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6-12-2002

## State of New York Public Employment Relations Board Decisions from June 12, 2002

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from June 12, 2002

### Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**BUFFALO COUNCIL OF SUPERVISORS and  
ADMINISTRATORS,**

**Petitioner,**

- and -

**CASE CP-764**

**BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF BUFFALO,**

**Employer.**

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In the Matter of

**BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF BUFFALO,**

**CASE NO. E-2258**

Upon the Application for Designation of  
Persons as Managerial or Confidential.

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**LAW OFFICES OF RICHARD D. FURLONG (MICHAEL REILLY of  
counsel), for BUFFALO COUNCIL OF SUPERVISORS and  
ADMINISTRATORS**

**MICHAEL RISMAN, CORPORATION COUNSEL (JOY C. TROTTER of  
counsel), for BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF BUFFALO**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Buffalo Council of Supervisors and Administrators (BCSA) to a decision of an Administrative Law Judge (ALJ) designating the title of Assistant Superintendent for School Leadership and Evaluation as managerial pursuant to an application filed by the Board of Education of the City

School District of the City of Buffalo (District). Having designated the incumbents in the title - Mark Frazier, Carol Needham and Christopher Quinn- the ALJ dismissed the unit clarification petition filed by BCSA which sought to include the newly created title in its bargaining unit.<sup>1</sup> The ALJ determined that incumbents in this Assistant Superintendent title were engaged in policy formulation, contract and personnel administration and could reasonably be expected to participate, on behalf of the District, in collective negotiations with BCSA.

#### EXCEPTIONS

BCSA argues that the ALJ erred in concluding that the title of Assistant Superintendent for School Leadership and Evaluation is managerial within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act). As pointed out by the District in its response to BCSA's exceptions, BCSA does not so much except to the ALJ's findings of fact and conclusions of law, as to the ALJ's ultimate decision.<sup>2</sup> The District supports the ALJ's decision.

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

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<sup>1</sup>The BCSA unit includes: All Principals, Assistant Principals, Directors, Supervisors, Project Administrators, Assistant Superintendents, Elementary Supervising Principals, Secondary Supervising Principals and any other persons serving in supervisory capacities sometimes called "Administrators" employed by the District.

<sup>2</sup>By letter dated June 3, 2002, BCSA filed a reply to the District's response. PERB's Rules of Procedure, §213.3, provide that no such additional pleadings will be accepted or considered by the Board unless requested or authorized by the Board. BCSA's reply has, therefore, not been considered by us.

FACTS

The facts are set forth in detail in the ALJ's decision and we adopt the factual findings of the ALJ, as they are fully supported by the record testimony and exhibits. The facts are repeated here only as relevant to our decision.

The District created the title of Assistant Superintendent for School Leadership and Evaluation (Assistant Superintendent) in 2001 as part of a management reorganization plan.<sup>3</sup> The three incumbents in the position are expected to, and actually do, spend the majority of their time in their assigned schools and not in the District's central offices. Their main job responsibility is to improve student academic performance by monitoring and facilitating the implementation of each school's individualized Comprehensive School Education Plan (CSEP).

The Assistant Superintendents report directly to the Associate Superintendent of Leadership and Operations (Associate Superintendent) but also have direct access to the Superintendent, primarily at the Superintendent's weekly cabinet meetings.<sup>4</sup> At these meetings, all aspects of District policies are discussed, including implementation of new policy and proposed changes in policy. In the past year, the Assistant

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<sup>3</sup>The reorganization plan was based upon a study conducted for the District by the Council of Great City Schools, which recommended that the Superintendent of Schools (Superintendent) appoint additional members of her management team to such positions. Joint Exhibit 8.

<sup>4</sup>The cabinet also includes the Superintendent's Executive Assistant, Director of Labor Relations, Director of Public Relations, Chief Academic Officer, Chief Operations Officer, Associate Superintendents, Executive Director of Human Resources, and Executive Director of Information and Technology, none of whom are represented employees.

Superintendents have made recommendations at these meetings as to hiring, lay-offs and vacancies.

The Assistant Superintendents also have a leadership and liaison role in the implementation of the District's plan to provide parents with school selection options. Frazier, for example, is preparing recommendations as to the configuration of the schools and all three Assistant Superintendents will have a lead role in the public hearings to be conducted on the District's plan.

At the Associate Superintendent's direction, the Assistant Superintendents meet with the parties to all grievances filed by the Buffalo Teachers Federation (BTF) which are specific to the buildings to which they are assigned, either before they are filed (in an attempt to resolve the potential grievance), or after the first step of the grievance procedure. The Assistant Superintendents have the authority to settle grievances at their level before they proceed to the Associate Superintendent.

The Assistant Superintendents are intended to participate in the preparation of proposals for negotiations with the BCSA and to be members of the District's negotiating team with that unit.

#### DISCUSSION

We have previously held that participation in meetings of the chief executive officer's cabinet is sufficient to support a managerial designation. In *City of Jamestown*,<sup>5</sup> we found that because the assistant fire chiefs regularly participated in the Fire Chief's cabinet meetings, where departmental objectives and policies were formulated and

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<sup>5</sup>25 PERB ¶3015 (1992).

implemented, that was itself sufficient to warrant their designation as managerial. As we noted in *City of Lackawanna*,<sup>6</sup> in designating the comptroller and the treasurer as managerial, they

participate in these cabinet discussions by offering information, opinions or advice. Although their participation is limited to their fields of expertise, their participation is nevertheless within that of policy-making managers. The definition of a policymaker is, and must be, sufficiently broad to include those relatively few individuals who directly assist the ultimate decisionmakers in reaching the decisions necessary to the conduct of the business of government.

The record establishes that the Assistant Superintendents offer advice, information and opinions during discussions with the Superintendent at the cabinet meetings. The ALJ correctly relied upon the cited decisions in concluding that the Assistant Superintendents of Leadership and Evaluation met the statutory criteria for designation as managerial due to their role in policy formulation.

Our decision could end here; however, certain arguments raised by BCSA should be addressed. We also find that the record supports the ALJ's determination that the Assistant Superintendents are managerial based upon alternative criteria. The ALJ found that the Assistant Superintendents could "reasonably be expected" to participate in labor relations by virtue of the District's stated intention to utilize the Assistant Superintendents in the formulation of negotiations proposals and as members of the District's negotiating team in contract negotiations with the BCSA.

A managerial designation based on labor relations responsibilities, personnel or contract administration can be based on duties not yet performed, if those duties are

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<sup>6</sup>28 PERB ¶3043, at 3100 (1995).

reasonably required.<sup>7</sup> The actual or anticipated role in these activities, however, must be reasonable, direct, major, not of a routine or clerical nature, and must involve the exercise of independent judgment. Certainly, the drafting of negotiations proposals and the participation on the District's negotiating team are duties that can "reasonably be required" of an Assistant Superintendent.<sup>8</sup> The title, the duties already performed by the Assistant Superintendents, and the District's stated intent are sufficient to support the ALJ's decision on this issue. That the BCSA has some doubt that the District will in fact utilize the Assistant Superintendents in this manner is not sufficient to defeat their designation.

Based on the foregoing, we deny BCSA's exceptions and affirm the decision of the ALJ granting the District's application.

Because of our decision on the managerial application filed by the District, we need not reach any separate issues raised by BCSA's unit clarification petition and we affirm the ALJ's decision dismissing the unit clarification petition.

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<sup>7</sup>Act, §201.7(a), which states, in relevant part, that:

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).

<sup>8</sup>See *City of Jamestown*, 19 PERB ¶13019 (1986), *conf'd*, 126 AD2d 826, 20 PERB ¶7004 (3d Dep't 1987).



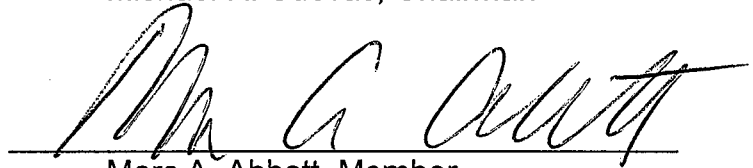
NOW, THEREFORE, WE ORDER that the following employees of the District be, and they hereby are, designated managerial: Mark Frazier, Carol Needham and Christopher Quinn.

WE FURTHER ORDER that the unit clarification petition in CP-764 is dismissed in its entirety.

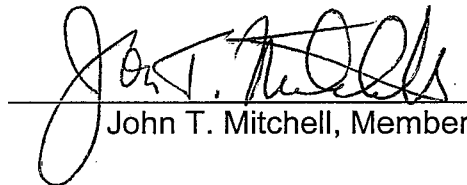
DATED: June 12, 2002  
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**UNITED UNIVERSITY PROFESSIONS  
(EDMUND EGAN),**

Charging Party,

- and -

**CASE NO. U-22037**

**STATE OF NEW YORK (STATE UNIVERSITY OF  
NEW YORK - SUNY AT BUFFALO),**

Respondent.

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**EDWARD J. GIBLIN, for Charging Party**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (AMY M. PETRAGNANI  
of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by United University Professions (UUP) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge alleging that the State of New York (State University of New York - SUNY at Buffalo) (SUNY) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it prevented Dr. Edmund Egan from engaging in clinical practice in retaliation for his participation in protected activities.

EXCEPTIONS

UUP has excepted to the ALJ's decision of March 1, 2002, based upon her findings of fact and conclusions of law in dismissing the charge.

SUNY has filed cross-exceptions also based upon the ALJ's findings of fact and conclusions of law and, more particularly, as they relate to the jurisdiction of the Public Employment Relations Board (Board) over the improper practice charge.

FACTS

We will confine our analysis to the salient facts relevant to our resolution of the exceptions.

UUP filed its charge with PERB on October 17, 2000. It alleged that the respondent, SUNY, violated §209-a.1(a) of the Act, from June 30, 2000 to present, by preventing Egan, a faculty member of the SUNY at Buffalo School of Medicine (School of Medicine), from engaging in clinical practice at Children's Hospital of Buffalo resulting in the loss of clinical practice income. UUP further alleged that SUNY, through its agents, including Dr. Frederick C. Morin III, unlawfully interfered with, restrained and coerced Egan in the exercise of his rights guaranteed in §202 of the Act for the purpose of depriving him of such rights. Furthermore, UUP alleges, SUNY discriminated against Egan for the purpose of discouraging his membership in, or participation in, the activities of UUP.

SUNY's amended answer not only denied the material allegations of the charge and included certain defenses which raised not only the question of PERB's jurisdiction over the charge, but also claimed that "any alleged actions were taken by a faculty

practice group, which both the State and UUP have acknowledged is a legal entity separate and apart from the State and the SUNY and Buffalo Medical School . . . .”

Hearings were conducted on May 7 and 8, July 17, and September 27, 2001. The record revealed that Egan was employed at the School of Medicine in the department of pediatrics. As with other faculty at the School of Medicine, Egan was afforded the opportunity to receive clinical practice income through his department’s pediatric faculty practice group, University Pediatrics Associates, Inc. (UPA).

SUNY, through its Board of Trustees (Trustees), has promulgated certain policies which constitute rules of the Trustees for the government of the SUNY.<sup>1</sup> The Trustees developed a plan under which clinical practice income was to be managed, which is set forth in Article XVI of the policies. As a faculty member in the School of Medicine, Egan was obliged to participate in the plan under the terms of Article XVI.

Article XIX of the policies states that the provisions of the policies shall be applicable to employees in negotiating units and “in the event that the provisions of the [respective collective bargaining] agreement are different from the provisions of said policies, the provisions of the agreement shall be controlling.” Article 29 of the agreement between the State and UUP provides that “[T]he provisions of Article XVI of the Policies shall be subject to review in the grievance procedure.”<sup>2</sup>

Annexed to the Amended Answer is a Memorandum of Agreement (MOA), dated February 1, 2001 and executed by representatives of UUP and the State which defined

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<sup>1</sup>Joint Exhibit 4, Article 1, §1 (2000).

<sup>2</sup>Joint Exhibit 1.

the relationship between UUP, the State and SUNY under the Plan. It expressly states that

[s]ince the early 1970's, . . . UUP has negotiated several collective bargaining agreements with the State of New York (State) which establish plans for the management of clinical practice income . . . . In discussions with the State over the years, UUP has emphasized its need to continue to provide for clinical practice and to ensure that monies earned as part of clinical practice are kept separate and distinct from any money appropriated by the State for SUNY.

The physicians in the Medical School at the University at Buffalo have established faculty practice groups. These practice groups may serve to limit the physician's liability, provide tax advantages and facilitate business dealings of the physicians. A faculty practice group is a separate legal entity whether organized as a partnership, corporation, or other legal structure . . . . As separate legal entities, the faculty group practices are not subject to the control of the State or SUNY except pursuant to Article 29 of the collective bargaining agreement. Article XVI of the Policies, Appendix 9 to the Agreement, Appendix A-38, entitled "The 1999 Memorandum of Understanding", dated March 29, 1996 . . . . Monies generated by clinical practice are funds wholly owned by the physicians organized into separate group practice plans, whether organized along departmental, multi-departmental, or institution-wide lines . . . . In effect, clinical practice plan members are employees of both SUNY and the individual groups. Both provide W-2 statements at the end of the taxable year . . . . Faculty Practice Groups may also limit a physician's malpractice, business and individual tax liabilities. The Faculty Practice Groups may also act as business agents, provide significant advantages to the members of the plan, because they have the ability to sell the services of the physicians in the plan to outside entities. As separate and distinct legal entities, group practice entities are not subject to State competitive bidding rules and regulations, but are expected to use sound business practices. The group practice entities are not parties to the UUP collective bargaining agreement with the State, but their actions must be consistent with [the Plan], the Collective Bargaining Agreement, and any appropriate Memoranda . . . . The State and SUNY are neither responsible nor liable, financially or otherwise, for any action(s) taken by a group practice entity that are inconsistent with these documents. As with any private employer, the group practice entities are subject to civil

suit by individuals they employ. To the degree necessary, the conclusion of any administrative procedures, such as the UUP grievance procedure, may form a necessary first step in allowing individual physicians to initiate lawsuits against their clinical practice groups for alleged violations of their individual rights.

On May 7, 2001, at the close of the UUP's direct case, counsel for SUNY made a motion to dismiss on the grounds that PERB lacked jurisdiction over the issue raised by the improper practice charge. The ALJ reserved decision and the hearings continued. The ALJ issued her decision on March 1, 2002, finding that PERB had jurisdiction but dismissing the charge on its merits.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the ALJ's decision on jurisdiction.

#### DISCUSSION

UUP, in its exceptions to the ALJ decision dismissing its improper practice charge, argues that it met its burden by demonstrating that but for Egan's protected activity (filing grievances), he would not have lost his clinical practice income. SUNY argues in its exceptions, *inter alia*, that the ALJ erred in determining that PERB has jurisdiction over issues raised by the aforesaid charge. We agree.

Egan, as a faculty member of the School of Medicine at SUNY Buffalo, was allowed to earn outside income separate and apart from his salary as a SUNY professor. The source of this outside income was derived from the practice of his medical speciality. At the heart of this dispute is the limitation placed upon Egan's outside income. Egan took certain actions, including the filing of grievances, which led UPA to terminate his association with it. The basis of UUP's argument that such action

constitutes an improper practice charge within our jurisdiction is the dual role played by Morin, who is both President of UPA and Chairman of the Medical School's Department of Pediatrics, and the involvement of SUNY in UPA's operations.

A review of the history of the practice plans illustrates that:

It is the practice of most medical schools in this country to allow full-time medical faculty members to also maintain a private practice. In order to regulate the amount of time devoted to such practice (by limiting the total amount of professional income a faculty member may earn), it is generally the procedure to require faculty members to treat their private patients through a practice plan.<sup>3</sup>

Prior to 1982, Article 8-AA of the Education Law authorized the trustees of SUNY to create "clinical practice income management corporations" in accordance with its statutory provisions to collect, manage and disburse clinical practice income at each of the State's University's medical and dental schools.<sup>4</sup> However, Article 8-AA was

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<sup>3</sup>*Frontier Insurance Co. v. State of New York*, 146 Misc.2d 237, at 243 (1989), *aff'd* 172 AD2d 13 (3d Dep't 1991). "While practice plans . . . are in effect in medical schools throughout the United States and in all four medical schools in the SUNY system they play an additional important role at SUNY Buffalo, the only State University medical school that does not have its own State-owned hospital. To obtain a hospital setting for its clinical teaching activities, the school has entered into affiliation contracts with local area hospitals including Children's Hospital and . . . SUNY expects its faculty members to provide, through their practice plan, the patients on whom the students are trained." (at 244) See also *Kountz v. State University of New York*, 109 Misc.2d 319, at 324 (1981), *aff'd* 87 AD2d 605 (2d Dep't 1982), which found that ". . . 85% of the medical schools in the United States have clinical practice plans. This statement was supported by a report prepared by the Association of American Medical Colleges surveying these plans". See also *Bourke v. Albany Medical Center*, 176 AD2d 1028 (3d Dep't 1991).

<sup>4</sup>*Frontier Insurance Co. v. State of New York*, *supra* note 3.

repealed by the laws of 1982.<sup>5</sup> The provisions of Article 8-AA were replaced in part by the provisions of Part 340 of the Policies of the Board of Trustees of the State University of New York (8 NYCRR Part 340). Article XVI of the Policies of the Trustees duplicates 8 NYCRR part 340.

The document that implements the Trustees' plan is the formal agreement executed on or about September 13, 2000, between SUNY at Buffalo, School of Medicine; SUNY; UB Associates, Inc., the governing board of the Practice Plan; and the various clinical practice corporations found in the record as UUP's Exhibit #2. This service agreement establishes an accounting procedure for compensation and reimbursement. Section 10.6 of the agreement expressly provides that

[N]either this Agreement, which represents terms and conditions applicable to the operation and administration of the Practice Plan, nor any provision hereof, shall be deemed to create a joint venture, partnership, unincorporated association or any other entity, or create an employment relationship, among or between any of the parties hereto for any purpose whatsoever.

The State's agreement with UUP is intended to keep the plan's funds separate and distinct from State monies and to insulate the State from liability for malpractice committed by any of the practice groups.

But SUNY does exercise some control over limited areas of the operations of the plans, as members of the boards of directors of the plans are also employees of the School of Medicine, and doctors participate in the plans only by virtue of their employment by the School of Medicine. These few elements of State involvement in

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<sup>5</sup>L. 1982, c. 924, §3.



the operation of the plans do not, however, transform what is substantially a private employer - UPA - into a public employer.<sup>6</sup> UPA is a private corporation that exercises substantial control over the terms and conditions of employment of the doctors who participate in the plan and is, therefore, the employer of these employees. While there is some supervision by SUNY over UPA, that alone is insufficient to establish that UPA is a public employer, especially where, as here, UPA serves no governmental or proprietary function, there is no receipt of public money by UPA and the doctors, as participants in UPA, have no civil service status.<sup>7</sup>

The plan was developed in consultation and negotiation with UUP.<sup>8</sup> Under the terms of Article 29 of the parties' collective bargaining agreement, the terms of Article XVI of the Policies were subject to the provisions of the grievance procedure. However, the intent of Article 29 as it applied to Article XVI of the Policies is found in the February 2001 MOA. The parties understood the MOA to mean, *inter alia*, that "[T]o the degree necessary, the conclusion of any administrative procedures, such as the UUP grievance procedure, may form a necessary first step in allowing individual physicians to initiate lawsuits against their clinical practice groups for alleged violations of their

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<sup>6</sup>See *Ad Hoc Committee of Regents College Degrees and Examinations Professional Employees*, 24 PERB ¶¶6501 (1991), for a discussion of the effect of the appointment of a public officer by a governmental entity and political accountability as factors in determining "public employer" status. Evidence of this kind of political accountability to a government officer or entity is absent from this record.

<sup>7</sup>See *State of New York (Insurance Dep't Liquidation Bureau) v. PERB*, 146 AD2d 961, 22 PERB ¶¶7008 (3d Dep't 1989).

<sup>8</sup>Transcript, p. 68.

individual rights.” In addition to the improper practice charge filed in this matter, Egan also has pending lawsuits against UUP and UPA in State Supreme Court and against the State of New York in the Court of Claims.<sup>9</sup>

The evidence in the record indicates that UPA is a private professional corporation with its own board of directors and employees.<sup>10</sup> Egan was employed by the corporation and the instant charge relates to actions taken by UPA with respect to his private employment, not SUNY employment, and not with respect to his pedagogical duties, which form the basis of Egan’s public employment. No university official ordered his employment with the corporation terminated in June, 2000.<sup>11</sup> The UPA Board of Directors voted against renewing Egan’s contract. He still retained his employment as a faculty member at the School of Medicine.

Upon review of all of the evidence in the record, we find, therefore, that UUP has failed to prove that PERB has jurisdiction over this dispute. Only employment which is “unequivocally or substantially public” is subject to the Act’s jurisdiction.<sup>12</sup> UPA is a private employer over which we do not have jurisdiction. With respect to the State’s involvement in the operation of UPA, we find that, at best, SUNY and UPA might constitute a joint employer. However, even if that is the case, we do not have

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<sup>9</sup>Transcript, p. 82.

<sup>10</sup>Transcript, p. 147.

<sup>11</sup>Transcript, pp. 148, 186 and 241.

<sup>12</sup>*N.Y. Public Library v. PERB*, 45 AD2d 271, 7 PERB ¶¶7013 (1<sup>st</sup> Dep’t 1974), *aff’d* 37 N.Y.2d 752, 8 PERB ¶¶7013 (1975).

jurisdiction over this matter because one of the components of this "joint employer" - UPA - is a private employer.<sup>13</sup>

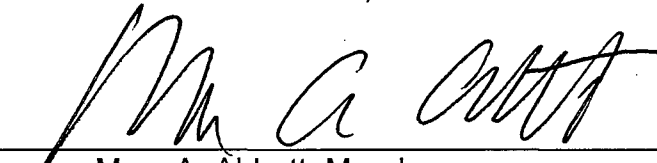
Based upon the foregoing, we reverse the ALJ's decision on jurisdiction and dismiss the charge upon jurisdictional grounds only. As such, we need not reach the exceptions raised by the parties concerning the merits of the charge.

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

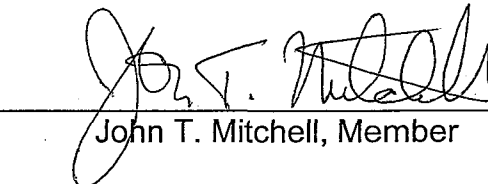
DATED: June 12, 2002  
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>13</sup>*Niagara Frontier Transp. Auth.*, 13 PERB ¶3003, at 3004 (1980). "The jurisdiction of this Board extends to a 'joint public employer of public employees' (footnote omitted), but not to employees of a joint employer, one part of which is a private employer."

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**AMERICAN FEDERATION OF STATE, COUNTY  
AND MUNICIPAL EMPLOYEES, LOCAL 1671,**

Charging Party,

- and -

**CASE NO. U-22390**

**BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF LONG BEACH,**

Respondent,

-and-

**LONG BEACH PUBLIC SCHOOL EMPLOYEES  
GROUP C ASSOCIATION,**

Intervenor.

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**MARGARET McCANN, ESQ., for Charging Party**

**INGERMAN SMITH, LLP (CHRISTOPHER VENATOR of counsel), for  
Respondent**

**WILLIAM FRIEDMAN, ESQ., for Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Long Beach Public School Employees Group C Association (Association) to a decision of an Administrative Law Judge (ALJ) finding that the Board of Education of the City School District of the City of Long Beach (District) violated §§209-a.1(a) and (e) of the Public Employees' Fair

Employment Act (Act) when it refused to forward to the American Federation of State, County and Municipal Employees, Local 1671 (Local 1671) union dues deducted from employees in the unit represented by Local 1671. The ALJ found that the claims made to the District by the Association that it was entitled to the dues from unit employees did not excuse the District from its obligation, both under the Act and under the expired collective bargaining agreement, to remit the dues to Local 1671 while it was the certified bargaining agent.

#### EXCEPTIONS

The Association excepts to the ALJ's decision, arguing that this Board does not have jurisdiction over a decision by public employees to disaffiliate from one employee organization and affiliate with another and that, in any event, Local 1671 abandoned the bargaining unit and thus forfeited any claim it had to the dues collected by the District. The Association further argues that the ALJ erred by not holding a hearing when the District did not appear for the scheduled hearing and in dismissing the District's pleading. Finally, the Association argues that no interest should be awarded on the monies to be paid by the District to Local 1671 as ordered by the ALJ. Local 1671 supports the ALJ's decision. The District has not responded.

#### FACTS

The last collective bargaining agreement between the District and Local 1671 expired on June 30, 2000. Effective July 1, 2000, AFSCME required Local 1671, and all locals, to join a council and pay dues to the council as well as to AFSCME. Local 1671 was advised that it was now part of Council 66. On October 12, 2000, some members of Local 1671 disaffiliated from AFSCME and became an unaffiliated union, calling itself

Long Beach Public School Employees Group C Association or, as identified herein, the Association. Local 1671 continued to exist as a separate entity, still affiliated with AFSCME.

The Association thereafter requested recognition as the exclusive bargaining agent from the District. When the District refused, the Association filed a representation petition with the Public Employment Relations Board (PERB), seeking Local 1671's decertification and the certification of the Association as the exclusive bargaining agent. An election was held under the auspices of PERB on February 5, 2001. As a result of the election, in which the Association prevailed, the Association was certified on March 5, 2001.<sup>1</sup>

On December 7, 2000, the Association, by letter to the District, claimed that it was the successor in interest to Local 1671 and that it was, therefore, entitled to any dues collected by the District from unit employees. From December 2000 to March 5, 2001, the District held the dues collected on behalf of Local 1671 in escrow. The District has not yet released the monies from the escrow account, arguing that it is merely a stakeholder and awaits PERB's direction as to which employee organization is entitled to the dues held in escrow.

#### PROCEDURAL MATTERS

The District did not appear at the hearing in this matter scheduled for December 3, 2001, despite having received the Notice of Hearing from the ALJ, which specifically provided that "failure to appear at the hearing may constitute ground for

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<sup>1</sup>*Long Beach City School District*, 34 PERB ¶3000.08 (2001)

dismissal of the absent party's pleading." The District did not appear at either of the two scheduled conferences in this matter, either, arguing that it was merely a stakeholder and would be bound by any order issued by PERB as to the disbursement of the funds held in escrow.

An improper practice charge is an adversarial proceeding, in which there are burdens of proof and specific responsibilities placed on the parties. Our Rules of Procedure (Rules), §212.4(b), specifically grant to the ALJ the authority to dismiss an absent party's pleadings for failure to appear at a scheduled hearing. Here, the District was on notice of the scheduled date for the hearing and of the consequences for nonappearance. The District took it upon itself to characterize its role in the proceeding and to determine that its presence at the hearing was not required or necessary. The Association argues on the District's behalf that all the parties had agreed that the District was merely a stakeholder and need not appear at the hearing. Local 1671 disputes the Association's assertion that there was an agreement that the District was not required to appear at the hearing. Certainly, the record reveals that the hearing ALJ was not part of any such agreement, that the District did not seek permission from the hearing ALJ to be absent from the hearing and that the District had not been excused from attendance at the hearing.

Given the District's failure to appear at the hearing, the ALJ properly determined to strike the District's answer, deem the material allegations in the charge admitted and

find that the District waived its right to a hearing. The case could then properly be decided on the basis of the charge, the papers in support of the Association's motion to intervene and the parties' briefs.<sup>2</sup>

### DISCUSSION

It is well-settled that it is only upon decertification that the recognized or certified bargaining agent loses its status as the representative of unit employees.<sup>3</sup> Until such time as this Board issues a decision decertifying an incumbent employee organization, that organization remains obligated to fairly represent those in the bargaining unit and, in turn, is entitled to their dues. The District's argument that there was a competing organization does not relieve it of its duty to deal with the certified bargaining agent. When Local 1671's source of funding was unilaterally stopped by the District, it negatively affected Local 1671's ability to ensure unit employees' representation rights, as set forth in §§203 and 208 of the Act. Such interference constitutes a violation of §209-a.1(a) of the Act.<sup>4</sup>

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<sup>2</sup>While denying any improper motivation, the District admitted that it had withheld collected dues from Local 1671 and, in its brief, argued that no interest should be assessed against the District because of its lack of improper motivation.

<sup>3</sup>*City of Newburgh*, 20 PERB ¶3017 (1987); *County of Clinton and Sheriff of County of Clinton*, 19 PERB ¶3048 (1986); *County of Erie*, 17 PERB ¶3073 (1984); *State of New York*, 5 PERB ¶3060 (1972), *conf'd*, *PBA of NYS Police, Inc. v. PERB*, 6 PERB ¶7001 ( Sup. Ct. Albany Co. 1973).

<sup>4</sup>*See Mineola Union Free Sch. Dist.*, 20 PERB ¶4622 (1987); *Norwich City Sch. Dist.*, 14 PERB ¶4654 (1981).



Further, as the expired collective bargaining agreement between the District and Local 1671 provides for the deduction and transmittal of membership dues by the District to Local 1671, the District's failure to transmit dues to Local 1671 until the date of the decision decertifying Local 1671, violated §209-a.1(e) of the Act.

The Association argues that this is a matter involving a union's affiliation vote and is, therefore, outside of PERB's jurisdiction. PERB does not exercise jurisdiction over matters involving solely a change in a union's affiliation.

This is so because decisions by employee organizations to affiliate or disaffiliate with or from parent organizations are matters over which PERB is without jurisdiction to preside, and in which it will not otherwise involve itself, except upon proceedings otherwise proper under the Act relating to the representation status of the employee organization with respect to a bargaining unit.<sup>5</sup>

This case, however, is not one concerning only a disaffiliation issue. The unit members' decision to disaffiliate from AFSCME is not before us. The case as pled by Local 1671, and as decided by the ALJ, deals only with the propriety of a public employer withholding membership dues deductions from a certified employee organization. That issue falls squarely within our jurisdiction and we here hold that until there has been a decision issued by this Board decertifying an incumbent employee organization, the public employer is required by the Act to remit to that organization any and all membership dues and agency shop fees deducted from unit employees' paychecks.

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<sup>5</sup>*City Sch. Dist. of the City of Schenectady*, 23 PERB ¶¶3028, at 3057 (1990). See, *State of New York (Unified Court System)*, 12 PERB ¶¶3019 (1979). See also *Board of Education of the City Sch. Dist. of the City of New York*, 17 PERB ¶¶4011 (1984); *Norwich Central Sch. Dist.*, 14 PERB ¶¶4654 (1981);

Based on the foregoing, we deny the Association's exceptions and affirm the decision of the ALJ.

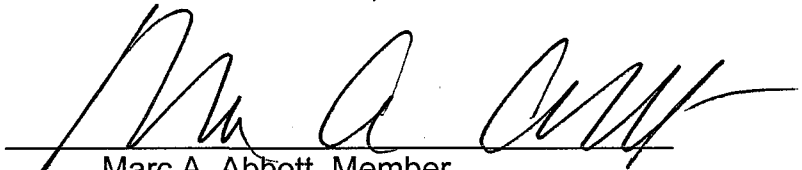
IT IS, THEREFORE, ORDERED that:

1. The District forthwith transmit to Local 1671 all dues collected from members but not remitted to AFSCME prior to March 5, 2001, with interest at the maximum legal rate,<sup>6</sup>
2. Sign and post notice in the form attached at all locations normally used to post written communications to unit employees.

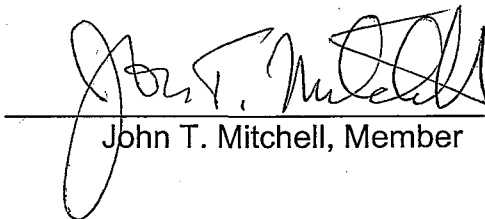
DATED: June 12, 2002  
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

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<sup>6</sup>While the District argued to the ALJ that it should not be ordered to pay interest even if a violation were found because of the lack of improper motivation on its part, we reject its argument. "A make-whole remedy should provide for interest unless there are particular circumstances to warrant deviation from this principle. There are no such circumstances here." See *Dunkirk City Sch. Dist.*, 17 PERB ¶3064, at 3099 (1984).

# 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 Board of Education of the City School District of the City of Long Beach (District) in the unit represented by American Federation of State, County and Municipal Employees, Local 1671 (Local 1671) that the District will forthwith:

1. Transmit to Local 1671 all dues collected from members but not remitted to AFSCME prior to March 5, 2001, with interest at the maximum legal rate.

Dated .....

By .....  
(Representative) (Title)

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT  
OF THE CITY OF LONG BEACH

.....

*This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.*

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**NEW YORK STATE SUPREME COURT  
OFFICERS ASSOCIATION, ILA, LOCAL 2013,  
AFL-CIO,**

Charging Party,

- and -

**CASE NO. U-23131**

**STATE OF NEW YORK (UNIFIED COURT  
SYSTEM),**

Respondent,

- and -

**NEW YORK STATE COURT OFFICERS  
ASSOCIATION,**

Intervenor.

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**PAT BONANNO, ESQ, for Charging Party**

**LAUREN P. DE SOLE, ESQ. (RICHARD MC DOWELL of counsel), for  
Respondent**

**WHITEMAN OSTERMAN & HANNA (NORMA MEACHAM of counsel), for  
Intervenor**

**BOARD DECISION AND ORDER ON MOTION**

The New York State Supreme Court Officers Association, ILA, Local 2013, AFL-CIO (SCOA) has filed exceptions to a decision of an Administrative Law Judge (ALJ) granting an oral motion made by the New York State Court Officers Association (COA) to intervene in this matter.

EXCEPTIONS

SCOA's exceptions are an interlocutory appeal on legal grounds of the ALJ's interim decision.

FACTS

On February 12, 2002, SCOA filed an improper practice charge alleging that the New York State Unified Court System (UCS) violated §§209-a.1(b) and (d) of the Public Employees' Fair Employment Act (Act). SCOA also sought injunctive relief which was denied and, thereafter, SCOA commenced an Article 78 proceeding in Supreme Court, Albany County, which is still pending.

The improper practice charge, while not naming COA as a respondent, alleges that UCS violated the Act when it assigned certain security work performed by SCOA to COA without negotiating. The answer filed by UCS also put SCOA on notice of COA's involvement and, subsequently, on March 20, 2002, counsel for COA notified all parties that COA represented the interests of COA unit employees and sought to attend the pre-hearing conference scheduled for April 1, 2002.

At the pre-hearing conference, COA orally moved to intervene in the instant proceedings. SCOA objected on the grounds that COA had not submitted its motion in writing as required by §212.1 of PERB's Rules of Procedure (Rules). The ALJ granted the motion. By letter dated April 24, 2002, the ALJ confirmed his decision in writing and gave his reasons therefor. The ALJ found that COA was an interested party and would be affected by the outcome of the improper practice proceeding. Because SCOA refused to consent to an adjournment to give COA an opportunity to submit a motion in

writing, the ALJ concluded that SCOA had waived any objection it might have to COA's oral motion.

### DISCUSSION

The ALJ's exercise of discretion to grant COA's oral motion to intervene under the facts and circumstances of this matter was incorrect.

As a general rule, this Board will not review the interlocutory determinations of the Director or an Administrative Law Judge until such time as all proceedings below have been concluded, and review may be had of the entire matter. It is only when extraordinary circumstances are present and/or in which severe prejudice would otherwise result if interlocutory review were denied that we will entertain a request for such review.<sup>1</sup>

Our Rules refer to six specific motions.<sup>2</sup> A motion for intervention is one of those which we require to be in writing on notice to the other party.

The record does not reflect any circumstances that would have precluded COA from submitting its motion in writing. On the contrary, on March 20, 2002, COA called the ALJ to inform him of its interest, its intention to intervene and to attend the pre-hearing conference scheduled for April 1, 2002. During the intervening eleven days, COA had ample opportunity to file a written notice to intervene, in accordance with the specific requirements of our Rules.<sup>3</sup> While COA orally made a motion to intervene at the conference, and that motion and the decision to grant it were later confirmed in writing

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<sup>1</sup>*County of Nassau*, 22 PERB ¶3027, at 3066 (1989).

<sup>2</sup>Section 204.3(b), Motion for particularization of the charge; §204.3(d), Motion for particularization of the answer; §211.6, Motion to withdraw or modify a subpoena; §212.1, Intervention; §212.4(l), Motion to dismiss on basis of timeliness; §212.4(g), Motion to recuse ALJ.

<sup>3</sup>*Rules*, §212.1.

by the ALJ, the record is clear that SCOA has maintained its objection to this procedural defect.

In this case, the ALJ may have assumed that SCOA's objection on the merits to COA's motion to intervene might not have had merit, but we find that that is not a good and sufficient reason to depart from the specific requirements of the Rules that a motion to intervene be made in writing. Even though the ALJ gave SCOA an opportunity to respond to COA's oral motion and he confirmed the motion, the objection to it and his reasons for granting the motion in writing, COA's motion does not conform to the requirements of the Rules. We, therefore, grant SCOA's interlocutory appeal and find that COA's motion to intervene must be denied.

Based on the foregoing, we grant SCOA's exception and reverse the decision of the ALJ to grant COA's oral motion for intervention, without prejudice to renew said motion in accordance with §212.1 of the Rules. SO ORDERED.

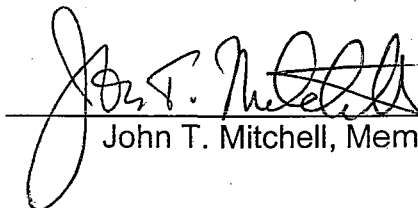
Dated: June 12, 2002  
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

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In the Matter of

**NEW COVENANT CHARTER SCHOOL  
EDUCATION ASSOCIATION FACULTY,**

Petitioner,

-and-

**CASE NO. C-5179**

**NEW COVENANT CHARTER SCHOOL,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the New Covenant Charter School Education Association Faculty 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, regular teachers, social workers, and library media specialists.

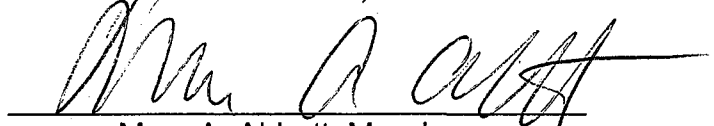
Excluded: Tutors, student support managers, school technology managers, user support technicians, administrators, management/confidential employees, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the New Covenant Charter School Education Association Faculty. 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.

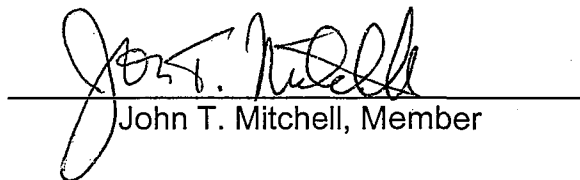
DATED: June 12, 2002  
New York, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TEAMSTERS LOCAL 264,**

Petitioner,

-and-

**CASE NO. C-5199**

**TOWN OF SHERIDAN,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

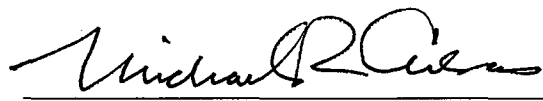
IT IS HEREBY CERTIFIED that the Teamsters Local 264 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

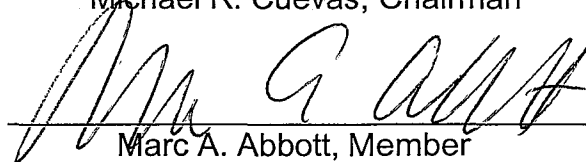
Included: All full-time and regular part-time Highway Department Employees.

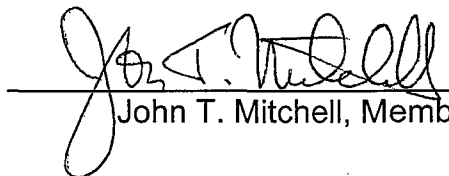
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 264. 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: June 12, 2002  
New York, New York

  
\_\_\_\_\_  
Michael R. Cuevas, Chairman

  
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Marc A. Abbott, Member

  
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John T. Mitchell, Member