STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Respondent,

-and- CASE NO. U-7748

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

Charging Party.

JOSEPH M. BRESS, ESQ. (ROBERT E. WATERS, ESQ., of Counsel), for Respondent

ROEMER & FEATHERSTONHAUGH, P.C. (CLAUDIA R. McKENNA, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the Governor's Office of Employee Relations of the State of New York (State) to the determination of an Administrative Law Judge (ALJ) that it violated §209-a.1(d) of the Taylor Law by unilaterally instituting a parcel inspection system at its Upstate Supply and Support Distribution Center (Center). The State acknowledges that it instituted a parcel inspection system at the Center without having negotiated this action with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), the certified representative of the employees who work at the Center. It argues, however, that its action is not violative of §209-a.1(d) because that

action constitutes a management prerogative not subject to mandatory negotiations.

The Center is a large warehouse which normally contains goods, the aggregate value of which is about $5,000,000. A police investigation conducted in 1983 revealed a shortage of about $10,000 worth of goods, and the State initiated several measures to better increase security at the Center. Among those measures is a parcel inspection system which was instituted pursuant to a memorandum issued on August 12, 1983, that provides:

> 1. No packages, containers, or paper bags, etc., will be removed from the Distribution Center by any employee or visitor unless checked by the security guard.
>
> 2. Failure to comply with or attempts to circumvent these regulations can be the basis for appropriate disciplinary action.

The parcel inspection system does not extend to purses or clothing pockets.

In County of Rensselaer, 13 PERB ¶3080 (1980), we had occasion to consider whether a similar, but not identical, parcel inspection system constituted a management prerogative, and we determined that it did not. The State urges us to distinguish Rensselaer, arguing that there are two important differences.

The first difference addressed by the State is that the parcel inspection system in Rensselaer was instituted at a nursing home facility while here the facility is a warehouse. The State contends that this distinction is

material because the mission of a nursing home is patient care while the mission of a warehouse is the security of the goods stored there. Thus, according to the State, its inspection plan was central to its mission while Rensselaer County's inspection plan was not.

We are not persuaded by this contention. The legitimacy of a nursing home protecting itself against the theft of its property is no less than that of a warehouse. Indeed, the social justification for doing so may be greater as nursing homes stock controlled substances, while the record does not indicate that such substances are stored at the warehouse. Accordingly, we reject the State's first proposed distinction.

The State's second contention is that its parcel inspection system is less intrusive than the one adopted in Rensselaer. Clearly, this is so. The State system calls for the inspection of certain types of parcels. The system adopted in Rensselaer went further. It instituted an internal pass system. Employees were required to obtain advance written permission to leave the premises with any type of parcel. This permission would be issued in duplicate, one copy of which would be given to the employee and a second to a security guard. In addition to inspecting the parcel, the security guard would compare the employee's copy of the parcel permission slip with his own.

The difference between the two security systems is not great, but neither is it insignificant. We applied a balancing test in Rensselaer,[1] and are applying one here. Applying such a test, the facts sometimes indicate a clear preponderance on one side or the other.[2]

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[1] We said there:

> In determining whether a work rule is a mandatory subject of negotiation, the Board must strike a balance between an employer's freedom to manage its affairs and the right of employees to negotiate their terms and conditions of employment.[3]

[3] In Newspaper Guild of Greater Philadelphia v. NLRB, ___ F2d ___; 89 LC ¶12,207 (August 13, 1980), the United States Court of Appeals for the District of Columbia said:

> "[W]hen there is a conflict between an employer's freedom to manage his business in areas involving the basic direction of the enterprise and the right of employees to bargain on subjects which affect the terms and conditions of their employment, a balance must be struck, if possible, which will take account of the relative importance of the proposed actions to the two parties." (footnote and citations omitted.)

[2] Compare Medicenter Mid-South Hospital, 221 NLRB No. 105, 90 LRRM 1576 (1975), in which the NLRB found a unilateral imposition of polygraph tests for the purpose of combatting wide-spread vandalism to violate the employer's duty to bargain, with Master Slack Corp., 230 NLRB No. 138, 96 LRRM 1309 (1977), in which the NLRB found that unilaterally imposed restrictions upon access to warehouse areas "did not rise to the level of a violation of the Act." The same management interest carried different weight when balanced against different levels of intrusiveness upon employees.

However, it is the nature of a balancing test that when the circumstances approach equipoise, subtle distinctions can shift the balance from one side to the other.

The question in Rensselaer was a close one. We determined that the work rule, and its potential enforcement by discipline, had a substantial effect on terms and conditions of employment. On the other hand, there was a substantial management interest in securing its property. Considering all the circumstances in that case, we concluded that the interest of the employees predominated.

In doing so, we relied, in part, upon a decision of the NLRB[3/] that the unilateral action of an employer in adopting an internal movement pass system applicable to the removal of property was a violation of its duty to negotiate. We therefore concluded that the combined parcel inspection and pass system instituted by the employer in Rensselaer crossed the line of management prerogatives and constituted improper unilateral action. We now determine that the security system imposed by the State which involves the inspection of parcels but does not include parcel permits does not cross that line.

[3/] Boland Marine and Manufacturing Co., 228 NLRB No. 173, 94 LRRM 1743 (1977), enforced, NLRB v. Boland Marine and Manufacturing Co., 84 LC ¶10,826 (5th Cir. 1978).

ACCORDINGLY, WE REVERSE the decision of the ALJ, and WE ORDER that the charge herein be, and it hereby is, dismissed.

DATED: September 10, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PATROLMEN'S BENEVOLENT ASSOCIATION OF NEWBURGH, NEW YORK, INC.,

Respondent,

-and-

CASE NO. U-7979

CITY OF NEWBURGH,

Charging Party.

HAROLD & SALANT, ESQS. (CHRISTOPHER HAROLD, ESQ., of Counsel), for Respondent

HITSMAN & HOFFMAN, P.C. (JOHN F. O'REILLY, ESQ., of Counsel), for Charging Party

BOARD DECISION AND ORDER

The charge herein was brought by the City of Newburgh (City). It complains that the Patrolmen's Benevolent Association of Newburgh, New York, Inc. (PBA) committed an improper practice by submitting a number of demands involving nonmandatory subjects of negotiation to interest arbitration. The Administrative Law Judge (ALJ) ruled on fourteen different demands. He dismissed the charge with respect to five of them on the ground that the demands in question were mandatory subjects of negotiation, and found merit in the other specifications of the charge because the

remaining nine demands were nonmandatory subjects of negotiation.

PBA has filed exceptions with respect to all nine of the demands found to be nonmandatory subjects of negotiation. The City has filed exceptions with respect to four of the five demands found to be mandatory subjects of negotiation. We now deal with the issues presented by the contested demands. In doing so, we begin our analysis of the negotiability of each demand by quoting that demand.

1. Those demands which the ALJ found to be mandatory subjects of negotiation:

a. Demand #11a - Article VI, first paragraph

> Clarify contract so as to indicate all overtime at time-and-a-half in excess of eight hours a day or in excess of the normal weekly tour to be paid in money or compensatory time off.

We conclude that the subject matter of this demand is preempted by the Fair Labor Standards Act. In Garcia v. San Antonio Metropolitan Transit Authority, ____ US ____, 83 L.Ed. 2d 1016, 102 LC ¶34,633 (1985), the Supreme Court held that the statute is applicable to state and local governments, and §7(k) of the statute permits compensatory time only during the pay period in which the overtime is worked. Accordingly, we hold that this demand is not a mandatory subject of negotiation.

b. Demand #23 - Contract Article XIV

> Indemnification against liability provision should be expanded so as to include indemnification of acts committed in the discharge of duties outside the geographical territory of the employer and whether committed on or off duty. Protection shall include pay for police officer's legal representative of choice and shall include all litigation expenses.

This demand is for indemnification against liability whether or not the liability is job related. The City argues that the subject matter is preempted by Public Officers Law §18.4 and General Municipal Law §50-j, both of which provide for indemnification under specified circumstances.

We find that these statutory provisions do not preclude negotiations for other liability indemnification protections but merely prescribe minimum indemnification protections. Thus, the demand is merely one for legal insurance which is a form of compensation that has been held to be a mandatory subject of negotiation.[1/]

[1/] Town of Haverstraw, 11 PERB ¶3109 (1978), aff'd. Town of Haverstraw v. Newman, 75 AD 2d 879, 13 PERB ¶7006 (2d Dept., 1980); Albany Police Officers Union, 16 PERB ¶3068 (1983).

c. Demand #24 - Article XVI

> The grievance procedure shall be amended to provide that failure to hold a hearing and render a decision at the chief and/or city manager level within the time limit specified in the contract shall result in an automatic granting of the grievance.

The City argues that since the grievance procedure is, by agreement of the parties, applicable to nonmandatory subjects of negotiation, this demand is not a mandatory subject of negotiation. We disagree. The thrust of the demand is exclusively procedural; it merely imposes time limits in the processing of grievances. The issue of what is grievable is not placed in question by either party. Accordingly, the demand is a mandatory subject of negotiation.

d. Demand #32 - (No Reference)

> PBA president shall be assigned tour described in first paragraph of Article VI(D) of current contract.

In Orange County Community College Faculty Association, 10 PERB ¶3080 (1977), at p. 3136, we found a demand that "the employer would assign a teaching schedule that will maximize the [union] president's availability for performing official duties" to be a mandatory subject of negotiation. The principle underlying that decision is similar to the one

underlying decisions of the NLRB and the courts in permitting superseniority for union officers in matters relating to layoffs and recall. Such superseniority has been held to be proper so long as it facilitates the performance of official responsibilities of the union officers which bear "a direct relationship to the effective and efficient representation of unit employees in implementing the collective bargaining agreement.[2/] The instant demand meets this test and is a mandatory subject of negotiation.

2. Those demands which the ALJ found to be nonmandatory subjects of negotiation:

   a. Demand #1 - Old contract except as amended.

The ALJ determined that it is a nonmandatory subject of negotiation because it is not restricted to provisions in the old contract that are themselves mandatory subjects of negotiation. In its exceptions, PBA argues that the demand cannot be declared a nonmandatory subject of negotiation merely because the terms of the old contract which would be extended to include a few nonmandatory provisions. Rather, it argues, the burden is on the City to indicate the provisions that should not be submitted to compulsory arbitration on the ground that those provisions are nonmandatory subjects of negotiation.

2/D'Amido v. NLRB, 582 F 2d 820, 99 LRRM 2350, 2353 (3d Cir, 1978) enforcing Electrical Workers Local 623, 230 NLRB 406, 95 LRRM 1343 (1977).

We affirm the decision of the ALJ in rejecting this argument. The demand is for the extension of both mandatory and nonmandatory provisions of the parties' past agreement. If this demand were included in the award of an arbitration panel, the City would be obligated to grant benefits that do not constitute mandatory subjects of negotiation, notwithstanding the absence of any waiver of its right not to be compelled to do so. In effect, PBA is arguing that the City's failure to identify the nonmandatory provisions of the parties' prior agreement constitutes such a waiver. However, as noted by the 3d Department,[3/] such a waiver must be clear and explicit, and no such waiver can be found here. Accordingly, we affirm the decision of the ALJ that this demand is not a mandatory subject of negotiation.

b. Demand #3 - Article II, Section C

> Detective position as permanent appointment with salary as set forth in schedule.

We affirm the decision of the ALJ that this is not a subject of mandatory negotiation. Detective work is part of the essential work of police officers generally. Accordingly,

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[3/] CSEA v. PERB, 88 AD2d 685, 15 PERB ¶7011 (1982), affd. 61 NY2d 1001, 17 PERB ¶7007 (1984).

the assignment of such work to police officers is a management prerogative.[4/]

c. Demand #11b - Article VI, second paragraph

> Subdivision "D" shall be modified so as to eliminate all training; and there shall be a Subdivision "E" which shall be captioned "Shift Differential" and shall require the payment of 50 cents more per hour for those officers who worked the 3:00 p.m. to 11:00 p.m. or the 4:00 p.m. to 12:00 midnight shifts and 74 cents more per hour for those officers who worked the 11:00 p.m. to 7:00 a.m. or the 12:00 midnight to 8:00 a.m. shifts. All overtime earned during those periods shall be computed on a regular wage plus the shift differential. Taking of "Comp Time" at members' discretion. Unlimited accumulation.

The ALJ determined that the paragraph constitutes a separate, "unitary" demand. A "unitary" demand is one that is not severable and therefore would be a nonmandatory subject of negotiation en toto if any part of it is a nonmandatory subject of negotiation.[5/]

If this is a unitary demand, it is not a mandatory subject of negotiation because it includes a requirement of "Comp Time", which, as we have already indicated, is precluded by the Fair Labor Standards Act.

[4/]Compare Waverly CSD, 10 PERB ¶3103 (1977).

[5/]Pearl River UFSD, 11 PERB ¶3085 (1978).

PBA argues that the demand is not a unitary one. The test, as articulated in Pearl River, 11 PERB ¶3085 (1978), is whether the party making a demand presented its contents in such a manner as would reasonably indicate to the other party whether or not its contents were severable. As indicated by the discussion in that decision, it was anticipated that, at the very least, severable aspects of a single demand would be expressed in separate paragraphs. That was not done here, and we find no other evidence that PBA presented this demand in such a manner as to reasonably indicate to the City that its contents were severable. Accordingly, we determine that this demand is not a mandatory subject of negotiation.

d. Demand #20 - Article X, Section E

> Increase personal leave to 8 days per calendar year. Newly hired personnel taking office any time after January 1st shall receive pro-rata share of the personal leave days allowed for that year for all other officers. Selection of personal days at member's discretion. Eliminate Chief's discretion on personal days carryover.

This demand was declared a nonmandatory subject of negotiation by the ALJ because it provides, in part, for the selection of personal leave days at the sole discretion of the employees. It seeks a change from the current practice which is that the choice of times for personal leave is subject to approval of the police chief. The ALJ concluded

that the proposal would interfere with the City's exercise of its right to determine the number of police officers who should be on duty at any time.

We agree. In City of Yonkers, 10 PERB ¶3056 (1977), this Board said, p. 3099, that a public employer

> may determine the number of unit employees that it must have on duty during each of the vacation periods. Within that framework, it is obligated to negotiate over the order in which vacation preferences may be granted.

The same is true about personal leave. However, this demand goes beyond the framework within which the order of preferences for granting personal leave may be negotiated. In the typically sensitive area of the performance of police functions, it would eliminate entirely management participation in the decision as to whether a particular employee could be spared from duty at the time sought for personal leave, and it would also eliminate all management control over the number of employees on personal leave at any one time. Accordingly, it is not a mandatory subject of negotiation.

e. Demand #25 - Article XVIII

Eliminate management's rights clause.

The ALJ determined that the management rights clause of the prior agreement deals "almost exclusively" with management prerogatives. Indeed, in its brief to us, the City asserts that the clause covers nothing but management prerogatives.

A demand for the elimination of provisions of a management rights clause which deals only with mandatory subjects of negotiation is a mandatory subject of negotiation. However, to the extent that it deals with nonmandatory subjects of negotiation, neither the elimination nor the continuation of such a management right constitutes a mandatory subject of negotiation.[6/] Past negotiations, or even agreements as to a matter that is not a mandatory subject of negotiation "do not oblige the parties to negotiate over such a matter subsequently."[7/] It follows that to the extent that it contains nonmandatory items, a clause cannot be included in the parties' contract, except upon the agreement of both parties. It also follows that the demand herein is a nonmandatory subject of negotiation.

6/As to the absence of a duty to negotiate for the continuation of a contract clause dealing with nonmandatory subjects of negotiation, see our ruling on item 2, a (Demand #1), supra.

7/State of New York, 6 PERB ¶3005 at p. 3021 (1973). See also Troy Uniformed Firefighters, 10 PERB ¶3015 (1977) in which we said, at p. 3031:

> Parties may negotiate over nonmandatory subjects of negotiation and are encouraged to do so. However, in doing so they do not alter the character of a demand from nonmandatory to mandatory; neither do they obligate themselves to negotiate over such a matter in the future. (footnote omitted)

f. Demand #26 - Article XIX

> Add new provision to bill of rights clause which shall permit up to 90 days for the department to investigate a civilian complaint lodged against an officer of the department within which time he shall be either officially charged or officially absolved. There shall also be a new subdivision mandating that each officer shall receive an hour meal time with pay for each 4 hour period thereafter.

The ALJ determined this to be a nonmandatory subject of negotiation because it extends to investigations of criminal conduct.

While PBA states that the demand is not intended to apply to criminal conduct unrelated to internal police department discipline, this is irrelevant. Mandatory collective bargaining cannot reach police department investigations of criminal conduct even if the criminal conduct is related to internal police department discipline.[8/] To hold otherwise would be to require a police department to negotiate with respect to a major part of its mission -- the investigation of crimes.

g. Demand #27 - Article XX

> There shall be only one personnel file relative to each police officer. This language is in addition to the existing language.

8/See Police Association of New Rochelle, Inc., 10 PERB ¶3042 (1977).

PBA argues that the sole purpose of the demand is to preclude "secret" personnel files. On its face, however, the demand would preclude the maintenance of duplicate personnel files; thus, the City would be prohibited from maintaining one file at a central personnel office and a second at the location where the employee works. The manner in which the City chooses to maintain its personnel files is not a term or condition of employment.

In the past, this Board has been lenient in permitting unions to clarify demands even as late as in their exceptions.[9/] Here, however, we have something more than the clarification of a demand. As explained by PBA, the demand has been given a meaning so different from that which is implied by its wording as to make it a new demand. We do not understand the demand as having the meaning now given it by PBA. Furthermore, even if we did, it would not be subject to interest arbitration now because it has not yet been considered in collective negotiations.[10/]

h. Demand #29 - New Article

> Each provision of the contract which affords benefits of (sic) the members of the bargaining unit shall specifically

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9/In City of Saratoga Springs, 16 PERB ¶3058 (1983), we held, at p. 3092, that a demand, "as clarified in the exceptions," was a mandatory subject of negotiation.

10/Compare Binghamton Fire Fighters, 9 PERB ¶3072 (1976).

> state that such benefits are to continue for those members who are on injury under Section 207-c of the General Municipal Law.

This demand cannot be found to be a nonmandatory subject of negotiation on the ground that it duplicates the provisions of GML §207-c. That statute deals with salaries, wages and medical and hospital expenses while the contract provides additional benefits. However, the ALJ ruled that the use of the word "benefits" implies that the demand incorporates nonmandatory subjects of negotiation. The source for this position is this Board's decision in Hudson Valley Community College, 12 PERB ¶3030 (1979). That case involved a demand "to maintain all terms and conditions of employment in effect until the negotiation of a successor agreement . . . ." This Board said, at p. 3058, "the demand is for the maintenance of 'terms and conditions of employment' and the Taylor Law uses this phrase to denote mandatory subjects of negotiation . . . ."

That decision did not make the phrase "terms and conditions of employment" the sine qua non of a continuation of benefits clause, but, in Police Association of Mount Vernon, 13 PERB ¶4582 (1980), at p. 4640, an ALJ found a demand to be nonmandatory which provided that "[a]ll other benefits being enjoyed by the members shall be continued unless specifically amended by this agreement" because it was not limited to "terms and conditions of employment". While we affirmed her decision based upon the

particular facts in that case,[11/] we did not intend to take as restricted a view of continuation of benefit clauses as she did. Indeed, in Lynbrook PBA, 10 PERB ¶3067 (1977), at p. 3121-3122, we held a demand to be a mandatory subject of negotiation which provided that "[u]pon the expiration of the contract, all terms, conditions, benefits, etc., shall continue until a new contract is signed." (emphasis supplied). Similarly, we rule that the demand herein is a mandatory subject of negotiation.

i. Demand #30 - (No Reference)

> Incorporate all addenda into formal collective bargaining agreement.

The ALJ found this to be a nonmandatory subject of negotiation because the addenda include nonmandatory matters. PBA argues that the ALJ had a more expansive view of the addenda intended for incorporation than was contemplated by the demand. In its exceptions it identified eight specific addenda for incorporation into the new agreement, and it claims that these are all mandatory subjects of negotiation.

Wholly apart from the question of whether the position taken by PBA in its exceptions constitutes a clarification or an amendment of its demand, the demand is a nonmandatory subject of negotiation. The very first addendum which PBA

[11/] 13 PERB ¶3071 (1980).

explicitly seeks to incorporate in the contract deals with interrogation sessions by superior officers and does not exclude interrogation sessions involving criminal conduct. As such, it is not a mandatory subject of negotiation because it goes to a major part of the mission of the police department -- the investigation of crimes.[12/]

NOW, THEREFORE, WE FIND that PBA committed an improper practice by submitting to interest arbitration Demands 1, 3, 11a, 11b, 20, 25, 26, 27 and 30; and

WE ORDER it to withdraw such demands from interest arbitration.

WE FURTHER ORDER that, in all other respects, the charge herein be, and it hereby is, dismissed.

DATED: September 10, 1985
Albany, New York

Harold R. Newman

Harold R. Newman, Chairman

Walter L. Eisenberg

Walter L. Eisenberg, Member

[12/]See our ruling on item 2, f (Demand #26), supra.

OPINION OF BOARD MEMBER DAVID C. RANDLES
CONCURRING IN PART AND DISSENTING IN PART

I concur in the majority opinion except with respect to Item 2, d (Demand #20), which the majority declared a nonmandatory subject of negotiation on the ground that a provision for the selection of personal leave days at the sole discretion of employees would interfere with the City's exercise of its right to determine the number of police who should be on duty at any time. I believe that the Board majority has failed to distinguish between the City's unilateral right to determine its manpower requirements and its Taylor Law obligation to negotiate the "manipulation of schedules of individuals and groups . . ."[1/] in order to satisfy those requirements. This Board determined that the latter is a mandatory subject of negotiation.[2/]

The demand herein does not preclude the City from determining its manpower needs and satisfying those needs. If adopted, however, it could impose an administrative and financial burden upon the City. In situations where employees' exercise of personal leave rights would diminish the number of

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1/ City of White Plains, 5 PERB ¶3008 (1972) at p. 3015.

2/ Id.

employees on duty to less than that deemed essential by the City, the City would be required to solicit volunteers for overtime or to call in employees to fill vacancies. For example, under the parties' past agreement, which may be continued, unit employees who are called in for work or who accept voluntary overtime must be assured a minimum of four hours pay at premium rates. Burdens such as these, however, are typical of those that are dealt with in collective negotiations; the issues that they raise go to the merits of the demand rather than to its negotiability.

I have a further concern. By reserving to management the right to approve or reject applications for personal leave in order to maintain manning levels, the majority decision may, in effect, have permitted management to render personal leave clauses a nullity.

I would hold this demand to be a mandatory subject of negotiation.

David C. Randles, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED UNIVERSITY PROFESSIONS, INC.,

Respondent,

-and-

CASE NOS. U-7449
and U-7482

THOMAS C. BARRY,

Charging Party.

In the Matter of

UNITED UNIVERSITY PROFESSIONS, INC.,

Respondent,

-and-

CASE NO. U-7765

MORRIS E. ESON,

Charging Party.

BERNARD F. ASHE, ESQ. (ROCCO A. SOLIMANDO, ESQ. and IVOR R. MOSKOWITZ, ESQ., of Counsel), for respondent

THOMAS C. BARRY, pro se

MORRIS E. ESON, pro se

BOARD DECISION AND ORDER

These matters come to us on the exceptions of Thomas C. Barry and Morris E. Eson to the consolidated decision of the Administrative Law Judge (ALJ) dated May 23, 1985, in which

he dismissed all charges in their entirety.[1/]

Barry filed two charges against the United University Professions, Inc. (UUP), alleging that the union violated §209-a.2(a) of the Act because its agency fee refund procedure for 1983-84 and subsequent fiscal years permits UUP and its affiliates to use a portion of his agency shop fee funds temporarily for political and ideological purposes. Eson filed a similar charge alleging an improper practice in that UUP failed to escrow 100% of his agency fees pending an independent determination of the amount actually expended by UUP for refundable purposes. Both argue that even the possibility of temporary use of part of their deduction for political or ideological causes is violative of their rights.[2/]

A brief recapitulation of the history of the two Barry cases is necessary. Originally, the Director dismissed the charges (17 PERB ¶4570; 17 PERB ¶4580). On appeal, we issued an interim decision (17 PERB ¶3066), in which we determined that, in light of the Supreme Court's recent decision in Ellis v. Brotherhood of Railway, Airline and Steamship

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[1/]The ALJ's consolidated decision included consideration of a charge filed in Case No. U-7793, Middle Country Teachers Association, NYSUT, AFT, AFL-CIO and Joseph Werner. Joseph Werner has not filed exceptions to the dismissal of his charge.

[2/]Werner's charge was to the same effect.

Clerks, Freight Handlers, Express and Station Employees, ____ U.S. ____, 17 PERB ¶7511 (1984), reexamination of the propriety of UUP's refund procedure was warranted. We invited Barry and UUP to submit memoranda of law concerning the effect of Ellis and whether alternative procedures were now required.

In July, 1984, after our interim decision, UUP amended its agency fee procedure for its 1984-85 and subsequent fiscal years. The refund procedure in effect at the dates the charges were filed provided for a demand and return after the close of UUP's fiscal year. Under the amended procedure, nonmembers who file an objection are issued a check by UUP during the current fiscal year representing UUP's approximation of the expenditures it and its affiliates will make during that year for refundable activities. Under the procedure as written, the approximation is based upon "the latest fiscal year for which there is a completed and available audit". After the year-end audit, the actual expenditures for refundable purposes are calculated and adjustments to the advance reduction are made as appropriate. If the amount tendered to the objector exceeds the amount finally determined to be owed, the procedure provides that the objector shall refund the overpayment to the UUP. Alternatively, additional monies are tendered to the objector if the advance reduction check is less than the

amount determined to be owed. The final determination is subject to appeal to the UUP's Executive Board and then to a neutral appointed by the UUP. These steps are the same as those earlier approved by us.

After receiving submissions from Barry and UUP, including a description of UUP's amended procedure, we issued a decision on September 19, 1984 (17 PERB ¶3098). In that decision, we held that our earlier approval of UUP's refund procedure should be overruled by virtue of the Supreme Court's holding in Ellis that a "pure rebate approach is inadequate". We further held that a refund procedure can be valid under §208.3 of the Taylor Law only if the agency shop fee, in its entirety, is held in an escrow account.

In so holding, we rejected, as inadequate, the UUP's revised refund procedure which contemplated an advance reduction of the fee. We directed UUP to place all agency fee payments in an interest-bearing escrow account to be maintained until a final determination of the amount of refund, at which time UUP could make a distribution of the escrow account in accordance with such final determination.

On October 9, 1984, we issued a supplementary decision (17 PERB ¶3101), in which we withdrew our order in the two cases and remanded them to the Director for further proceedings. On our own motion, we determined that "while our overruling of UUP (Eson) was appropriate, we acted

prematurely insofar as we addressed the merits of the charges, found a violation and issued a remedial order." We recognized that UUP had not yet been given an opportunity to file an answer to the charges and to present whatever evidence it believed was warranted. The cases were remanded to consider the merits of the charges.

On May 23, 1985, the ALJ issued his decision (18 PERB ¶4575), in which he dismissed all the charges. The ALJ concluded that although Ellis made a "pure rebate approach" improper, the Ellis decision is not dispositive of the question of the proper interpretation of §208.3. He determined that §208.3 does not bar an advance reduction method as part of the refund procedure, nor, in his opinion, does §208.3 mandate 100% escrow of all agency fee monies collected by the union. Accordingly, he found that UUP's amended refund procedure is not violative of the Act in this regard.

In his exceptions, Barry asserts that any procedure which allows, or has the possibility of allowing, his agency shop monies to be used for improper purposes, must be found invalid. He takes exception to several of the comments and analyses of the ALJ which support the ALJ's ultimate conclusion that a refund procedure under §208.3 may contain an advance reduction method and need not contain a requirement for the escrow of all of the funds of the agency fee payer. Barry urges that this Board should reinstate our

order of September 19, 1984. Eson's exceptions are to the same effect. Specific contentions are made with regard to aspects of the ALJ's analyses, but his basic position appears to be that to be both constitutional and consistent with the requirements of §208.3, an agency shop refund procedure must provide that all agency fee money be placed in an escrow account and that such monies can be released to the union only as, and when, it is necessary for expenditures allowed by the Ellis decision. In effect, he also urges that the union may not use any of the agency fee monies, even temporarily, for refundable purposes.

UUP's response supports the decision of the ALJ. It argues that the Ellis decision, being solely an interpretation of the Railway Labor Act, is not controlling. It argues further that §208.3 does not mandate any particular refund procedure and that an advance reduction of agency fees prior to the final internal UUP determination is consistent with §208.3. It also urges that even though the refund procedure applicable to the 1983-84 fiscal year may have been a "pure rebate" procedure, the type which the Ellis decision found to be improper, this Board should not penalize UUP by way of special remedy because of its failure to anticipate the Supreme Court's Ellis decision. The Civil Service Employees Association, Inc. also filed an amicus brief in support of the ALJ's decision.

DISCUSSION

Upon further consideration, we conclude that §208.3 of the Act can be satisfied by a refund procedure that incorporates an advance reduction method. Accordingly, we dismiss the charges in the cases before us.

Although the U. S. Supreme Court's decision in Ellis ostensibly construed only the provisions of the Railway Labor Act, we believe the Court's analysis, especially in the light of its earlier decisions involving the same statute,[3/] indicates the constitutional considerations which must govern our construction of §208.3. We continue to believe, on the basis of the Ellis decision, that §208.3 cannot constitutionally authorize an agency shop refund procedure which is based on a "pure rebate approach". Thus, we reaffirm our earlier holding (17 PERB ¶3098) that our decision in UUP (Eson), 11 PERB ¶3074 (1981), in which we approved such a "pure rebate approach", must be overruled.

In Ellis, the Supreme Court suggested alternatives to the pure rebate approach, including the use of advance reduction methods and/or interest-bearing escrow accounts. Although

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[3/] Railway Employees Department v. Hanson, 351 U.S. 225 (1956); International Association of Machinists v. Street, 367 U.S. 740 (1961); Brotherhood of Railway and Steamship Clerks v. Allen, 373 U.S. 113 (1963). Of great significance, of course, is Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

the matter is not entirely free from doubt, we do not read the Ellis decision as sanctioning the use of escrow accounts only when the union deposits 100% of the agency fee of objecting nonmembers in such accounts. Inasmuch as the Court indicated that an advance reduction of the agency fee is an acceptable alternative, it would seem that the escrow alternative similarly can apply to a portion of the fee. We now believe that the Ellis alternatives to the impermissible pure rebate approach apply only to that portion of the fees which are to be used for purposes outside the scope of the statutory authorization.

The charging parties strongly urge that any procedure which permits the possibility of any part of the refundable portion to be used by the union, even temporarily, is objectionable and cannot be approved. Indeed, this contention appears to be supported by the Supreme Court's statment in Ellis that "given the existence of acceptable alternatives, the union cannot be allowed to commit dissenters' funds to improper uses even temporarily". The charging parties argue, therefore, that the only procedure which can fully protect their rights is one which requires the deposit of 100% of their agency fee deductions in an interest-bearing escrow account until the final determination of the proper refund.

While we have previously accepted such an approach, we now conclude that it is not required, either by Ellis or by

§208.3. Theoretically at least, any partial escrow, as well as any advance reduction method, can result in some portion of the agency fee being used temporarily by the union for rebatable purposes. Nevertheless, Ellis accepts both of these alternatives to the pure rebate approach. We conclude, therefore, that the Supreme Court did not intend to accord absolute protection to the objecting nonmembers' interests, but, rather, required that the procedure chosen by a union should provide reasonable assurance that agency fees will not be used by the union in a manner which violates the objecting nonmembers' rights.

In construing the Taylor Law, the ALJ properly noted that Ellis is not dispositive of the statutory interpretation necessary to be made in this matter. The Legislature, when it enacted §208.3, could have imposed more stringent requirements upon agency fee recipients than is contemplated by Ellis. We now conclude, however, that §208.3 does not foreclose the use of an advance reduction method as part of an acceptable refund procedure.

While §208.3, by its terms, can only be satisfied by a refund procedure, the statute does not mandate any particular form of procedure.[4/] The statute should be construed as permitting any refund procedure, including the incorporation of the Ellis alternatives, which accords appropriate

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[4/]See UUP (Barry), 15 PERB ¶3130 (1982).

protection to the interests of nonmembers. So long as the procedure gives reasonable assurance that agency fees will not be used by the union in a manner which violates objecting nonmembers' rights, the provisions of §208.3 do not bar an otherwise reasonable refund procedure solely because the procedure incorporates an advance reduction method.

While advance reduction is permitted under §208.3, not every procedure for its implementation is necessarily acceptable. Our decision herein should not be construed as necessarily approving all aspects of UUP's advance reduction method as incorporated in its refund procedure. The charges in these cases do not challenge specific elements of that method. Nor has UUP been asked to address possible concerns with particular aspects of its procedure. It would be premature, therefore, for us to consider whether the UUP procedure is, in its entirety, an acceptable advance reduction method.

We would, however, note that any method selected by a union must provide reasonable assurance that the interests of the objecting nonmembers are protected. Any such procedure should be designed to avoid the "involuntary loan" to which the Supreme Court objected. Attention must, therefore, be directed to the timing of the advance reduction determination and its implementation, as well as the basis upon which the amount of the advance reduction is determined. Other aspects may also be subject to further scrutiny.

In regard to the other contentions of the charging parties, we find that the ALJ has properly disposed of them, and we adopt his conclusions.

Finally, we agree that a remedial order is not warranted by virtue of the fact that UUP maintained a pure refund procedure for its 1983-84 fiscal year. In particular, charging parties urge that since the procedure did not satisfy the Ellis requirements, we should issue an order requiring UUP to refund all agency fees collected by it for the 1983-84 year. We have previously rejected such a remedy (17 PERB ¶3098), and, for the reasons stated in the cited decision, we conclude that, under all of the circumstances disclosed by this record, it would not effectuate the policies of the Act to order such a remedy.

NOW, THEREFORE, WE ORDER that the charges herein be, and they hereby are, dismissed.

DATED: September 10, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF ALEXANDRIA,

Employer,

-and-

CASE NO. C-2928

TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 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 Truck Drivers and Helpers Local Union No. 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: Motor equipment operators.

Excluded: All other employees.

Further, IT IS ORDERED that the above named public employer shall negotiate collectively with the Truck Drivers and Helpers Local Union No. 687, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and enter into a written agreement with such employee organization with regard to terms and conditions of employment of the employees in the above unit, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances of such employees.

DATED: September 10, 1985
Albany, New York

Harold R. Newman, Chairman

David C. Randles, Member

Walter L. Eisenberg, Member

STATE OF NEW YORK

Public Employment Relations Board

TEXT OF PROPOSED RULE

Text of Proposed Rule: The Public Employment Relations Board, pursuant to the authority vested in it by Civil Service Law, Article 14, Section 205.5, at its regularly scheduled meeting held at Albany, New York, on June 18, 1985, resolved to amend the rules of such Board, 4 NYCRR, Chapter VII, as follows:

Subdivision (e) of Rule Section 201.3 is hereby amended to read as follows:

(e) A petition for certification or decertification may be filed by an employee organization other than the recognized or certified employee organization and a petition for decertification may be filed by one or more public employees, if no new agreement is negotiated, 120 days subsequent to the expiration of a written agreement between the public employer and the recognized or certified employee organization or, if the agreement does not expire at the end of the employer's fiscal year, then 120 days subsequent to the end of the fiscal year im-

mediately prior to the termination date of such agreement. Thereafter, such a petition may be filed until a new agreement is executed. Such a petition shall be supported by a ~~showing interest~~ * showing of interest * of at least 30% of the employees in the unit already in ~~existance~~ * existence * or alleged to be appropriate by the petitioner.

Subdivision (b) of Rule Section 203.8 is hereby amended to read as follows:

(b) Petitions: Filing. A petition to review the question of whether provisions and procedures of a local government are being implemented in a manner substantially equivalent to the provisions and procedures set forth in the Act and these Rules (hereinafter called a petition for review) may be filed by any person. Petitions under this section shall be in writing and signed. Four copies of the petition shall be filed with the Board [within sixty days after the act or inaction complained of occurred or failed to occur]. Petition forms will be supplied by the Board upon request. The petition may be withdrawn only with the consent of the Board. Whenever the Board approves withdrawal of any petition, the case shall be closed.

Subdivision (c) of Rule Section 203.8 is hereby amended to read as follows:

(c) Time for Filing of Petitions. A petition for review may be filed [at any time] within sixty days after the act or inaction complained of occurred or failed to occur.

Rule Section 204.11 is hereby amended to read as follows:

204.11 Cross-Exceptions. Within seven working days after [receipt] service of exceptions, any party may file an original and four copies of a response thereto or cross-exceptions and a brief in support thereof, together with proof of service of copies of these ~~documents~~ * documents * upon each party to the proceeding.