STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

CASE NO. U-25956

- and -

STATE OF NEW YORK - UNIFIED COURT SYSTEM,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel), for Charging Party

JAMES P. WELCH, DEPUTY DIRECTOR FOR EMPLOYEE RELATIONS (JAMES GORMAN of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions to a decision of an Administrative Law Judge (ALJ), filed by the State of New York - Unified Court System (UCS). The ALJ held that UCS violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally implementing a new policy regarding off-duty employment for court officers in a bargaining unit represented by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). To remedy the violation, the ALJ directed UCS to rescind the new policy, to "compensate and/or make whole court officers for any loss of pay or benefits resulting from" that policy, with interest at the maximum legal rate, to rescind any disciplinary measures imposed on employees for failing to abide by

the new policy, and to sign and post a notice at locations used to post notices to unit employees.[1]

EXCEPTIONS

UCS argues that the new policy is not a change in its prior practice; that the policy is a nonmandatory, mission-related directive; that the ALJ erred in finding that UCS's imposition of the disciplinary component of the new policy violated the Act; and that the remedial order improperly requires UCS to pay employees the wages that they would have earned from outside employment. CSEA supports the ALJ's decision and order.

FACTS

UCS employs court officers in several different bargaining units defined by Judicial District and region. About 250 to 300 court officers are represented by CSEA in the Third through Eighth Judicial Districts and those who served in State-paid positions for UCS prior to April 1, 1977, as well as those who were once employed by various counties. The other court officers are represented by different employee organizations. The job description for all court officers states that they are responsible for maintaining order and providing security in courtrooms, court buildings and grounds. It states that they are peace officers, required to wear uniforms, and that they may be authorized to carry firearms, execute warrants, make arrests and coordinate the activities of other court security personnel.

According to Lauren DeSole, UCS's Director of Human Resources, court officers are frequently asked to provide security services for private entities while off duty. In May 2004, two court officers of the Ninth Judicial District were shot, one fatally, during

[1] 40 PERB ¶4597 (2007).

off-duty employment as bouncers in a Queens nightclub. Newspaper accounts of the incident stated that the court officers broke up a fight in the club and evicted those involved. Soon after, some of the culprits returned and shot the officers.

DeSole testified that the incident was very upsetting to UCS administrators, including its Chief Administrative Judge, who was then Jonathan Lippman, and was the impetus for UCS to curtail such off-duty activity. She testified that UCS wanted to prevent court officers from "putting [themselves] in harms way and then having some horrible incident [happen] that ha[s] an impact on the Court's public image, which affects our mission."[2] According to DeSole, UCS was particularly concerned about adverse press coverage if court officers are involved in violent encounters during off-duty employment in disreputable establishments. In that regard, DeSole noted that the nightclub in which the officers were shot was a "gentleman's club" and that it was not a "nice" place. The newspaper articles reported that the club was a "strip club." DeSole testified that UCS was also concerned about its potential liability stemming from the training that it provides court officers as peace officers and their use of UCS-issued equipment during off-duty employment.[3]

UCS requested bargaining with several bargaining agents for court officers to negotiate a new off-duty employment policy. According to DeSole, among the subjects that UCS wanted to negotiate were limits on the number of hours an employee could work off-duty and restrictions on the use of UCS equipment during outside employment.

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[2] Tr., at p. 144.

[3] DeSole testified the UCS issues bulletproof vests but that the officers purchase their own firearms.

After several meetings without agreement with CSEA, UCS issued the May 12, 2005 policy at issue here. It distributed the new policy under a cover memo that stated:

> Following the tragic event last year involving two court officers who were working off-duty, we undertook an effort with our unions that represent peace officers to clarify and improve our off-duty employment policy.
>
> Attached is the product of that effort – an Off-Duty Employment Policy for Peace Officers and a new Off-Duty Security Employment Form.

Although the cover memo suggests that all of the unions participated in the development of the new policy and form, CSEA did not agree to them.

As relevant here, the new policy states:[4]

> All peace officers shall comply with the following regulations governing off-duty employment:
>
> * * *
>
> 2. Off-duty employment to provide security at the following locations is strictly prohibited:
>
> a. a location where the primary business activity is the selling of alcohol for consumption on the premises, for example bars and taverns. Employment is allowed at locations where alcohol is sold for on premises consumption as long as this is not the primary business activity, for example security employment at hotels or stadiums hosting sporting events.
>
> * * *
>
> 3. Off-duty Security Employment Form...
>
> a. Peace officers must submit an Off-Duty Security Employment Form to the Administrative Director of the

[4] The omitted portions of the new policy are not contested by CSEA. *See*, ALJ Exhibit 4. Thus, for example, CSEA does not object to the policy's blanket ban on outside employment where illegal activity is taking place or in locations owned or operated by individuals with involvement in organized criminal enterprises.

> Office of Court Administration and obtain approval for all off-duty security positions. No off-duty security position can be accepted without prior approval. The Administrator [sic] Director of the Office of Court Administration, in consultation with the appropriate Deputy Chief Administrative Judge, may disapprove off-duty employment not in compliance with the Rules of the Chief Judge or this procedure. The Administrative Director will respond within ten business days of receipt of the Off-Duty Security Employment Form.
>
> b. Every peace officer presently engaged in off-duty security employment must file an Off-Duty Security Employment Form with the Administrative Director of the Office of Court Administration within ten days of receipt of this directive. If disapproved, the peace officer must immediately terminate the off-duty employment.
>
> c. All approvals to work off-duty security employment expire on April 30th. A renewal application must be submitted to the Administrative Director for the Office of Court Administration by April 1st of each year.
>
> d. A determination by the Administrative Director may be appealed by petition to the Chief Administrative Judge or by application to the courts in accordance with the provisions of Article 78 of the Civil Practice Law and Rules.
>
> 4. Failure to comply with this procedure...shall result in disciplinary action.

The new form, which was attached to the policy, requires the identification of the employee, including work address, the outside employer, including address and type of business, the title and duties of the position to be filled, and whether the employee will be required to carry a firearm.[5]

The previous policy regarding off-duty employment of peace officers is set forth in the Rules of the Chief Judge, two versions of the Employee Handbook and the Court

[5] The ALJ held that the requirement to use the new form did not violate the Act, and CSEA has not taken exception to that determination.

Officers Rules and Procedures Manual. Each prior articulation of the policy is substantially similar to the others, but different from the May 12, 2005 version.

The Rules of the Chief Judge provide a code of ethics for non-judicial employees which, in relevant part, states that court employees "shall not engage in outside employment or business activities that interfere with the performance of their official duties or that create an actual or appearance of conflict with those duties."[6] The 1988 and 1999 Employee Handbooks also prohibit outside employment that will create a conflict of interests or interfere with the performance of official duties. The Handbooks further provide that employees "should report and discuss any outside employment and relevant restrictions" with their local administrators.

The December 2003 Court Officers Rules and Procedures Manual also prohibits any outside employment that creates a conflict of interests or interferes with the performance of a court officer's duties. It too states that court officers "should report and discuss any outside employment and its relevant restrictions" with local administrators. In contrast, the Rules and Procedures Manual expressly requires prior approval for outside public sector employment.

Other provisions of the Rules and Procedures Manual, while not directly related to outside employment, prohibit the performance of "any service for personal gain or the private interest of another party which interferes with the proper performance of duty" and the knowing association with "any person or organization reasonably believed to be engaged in, likely to engage in or having engaged in criminal activities" or engaging in "any behavior which is prejudicial to the good order, efficiency or discipline of [UCS]."

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[6] *See*, 22 NYCRR §50.1 (III) (A).

The Rules and Procedures Manual also states that court officers "must always be mindful that they are the visible representatives of the Unified Court System and that their appearance and conduct has a direct effect on how the court system is perceived."

DeSole testified that until the May 2005 policy was issued, the outside employment rules were administered at the local level.[7] Thus, for example, in February 2002, Judge Ann Pfau, then the new Administrative Judge for the Second Judicial District, issued a memorandum to employees under her administration regarding UCS policy on outside employment, stating: "As a general rule, our employees are permitted to hold jobs outside their court employment, provided that there is no conflict of either time or interest between the court job and outside job." The memo explained:

> This means that the outside employment must not be performed during court working hours, and that the duties and responsibilities of the outside job must not be incompatible with the proper performance of the court job, both in actuality and in appearance.

Although the 1988 and 1999 Employee Handbooks state that employees "*should* report and discuss any outside employment and its relevant restrictions" with the appropriate person in their administrative office [emphasis added], Judge Pfau's 2002 memo states: "As set forth in the Employee Handbook, court employees *are obligated* to report and discuss any outside employment and its relevant restrictions with court administrators to ensure that there are no conflicts with court employment" [emphasis added]. The memo further states: "In beginning my new role, I would like to take an overall look at the outside employment of all court employees to determine if any conflicts exist." Finally, the memo states that employees must "send directly to my attention all

[7] CSEA did not object to the centralization of the off-duty employment policy.

instances of outside employment that you engage in. If I see there may be a conflict, I will speak with you personally to determine how best that conflict may be resolved." DeSole testified that the more restrictive rules for outside employment for employees in the Second Judicial District, including the review of existing outside employment, were attributable to Judge Pfau's belief that her predecessor in that district had not effectively administered UCS's policy.

Colin R. Farley, a court officer employed by UCS since 1993, testified that in February 2002, he took outside employment for three weeks performing security at a night club located in a Holiday Inn while he was a court officer for the Fourth Judicial District – a District where CSEA represents court officers. Farley testified that "the rules and procedure" required him to get approval for his outside employment to ensure that there was no "conflict." However, it was not until after he accepted the job that he notified his immediate supervisor, Sergeant Charvoneau, whose only inquiry was whether he would be armed. Farley responded that he would not be armed, and Charvoneau directed him to notify a superior officer named McCartney, whose rank at that time is not specified on the record. In McCartney's absence, Farley next spoke with another senior officer, Levers, whose rank at that time is also not specified on the record. Levers advised Farley that he had either spoken to or would speak to McCartney on his behalf. Farley testified that McCartney, upon speaking with Levers, orally approved his outside employment. Three weeks later, after Farley's outside employment ended, McCartney told him that, in the future, he would have to fill out a form to report outside security work in any club.

DISCUSSION

A public employer violates §209-a.1(d) of the Act by unilaterally altering a non-contractual practice concerning mandatorily negotiable terms and conditions of employment for represented employees where the practice "was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."[8] Generally, work rules that restrict represented employees' activities while off duty, including outside employment, are mandatorily negotiable terms and conditions of employment.[9] However, a new work rule that serves an objectively demonstrable need in furtherance of the employer's mission may not be mandatorily negotiable where the employer's interests in a particular mission-related rule outweigh the impact that the change has on the employees' terms and conditions of employment.[10] The employer bears the burden of proof to establish that its mission-related purpose for the change is sufficient, on balance, to defeat its bargaining obligations.[11] That a work rule may have some relationship to an employer's mission

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[8] *Matter of Manhasset Union Free Sch Dist v New York State Pub Empl Relations Bd,* 61 AD3d 1231, 1233, 42 PERB ¶7004, at 7008 (3d Dept 2009) citing *Chenango Forks Cent Sch Dist*, 40 PERB ¶3012 (2007).

[9] *See Village of Catskill*, 43 PERB ¶3001 (2010); *New York City Transit Auth*, 42 PERB ¶3012 (2009) (appeal pending); *City of Albany*, 42 PERB ¶3005 (2009); *Hewlett-Woodmere Union Free Sch Dist*, 38 PERB ¶3006 (2005); *Ulster County Sheriff*, 27 PERB ¶3028 (1994); *City of Buffalo (Police Dept)*, 23 PERB ¶3050 (1990); *Local 589, Intl Assn of Fire Fighters*, 16 PERB ¶3030 (1983).

[10] *Id. See also, Lippman v New York State Pub Empl Relations Bd*, 296 AD2d 199, 35 PERB ¶7014 (3d Dept 2005); *New York State Thruway Auth*, 21 PERB ¶3058 (1988); *County of Montgomery*, 18 PERB ¶3077 (1985).

[11] *See, City of Albany, supra* note 9.

does not permit the employer to act unilaterally in any manner it deems appropriate.[12] A work rule that is directed to an employers' mission may not be mandatorily negotiable only to the extent that it does not "significantly or unnecessarily intrude on the protected interests of bargaining unit employees."[13]

Applying those standards here, we find that UCS's May 12, 2005 off-duty employment policy is, as written and implemented, a material change from the prior policy.

First, unlike the new off-duty employment policy, none of the previous versions contains a blanket prohibition on outside employment in locations where the primary business activity is the selling of alcohol for consumption on the premises. Rather, each of the prior versions states only that employees may not engage in off-duty employment that creates a conflict of interests, real or apparent, or which interferes with the performance of official duties.

Farley's testimony shows that he was permitted to take outside employment providing security in a nightclub where the primary business was the legal sale and consumption of alcohol, establishing that such work was not treated as a conflict of interests under the prior policy. Indeed, Carol Hamm, Deputy Inspector General in UCS's Inspector General's Office, testified that she has investigated reports of off-duty employment alleged to constitute conflicts of interests under the prior policy. She illustrated such employment as a court officer in a surrogate's court who was gathering documents for private companies that were doing work before the surrogate's court and

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[12] *Id.*, at 3007.

[13] *Id.*

another working as a process server. She had no examples of impermissible off-duty employment in legally operated bars and taverns, and she had no knowledge of a CSEA represented court officer being disciplined for working in such establishments.[14]

Although DeSole testified that UCS would never have permitted employees to work in locations where the primary business is the legal sale and consumption of alcohol, she had no direct role in approving, much less considering the appropriateness of such work under the prior policy, which was administered at the local level. Her testimony appears to be based on her construction of the prior policy rather than her experience with its implementation, and it does not outweigh Farley's testimony regarding his personal experience under the prior policy. Moreover, like Hamm, DeSole was unable to offer specific examples where CSEA represented employees were told that they could not work in such places or disciplined for doing so.

In *State of New York (Dept of Taxation and Finance)*,[15] the Board held that an employer's general policy requiring professional attire did not permit it to unilaterally impose a more restrictive ban on wearing specific clothing where employees had never been disciplined for wearing such clothing before. Likewise, UCS's general policy barring outside employment where there is a conflict of interests, real or apparent, or which interferes with the performance of official duties, does not permit it to unilaterally

[14] The ALJ declined to accept into evidence Respondent's Exhibit 10, which is a selection of disciplinary charges brought against employees for misconduct. The charges were for various forms of time and attendance abuse. During some of the unauthorized absences, employees were engaged in outside employment. However, none of the charges was based on the outside employment, and none concerned work in bars or taverns. We agree with the ALJ's conclusion that the documents are not relevant to UCS's claim that the new policy was not a change.

[15] 30 PERB ¶3028 (1997).

place a more restrictive ban on all off-duty employment in establishments where the legal sale and consumption of alcohol is the primary activity where, as Farley's testimony shows, such employment was permitted before the implementation of the new policy.

Second, although the Rules and Procedures Manual expressly requires pre-approval for outside public sector employment, each of the prior versions of the policy regarding outside private sector employment states only that such employment "should" be reported and discussed with administrative officials. In contrast to the new policy, none speaks of prior approval or annual re-approval for outside employment of any kind in privately owned and operated establishments. While Farley's testimony shows that prior notice was required, it also shows that such notice enabled UCS administrators to consider the work to ensure that there was no conflict of interests, and, as appropriate, to place restrictions on his outside employment after discussing it with him. However, an employee's duty to notify UCS of his or her outside employment does not establish that prior approval was required. Although DeSole testified that court officers have always been required to obtain pre-approval for any outside employment, there is again no record basis for her understanding because the prior policy was administered at the local level. Indeed, paragraph 3(b) of the new policy requires those who presently hold outside employment to seek approval of that work. Thus, the new policy itself implicitly recognizes that current outside employment by court officers was not always pre-approved by UCS.

Third, none of the prior versions of the off-duty employment policy contains a mandated disciplinary component for failing to notify UCS of outside employment or for engaging in inappropriate outside employment, and there is no evidence of anyone

having been disciplined for failing to give UCS prior notice of or engaging in any particular outside employment. In that regard, Hamm testified that when outside employment was found to present a conflict of interests, UCS generally required the employee to simply discontinue it, as does paragraph 3(b) of the new policy.[16] Likewise, Judge Pfau's construction of the prior policy as articulated in her 2002 memo shows that there was no mandated disciplinary component for engaging in work that she disapproved of. Rather, employees were told: "If I see there may be a conflict, I will speak with you personally to determine how best that conflict may be resolved."

UCS argues that the disciplinary component of the new policy does not constitute a change. It emphasizes that "misconduct" has always warranted discipline under the parties' collective bargaining agreement and that failure to abide by the previous off-duty employment policy constituted "misconduct." However, the argument assumes that under the prior policy an employee engaged in "misconduct" by taking outside employment where the legal sale and consumption of alcohol is the primary business or by failing to obtain pre-approval and re-approval for outside employment. There is, as discussed above, no evidence to support that proposition.

UCS also argues that the new policy does not mandate disciplinary action. It contends that the policy does not impair the discretion that UCS's administrators have in deciding whether to impose such action. However, the new policy plainly states that failure to abide by its rules and restrictions "*shall* result in disciplinary action" [emphasis added]. It does not say "*may*" result in disciplinary action. To whatever extent UCS has

[16] Presumably, if the employee refused to discontinue the employment he or she would be subject to discipline.

discretion whether to take disciplinary action under the new policy, it is inconsistent with the policy's unambiguous wording.

Finally, UCS argues that CSEA withdrew any objection to the mandated disciplinary component of the new policy. It emphasizes the ALJ's statement in her decision that CSEA only objected to paragraphs 2 and 3 of the new policy. However, in its proper context, the record shows that CSEA withdrew its objections to the restrictions on the other activities.[17] It did not withdraw its objection to the disciplinary component associated with the restrictions on the activities about which it had not withdrawn its objections.

Accordingly, the record fully supports the ALJ's conclusion that the new policy changed the previous policy by prohibiting all outside employment in establishments where the legal sale and consumption of alcohol is the primary business, by requiring pre-approval, rather than prior notice, of outside employment, and by requiring annual re-approval of all such employment, all subject to a new mandatory disciplinary component. The new policy affects work rules and contains a disciplinary aspect, both of which are mandatory topics of bargaining. Because of its unequivocal nature, uninterrupted duration and the circumstances under which it was applied, UCS's prior policy was a past practice cognizable under the Act.[18] Therefore, UCS violated §209-a.1(d) by implementing those aspects of its new off-duty employment policy, unless there is merit to its defense that the changes had a mission-related purpose that defeated its statutory bargaining obligations.

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[17] *See*, ALJ Exhibit 4; Tr., at pp. 132-134.

[18] See *Matter of Manhasset Union Free Sch Dist v New York State Pub Empl Relations Bd* and *Chenango Forks Cent Sch Dist*, *supra* note 8.

UCS argues that its mission, vis-à-vis the court officers, is "to provide effective and impartial justice in a secure and safe setting with a professional uniformed force that is sensitive to the needs of the court and the public."[19] It contends that its new policy serves that mission "by ensuring that its court officers are perceived as law abiding, responsible individuals who exercise good judgment."[20]

Although the new policy prohibits all off-duty employment in bars and taverns where the primary business is the sale and consumption of alcohol, DeSole testified that it was not intended to prohibit court officers from tending bar in such establishments. She explained that bartending "does not put them in harm's way in the same way that working as security does."[21] Her testimony suggests that the new restrictions, while not so articulated in the policy, are limited to court officers performing off-duty security functions. Characterizing the work of off-duty security in bars and taverns as an exercise of poor judgment, DeSole testified that the public's confidence in the security functions that court officers provide in court is impaired when people read press accounts of court officers involved in such off-duty work. She testified that such off-duty employment reflects poorly on the courts.

Having considered UCS's argument and DeSole's testimony, we are not persuaded that the new policy so advances UCS's mission as to outweigh the employees' interests in earning extra income while off-duty by working in bars and taverns where the legal sale and consumption of alcohol is the primary business, even if the new policy were

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[19] UCS's brief at p. 23.

[20] *Id.*

[21] Tr., at p. 129.

confined to security services in those establishments. Indeed, we are not persuaded that working off-duty in such establishments, whether as a bartender, security person or in some other lawful capacity reflects poor judgment. There is, for example no reason to conclude that the officers exercised poor judgment by taking outside employment in the Queens nightclub. Although we might agree that strip-clubs are not nice places, as DeSole testified, we cannot, on this record, conclude that court officers' mere employment in such establishments impairs UCS's ability to rely on them to fulfill its mission while they are on-duty. That press coverage of tragic events such as that which occurred in the Queens nightclub may prove embarrassing to UCS administrators does not outweigh the employees' right to earn extra money engaging in off-duty security. We do not see how UCS would be less embarrassed if they were working as bartenders in such establishments, which, according to DeSole, is not prohibited by the new policy. Finally, UCS's potential liability for court officers' off-duty conduct owing to its training of the officers is an economic factor that does not affect the duty to negotiate.[22]

Therefore, we affirm the ALJ's conclusion that the new policy is mandatorily negotiable. Because there is no dispute that it was unilaterally implemented, we affirm the ALJ's conclusion that UCS violated §209-a.1(d) of the Act.

We now address UCS's exceptions regarding the ALJ's remedial order.

Under §205.5(d) of the Act, PERB has broad remedial authority. It states that PERB is authorized "to issue a decision and order directing an offending party to cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of this article (but not to assess exemplary damages), including but

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[22] *See, Village of Catskill* and *Ulster County Sheriff, supra.*

not limited to the reinstatement of employees with or without back pay." It expressly characterizes PERB's remedial power as the "authority to make employees whole for the loss of pay and/or benefits."[23] As the Board stated in *International Brotherhood of Teamsters, Local 182 (Hoke)*,[24] "[m]ake-whole relief is intended to place aggrieved parties in the position they would have been in had the statutory improper practice not been committed."[25] Record evidence of the extent of any harm caused by an improper practice is not a prerequisite to a make-whole order.[26] Who is owed how much are questions properly addressed by the parties in negotiations or in compliance proceedings.[27]

UCS argues that we should not order it to compensate court officers for income they would have earned in bars and taverns under the prior policy because they would not have been authorized to take such jobs. However, based on the foregoing, we have found that the prior policy did not prohibit all such outside work.

UCS also argues that it should not be required to compensate court officers for wages that they would have earned from a private employer. However, the remedy that

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[23] See, e.g., *Matter of Uniondale Union Free Sch Dist v Newman*, 167 AD2d 475, 23 PERB ¶7022 (2d Dept 1990); *Matter of State of New York, Governor's Off of Empl Relations v Public Empl Relations Bd*, 116 AD2d 827 (3d Dept 1986); *Matter of City of Poughkeepsie v Newman*, 95 AD2d 101 (3d Dept 1983), *appeal dismissed* 60 NY2d 859 (1983), *lv denied* 62 NY2d 602 (1984); *Matter of Public Empl Fedn v Public Empl Relations Bd*, 93 AD2d 910 (3d Dept 1983); *Matter of City of Albany v Helsby*, 56 AD2d 976 (3d Dept 1977); *Matter of City of Albany v Helsby*, 29 NY2d 433 (1972).

[24] 30 PERB ¶3005 (1997) at 3013.

[25] *See also, State of New York (Semowich)*, 26 PERB ¶3026 (1993); *Burnt Hills-Ballston Lake Cent Sch Dist*, 25 PERB ¶3066 (1992).

[26] *See, e.g., County of Erie*, 30 PERB ¶3017 (1997).

[27] *See, e.g., City of Troy*, 28 PERB ¶3027 (1995); *County of Broome*, 22 PERB ¶3019 (1989).

the ALJ issued here places the affected employees in the same position that they would have been in had UCS not violated the Act, and it is virtually identical to the remedial orders we have issued in other cases involving unlawful restrictions on outside employment. We see no reason why we should depart from those precedents here.

By reason of the foregoing, UCS's exceptions are denied, and the decision and order of the ALJ are affirmed.[28]

IT IS THEREFORE ORDERED that UCS:

1. immediately rescind and cease enforcement or implementation of its May 12, 2005 policy on outside employment for court officers in the State Judiciary Negotiating Unit represented by CSEA, with the exception of the requirement of the form to be filled out by the employee;

2. Make whole court officers for any loss of pay or benefits resulting from the May 12, 2005 policy, with interest at the maximum legal rate and including any imposition of discipline thereunder; and

3. sign and post notice in the form attached at all locations ordinarily used to post written notices of information to employees in the unit represented by CSEA.

DATED: March 17, 2010
Albany, New York

Robert S. Hite, Member

Sheila S. Cole, Member

[28] Chairman Jerome Lefkowitz and Deputy Chair William A. Herbert took no part.

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 State of New York – Unified Court System in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, that the Unified Court System:

1. Will immediately rescind and cease enforcement or implementation of its May 12, 2005 policy on outside employment for court officers in the State Judiciary Negotiating Unit represented by CSEA, with the exception of the requirement of the form to be filled out by the employee;

2. Will make whole court officers for any loss of pay or benefits resulting from the May 12, 2005 policy, with interest at the maximum legal rate and including any imposition of discipline thereunder.

Dated . . . . . **By** . . . . . .
(Representative) (Title)

State of New York – Unified Court System

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

RONALD GRASSEL,

Charging Party,

- and -

CASE NO. U-28124

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

Respondent.

RONALD GRASSEL, *pro se*

DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE BARGAINING (RUSSELL J. PLATZEK of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Ronald Grassel (Grassel) to a decision by an Administrative Law Judge (ALJ) dismissing an improper practice charge, as amended, filed by Grassel against the Board of Education of the City School District of the City of New York (District) alleging that the District violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it issued disciplinary charges against him, and suspended him, in December 2007 pursuant to Education Law §3020-a.

Following our decision in *Board of Education of the City School District of the City of New York (Grassel)*[1] affirming the dismissal of an earlier related charge, Case No. U-27502, the ALJ requested the parties to identify any triable issues of fact that may

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[1] 41 PERB ¶3024 (2008).

require a hearing based upon a June 13, 2008 offer of proof by Grassel during the processing of the amended charge.

In response to the ALJ's request, Grassel submitted a letter demanding a hearing without identifying any disputed facts and without supplementing his prior offer of proof. The District responded by moving to dismiss the amended charge. Subsequently, Grassel submitted to the ALJ transcript excerpts from the pending Education Law §3020-a disciplinary hearing in support of his charge.

On July 15, 2009, the ALJ issued a decision dismissing the amended charge concluding that Grassel's allegations, which if proven, are insufficient to establish a *prima facie* case of improper motivation under the Act.[2]

EXCEPTIONS

In his exceptions, Grassel asserts that the ALJ erred in dismissing his amended charge without a full hearing, and erred in requesting the parties to identify triable issues of fact. In addition, Grassel seeks review of various procedural rulings, including the denial of his motions for the disqualification of the ALJ, particularization of the District's answer, and for issuance of subpoenas. Finally, Grassel renews his request that the ALJ be disqualified. The District supports the ALJ's dismissal of the charge.

Based upon our review of the record and consideration of the parties' arguments, we grant Grassel's exceptions, in part, but affirm the ALJ's decision dismissing the amended charge.

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[2] 42 PERB ¶4541 (2009).

PROCEDURAL HISTORY

In his amended charge, Grassel alleges that the District violated §§209-a.1(a) and (c) of the Act when it issued Education Law §3020-a disciplinary charges against him on December 17, 2007, and suspended him, after it had withdrawn prior disciplinary charges "with prejudice," on March 1, 2007.

Among the documents attached to the charge are the Education Law §3020-a disciplinary charges, dated December 17, 2007, issued by the principal of the Harry Van Arsdale High School. The disciplinary charges allege that Grassel failed to report for a scheduled medical evaluation on June 29, 2007 and that he refused a directive to be examined by District medical personnel on August 3, 2007. In addition, attached to the charge are an excerpt from the District's medical records, dated September 25, 1991, a June 16, 1997 counseling memorandum to Grassel about his conduct in the principal's office on June 13, 1997, and the transcript of a March 1, 2007 hearing during which the District withdrew prior disciplinary charges against him.

Following two deficiency notices from the Director of Public Employment Practices and Representation (Director), Grassel amended his charge to allege that the December 2007 disciplinary charges and suspension were in retaliation for him filing a grievance on June 13, 1997, and contesting earlier disciplinary charges that had been withdrawn by the District on March 1, 2007.[3] The District filed an answer to the amended charge.

[3] ALJ Exhibit 5, ¶¶3(a) and (b).

At a pre-hearing conference on March 27, 2008, Grassel filed a "Procedural Objection" alleging that the District's answer is untimely. In addition he submitted a request for issuance of multiple subpoenas.

By letter dated April 7, 2008, the ALJ concluded that the District's answer is timely and directed Grassel to renew his subpoena request to the ALJ assigned to conduct a hearing. On April 11, 2008, Grassel filed a modified subpoena request.

Preceding the scheduled hearing on June 13, 2008, the ALJ conducted an off-the-record discussion with the parties with respect to the allegations of the amended charge and with respect to certain exhibits. Based upon those discussions, at the commencement of the hearing, the ALJ placed on the record the following clarification of the amended charge:

> The charge alleges that on March 1, 2007 the Board of Education withdraw [sic] a charge that had been brought against Mr. Grassel and thereafter on December 17th, 18th and 19th, 2007 the Board of Education revoked the withdrawal of the charges and suspended him without pay.
>
> The reason why the charge was reinstated was because he previously had contested the 3020-A [sic] charges that had been brought against him.[4]

Thereafter, the ALJ requested Grassel to set forth, on the record, any additional factual bases for his amended charge. In response, Grassel stated that the District violated the stipulation withdrawing the prior charges, and that it issued the new disciplinary charges in retaliation for his resistance to the earlier disciplinary charges, and because he had filed grievances.[5] During a colloquy, the ALJ noted that the only specific grievance identified in

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[4] Transcript, pp. 6-7.

[5] Transcript, pp. 13-25.

the amended charge is a June 13, 1997 grievance.[6] In response, Grassel did not identify any other specific grievances he had filed but referenced handwritten notes, dated September 25, 1991, from the District's medical records, mentioning other grievances.[7] Finally, Grassel stated that his grievances led to threats against him, a heart attack, and the refusal of the school to allow him to receive medical care.[8]

On July 3, 2008, the Board denied a motion by Grassel for leave to file exceptions, pursuant to §212.4(g) of the Rules, in which he alleged purported misconduct by the ALJ during the off-the-record discussions on June 13, 2008. At that time, we did not address Grassel's claim that the ALJ should be disqualified because the issue was then pending before the ALJ.[9]

On August 27, 2008, the ALJ issued a letter decision setting forth a series of rulings in response to procedural issues raised by the parties.[10] The ALJ denied Grassel's disqualification motion concluding that Grassel had failed to demonstrate personal bias or improper conduct by the ALJ. In addition, the ALJ denied Grassel's motion for particularization and his request for subpoenas because he failed to comply with the requirements of the Rules. The ALJ also denied the District's motion to dismiss the amended charge, rejecting its claim that PERB lacks subject matter jurisdiction to

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[6] Transcript, p. 20.

[7] Transcript, pp. 21-24.

[8] Transcript, pp. 22, 25. The September 25, 1991 medical record excerpt, attached to the original charge, states that Grassel engaged in erratic behavior, irrational behavior, and filed 2 or 3 grievances weekly. ALJ Exhibit 1.

[9] 41 PERB ¶3016 (2008).

[10] 41 PERB ¶3031 (2008).

hear Grassel's amended charge. At the conclusion of his letter decision, the ALJ stated that he would hold the amended charge in abeyance pending the Board's decision on the exceptions filed by Grassel to the dismissal of an earlier related charge, Case No. U-27502.

On September 24, 2008, we issued our decision in *Board of Education of the City School District of the City of New York (Grassel)*[11] affirming the dismissal of Grassel's earlier charge on the grounds that he had failed to prove that the District's delay in reinstating him in 2007 was improperly motivated under the Act.

In reaching our decision, we concluded that his January 1997 protected activity was too remote to demonstrate a causal connection with the delay in reinstating him in 2007. Although Grassel referenced a 1997 grievance in his exceptions, that grievance was not in the record, and we therefore were unable to determine its probative value.

In our decision, we rejected Grassel's argument that the alleged failure of the District to comply with the terms of the March 1, 2007 stipulation constituted proof of improper motivation, stating

> that although the District stipulated that it was withdrawing the pending disciplinary charges "with prejudice," the colloquy between counsel makes clear that the stipulation was limited to the District agreeing not to bring future disciplinary charges based on the directives given to Grassel in 1997 and 1998 and the disciplinary issues resolved by the arbitration panel. The stipulation did not bar the District from filing future disciplinary charges premised on other alleged conduct by Grassel or from following its administrative practices with respect to reinstatements.[12]

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[11] *Supra* note 1.

[12] *Supra* note 1, 41 PERB ¶3024, at pp. 3112-3113.

Following our decision, the ALJ sent a letter, dated April 15, 2009, to the parties requesting they submit their respective positions as to whether there are triable issues of fact remaining in the present case based upon the Board's decision and Grassel's June 13, 2008 offer of proof. In response, Grassel submitted a letter asserting that a hearing was necessary but did not identify any additional facts he intended to prove if a hearing were held. The District renewed its motion to dismiss the amended charge.

In response to the District's motion, Grassel submitted to the ALJ transcript excerpts from the hearing being conducted with respect to the disciplinary charges referenced in the amended charge. According to Grassel, the transcript excerpts include an inconsistency with the District's description, in its motion to dismiss, of the underlying facts that support the disciplinary charges.

Following a review of the parties' submissions, and Grassel's prior offer of proof, the ALJ dismissed the amended charge without a hearing concluding that our prior decision is dispositive.

DISCUSSION

We begin with Grassel's exceptions challenging the ALJ's procedural rulings denying his motion for disqualification, his motion for particularization of the District's answer, and his application for the issuance of multiple subpoenas.[13]

1. Motion for Recusal

Pursuant to §212.4 of the Rules, a party can make a motion to an ALJ seeking his or her recusal. In the present case, Grassel seeks the ALJ's disqualification based

[13] Grassel excepts to the Board's prior decisions denying him leave to file exceptions. We deny those exceptions because our prior decisions are not reviewable under §213.2 of the Rules.

upon purported pre-hearing statements made by the ALJ to the parties during off-the-record discussions on June 13, 2008 and delays by the ALJ in ruling on his application for issuance of subpoenas. In his decision denying the motion, the ALJ ruled that Grassel had failed to set forth facts that demonstrate personal bias or facts establishing that the ALJ is incapable of making a fair and impartial decision on the merits.

Grassel asserts in his exceptions that the ALJ erred in denying the motion for disqualification. In addition, he claims that the ALJ's dismissal of the charge without holding a hearing and the ALJ's alleged failure to set forth a detailed factual analysis of the record constitute additional grounds for disqualification.

Following our review of the record, we reaffirm our prior determination that the ALJ's purported pre-hearing statements, and the delay in ruling on the request for subpoenas, do not constitute bases for disqualification.[14] Efforts to clarify the allegations of a charge or an answer are part of an ALJ's quasi-judicial responsibilities. Furthermore, the delay in ruling upon Grassel's subpoena requests does not demonstrate bias by the ALJ.

Contrary to Grassel's argument, the ALJ's reference to Judiciary Law §14 in denying the motion for disqualification is not reversible error. The disqualification standards for ALJs are analogous to those applicable to members of the judiciary.

Finally, we reject Grassel's claim that the ALJ demonstrated bias because he dismissed the charge without holding a hearing and without setting forth a proper analysis of the record. The dismissal of the amended charge, premised upon the pleadings, offers of proof, and prior precedent between the parties, is well within the

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[14] *Supra* note 10.

ALJ's discretion and does not constitute objective evidence that the ALJ favors a particular party or is incapable of rendering an impartial determination.[15]

2. Motion for Particularization

The ALJ denied Grassel's motion for particularization, pursuant to §204.3 of the Rules, because the motion does not seek amplification of the factual allegations that form the basis for the District's affirmative defenses. Following a review of the record, we affirm the ALJ's ruling denying Grassel's motion because it does not seek particularization of the affirmative defenses set forth in the District's answer.

3. Application for Subpoenas

Grassel filed a pre-hearing application for the issuance of 14 subpoenas to be served upon various District administrators including the District's Superintendent. In addition, he sought issuance of a *subpoena duces tecum* seeking "any other records, e-mails, photographs, personnel files, papers or objects" relating to the disciplinary charges and suspension and the hearing on his amended charge. As a result of our review of the full record, we reaffirm our earlier conclusion that Grassel's subpoena requests are overbroad and vexatious.[16] In addition, we affirm the ALJ's ruling that the request for 14 *subpoenas ad testificum* did not comply with §211.3 of the Rules by setting forth sufficient facts to demonstrate the relevancy of the testimony Grassel seeks to adduce.

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[15] Similarly, we are not persuaded by Grassel's argument that the ALJ engaged in improper conduct by informally advising the District's counsel on April 30, 2009 that his request for an extension of time was granted until May 1, 2009. Such brief *de minimis* communications over scheduling do not constitute misconduct by an ALJ.

[16] *Supra* note 5, 41 PERB ¶3031 (2008).

We also reject Grassel's exceptions challenging the ALJ's reliance upon statements he made on June 13, 2008 at the commencement of the hearing. Similarly, we deny his challenge to the ALJ's April 15, 2009 request to the parties for statements as to whether there are any remaining triable issues of fact, based upon our decision in *Board of Education of the City School District of the City of New York (Grassel).*[17]

4. The Offers of Proof

During the processing of a charge or petition, an ALJ has the discretion to request an offer of proof from a party aimed at clarifying the alleged facts in support of a claim or defense.[18] An offer of proof can aid in the narrowing of factual issues in dispute, and clarify for the ALJ whether a hearing is necessary.

On June 13, 2008, in response to the ALJ's request to clarify the amended charge, Grassel stated that the December, 2007 disciplinary charges were in retaliation for his contesting the prior disciplinary charges that had been withdrawn on March 1, 2007, and for filing grievances. The grievances mentioned during the colloquy between the ALJ and Grassel are a June 13, 1997 grievance, which he pled in the amended charge, and other unspecified grievances referenced in the September 25, 1991 handwritten District medical notes attached to his original pleading. In addition, he asserted that his grievances led to threats, a heart attack, and a denial of medical care.

In his exceptions, Grassel objects to the ALJ's treatment of his June 13, 2008 statements as an offer of proof, and notes that his statements were not under oath. In

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[17] *Supra* note 1.

[18] *See, Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶3023 (2009); *Roswell Park Cancer Institute,* 34 PERB ¶3040 (2001).

addition, he claims that he was not afforded a sufficient opportunity to describe the factual predicate for his amended charge at the June 13, 2008 hearing.

The ALJ's request to Grassel to articulate the facts that form the basis for his amended charge constitutes a request for an offer of proof. It is reasonable for an ALJ to expect a charging party, alleging a violation of §§209-a.1(a) and (c), to be able to identify the facts that he or she asserts supports a claim of improper motivation under the Act. A response to such a request must include alleged facts but it does not have to be in the form of a sworn statement.

In the present case, the record establishes that Grassel responded to the ALJ's request with legal arguments and certain alleged facts. Although Grassel claims that the ALJ did not permit him a full opportunity to identify the factual bases for his amended charge, we note that in subsequent multiple filings, Grassel has not identified any other alleged facts that underlie his charge. Therefore, we affirm the ALJ's reliance upon Grassel's June 13, 2008 offer of proof in dismissing the amended charge.

Similarly, we deny Grassel's exception to the ALJ's April 15, 2009 request to the parties to identify any triable issues following our 2008 decision.[19] In that decision, we affirmed the dismissal of the earlier charge holding that Grassel had failed to prove a causal relationship between his January 17, 1997 memorandum and the District's delay in reinstating him following the March 1, 2007 withdrawal. In reaching our decision, we concluded that his January 1997 protected activity was too remote in time to demonstrate a causal connection. Although Grassel had referenced a 1997 grievance in his

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[19] *Supra* note 1.

exceptions, that grievance was not in the record, and we therefore were unable to determine its probative value.

Based upon the undisputed interrelationship between the allegations examined by the Board in the earlier case and Grassel's allegations in the amended charge, we conclude that the ALJ's April 15, 2009 request was well within the discretion granted to an ALJ in the processing of a charge. The ALJ's request provided Grassel with an additional opportunity to identify alleged facts that he believed demonstrate a causal relationship between his June 1997 grievance and earlier grievances, and the December 2007 disciplinary charges and suspension. Therefore, we deny Grassel's exception to the ALJ's request for a supplemental offer of proof.

However, we grant the exception that challenges the ALJ's failure to consider the disciplinary hearing transcript excerpts submitted by Grassel. The ALJ did not consider the transcript excerpts on the grounds it does not constitute newly discovered evidence.[20] We construe Grassel's submission of the excerpts as his attempt to establish that there are alleged facts in dispute. Therefore, we will examine the content of those transcripts as a part of our determination of the remaining exceptions to the ALJ's decision dismissing the amended charge.

5. The Dismissal of the Amended Charge

In his exceptions, Grassel asserts that the ALJ misconstrued the scope of protected activity alleged in the amended charge, treated our earlier decision as dispositive, and dismissed the amended charge without a hearing.

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[20] *Supra* note 2, 42 PERB ¶4541 at 4648, note 4.

As part of our consideration of his exceptions, we accept the truth of the allegations in the amended charge, as clarified by Grassel, granting all reasonable inferences to the facts alleged by him in support of his amended charge.[21]

On June 13, 2008, the charge was clarified by the ALJ to include an allegation that the December 2007 disciplinary charges are in retaliation for Grassel's contesting the earlier disciplinary charges that were withdrawn on March 1, 2007. In addition, during his offer of proof, Grassel made explicit reference to the 1991 medical records that mention his earlier grievances. We, therefore, reverse the ALJ's finding that Grassel's 1997 grievance is the only protected activity alleged in the amended charge.

However, granting all reasonable inferences to the facts alleged in the amended charge, and the content of Grassel's offers of proof, we affirm the ALJ's dismissal of the amended charge without a hearing.

In *Board of Education of the City School District of the City of New York (Grassel),*[22] we held that the ten years between the protected activity in January 1997 and the District's alleged retaliatory employment action in 2007, was too long a period to create an inference of unlawful motivation under the Act. In addition, we found that the March 1, 2007 stipulation did not bar the District from pursuing "future disciplinary charges premised on other alleged conduct by Grassel." [23]

In the present case, we conclude that Grassel has failed to allege sufficient facts, which, if proven, would create an inference that the December 17, 2007 disciplinary

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[21] *Niagara Frontier Transit Metro System, Inc., supra* note 18.

[22] *Supra* note 1.

[23] *Supra* note 1, 41 PERB ¶3024 at 3113.

charges and suspension are improperly motivated by his grievances in 1991 and 1997. Although there is a relatively low initial evidentiary threshold for establishing a *prima facie* case of improper motivation under the Act,[24] we find that Grassel alleged no facts that might reasonably demonstrate a causal relationship between his decade-old protected activities and the District's disciplinary action resulting from his alleged misconduct in June and August 2007.

As in his earlier related case, the grievances referenced by Grassel are not in the record, and he fails to state how the substance of those grievances is probative of the issue of causation. Similarly, Grassel has not explained in his offers of proof how the references to his irrational and erratic behavior in the District's 1991 medical record create an inference that the District is improperly motivated 16 years later.

Upon our review of the disciplinary hearing transcript excerpts, we find nothing that would support a finding of improper motivation by the District. The purported inconsistent statements by the District's attorneys, premised upon the transcripts, do not support an inference of improper motivation under the facts and circumstances of the present case.

Finally, we find nothing in the record to indicate that Grassel, at a hearing, would present evidence establishing an inference that the current disciplinary charges and suspension are in retaliation for him contesting the earlier disciplinary charges. As we found in our prior decision, the stipulation resolving the prior disciplinary charges does not preclude the District from pursuing future disciplinary charges against Grassel for

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[24] *United Fedn of Teachers, Local 2, AFT, AFL-CIO (Jenkins)*, 41 PERB ¶3007 (2008), *confirmed sub nom. Jenkins v New York State Pub Empl Rel Bd*, 41 PERB ¶7007 (Sup Ct New York County 2008), *affd*, 67 AD3d 567, 42 PERB ¶7008 (1st Dept 2009).

other conduct. The December 17, 2007 disciplinary charges allege specific acts of misconduct in June and August 2007, and Grassel has not alleged any facts that suggest those charges are improperly motivated.

Based on the foregoing, we grant Grassel's exceptions, in part, and affirm the ALJ's decision dismissing the amended charge.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: March 17, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Charging Party,

- and -

CASE NO. U-27724

ELWOOD UNION FREE SCHOOL DISTRICT,

Respondent.

RICHARD M. GREENSPAN, P.C. (THOMAS RUBERTONE of counsel), for Charging Party

INGERMAN SMITH, L.L.P. (CHRISTOPHER VENATOR of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Elwood Union Free School District (District) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge, dated July 19, 2007, filed by the United Public Service Employees Union (UPSEU) alleging that the District violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it eliminated a position of Maintenance Mechanic II held by UPSEU shop steward and activist David DeSimone (DeSimone) and terminated him in retaliation for his protected activities.

Following a hearing, the ALJ issued a decision finding that UPSEU demonstrated that the adverse employment action taken against DeSimone by the District was

unlawfully motivated under the Act and ordered his reinstatement to his former position along with make-whole relief.[1]

EXCEPTIONS

In its exceptions, the District asserts that the ALJ erred in concluding that UPSEU met its burden of presenting sufficient direct and/or circumstantial evidence to demonstrate that the District was improperly motivated under the Act when it eliminated DeSimone's position and terminated him. As part of its exceptions, the District challenges the ALJ's reliance on statements of unlawful motivation attributed to Plant Facilities Administrator Michael Butler (Butler), who the District asserts did not have authority to make personnel decisions. In addition, it asserts that the ALJ erred in concluding that the District's proffered reason for its conduct toward DeSimone was pretextual. UPSEU supports the ALJ's decision.

Based upon our review of the record and consideration of the respective arguments of the parties, we affirm but modify the ALJ's decision.

FACTS

UPSEU represents a unit composed of all District maintenance and custodial employees including Chief Custodian, Maintenance Mechanic (MM) II, III and IV, Custodial Worker (CW) I and II, Driver/Messenger and Head Custodian with substitutes and seasonal employees excluded.[2] The District and UPSEU are parties to a collectively negotiated agreement (agreement) for the period July 1, 2004-June 30, 2008. It is undisputed that in seven years of representation, UPSEU has been able to

[1] 42 PERB ¶4551 (2009).

[2] Joint Exhibit 1, Art. I.

resolve contractual issues informally with the District without filing written grievances.

In October 2005, the District hired DeSimone as a temporary MM II, and assigned him to perform maintenance duties in the District's four schools: two elementary schools, a middle school and a high school. Although the posting stated that the position would have a Monday-Friday schedule, when District Assistant Superintendent for Human Resources Robert Annucci (Annucci) offered him the position, DeSimone was informed that he would be working a Tuesday-Saturday schedule.

In February 2006, the District appointed DeSimone to a permanent MM II position on a District-wide maintenance crew. Following his permanent appointment, DeSimone objected to his Tuesday-Saturday schedule citing a provision of the parties' agreement limiting the application of that schedule to two new hires.[3] Initially, the contract issue was raised with Plant Facilities Administrator Butler and maintenance supervisor MM IV Ed Kirby (Kirby). Thereafter, DeSimone contacted UPSEU representative Randy Tillman (Tillman) who arranged a meeting with Assistant Superintendent Annucci, attended by both Tillman and DeSimone, to discuss the issue. The meeting did not result in a change to DeSimone's schedule, and UPSEU and DeSimone chose not to pursue the issue through a formal written grievance.[4]

Beginning in June 2006, and continuing over the next two months, DeSimone publicly expressed an interest in becoming a shop steward to replace a unit member who had resigned from one of the two elected UPSEU steward positions. In mid-August 2006, Butler summoned DeSimone to his office about an uncompleted work assignment

[3] Joint Exhibit 1, Art. V, ¶F.

[4] Transcript, pp. 110-113, 180-183.

in an elementary school. During the meeting, Butler told DeSimone that he should stop complaining about work and that he should not be involved in union activities. In addition, Butler stated that DeSimone was still on probation and that he should be careful because he may lose his job. As a result of these comments, DeSimone insisted upon a meeting with Annucci. At that meeting, DeSimone repeated to Annucci the content of his conversation with Butler and told Annucci that he felt threatened by Butler's statements. During his testimony, Annucci did not refute, in any manner, DeSimone's description of the meeting including his "replay" for Annucci of DeSimone's conversation with Butler.[5]

In late September or early October 2006, DeSimone was elected UPSEU shop steward. In the autumn of 2006, Butler transferred DeSimone to work with Chief Custodian John Piersa (Piersa) in the high school. Prior to the transfer, Butler told Piersa that DeSimone is a troublemaker and a problem, and he directed Piersa to document and discipline DeSimone for any deficiencies in his job performance. In response to an inquiry from Piersa, Butler did not explain his reasoning or motivation for the directive. For the remainder of the 2006-07 school year, DeSimone worked at the high school performing custodial and maintenance duties in that school to the satisfaction of Piersa, the high school principal, and teachers. According to Piersa, it is common for MM II employees to be assigned custodial duties in the absence of a custodial employee.

During an October 2006 meeting, Tillman introduced DeSimone as a shop steward to the District's Assistant Superintendent of Business William Pastore

[5] Transcript, p. 129. In addition, Annucci did not identify any action that he took in response to Butler's comments to DeSimone.

(Pastore).[6] According to Annucci, he first learned of DeSimone's election to a UPSEU steward position one month later.[7]

In February 2007, a preliminary budget for the 2007-08 school year was presented at a District budget meeting by Superintendent of Schools William Swart (Swart) proposing the elimination of one custodial position and one maintenance position in the UPSEU unit through attrition.[8] Under the plan, developed by Superintendent Swart and Assistant Superintendent Annucci, the two positions would be cut following a retirement or resignation. Prior to the preliminary budget being presented, MM IV Edward Kirby had already retired. In addition, it was anticipated that CW I Giuseppe Buffalino (Buffalino) would be retiring and CW I Ryan Raleigh (Raleigh) would be resigning to join the military.

After downloading the District's powerpoint slides from the internet, which described the District's preliminary budget, DeSimone prepared an open letter on behalf of the unit criticizing the District's plan to eliminate the two positions citing previous cuts to the maintenance and custodial staff and increases in the scope of work. DeSimone distributed the letter via email to Swartz, members of the District's Board of Education and unit members. In addition, he posted it on his locker door where it could be seen by unit employees, teachers and administrators.

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[6] Transcript, pp. 217-218.

[7] According to Annucci, he was advised during a telephone conversation with shop steward Anthony Gallo that DeSimone was elected as an assistant shop steward to represent night employees. Transcript, p. 229.

[8] The powerpoint presentation of the preliminary budget proposal presented by Superintendent Swart at the budget meeting states:

Custodial (retirement)	-(1.0)
Buildings and Grounds (retirement)	-(1.0)

Charging Party Exhibit 1, p. 21.

The final paragraph of the letter states, in part:

> We realize that we need to be a more public voice until we are treated fairly and given both the manpower and the tools to do our job. We will no longer sit idly by being treated this way. We not only need to have the 2 Custodial/ Maintenance positions filled but we need more to keep our schools safe and clean and continue our push to help keep the Elwood School District a place we can all be proud of.[9]

Following distribution of the letter, Butler told DeSimone that the letter was a bad idea, that recipients perceived it as a ploy to get more money, and that DeSimone was lucky to have a job. Despite Butler's comments, DeSimone began organizing opposition to the proposed staff reductions through discussions with unit members during lunch breaks and after work. In addition, a unit executive committee was formed with DeSimone as a member. In April 2007, the unit executive committee, along with Tillman, met with Superintendent Swart, Assistant Superintendents Annucci and Pastore, and Board of Education Vice-President Joseph Fusaro, to follow-up on the content of the open letter criticizing the proposed elimination of two positions.

In addition, DeSimone and other executive committee members regularly attended District budget meetings from March through June 2007 where they lobbied Board members.

In June 2007, Annucci refused DeSimone's request for the scheduling of a labor-management meeting asserting that shop steward Gallo should contact him. When the labor-management meeting took place on June 27, 2007, Tillman brought with him a letter from UPSEU formally advising the District of DeSimone's authority as a shop steward. However, the subject of the letter became moot when Annucci announced

[9] Charging Party Exhibit 2.

that the District was laying off DeSimone from his MM II position.

According to Annucci, the decision to lay-off DeSimone was made during an unspecified meeting between Swart, Annucci, Pastore and Butler. Annucci testified that the anticipated vacancy in a CW I position had not occurred by the end of the 2006-07 school year. The District chose to eliminate an MM II position because the District had eliminated one CW I position in each of the prior two school years and UPSEU had argued against further custodial staff reductions. According to Annucci, DeSimone was selected to be laid off because he was the least senior MM II.

On cross-examination, Annucci acknowledged that in the 2006-07 school year, the District employed Christian Haack (Haack) as a daily substitute maintenance employee. It is undisputed that Haack performed maintenance duties similar to those performed by DeSimone. Unlike unit employees, temporary employees are not subject to approval by the Board of Education. The District continues to employ Haack as a substitute performing maintenance and custodial duties.

Following his lay-off, DeSimone applied unsuccessfully for vacant CW I positions in the two elementary schools and the middle school. Two of those vacancies resulted from Raleigh's resignation in August 2007 and Buffalino's subsequent retirement. Each vacancy was filled by another candidate on the recommendation of Plant Facilities Administrator Butler following interviews conducted by Butler and the respective school administrators.

DISCUSSION

It is well-established that a charging party in an improper practice charge alleging a violation of §§209-a.1(a) and (c) of the Act has the burden to demonstrate by a preponderance of evidence that: a) the affected individual engaged in protected activity

under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity.[10]

Proof of unlawful motivation in violation of §§209-a.1(a) and (c) of the Act can be demonstrated through direct evidence such as a statement by a decision-maker expressing an intent to discriminate.[11] When direct evidence of discriminatory motivation under the Act is introduced, the burden then shifts to the respondent to establish by a preponderance of the evidence that the protected activity under the Act was not a motivating factor.

However, as we recognized in *United Federation of Teachers (Jenkins),*[12] it is far more common for a charging party to rely upon circumstantial evidence, such as disparate treatment, in an effort at demonstrating unlawful motivation under the Act. The circumstantial evidence presented to prove a *prima facie* case must give rise to an inference that "but for" the protected activity the employer would not have engaged in the adverse employment action. If sufficient circumstantial evidence is introduced to

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[10] *Board of Educ of the City Sch Dist of the City of New York (Grassel),* 41 PERB ¶3024 (2008); *United Fedn of Teachers, Local 2, AFT, AFL-CIO (Jenkins)*, 41 PERB ¶3007 (2008), *confirmed sub nom. Jenkins v New York State Pub Empl Rel Bd,* 41 PERB ¶7007 (Sup Ct New York County 2008) *affd*, 67 AD3d 567, 42 PERB ¶7008 (1st Dept 2009); *State of New York (Division of Parole)*, 41 PERB ¶3033 (2008); *County of Wyoming*, 34 PERB ¶3042 (2001); *Stockbridge Valley Cent Sch Dist*, 26 PERB ¶3007 (1993); *County of Orleans*, 25 PERB ¶3010 (1992); *Town of Independence*, 23 PERB ¶3020 (1990); *City of Salamanca*, 18 PERB ¶3012 (1985).

[11] *United Fedn of Teachers, Local 2, AFT, AFL-CIO (Jenkins), supra* note 11; *Town of Hempstead*, 19 PERB ¶3022 (1986); *Vil of New Paltz*, 25 PERB ¶3032 (1992); *Hudson Valley Community Coll,* 25 PERB ¶3039 (1992); *County of Nassau*, 35 PERB ¶3045 (2002), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 2 AD3d 1197, 36 PERB ¶7019 (3d Dept 2003).

[12] *Supra* note 11.

establish such an inference, the burden of persuasion shifts to the respondent to rebut the inference by presenting evidence demonstrating that its conduct was motivated by a legitimate non-discriminatory business reason.[13] If the respondent presents evidence of a legitimate non-discriminatory reason, then the burden shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual. At all times, however, the burden of proof rests with the charging party to establish the requisite causation under the Act by a preponderance of evidence.

In the present case, we reject the District's contention that Butler's various anti-union statements constitute stray remarks that are not probative of the allegations of the charge.[14] The record establishes that Butler is a District administrator with the authority to make District personnel decisions, and he can influence the decisions of other District administrators. In addition to ordering DeSimone's transfer to the high school, Butler directly participated in the lay-off decision, and made three recommendations to the District to hire applicants other than DeSimone as a CW I.

At the same time, we conclude the ALJ erred by treating Butler's various anti-union statements as direct evidence, rather than circumstantial evidence, of the District's motivation. While Butler's anti-union statements are probative of the District's motivation because he participated in the lay-off decision, his statements were not sufficiently proximate to that decision to be treated as direct evidence. Therefore, we modify the ALJ's decision and apply the shifting burdens analysis applicable in

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[13] *State of New York (Division of Parole), supra* note 11; *State of New York (SUNY at Buffalo)*, 33 PERB ¶3020 (2000).

[14] *See, Roadway Package System, Inc.*, 299 NLRB 458 (1990); *Tomassi v Insignia Financial Group, Inc.* 478 F3d 111, 115-116 (2d Cir 2007).

circumstantial evidence cases involving allegations of improper motivation.

A. UPSEU Established a *Prima Facie* Case of Union Animus

Contrary to the District's claim, DeSimone engaged in protected activities under the Act when he challenged his schedule under the terms of the agreement and when he objected to Butler's anti-union comments during a conversation over a work assignment. The evidence establishes that as a result of DeSimone's contractual dispute over his schedule in 2006, UPSEU representative Tillman and DeSimone met with Annucci to discuss the contract issue. Although no formal written grievance was subsequently filed, DeSimone's obtaining of UPSEU representation to assist in presenting the contractual issue to Annucci is a protected activity under the Act.

During the course of DeSimone's efforts to become a UPSEU shop steward, Butler had a conversation with DeSimone about an uncompleted job assignment. During that conversation, Butler told DeSimone that he should stop complaining and that he should not engage in union activities because his job may be in jeopardy. The substance of Butler's comments was reported to Annucci immediately following the conversation. The comments demonstrate Butler's knowledge of DeSimone's union activities and they constitute a threat of adverse consequences should he continue to engage in those activities.[15]

While a mere discussion between a supervisor and a subordinate about an uncompleted job assignment is not protected, we conclude that DeSimone's reporting of Butler's anti-union comments to Annucci is protected under the Act. The reporting of such comments serves to effectuate the right to organization granted to public employees

[15] *See, Village of New Paltz, supra* note 12.

by §202 of the Act because it provides an employer with an opportunity to investigate, and to take appropriate remedial action to ensure the employer's compliance with its obligations under the Act.[16]

The record establishes that Assistant Superintendents Pastore and Annucci became aware of DeSimone's status as an elected unit representative in October and November 2006, respectively. Therefore, the District's contention that UPSEU did not formally provide it with notification about DeSimone's representational status, and that Annucci believed DeSimone to be an assistant shop steward, are irrelevant based upon the District's actual knowledge of DeSimone's status.

A week prior to DeSimone's transfer to the high school, Butler described DeSimone as a troublemaker and directed Piersa to document any deficiencies in DeSimone's job performance. In response to Piersa's inquiry, Butler failed to provide any rationale for the directive. During the hearing, the District did not present any evidence to controvert Piersa's testimony that Butler's directive is inconsistent with District practices, which suggests DeSimone was targeted for his protected activities.

After Superintendent Swart and others within the District received DeSimone's email with the February 2007 letter criticizing the District's plan to eliminate a maintenance position and a custodial position through attrition, Butler told DeSimone that the letter was a bad idea and that he was lucky to have a job.

Following distribution of the February 2007 letter criticizing the proposed personnel

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[16] *See*, *Board of Educ of the City School Dist of the City of New York (Grassel), supra* note 10. However, the reporting of coercive and discriminatory statements to an employer does not constitute a prerequisite under the Act for the filing and the processing of an improper practice charge.

cuts, DeSimone continued to engage in protected activities aimed at persuading the District to fill the positions scheduled to be left vacant at the end of the school year. He helped to organize a unit executive committee that met with Swart, Annucci and Pastore over the scheduled cuts, engaged in lobbying with Board members and attempted to schedule a labor-management meeting with Annucci. It is undisputed that Annucci refused to schedule a meeting directly with DeSimone, which supports an inference of anti-union animus.

The failure of the District to abolish the position held by Haack constitutes evidence of disparate treatment. It is undisputed that Haack has no seniority rights under the agreement and the elimination of his position was not subject to Board of Education approval.

Finally, the District's reliance on Butler's recommendation not to rehire DeSimone as CW I, despite the quality of his custodial and maintenance work in the high school, is further evidence of improper motivation. We note that during the hearing the District did not call as witnesses Butler or other school administrators who conducted the interviews that led to Butler recommending candidates other than DeSimone for the vacancies.[17]

Based upon the foregoing, we conclude that UPSEU established a *prima facie* case of improper motivation under the Act.[18] We next turn to the District's exceptions challenging the ALJ's conclusion that the District's non-discriminatory justification is pretextual.

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[17] *State of New York (Division of Parole)*, 41 PERB ¶3033, n.15 (2008).

[18] Based upon the District's actual knowledge of DeSimone's protected activity, we do not reach the District's exception challenging the ALJ's application of the small plant doctrine. *See generally*, *City of Corning*, 17 PERB ¶3022 (1984); *Hadley Mfg Corp*, 108 LRB 1641 (1954).

B. The District's Non-Discriminatory Reason for Its Termination of DeSimone Is Pretextual

During his testimony, Annucci stated that the District decided to eliminate DeSimone's position after learning that a vacancy in a custodial position would not take place at the end of the 2006-07 school year. Following a review of the record, we affirm the ALJ's conclusion that this proffered reason for abolishing DeSimone's position is pretexutal.

Significantly, Annucci did not articulate any explanation for the District eliminating the permanent MM II position held by DeSimone while at the same time continuing to employ substitute Haack on a regular basis to perform maintenance duties despite Haack's lack of any contractual protections.

In addition, Annucci did not set forth any clear financial or managerial explanation for the District's deviation from its original plan to eliminate one custodial and one maintenance position. The assertion that the District chose not to eliminate the custodial position as planned because of prior custodial cuts, and UPSEU's opposition to further custodial and maintenance cuts, is simply not credible. In its proposed budget, the District included the elimination of a custodial position despite the earlier cuts. The evidence reveals that UPSEU and its members opposed the elimination of both maintenance and custodial positions due to the prior elimination of some of those positions, and the increase in maintenance and custodial duties.

Finally, the pretextual nature of the District's explanation of its termination of DeSimone is demonstrated by its repeated decision not to rehire him during the 2007-08 school year despite a work record of satisfactorily performing custodial and maintenance duties at the high school. Instead, as noted by the ALJ, one of the vacant CW I positions was filled by the District with a substitute custodian and another vacant

position was filled by a District part-time employee.

Based upon the foregoing, we affirm the ALJ's conclusion that the District failed to meet its burden of persuasion of demonstrating a non-pretextual reason for its conduct toward DeSimone and, therefore, we conclude that UPSEU met its burden of proof demonstrating that the District violated §§209-a.1(a) and (c) of the Act.

IT IS, THEREFORE, ORDERED that the District:

1. Offer DeSimone reinstatement to the position of Maintenance Mechanic II within the District;
2. Make DeSimone whole for lost wages or benefits, if any, suffered as a result of his termination from employment effective June 27, 2007, until the effective date of the offer of reinstatement, with interest at the maximum legal rate, but offset by any earnings he received from other employment that he did not hold at the time he was employed for the District; and
3. Sign and post the attached notice at all locations customarily used to post notices to employees in UPSEU's bargaining unit.

DATED: March 17, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the Elwood Union Free School District (District) in the unit represented by United Public Service Employees Union that the District will:

1. Offer DeSimone reinstatement to the position of Maintenance Mechanic II within the District; and

2. Make DeSimone whole for lost wages or benefits, if any, suffered as a result of his termination from employment effective June 27, 2007, until the effective date of the offer of reinstatement, with interest at the maximum legal rate, but offset by any earnings he received from other employment that he did not hold at the time he was employed for the District.

Dated . . . . . .

By . . . . . .
on behalf of the **ELWOOD UNION FREE SCHOOL DISTRICT**

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

**TEAMSTERS LOCAL 118,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,**

Petitioner,

CASE NO. C-5796

- and -

TOWN OF WALWORTH,

Employer.

CHAMBERLAIN D'AMANDA OPPENHEIMER & GREENFIELD LLP (ROBERT G. McCARTHY of counsel), for Petitioner

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C. (CRAIG M. ATLAS of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Town of Walworth (Town) to a decision by an Administrative Law Judge (ALJ), on a petition filed by Teamsters Local 118, International Brotherhood of Teamsters (Teamsters), as amended, seeking certification of a unit of all Town full-time and part-time Motor Equipment Operator (MEO) employees.

Following the submission of offers of proof and a stipulated record by the parties, the ALJ issued a decision concluding that it is appropriate to include the Deputy Highway Superintendent in a unit of full-time and part-time Town MEO employees.[1]

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[1] 42 PERB ¶4011 (2009). Before the ALJ, the parties stipulated to the appropriateness of a unit of full-time and part-time Town MEO employees excluding seasonal employees. Joint Exhibit 1, Stipulated Record, ¶40. However, the Town objects to the inclusion of the MEO employee who has been appointed Deputy Highway Superintendent.

EXCEPTIONS

The Town asserts in its exceptions that the position of Deputy Highway Superintendent should not be included in a unit of Town MEO employees. It contends that the legal status of the Deputy Highway Superintendent position requires the position to be excluded. In addition, it claims that the duties performed by the incumbent in the position renders it managerial or confidential under the criteria set forth in §201.7(a) of the Public Employees' Fair Employment Act (Act). Alternatively, the Town contends that inclusion of the position creates a supervisory conflict of interest.

FACTS

Within the Town Highway Department there are nine employees, including Kevin Switzer (Switzer), who hold MEO positions.

The current Superintendent of Highways is Michael Frederes (Frederes), who is an elected official with the powers and responsibilities set forth in state law.[2] If an employee organization is recognized or certified to represent Highway Department employees, it is anticipated that Frederes will play a direct role in negotiations on behalf of the Town. In addition, Frederes may have a major role in contract and personnel administration. His current duties already include personnel administration in the Highway Department.

On an annual basis, since January 2005, the Town Board has appointed Switzer to be the Deputy Highway Superintendent, which does not adversely affect his status as

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[2] *See*, Town Law §32; Highway Law §140, *et seq.*

an MEO.[3]

As Deputy Highway Superintendent, Switzer reports to Frederes and consults with him regarding the work that needs to be completed. Since Switzer's initial appointment as Deputy Highway Superintendent, Frederes's longest absence from work has not exceeded two weeks. When Frederes is absent, he leaves written operational instructions for Switzer. During such absences, Switzer may exercise his own discretion with respect to matters that are not covered by the instructions. When Frederes is unreachable, Switzer is notified of an emergency. If both Frederes and Switzer are unreachable, another MEO will be contacted about the emergency. Switzer is responsible for attempting to resolve complaints from Town residents, and to refer unresolved complaints to Frederes.

On a daily basis, Switzer supervises and works with a crew of employees. In that role, he issues MEO work assignments, directs the proper performance of MEO duties, and is expected to work alongside the crew in performing many of those duties. However, he does not have the responsibility to assign work to other MEO employees who are not on his crew.

Switzer has not participated in interviews of candidates for Highway Department employment. Although he has the authority to impose discipline in Frederes's absence, Switzer has never disciplined or formally evaluated Highway Department employees. He provides Frederes with information and recommendations about MEO employees. For example, Frederes reassigned two employees as a result of Switzer's

[3] The stipulated record states the fact that Switzer was reappointed through December 31, 2009. For purposes of this decision, we will presume that Switzer has been reappointed as deputy highway superintendent for 2010.

recommendation stemming from the employees fraternizing rather than working. On one occasion, Frederes asked Switzer to witness the counseling of two employees who had had a verbal altercation.

Switzer has the authority to contact employees to perform overtime. He also has the authority to sign the payroll in Frederes's absence, to sign vouchers for payment and to purchase certain items. As Deputy Highway Superintendent, Switzer has signed the payroll and the vouchers for payment on a few occasions. However, he does not have direct access to employee records but Frederes would provide him with access upon request.

DISCUSSION

We begin our discussion with the Town's argument that the Deputy Highway Superintendent should be excluded because the position is granted the statutory authority to temporarily perform the duties of Superintendent of Highways when he or she is absent or unable to perform those duties.

Pursuant to Town Law §32.2, a Town Board has the authority to create an office of Deputy Highway Superintendent, which has the following statutory authority:

> During the absence or inability of the town superintendent of highways to act, such deputy shall act and be vested with all the powers and duties of the town superintendant of highways as provided by law.

The Deputy Highway Superintendent can be appointed by the Town Board or the Superintendent of Highways.[4] Although a Deputy Highway Superintendent serves at the pleasure of the Superintendent of Highways, the Town Board has the sole legal

[4] In the present case, Switzer has been appointed and reappointed by the Town Board.

authority to set the salary for the position.[5] The Superintendent of Highways is granted the authority, pursuant to Highway Law §140.4, to appoint and discipline other employees in the Highway Department including those holding MEO positions.

While the statutory authority of a position is relevant to a uniting determination, it is not outcome determinative.[6] The statutory criteria for determining unit composition are those set forth in §207.1 of the Act. Therefore, we reject the Town's argument that the legal status of the Deputy Highway Superintendent position constitutes a *per se* basis for the exclusion of the position from the proposed unit.

Next, we turn to the Town's argument that the Deputy Highway Superintendent position should be excluded because Switzer is a managerial or confidential employee under the Act.[7]

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[5] Town Law §32.2.

[6] See, *State of New York-Unified Court System*, 22 PERB ¶3051 (1989), *pet dismissed, Crosson v Newman*, 149 Misc.2d 499, 24 PERB ¶7001 (Sup Ct Albany County 1990), *aff,* 178 AD2d 719, 24 PERB ¶7020 (3d Dept 1991). *See also, State of New York (Division of Parole),* 40 PERB ¶3011 (2007) (fragmentation is appropriate for public employees who hold police officer titles or hold a title that has police officer powers under state law and whose exclusive or predominant duties are the enforcement of the State's general criminal laws.)

[7] Section 201.7(a) defines the term "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, . . . persons who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board. . . . Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

Pursuant to §201.7(a) of the Act, a managerial employee is a person who formulates policies on behalf of the employer, or who may reasonably be required to assist directly in the preparation and formulation of the employer's negotiation proposals or to have a major role in the administration of an agreement or in personnel administration.[8] An employee will be designated confidential only if he or she assists and acts in a confidential capacity to a managerial employee under the Act.[9] The statutory criteria for such designations are applied strictly, with all uncertainties resolved in favor of coverage under the Act.

The temporary legal authority granted to a Deputy Superintendent of Highways in the absence of the Superintendent of Highways, under Town Law §32.2, does not render the person holding the position managerial under the Act. In reaching our conclusion, we note that the Legislature did not include the position of Deputy Superintendent of Highways as one of the specific positions that must be designated managerial under the Act.[10]

In *City of Binghamton*,[11] we set forth the applicable standard for determining whether an employee formulates policy, pursuant to §207.1(a)(i) of the Act:

> To formulate policy is to participate with regularity in the essential process involving the determination of the goals and objectives of the government involved, and of the methods for accomplishing those goals and objectives that have a substantial impact upon the affairs and the

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[8] *Fashion Institute of Technology*, 42 PERB ¶3018 (2009).

[9] *City of Rome*, 39 PERB ¶3009 (2006).

[10] Act, §§201.7(b), (c), (e) and (g).

[11] 12 PERB ¶3099 (1979).

> constituency of the government. The formulation of policy does not extend to the determination of methods of operation that are merely of a technical nature.[12]

As the ALJ correctly concluded in the present case, the duties performed by Switzer do not meet the criteria for a managerial designation under the Act. The stipulated record establishes that Switzer does not formulate Town policies or play a major role in personnel administration. Switzer has daily supervisory responsibilities for a single crew that are the equivalent to the duties of a working foreman. While he has the authority to summon employees for overtime and he has signed the payroll and vouchers on a few occasions, Switzer does not supervise other Highway Department employees. Even during the relatively brief periods of absence by Frederes, Switzer does not have substantial and unfettered discretion in making decisions about the functioning of the Highway Department.

In addition, Switzer does not play a major role in employee relations. He does not discipline or formally evaluate employees, and he does not have regular direct access to employee records. Furthermore, he is not involved in hiring prospective employees. The fact that he makes recommendations and expresses his opinions to Frederes about employees is an aspect of his supervisory authority but does not demonstrate that he has a major role in personnel administration.

In support of its exceptions, the Town relies upon the *Town of Riverhead*[13] where the Director of Public Employment Practices and Representation (Director) designated, as managerial, a person holding the position of Deputy Highway Superintendent.

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[12] *Supra* note 11, 12 PERB at 3185.

[13] 24 PERB ¶4052 (1991).

However, that designation was on consent and it was based solely upon the allegations of the employer's application that are not set forth in the Director's decision. Therefore, the Director's decision in *Town of Riverhead* is unpersuasive.[14]

Based upon the record, we also conclude that Switzer is not a confidential employee under the Act. Although it is undisputed that the duties performed by Frederes would warrant a managerial designation under the Act,[15] there is no evidence in the record to demonstrate that Switzer assists or acts in a confidential manner to Frederes.[16] Contrary to the Town's argument, the mere fact that Switzer has provided Frederes with information and opinions about employees relevant to evaluations and discipline does not constitute evidence warranting a confidential designation under the Act. Furthermore, based upon the scope of Switzer's duties, we do not find it reasonable to expect that he will be assisting and acting in a confidential manner with respect to negotiations and personnel administration following the certification or recognition of an employee organization for the Highway Department employees.

Finally, we reject the Town's contention that the Deputy Superintendent of Highways should be excluded based upon an actual or potential supervisory conflict of

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[14] In fact, the Board has certified units composed of a Deputy Highway Superintendent and rank and file Highway Department employees. *See*, *Town of Attica*, 22 PERB ¶3000.29 (1989); *Town of Sheldon*, 23 PERB ¶3000.22 (1990); *Town of Warsaw*, 23 PERB ¶3000.23 (1990); *Town of Middlebury*, 23 PERB ¶3000.24 (1990); *Town of Perry*, 23 PERB ¶3000.7 (1990); *Town of Pike*, 24 PERB ¶3000.08 (1991). In other cases, we have certified units that exclude the Deputy Highway Superintendent. *Town of Colchester*, 41 PERB ¶3000.06 (2008); *Town of Cazenovia*, 41 PERB ¶3000.03 (2008); *Town of Concord*, 40 PERB ¶3000.09 (2007).

[15] Joint Exhibit 1, Stipulated Record, ¶35.

[16] *See*, *Town of Dewitt*, 32 PERB ¶ 3001 (1999).

interest.

In *St. Paul Boulevard Fire District*[17], we reiterated that:

> The factors that are considered in determining whether a community of interest exists include the similarity of the terms and conditions of employment, shared mission and duties, and common work location. The existence of disparities in benefits is not a sufficient basis for the exclusion of an unrepresented employee when other facts, such as shared duties and responsibilities, establish a community of interest. When the uniting question involves an unrepresented supervisor, the Board also examines whether the extent and nature of the assigned supervisory functions create a conflict of interests, thereby outweighing other facts that may support inclusion. Among the significant supervisory duties that may indicate such a conflict of interests is the authority to impose discipline, initiate disciplinary procedures, conduct formal evaluations, render first step decisions on contract grievances and provide supervision over day-to-day operations.[18] (citations omitted)

In the present case, Switzer's daily responsibilities over the work performed by a single crew of Highway Department employees do not create a conflict of interests that outweigh the community of interests between him and the other full-time and part-time MEO employees. Switzer works directly with members of the crew including performing MEO duties. In addition, his limited supervisory duties do not include initiating discipline, formally evaluating employees or participating in making hiring decisions. Finally, based upon his actual duties, we find his temporary legal authority to act in the absence of the Superintendant of Highways to be insufficient to demonstrate a conflict

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[17] 42 PERB ¶3009 at 3028 (2009).

[18] *Supra*, note 17, 42 PERB at 3028.

of interests.[19]

We accordingly affirm the decision of the ALJ that it is appropriate to place the title of Deputy Highway Superintendent in a collective bargaining in the unit with full-time and part-time MEO employees in the Town's Highway Department.

DATED: March 17, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member

[19] *See, Town of Attica*, 22 PERB ¶4031 (1989).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 118, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

- and -

CASE NO. C-5927

TOWN OF MENDON,

Employer.

DAVID W. WEILER, for Petitioner

SHELDON W. BOYCE, ESQ., for Employer

BOARD DECISION AND ORDER

On November 25, 2009, the Teamsters Local 118, International Brotherhood of Teamsters (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of Mendon (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included:	All full-time MEOs, HEOs, Lead Mechanic, Mechanic Assistant, Laborer and Buildings and Grounds Manager.
Excluded:	Highway Superintendent, Deputy Highway Superintendent, Foreman and all others.

Pursuant to that agreement, a secret-ballot election was held on March 1, 2010, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: March 17, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-5919

INCORPORATED VILLAGE OF ROCKVILLE CENTRE,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,[1]

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties

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[1] By letter dated November 18, 2009, the incumbent bargaining agent, Rockville Centre Village Employees Civil Service Association, Inc., has disavowed any interest in representing the existing bargaining unit.

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

Included: All full-time employees in the following titles:

Account Clerk, Accounts Investigator, Administrative Assistant, Apprentice Line Maintainer, Assistant Motor Repair Supervisor, Assistant Oiler, Assistant Power Plant Operator, Assistant Sanitation Supervisor, Automotive Mechanic, Building Custodian, Building Inspector, Building Inspector-Trainee, Cable Splicer, Caretaker, Cashier, Cleaner, Clerk, Clerk-Laborer, Designer Drafter, Drafter, Drafting Aider (Utility), Driver Ground Helper (Utility), Electric Meter Repairer, Head Clerk, Highway Supervisor, Housing Assistant, Housing Inspector, Labor Supervisor, Line Maintainer 1/c, Line Maintainer 2/c, Line Supervisor, Maintainer, Maintenance Supervisor, Messenger, Meter Reader (Utility), Meter Tester (Utility), Motor Equipment Operator, M.E.O. Sanitation Worker, Multiple Housing Inspector, Neighborhood Aide, Nursery Manager, Oiler, Park Attendant, Parking Meter Attendant, Parking Meter Servicer, Plumbing Inspector, Police Communications Operator, Power Plant Laborer, Power Plant Mechanic (Diesel), Power Plant Laborer (Electric), Power Plant Servicer, Principal Account Clerk, Principal Account Clerk (Utility), Principal Clerk, Principal Stenographer, Principal Typists-Clerk, Recreation Assistant, Recreation Attendant, Recreation Attendant/Bus Driver, Recreation Leader, Sanitation & Parking Violations Inspector, Sanitation Supervisor, Sanitation Worker, Secretarial Assistant, Security Guard, Senior Account Clerk, Senior Building Inspector, Senior Cashier, Senior Citizens Program Development Aide, Senior Citizen Social Workers, Senior Clerk, Senior Drafter, Senior Law Stenographer, Senior Maintainer, Senior Motor Equipment Operator, Senior Parking Meter Servicer, Senior Power Plant Operator, Senior Stenographer, Senior Stores Clerk, Senior Typist-Clerk, Senior Village Court Clerk, Sewer Servicer, Sewer Servicer Supervisor, Sign Shop Supervisor, Stenographer, Stock Assistant (Utility), Storekeeper (Utility), Stores Clerk (Utility), Typist-Clerk, Underground Cable Supervisor, Village Court Clerk, Water Servicer, Water Servicer Supervisor, Water Servicer Trainee, and Working Line Supervisor.

Excluded: All other employees.

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

DATED: March 17, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

EAST IRONDEQUOIT TRANSPORTATION ASSOCIATION,

Petitioner,

-and-

CASE NOS. C-5935 & C-5936

TEAMSTERS LOCAL 118,

Petitioner,

-and-

EAST IRONDEQUOIT CENTRAL SCHOOL DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

Two consolidated representation proceedings 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 East Irondequoit Transportation 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.

Included: All full-time and regular Part-time School Bus Drivers and Bus Monitors.

Excluded: All other employees.

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

DATED: March 17, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

Sheila S. Cole, Member