even if there is no exclusivity over the job function beyond that boundary.

The factors relied upon by the Director in his decision, including the length of time the aides have done the attendance work at the middle school, the District's own posting and hiring practices, and the functional and physical separation of the aides' and the clericals' work, are at least as compelling as those which led us in City of Rochester to conclude that the unilateral transfer of work was improper.

We have reviewed each of the other cases cited by the District in support of its exceptions and find none to be inconsistent with the result we reach here. Otselic Valley Central School District,[4/] for example, which the District

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[3/] 21 PERB ¶3040 (1988), conf'd, 155 A.D.2d 1003, 22 PERB ¶7035 (4th Dep't 1989).

[4/] 19 PERB ¶3065 (1986).

recites at some length, is inapposite. We there concluded that reading to elementary students was not exclusive to the teachers' unit. There were, however, no circumstances or arguments presented in that case which favored the recognition of any discernible boundary as there are in this case.

For the reasons set forth above, we deny the District's exceptions and affirm the Director's decision.

THEREFORE, IT IS ORDERED, that the District:

1. Immediately discontinue assigning attendance functions at the middle school to persons not within CSEA's aides' unit and forthwith restore this attendance work to the aides' unit.

2. Sign and post the attached notice at all locations ordinarily used to post notices of information to employees in the aides unit.

DATED: October 8, 1991
Albany, New York

Pauline R. Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

**APPENDIX**

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

**THE DECISION AND ORDER OF THE**

## NEW YORK STATE
## PUBLIC EMPLOYMENT RELATIONS BOARD

**and in order to effectuate the policies of the**

## NEW YORK STATE
## PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

**we hereby notify** the employees of the Hudson City School District in the Aides Unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Columbia County Local 811, Hudson City School District Unit, that the District

Will immediately discontinue assigning attendance functions at the middle school to persons not within CSEA's aides' unit and forthwith restore this attendance work to the aides' unit.

Hudson City 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

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In the Matter of

CARL E. CARTER,

Charging Party,

- and -

Case No. U-12001

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, LOCAL 650,

Respondent,

- and -

CITY OF BUFFALO,

Employer.

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CARL E. CARTER, pro se

SARGENT, REPKA & PINO (ROBERT HEFTKA and KEVIN STOCKER of counsel), for Respondent

SAMUEL F. HOUSTON, CORPORATION COUNSEL (DAVID F. MIX of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions by Carl E. Carter to a decision by an Administrative Law Judge (ALJ). The ALJ dismissed Carter's charge which alleges that the American Federation of State, County and Municipal Employees, AFL-CIO, Local 650 (AFSCME) breached its duty of fair representation in violation of §209-a.2(c)[1/] of the Public Employees' Fair Employment Act (Act) when it refused to process a grievance on his behalf.

The ALJ dismissed the charge on a finding that AFSCME was relieved of its promise to Carter to file a grievance for him

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[1/] Section 209-a.2(c), added in 1990, simply codifies the union's duty of fair representation as developed through case law.

once it learned that he had resigned from his provisional appointment with the City of Buffalo rather than be fired.

Carter's exceptions address the ALJ's decision only in part. Many of his exceptions are directed to allegations that his former employer had discriminated against him and had coerced his resignation, and to an alleged "concerted effort" among several administrative agencies to deny him his constitutional and statutory rights. These allegations are either not within our jurisdiction to review or were not in issue under the charge before the ALJ. To this extent, therefore, Carter's exceptions are dismissed without any findings regarding the merits of those allegations.

Insofar as the exceptions do relate to the alleged breach of representational duty by AFSCME, we affirm the ALJ's decision to dismiss the charge.

A union does not have, as Carter suggests, an absolute duty to prosecute any and every complaint by a unit employee regardless of circumstance solely because the employee pays dues or fees to the union. A union violates its duty of fair representation under the Act only if its conduct is arbitrary, discriminatory or in bad faith.[2/] There is nothing in the record, even when read most favorably to Carter, which would support a conclusion that AFSCME's conduct violated its duty under this standard. There is no evidence of disparate treatment in AFSCME's interpretation and application of the relevant

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[2/] Civil Service Employees Ass'n, Inc. v. PERB, 132 A.D.2d 430, 20 PERB ¶7024 (3d Dep't 1987), aff'd on different grounds, 73 N.Y.2d 796, 21 PERB ¶7017 (1988).

provisions of the contract. Moreover, its initial willingness to file a grievance under a layoff clause on behalf of a provisional employee who had been terminated reflects an aggressive interpretation of the contract most favorable to Carter's interests. Its decision not to pursue that grievance once Carter resigned his employment constituted a reasonable exercise of discretion.

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

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

DATED: October 8, 1991
Albany, New York

Pauline Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Petitioner,

- and -

Case No. C-2894

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

Employer,

- and -

UNITED UNIVERSITY PROFESSIONS,

Intervenor.

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DAVID A. MINTZ, ESQ. and STEVEN P. WEISSMAN, ESQ.,
for Petitioner

WALTER J. PELLEGRINI, ESQ. (RICHARD J. DAUTNER of counsel),
for Employer

BERNARD F. ASHE, ESQ. (IVOR R. MOSKOWITZ of counsel),
for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Communications Workers of America/Graduate Student Employees Union, AFL-CIO (CWA/GSEU) and United University Professions (UUP) to a decision by the Director of Public Employment Practices and Representation (Director). The Director dismissed CWA/GSEU's petition, which seeks to represent a separate negotiating unit

consisting of all graduate students of the State University of the State of New York (State or University) who hold State-funded positions as either graduate assistants (GAs) or teaching assistants (TAs), on a finding that the GAs and TAs are not covered public employees within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act or Taylor Law). That section of the Act defines a public employee as "any person holding a position by appointment or employment in the service of a public employer. . . ."

The Director's decision describes in detail the nature of the University's assistantship program and the GAs' and TAs' work under that program and his findings of fact are not disputed in any material respect. We adopt the Director's findings of fact and but briefly summarize a few of the basic findings for purposes of our discussion.

There is a significant variation in the assistantship program across the academic disciplines at each campus because the GA and TA program is largely decentralized. Certain generalizations can, however, be made. The University awards assistantships to about 15% of its approximately 27,000 graduate students based primarily upon established and potential academic merit. GAs and TAs are given a stipend of varying amounts and a full or partial tuition waiver in exchange for a service requirement limited to a maximum of twenty hours of work for the University per week on average. TAs normally assist faculty with teaching or research activities. Experienced TAs may have full

responsibility for a course and grading. GAs may teach, but normally they are responsible for nonteaching duties in support of a course or a faculty member's research. GAs and TAs generally must be full-time students in good standing. The assistantships are awarded annually with a limit on renewal ranging, with limited exceptions, for two years for masters candidates and four years for candidates for doctoral degrees. An assistantship is not a degree requirement and no academic credit is granted for an assistantship itself. Although by University policy the GAs' and TAs' work is to be academically relevant and supervised, the record shows that the GAs' and TAs' work is often unsupervised and that there is a difference of opinion between the GAs and TAs and the University's administration regarding the relevance to their graduate studies of much of the work which is in fact assigned to a GA or TA.

Against this background, the Director read our decision in State of New York (Department of Correctional Services)[1/] (Correctional Services) to have established a balancing test to determine the applicability of the Act to employees such as the GAs and TAs. According to the Director, our decision in Correctional Services necessitates a dismissal of any representation petition if the employment relationship derives from and is secondary or subordinate to some other noncovered

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[1/] 6 PERB ¶3033 (1973), conf'd sub nom. Prisoners' Labor Union v. Helsby, 44 A.D.2d 707, 7 PERB ¶7006 (2d Dep't 1974), amended, 7 PERB ¶7010 (2d Dep't 1974), motion for leave to appeal denied, 35 N.Y.2d 641 (1974).

status. In this case, notwithstanding his finding that the GAs and TAs are employees as the term is generally defined, the Director concluded that the GAs' and TAs' employment relationship is not covered because it derives from and is secondary to their status as full-time students of the University.

We note briefly at the outset of our discussion our agreement with many aspects of the Director's decision. We agree that the GAs' and TAs' dual status as University students and employees does not necessarily negate the existence of covered employment. The relationships embraced in the dual status of student/employee are not mutually exclusive.[2/] Student status, which is necessary to obtain and continue employment under an assistantship, is not fundamentally different from other prerequisites for hiring and continuation of employment such as, for example, residency and licensure requirements. Similarly, the benefits derived by the GAs and TAs from their assistantships are no more dispositive of the issue before us than the advantages secured by other employees from their employment, whether those be overall job knowledge, career development or enhanced promotional opportunity.

The Director also properly disregarded as immaterial to the instant employment relationship the parties' differing characterizations of the assistantship relationships, any examination of the GAs' or TAs' motivation for accepting the

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[2/] See, e.g., Long Island College Hospital, 33 N.Y. SLRB 161 (1970).

assistantships, and any analysis of whether and the extent to which the assistantships are related to the GAs' and TAs' curricular or career goals. The subjective factors which are necessarily involved in the analysis of these issues do not yield anything of value to the resolution of the representation questions in this case. Finally, the Director correctly eschewed reliance upon precedents from other jurisdictions or other agencies because those determinations often rest upon specific statutory language, involve policies unique to a particular statutory scheme and/or otherwise reflect a simple yet fundamental difference of opinion as to whether students are properly regarded as public employees.[3/]

Having noted the several areas of agreement with the Director's decision, we turn to his interpretation of Correctional Services.

In Correctional Services, an organization representing inmates at a correctional facility operated by the State sought the right to bargain collectively on behalf of the inmates in relation to the work they performed for minimal compensation within the facility. We held in that case that prison labor does

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[3/] Compare Leland Stanford Junior Univ. 87 LRRM 1519 (1974); St. Clare's Hospital, 95 LRRM 1180 (1977); Board of Trustees, University of Massachusetts, Case No. SCR-2096 (April 25, 1979); Ass'n of Graduate Student Employees, Case No. SF-CE-179-H (April 26,1989) (student employees excluded) with United Faculty of Florida v. Board of Regents, 417 So.2d 1055, modified, 423 So.2d 429 (1982), aff'd. 443 So.2d 982 (1983); Regents of the University of Michigan, Case No. C76K-370 (Nov. 4, 1981); and University of Oregon Graduate Teaching Fellows Fed'r, Case No. C-207-75 (1977) (student employees covered).

not constitute employment within the meaning of the Act. Our holding was based, in part, upon the absence of certain significant indicia of employment, such as the right to choose alternative employment and, in part, upon our understanding that the Legislature did not intend to include the labor performed by prison inmates in the State correctional services system in the definition of employment covered by the Act.

Unlike the Director, we hold that it is too narrow a reading of Correctional Services to conclude that it creates or endorses a balancing test for covered employment. The basis for our decision in that case was that "the employment relationship to the New York State Department of Correctional Services of the prisoners incarcerated at Green Haven Correctional Facility is too peripheral to be covered by the Taylor Law."[4/] The absence of important employment indicia, a legislative intent to exclude inmate labor from the Act and public policy considerations disfavoring coverage determined the outcome in Correctional Services. We did not hold in Correctional Services that the inmates' relationship to the State as prisoner was primary to their employment relationship, but held instead that an employment relationship, as contemplated by the Act, simply did not exist. Thus, no balancing test was used to decide which of the two relationships was dominant. The standard which we have consistently used to decide coverage under the Act is whether an

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[4/] 6 PERB ¶3033, at 3070.

employment relationship exists and, if so, whether it is regular and substantial. That we have never since Correctional Services even arguably used a balancing test to determine the coverage of employees who held regular and substantial employment further supports our position that coverage under the Act is not dependent upon any balancing test.

The Director found and the State concedes that an employment relationship exists between the GAs and TAs and the State. Therefore, there are only two pertinent inquiries in this case: whether the GAs' and TAs' employment relationship with the State is regular and substantial and, if so, whether there is, nevertheless, a basis to conclude that the Legislature intended to exclude that employment relationship from coverage.

With respect to the first inquiry, we reject the State's contention that the GAs' and TAs' employment relationship is casual and not covered because they allegedly do not satisfy the rate of return to work which we have required of seasonal employees.[5/] Our seasonal tests, however, are not appropriately applied to the GAs and TAs who regularly work fifteen to twenty hours per week throughout the University's academic or service

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[5/] See State of New York, 5 PERB ¶¶3022 and 3039 (1972). Seasonal employment is considered to be casual if the employees, as a class, fail to meet any of the following:

1. the season is shorter than six weeks a year;
2. the employees are required to work fewer than 20 hours per week;
3. fewer than 60 percent of the employees in the title return for at least two successive seasons.

year. The GAs and TAs are regular, part-time employees and are covered as such.[6/]

As to the second inquiry, we are unable to discern the existence of any intent by the Legislature to preclude students of the University, who are part-time employees at the institution at which they are enrolled, from being afforded representation and bargaining rights. There is no explicit student exclusion contained in the broad definition of "public employee" set forth in the Act, which does exclude certain other employees.[7/] Although the list of employees who are excluded from coverage is not comprehensive, there is nothing else in the language of the Act which can be read to implicitly deny the GAs and TAs coverage. Similarly, we are unaware of any other statutory provisions which would indicate a general legislative intent to exclude the GAs and TAs from Taylor Law coverage, unlike the State's Labor Law which specifically excludes student employees from coverage.[8/] Moreover, several other jurisdictions, including Ohio, Hawaii, Illinois and Minnesota, have specifically excluded graduate student employees from coverage. These

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[6/]See Onondaga-Cortland-Madison BOCES, 23 PERB ¶3014 (1990); Weedsport Cent. School Dist., 12 PERB ¶3004 (1979). In these cases, we held that our seasonal tests are not properly applied to persons who are employed throughout a work year.

[7/]Act §201.7(a); See State of New York - Unified Court System, 22 PERB ¶¶3023 and 3051 (1989), conf'd sub nom. Crosson v. Newman, 24 PERB ¶7001 (Sup. Ct. Albany Co. 1990) (appeal pending).

[8/]N.Y. Labor Law §511.15 (McKinney 1988) as interpreted in Theurer v. Trustees of Columbia University, 59 A.D.2d 196 (3d Dep't 1977).

exclusions are further persuasive evidence that the Legislature would have excluded the GAs and TAs from Taylor Law coverage had that been its intent.

We also believe that the policies of the Act, as presently structured,[9/] are carried out by our finding that the GAs and TAs hold covered employment. As the Director observed, the GAs and TAs render services for the University which are the same or similar to those performed by the employees in UUP's unit. Employees in UUP's unit enjoy the benefits of the Act and are subject to all of its restrictions and prohibitions. The GAs and TAs, as employees, should be similarly benefitted and accountable in the absence of a clear expression of legislative intent to the contrary.

Having concluded that the GAs and TAs are covered employees, we are left with the question of whether, as CWA/GSEU argues, the GAs and TAs are most appropriately given a separate unit or whether, as argued by the State and UUP, they are most appropriately added to the faculty and professional unit represented by UUP. The Director did not reach the unit issue. As the parties have fully litigated this issue, and given the time it has taken to process the case to this stage, we are persuaded that in the exercise of our discretion we should reach the unit question at this time so that the parties may be given a final order on all issues.

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[9/]We express no opinion as to whether the GAs or TAs should be covered by the Act, only that they are covered currently.

Having carefully reviewed the record and the parties' arguments on the unit issue, we find that the GAs and TAs are most appropriately placed in a separate negotiating unit consisting of all graduate students of the University holding State-funded positions as either graduate assistants or teaching assistants, excluding all other employees. As the facts recited by the Director show, the GAs' and TAs' dual status is unique,[10/] and they have little, if any, community of interest with the employees in UUP's existing unit. Moreover, we see a significant potential for a conflict of interest if the GAs and TAs were placed into UUP's faculty and professional unit growing out of, among other things, the supervisory role exercised by the faculty over the GAs' and TAs' work,[11/] the tremendous disparity in wages and benefits[12/] between the faculty and the GAs and TAs, and the faculty's control of the GAs' and TAs' student relationship, which could be used to affect the GAs' and TAs' employment relationship. Although mindful that the creation of an additional negotiating unit may be administratively inconvenient for the State,[13/] we believe that only a separate

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[10/] See County of Erie (E.J. Meyer Memorial Hospital), 9 PERB ¶3029 (1976) (medical interns and residents fragmented from white collar unit; separate unit most appropriate).

[11/] See County of Ulster, 16 PERB ¶3069 (1983) for a discussion of supervisory conflict of interest.

[12/] See Brighton Cent. School Dist., 13 PERB ¶3088 (1980).

[13/] We give no weight to the State's administrative convenience argument to the extent it rests upon the identity of the bargaining agent and not the composition of the unit itself.

negotiating unit will afford the GAs and TAs a meaningful opportunity to exercise their statutory rights as public employees.

For the reasons set forth above, IT IS ORDERED that such of CWA/GSEU's exceptions as are raised to the Director's finding that the GAs and TAs are not covered employees are granted. The Director's decision in that respect is reversed and the case is remanded to the Director for further proceedings consistent with this decision.

DATED: October 8, 1991
Albany, New York

Pauline Kinsella, Chairperson

Walter L. Eisenberg, Member

Eric J. Schmertz, Member