STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF SUFFOLK and SUFFOLK COUNTY SHERIFF'S OFFICE,

Respondents,

-and-

CASE NO. U-8594

SUFFOLK COUNTY CORRECTIONS OFFICERS ASSOCIATION,

Charging Party.

RAINS & POGREBIN, P.C. (BERTRAND B. POGREBIN, ESQ. of Counsel), for Respondents

ROBERT M. ZISKIN, ESQ., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Suffolk County Correction Officers Association (Association) and the cross-exceptions of the County of Suffolk and the Suffolk County Sheriff's Office (together, County) to the decision of the Administrative Law Judge (ALJ) dismissing the charge filed by the Association against the County. The charge alleged that the County violated §209-a.1(a) and (c) of the Act by denying a promotion to Crew Sergeant William Easparro, a unit member, because of his position in and activities on behalf of the Association.

FACTS

The County solicited applications from employees interested in filling a vacant position, Internal Security Sergeant. Easparro, second vice-president and grievance chairman for the Association, applied for the position. A total of eight such applications were received by the County. By notice dated December 27, 1985, the County announced that a Sergeant Bennett would be given the job.

After learning of Bennett's appointment, Easparro requested a meeting with Under Sheriff Linder. The meeting was held on January 9, 1986. Linder requested Captain Leo, a unit member and a member of the Association, to attend the meeting. Leo was one of several upper-level supervisors who participated in the selection process. Easparro inquired into the basis for the County's action. Easparro testified that Captain Leo told him that he wanted somebody available all the time and that because of Easparro's position on the Association's Executive Board, Easparro would not be available during negotiations. He also testified that Leo was concerned that because of Easparro's union position Leo would have difficulty chastising an officer in Easparro's presence. He testified also that Leo expressed concern that because of his obligations relating to his membership in the National Guard there would be loss of duty time which would make him unavailable for work.

Leo testified that when Easparro asked why he wasn't picked, Leo responded "because you are not there a lot of time, it is lost between military and union activity." Leo also testified, however, that because of a friendly professional and social relationship with Easparro, he didn't want to tell Easparro the real reason he was not picked and that the explanation given to Easparro at the meeting was "not the truth". He testified that "I didn't want to tell him that we didn't think he had what Sergeant Bennett had. I used that [explanation] as my reason for selecting Sergeant Bennett."

Deputy Warden Jacquin testified that a committee consisting of himself, Warden Romano, Chief of Staff Flammia and Captain Leo met to screen the applicants. No interviews were conducted and the selection was based upon their knowledge of the applicants. Jacquin testified that they considered the applicants' experience and ability, their communication skills, writing ability, investigatory proficiency, supervisory skills and ability to establish and maintain a "good rapport" with inmates. He also testified that the responsibilities of the Internal Security Sergeant required the incumbent to be available at all times to intercede in prison disturbances. As to this latter point, however, no personnel records were consulted. It appears that all the applicants had "attendance problems" and,

therefore, attendance histories were not in fact "a major factor" in the selection process. Jacquin also testified that he found Bennett to be best qualified considering all the criteria used.

The committee agreed that Bennett should be recommended for the position. Leo passed the recommendation on to Linder who in turn passed it on to the Sheriff, who made the appointment.

ALJ'S DECISION

The ALJ found that a part of Leo's "explanation" given at the January 9 meeting would constitute animus towards Easparro's responsibilities to the Association as a member of its Executive Board. He concluded that (1) it is not improper to consider the loss of duty time due to Association obligations in evaluating an employee for appointment to a position despite the contractual availability of such leave time, but (2) it would be improper to assume a conflict between Easparro's obligations to the Association and the supervisory functions of the post. The ALJ found that this latter factor played some part in Leo's consideration of Easparro's application.

Nevertheless, the ALJ determined that this animus by Leo towards Easparro's Association obligations did not taint the selection process. He found no evidence in the record ascribing this animus by Leo to the others involved in the

selection process nor any evidence that Leo's input during the selection process was determinative. The only evidence in the record as to Leo's input during the selection process was his praise of Bennett's investigatory proficiency and writing abilities. Moreover, the ALJ credited Jacquin's testimony that Jacquin's decision was based upon the relative attributes of Bennett and Easparro vis-a-vis their ability to establish and maintain a "good rapport" with inmates. He also credited Jacquin's testimony that two applicants were better qualified than Easparro and, as to the second, there is no evidence regarding Easparro's relative abilities. The other two members of the selection committee did not testify. The ALJ concluded that the evidence in the record could not support a determination that but for Leo's animus Easparro would have been assigned to the position.

EXCEPTIONS

In its exceptions the Association claims that the ALJ committed numerous errors in evaluating the record evidence. It urges that Leo's concerns expressed at the January 9 meeting should have been given greater weight. It urges that it was error to find that it was proper to consider absences which have a direct relationship to union business and are provided for by the terms of the parties' collective bargaining agreement. It argues that it was error to find that Leo's animus did not taint the selection process. In

particular, it urges that Leo's animus should be ascribed to the others. It argues that Leo's testimony was simply an attempt to justify an improper and unlawful selection. It urges that the County's failure to call Linder, Romano and Flammia should be held against the County. It requests this Board to nullify the selection of Bennett and find that Easparro would have been selected but for his protected union activities. Alternatively, the Association requests that we find that the selection process was tainted, that the selection of Bennett should be nullified and that the County be ordered to reconsider the candidates without regard to Easparro's union activities as an unfavorable factor.

In its cross-exceptions the County urges that the ALJ erred in finding that Leo's statements at the January 9 meeting evidence any animus. It argues that Leo's concerns about a possible inhibition of his own supervisory responsibilities while in Easparro's presence was a lawful consideration. Nevertheless, the County argues that the charge was properly dismissed because the evidence as a whole shows that Easparro's Executive Board membership was not a factor in the decision not to assign him to the post of Internal Security Sergeant. It urges that the record as a whole establishes that Easparro did not receive the

assignment because it was determined that another officer was best qualified for the position.

DISCUSSION

We reverse the ALJ's decision and find that the selection process was tainted by Leo's consideration of improper factors. We cannot find, however, on the basis of this record, that but for Leo's animus, Easparro would have been selected for the post. We direct that the assignment of Bennett be rescinded, that the employer conduct a de novo review of all of the applications and evaluate Easparro's qualifications without regard to Easparro's union activities.

The charge is based on certain statements made by Leo at the January 9 meeting. As found by the ALJ, at that meeting, Leo told Easparro that Easparro was not selected because (1) he would not be sufficiently available for the duties of the position due to time taken for union business, and (2) Leo was concerned that there was a potential conflict between Easparro's union obligations and his supervisory functions.

As to the first reason given by Leo, we have recently held that an employer could properly deny promotion to an employee who was not prepared to perform the duties of the job because he chose to avail himself of union leave

provisions of a collective bargaining agreement.[1/] If there is a significant conflict between an employee's union leave and the reasonable requirements of the position he seeks, the promotion or assignment may be denied if the employee chooses to make himself unavailable for, or refuses to perform,[2/] such position. The employer may not act on the basis of a perceived conflict but must leave the matter to the employee to resolve.[3/] It is clear that no such choice was offered to Easparro. If this "explanation" had been a factor in evaluating Easparro's application, we would find that the County violated CSL §209-a.1(a) and (c). However, we need not determine whether it was a factor because we find a violation based upon the second reason offered by Leo.

As to the second reason, there appears to be some confusion in the record as to whether Leo expressed concern that he would be inhibited in his supervisory functions in Easparro's presence or whether Leo expressed concern that Easparro would be inhibited in his supervisory functions because of Easparro's union position and obligations. The ALJ found that the former more accurately described Leo's

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[1/] City of Rochester, 19 PERB ¶3081 (1986).

[2/] Environmental Protection Administration of the City of New York, 9 PERB ¶3066 (1976).

[3/] Id.

concern. A resolution of this issue is not necessary since we find that either concern would be an improper factor in evaluating an employee for this assignment. If Leo's concern was his own inhibition to chastise employees, we agree with the ALJ that this can have no bearing upon Easparro's ability to meet the requirements of the post and that such consideration establishes Leo's animus. If the alternate view of the evidence is taken, we find that such factor would be improper in the absence of evidence of conduct reflecting a conflict between Easparro's union obligations and the performance of his supervisory duties.[4/] The admittedly excellent performance by Easparro of his present supervisory functions as Crew Sergeant offers ample basis for the conclusion that no such conflict exists.

Leo testified that his explanation to Easparro "was not the truth". The ALJ found that this denial of the veracity of his explanation was directed only to the first reason. Since he found the second reason was improper, the ALJ determined that Leo bore animus toward Easparro's responsibilities to the Association as a member of the Executive Board. We agree with this finding.

4/ Id.

We disagree, however, with the ALJ's finding that Leo's animus did not taint the selection process. While we cannot ascribe Leo's animus to the other members of the selection committee, we have only the testimony of one other member. Furthermore, it is not without significance that Linder did not object to Leo's explanation at the January 9 meeting. While we cannot find on this record that but for Easparro's union position and activities he would have been selected for the position of Internal Security Sergeant, we find that improper factors played some part in the evaluation of Easparro and therefore tainted the selection process. To the extent that the selection process was tainted, a violation of §209-a.1(a) and (c) occurred.

The appropriate remedy, under these circumstances, is a direction to the County to conduct a de novo review of all of the applications and evaluate Easparro's qualifications without regard to his union activities.[5/]

NOW, THEREFORE, WE ORDER that the County of Suffolk and the Suffolk County Sheriff's Office:

1. Rescind the assignment of Sergeant Bennett to the post of Internal Security Sergeant and conduct a

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5/See Toler and Monroe County Community College, 2 PERB ¶3025 (1969).

de novo review of the applications for that position and evaluate Sergeant Easparro's qualifications without regard to his union activities;

2. Cease and desist from interfering with, restraining, coercing or discriminating against William B. Easparro or any other unit employee in the exercise of rights protected by the Act;

3. Sign and post a notice in the form attached at all locations ordinarily used to communicate information to unit employees.

DATED: March 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, 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 Suffolk County Corrections Officers Association that the County of Suffolk and Suffolk County Sheriff's Office will:

1) Rescind the assignment of Sergeant Bennett to the post of Internal Security Sergeant and conduct a de novo review of the applications for that position and evaluate Sergeant Easparro's qualifications without regard to his union activities;

2) Not interfere with, restrain, coerce or discriminate against William B. Easparro or any other unit employee in the exercise of rights protected by the Act.

Suffolk County and Suffolk
County Sheriff

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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

VILLAGE OF SLOATSBURG,

Respondent,

-and- CASE NO. U-8814

NEW YORK STATE FEDERATION OF POLICE, INC.,

Charging Party,

-and-

SLOATSBURG VILLAGE POLICE BENEVOLENT ASSOCIATION,

Intervenor.

SCHLACHTER & MAURO, ESQS., for Charging Party

KRUSE & McNAMARA, ESQS., for Intervenor

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Intervenor, Sloatsburg Village Police Benevolent Association (Village PBA) to the decision of the Administrative Law Judge (ALJ) that the Village of Sloatsburg (Village) violated §209-a.1(d) of the Act when it refused to negotiate with the New York State Federation of Police, Inc. (Federation). In its charge the Federation alleged that the Village refused its demand to begin negotiations for a contract to succeed the one which expired on May 31, 1986. The sole issue in

this case is whether the Federation or the Village PBA is the collective bargaining representative for the police officers' unit in the Village.

FACTS

The Federation was certified by this Board as the exclusive representative for all full-time police officers in a decision dated February 10, 1984 (17 PERB ¶3000.7 [1984]). The Federation's primary function is to provide various services to local organizations affiliated with it, such as attorney services and negotiation services. The Village PBA was such an affiliated organization in 1984.

Negotiations for a contract covering July 1, 1984 through May 31, 1986 began in the fall of 1984. These negotiations for the 1984-86 contract were conducted by Mauro, an attorney for the Federation, and two officers of the Village PBA. All three acted on the assumption that the Village PBA was the bargaining agent. None realized that the Federation had been the organization certified by PERB. Federation officials also believed that the Village PBA was the bargaining agent and communicated such belief to unit employees and the Village PBA attorney. The reason for this is that while the Federation has numerous affiliated local organizations, it is the named collective bargaining representative for only a few of them.

The parties signed a collective bargaining agreement in April 1985, the recognition clause of which named the Village PBA as the exclusive bargaining agent. The cover page of that agreement also identified the Village PBA as the union party to it.

Early in 1986 the Village PBA notified the Federation that it was withdrawing from the Federation and would thereafter use the Rockland County PBA for legal services.[1/] The president of the Federation sent a letter to all the unit employees wishing them luck in their new affiliation. The Federation's Executive Vice-President and Director of Labor Relations told the attorney for the Village PBA at or about this time that the Federation was not the certified bargaining agent.

The Village PBA undertook negotiations with the Village for the new contract, which continued into June 1986. Mauro testified that in June 1986 he discovered the PERB order which certified the Federation as the representative. Shortly thereafter the Federation notified the Village that it was the proper representative and demanded to negotiate

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1/The Village PBA had been affiliated with Rockland County PBA at the time when the 1981-84 collective bargaining agreement had been negotiated. The cover page of that agreement had identified the Village PBA as the union party in interest, but the recognition clause of that agreement had referred to Rockland County PBA.

with the Village. The Village discontinued negotiations with the Village PBA but stated that it would not resume negotiations with any union until PERB determined the identity of the bargaining agent. That response prompted the charge.

ALJ's DECISION

The ALJ determined that the certification of the Federation as the bargaining agent continued in effect because there was no evidence of an intentional consent by the Federation to a change of its status. In his view, all of the parties acted under a mistake of fact as to the identity of the bargaining agent. Since all thought the Village PBA was the agent, he concluded that there was no intention by anyone to effect a change in agents.

The ALJ rejected the Village PBA's argument that the charge was not timely. The Village PBA urged that the charge should have been filed within four months of the execution of the 1984-86 contract since that contract evidenced a recognition inconsistent with any asserted claim of representative status by the Federation. The ALJ found that since the charge alleges a refusal to negotiate on demand, such charge was timely because it was filed within four months of refusal.

The ALJ also rejected the argument that the Federation should be estopped from denying that the Village PBA is the representative of the unit. The estoppel argument was that

the Village PBA relied upon conduct and assurances of the Federation in concluding that it represented the unit, and it incurred costs in furtherance of those representational responsibilities. The ALJ found that the Federation was not in possession of the facts when it acted or spoke, and therefore was "not responsible for the employees' mistaken belief that they were represented by the Sloatsburg Village PBA." In his view, the employees' belief that the Village PBA was their agent was arrived at independently of anything said or done by the Federation.

DISCUSSION

We reverse the decision of the ALJ and dismiss the charge.

The Federation filed with us a petition for certification in its own name, and we issued such a certification. The order was duly served on the Federation. We cannot now accept the proposition that the Federation did not know that it was the representative of these employees. It must have had actual knowledge of the contents of its petition and, at the least, constructive knowledge of our certification order. Accordingly, knowledge that it was the representative is imputed to the Federation. The subsequent conduct of its officers and agents must be judged in light of that knowledge.

That conduct, together with Mauro's testimony, indicates that the Federation disregarded the fact that it had sought

and attained certification because it intended that the Village PBA, and not it, would act as the representative of the unit. We therefore find that the Federation knowingly and intentionally consented to the recognition of the Village PBA as the representative of the employees in the unit.[2/] Furthermore, inasmuch as the Federation did not intend to represent the unit itself when it sought and obtained certification, it would not serve the purposes of the Taylor Law to accord it representation now.

NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: March 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member

[2/]Having so concluded, we do not reach the other arguments made by the Village PBA.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY SCHOOL DISTRICT OF THE CITY OF SCHENECTADY,

Employer,

-and-

CASE NO. C-3161

SCHENECTADY FEDERATION OF TEACHERS, NYSUT, AFT, AFL-CIO,

Petitioner.

KEVIN BERRY, Field Representative, New York State United Teachers, for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Schenectady Federation of Teachers, NYSUT, AFT, AFL-CIO (Federation) to the decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition to add teachers of English as a second language to its existing unit of teachers employed by the City School District of the City of Schenectady.

The Director dismissed the petition because the Federation did not simultaneously file with the petition a numerically sufficient showing of interest from the employees in the unit alleged to be appropriate, as required by Rule

§201.4(a). When the petition was filed it was supported by a showing of interest of 10 of the 11 teachers of English as a second language sought to be added to the unit of approximately 600 teachers. Subsequent to the filing and at a date after the end of the filing period available to the Federation for the petition's intended purpose, the Federation submitted a showing of interest for the unit alleged to be appropriate in the form of its current membership list, which shows approximately 535 current members.

The Federation urges that we should not apply our Rule so strictly. It asserts that a strict application of the Rule serves no one's interest in this case and will prejudice the rights of the 11 teachers who seek representation. We have, however, long applied quite strictly our Rules regarding the filing of the showing of interest, including the requirement that a showing of interest be filed simultaneously with the petition.[1/] Our Rules in this regard are not intended as a general guide to the exercise of discretion by the Director. Accordingly, the Federation's exceptions must be dismissed.

[1/] See County of Rensselaer, 11 PERB ¶3046 (1978); Incorporated Village of Hempstead, 11 PERB ¶4088 (1978), aff'd, 12 PERB ¶3051 (1979).

NOW, THEREFORE, WE ORDER that the Federation's petition be, and it hereby is, dismissed.

DATED: March 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF HENRIETTA,

Respondent,

-and-

CASE NO. U-8931

ROADRUNNERS ASSOCIATION, LOCAL 1170,
COMMUNICATION WORKERS OF AMERICA,
AFL-CIO,

Charging Party.

WILLIAM J. MULLIGAN, JR., for Respondent

ROBERT J. FLAVIN, for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Town of Henrietta (Town) to the decision of the Administrative Law Judge (ALJ) sustaining the charge filed by the Roadrunners Association, Local 1170, Communication Workers of America, AFL-CIO (Charging Party). The charge alleged that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally discontinuing its past practice of tuition reimbursement.

Based upon the conduct of the Town during the course of this proceeding, the ALJ determined it to be appropriate to apply the provisions of Rule §204.3(e) and deem the failure of the Town to file a timely answer, coupled with its refusal

to attend a pre-hearing conference, to constitute an admission of the material facts alleged in the charge and a waiver of a hearing. She determined that, on the basis of the facts alleged in the charge and thus admitted, the Town violated the Act.

In its "exceptions" the Town states that the delay in filing an answer was due to the fact that its representative was on vacation.[1/] It also asserts, with regard to the merits of the charge, that the policy of tuition reimbursement rested entirely in the Town Board's discretion. The Town also asserts that this Board does not have jurisdiction to interfere with the Town in this matter.

DISCUSSION

We have quite recently had occasion to consider the conduct of the Town in improper practice proceedings before this Board (Town of Henrietta, 19 PERB ¶3067 (1986)). In that case, as well as in this one, the Town failed to file an answer within the time limits of our Rules, and when it did finally submit a response to the charge, such response failed to comply with several requirements of our Rules regarding the form and content of an answer. In addition, in that case, as well as in this one, the Town refused to attend a duly scheduled pre-hearing conference.

[1/]There is no indication, however, that the Town had requested an extension for this reason.

It is not necessary for us to reiterate our reasons for finding that such conduct by the Town warrants the application of Rule §204.3(e).[2/] For the reasons set forth in the above cited decision we determine that it was proper for the ALJ to conclude that the Town's conduct constituted an "admission of the material facts alleged in the charge and a waiver by the respondent of a hearing."

The charging party alleged that the Town Board passed a resolution providing for reimbursement to employees for courses offered by an accredited college or continuing education program and that the Town has maintained a past practice of tuition reimbursement. The charge also alleges that two employees, Donald Youngman and Paul Pettrone, requested tuition reimbursement and the Town refused to reimburse them.

Employer payment of educational expenses, whether work related or not, is compensation and a mandatory subject of bargaining.[3/] The Town may not, therefore, unilaterally discontinue its practice of tuition reimbursement without

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[2/]The allegation with respect to the vacation of the Town's representative is not a basis for a different result.

[3/]Local 343, IAFF, AFL-CIO, 17 PERB ¶3121 (1984); New York State Professional Firefighters Association, Inc., Local 461, 9 PERB ¶3069 (1976); Board of Education of Union Free School District No. 3 of the Town of Huntington, 30 N.Y.2d 122, 5 PERB ¶7507 (1972).

first negotiating with the union. Accordingly, we affirm the decision of the ALJ.

NOW, THEREFORE, WE ORDER that the Town of Henrietta:

1. Cease and desist from unilaterally discontinuing its past practice of tuition reimbursement.
2. Reimburse Donald Youngman and Paul Pettrone for their tuition expenses, as requested on August 18, 1986, plus interest at the legal rate.
3. Negotiate in good faith with the charging party concerning the terms and conditions of employment of unit members.
4. Sign and post the attached notice at all locations customarily used to communicate with unit employees.

DATED: March 17, 1987
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

Jerome Lefkowitz
Jerome Lefkowitz, 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 of the Town of Henrietta within the unit represented by the Roadrunners Association, Local 1170, Communication Workers of America, AFL-CIO, that the Town of Henrietta:

1. Will not unilaterally discontinue its past practice of tuition reimbursement.

2. Will reimburse Donald Youngman and Paul Pettrone for their tuition expenses, as requested on August 18, 1986, plus interest at the legal rate.

3. Will negotiate in good faith with the Roadrunners Association, Local 1170, concerning the terms and conditions of employment of unit members.

Town of Henrietta
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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

UNITED FEDERATION OF TEACHERS,

Respondent,

-and- CASE NO. U-8849

DONNA NICOLARDI,

Charging Party.

DONNA NICOLARDI, pro se

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of Donna Nicolardi (charging party) to the decision of the Director of Public Employment Practices and Representation (Director) dismissing the charge that she filed. The charge was dismissed because the charging party, despite several opportunities, failed to provide sufficient specification of events occurring within four months of the date of filing of her charge (July 16, 1986) to support any of her allegations that the United Federation of Teachers (respondent) violated the Public Employees' Fair Employment Act (Act).

The charge, in its entirety, recites:

1. UFT both refused and neglected to notify proper health agencies (OSHA, EPA, Bd. of

Health and Bd. of Education) about ensuing toxic chemical work condition adversely affecting health of charging party and other employees.

2. UFT permitted slanderous remarks to be made during grievance hearings.

3. UFT has permitted the employer to blacklist charging party from obtaining other alternate employment.

4. UFT refused to allow charging party to communicate with union officials regarding health/employment status.

5. UFT allowed Bd. of Education to postpone appropriate administrative procedures (medical) to determine proper status of charging party.

6. Union misled charging party as to proper procedures to follow in protecting charging party's contractual rights.

Repeated efforts by the Administrative Law Judge assigned to this matter, including the holding of a conference, produced a number of writings which purport to describe the events about which the charging party complains.

The charging party claims that due to construction at the school where she worked, she became ill. She claims that the respondent failed to pursue the matter with appropriate health agencies. All such events appear to have taken place more than four months before her charge was filed. At some point, at or about the beginning of January 1986, she ceased working for her employer, the City School District of the City of New York (District). It appears that she was absent for some period of time prior thereto because of her claimed

illness, but the District thought she was fit to work. It also appears that a hearing or conference took place concerning her employment status at which she was represented by the respondent. She complains of conduct by her representative at that meeting. She also complains that officers of the respondent have refused to speak with her.

Having reviewed the materials submitted by the charging party, we conclude that she has failed to present a clear statement of facts which could constitute a violation of §209-a.2(a) of the Act. Her charge, as supplemented, does not allege facts which could support a finding that the respondent was improperly motivated, grossly negligent or irresponsible in its actions. Accordingly, we affirm the decision of the Director.

NOW, THEREFORE, WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: March 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BOCES I, SUFFOLK COUNTY,

Employer,

-and-

CASE NO. C-3015

BOCES I TEACHERS ASSOCIATION,
NYSUT, AFT, AFL-CIO,

Petitioner.

MARTIN FEINBERG, Field Representative, New York State United Teachers, for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the BOCES I Teachers Association, NYSUT, AFT, AFL-CIO (Association) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing its petition to add the teachers employed in the summer school program to its unit of teachers who work during the regular school year for BOCES I, Suffolk County (BOCES). The Director dismissed the petition upon its finding that the employees were not public employees within the meaning of §201.7 of the Taylor Law.

In Matter of State of New York, 5 PERB ¶¶3022 and 3039 (1972), this Board established criteria to determine whether

seasonal employees, such as summer school employees,[1/] have a sufficient employment relationship to warrant coverage under the Law. To be public employees, three criteria must be met: 1) the employees must be employed at least six weeks a year; 2) they must work at least 20 hours a week, and 3) at least 60 per cent of the employees must return for at least two successive years. The Director held that the third criterion was not met. He found that while more than 60% of the teachers employed in the summer of 1983 returned in the summer of 1984, only 54% of those employed in the summer of 1984 returned in the summer of 1985. He dismissed the petition because of the insufficient return rate in 1985.

In its exceptions, the Association states that the documents submitted by it into evidence did not accurately reflect the return rate in that three female teachers who worked under their maiden names in 1984 were married in that year, and worked under their married names in 1985. The Association calculates that 57.4% of those who worked in the summer of 1984 returned in the summer of 1985.[2/]

The Association also asserts in its exceptions that it need not be the return rate for the last two successive years that is controlling. Accordingly, it argues that

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[1/] Merrick UFSD, 19 PERB ¶3058 (1986).

[2/] The BOCES not having filed a response to the exceptions, these figures will be accepted.

because the return rate in both 1983 and 1984 was more than 60%, the third criterion has been met.

The Association concludes by arguing that since the return rates in 1983, 1984 and 1985 were 75%, 65.5% and 57.4% respectively, PERB's guidelines have been met.

We reject the Association's exceptions and affirm the Director's dismissal of the petition. The Association acknowledges that in the last year of summer school prior to the petition, the return rate was less than is required for public employee status under §201.7 of the Taylor Law. Its argument that earlier successive years should be counted cannot be accepted. Our determination must be based on the most current status of the employees. We therefore apply the test to the two most recent successive years preceding the petition. Applying this test to the instant petition, it must be dismissed.

NOW, THEREFORE, WE ORDER that the petition be, and it hereby is, dismissed.

DATED: March 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NASSAU COUNTY COMMUNITY COLLEGE,

Respondent,

-and- CASE NO. U-8690

ADJUNCT FACULTY ASSOCIATION OF
NASSAU COMMUNITY COLLEGE,

Charging Party.

PETER A. BEE, ESQ. (BEE, DE ANGELIS & EISMAN), for Respondent

MICHAEL C. AXELROD, ESQ. (AXELROD, CORNACHIO & FAMIGHETTI), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Adjunct Faculty Association of Nassau Community College (Association) to the decision of the Administrative Law Judge (ALJ) dismissing its charge against the Nassau County Community College (College) on the ground of untimeliness. The ALJ relied on the provisions of Rule §204.7(l) which permit the ALJ to dismiss a charge on the ALJ's own initiative "on the ground that the alleged violation occurred more than four months prior to the filing of the charge, but only if the failure of timeliness was first revealed during the hearing."

The Association's charge, as amended, alleged that the College violated §209-a.1(e) of the Public Employees Fair Employment Act (Act) by refusing in April 1986 to grant grievance arbitrators a term appointment, as allegedly required by the parties' expired contract. On the basis of the record evidence, the ALJ found that the Association had been put on notice in February 1984 that the College would no longer designate neutrals to a term but only on a case-by-case basis. She rejected the contention that a memorandum dated "March 30, 1984" superseded and was inconsistent with the February 1984 action because she found that the testimony established that the memorandum was in fact issued in March 1983, not March 1984.

Subsequent to the filing of the Association's exceptions, the attorney for the College ascertained that the author of the March 30, 1984 memorandum was not employed by the College in March 1983 and that the finding that the memorandum was written in 1983 was in error. The attorney for the Association was so notified.

The Association now requests that we remand this matter to the ALJ to reconsider her decision in light of the new evidence. The College responds that the correct date of the memorandum is 1984 but it believes this fact should not alter the decision.

We conclude that the newly discovered evidence could affect the ALJ's decision regarding the timeliness of the charge. It is appropriate, therefore, that this matter be remanded to the ALJ to consider whether such evidence warrants altering her decision.

NOW, THEREFORE, WE ORDER that this matter be, and it hereby is, remanded to the Administrative Law Judge.

DATED: March 17, 1987
Albany, New York

Harold R. Newman
Harold R. Newman, Chairman

Walter L. Eisenberg
Walter L. Eisenberg, Member

Jerome Lefkowitz
Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF STEUBEN and SHERIFF OF THE COUNTY OF STEUBEN,

Joint Employer,

-and-

CASE NO. C-3066

STEUBEN COUNTY DEPUTY SHERIFF'S ASSOCIATION,

Petitioner,

-and-

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

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 Steuben County Deputy Sheriff's 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 criminal investigators, road patrol deputies, correction officers, dispatchers, cooks, registered nurse, civil clerks, and all part-time employees in the above titles employed twenty (20) or more hours per week.

Excluded: Sheriff, undersheriff, physician, jail superintendent and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Steuben County Deputy Sheriff's Association. To negotiate collectively is the performance of their 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 rising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNIONDALE UNION FREE SCHOOL DISTRICT,

Employer,

-and- CASE NO. C-3133

UNIONDALE TEACHERS ASSOCIATION
(#3070) NYSUT, AFT, AFL-CIO,

Petitioner.

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 Uniondale Teachers Association (#3070) NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: Registered Nurses.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Uniondale Teachers Association (#3070) NYSUT, AFT, AFL-CIO. To negotiate collectively is the performance of their 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 rising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member

10853

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HAUPPAUGE UNION FREE SCHOOL DISTRICT,

Employer,

-and- CASE NO. C-3141

LOCAL 424, UNITED INDUSTRY WORKERS,

Petitioner,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 144,

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 Local 424, United Industry Workers 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- and part-time employees holding the following titles: Custodian, Custodial Worker II, Groundsman/Dr. Msgr., Asst. Hd. Custodian (M.S. Nights), Lead Custodian-Elem. (Pines), Head Custodian Elementary, Lead Grounds, Maintenanceman, Painter, Storekeeper, Head Custodian M.S., Head Custodian H.S. Nights, Lead Maintenance, Chief Custodian H.S., Head Maintenance, Bus Drivers-Step A & Step B, Cafeteria Monitors, Hall Monitors, Security, Lead Security, Pool Attendant, and Lavatory Attendant.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 424, United Industry Workers. To negotiate collectively is the performance of their 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 rising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF THERESA,

Employer,

-and- CASE NO. C-3149

TEAMSTERS LOCAL 687, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioner.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local 687, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America 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 Town of Theresa Highway Department in the following titles: Truck Driver, MEO, Heavy Equipment Operator, Mechanic and Laborer.

Excluded: Highway Superintendent, elected officials and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 687, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. To negotiate collectively is the performance of their 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 rising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 17, 1987
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

Jerome Lefkowitz

Jerome Lefkowitz, Member

10857

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF WESTHAMPTON BEACH,

Employer,

-and-

CASE NOS. C-3128
& C-3132

VILLAGE OF WESTHAMPTON BEACH DEPARTMENT OF PUBLIC WORKS ASSOCIATION OF MUNICIPAL EMPLOYEES,

Petitioner-Intervenor,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 1000, AFSCME,

Petitioner-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 Village of Westhampton Beach Department of Public Works Association of Municipal Employees 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 employees of the Department of Public Works.

Excluded: The Superintendent and all other employees of the Village of Westhampton Beach.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Village of Westhampton Beach Department of Public Works Association of Municipal Employees. To negotiate collectively is the performance of their 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 rising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: March 17, 1987
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

Jerome Lefkowitz

Jerome Lefkowitz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK CITY TRANSIT AUTHORITY,

Employer,

-and-

CASE NO. C-3118

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,
LOCAL 1655,

Petitioner.

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 District Council 37, AFSCME, AFL-CIO, Local 1655 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 Laboratory Technicians.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with District Council 37, AFSCME, AFL-CIO, Local 1655. To negotiate collectively is the performance of their 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 rising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.[1/]

DATED: March 17, 1987
Albany, New York

Harold R. Newman, Chairman

Walter L. Eisenberg, Member

Jerome Lefkowitz, Member

1/ This amends, nunc pro tunc, our recent Order [see, 20 PERB ¶3000.04 (1987)], so as to make clear the full and complete name of the negotiating agent.