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State of New York Public Employment Relations Board Decisions from November 20, 1996

New York State Public Employment Relations Board

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Keywords

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SCOTIA PATROLMEN'S BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-16861

VILLAGE OF SCOTIA,

Respondent.

GRASSO & GRASSO (JANE K. FININ of counsel), for Charging Party

GOLDBERGER & GOLDBERGER (BRYAN J. GOLDBERGER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Scotia Patrolmen's Benevolent Association (PBA) to a decision by an Administrative Law Judge (ALJ) on its charge against the Village of Scotia (Village). The PBA alleges that the Village demoted and disciplined police officer Timothy Macfarlane for comments he made in a letter he wrote to the Village's Board of Trustees which were critical of the Village's Chief of Police and Mayor. It also alleges that Macfarlane's discipline constituted a unilateral change in the standards governing police officers' conduct. These actions are alleged to have violated §209-a.1(a), (c) and (d) of the Public Employees' Fair Employment Act (Act).

After a hearing, the ALJ dismissed the charge. The interference and discrimination allegations under §209-a.1(a) and (c) were dismissed because the ALJ determined that the part of the letter for which Macfarlane was admittedly demoted and disciplined did not constitute concerted protected activity under the Act. The refusal to bargain allegation under §209-a.1(d) was dismissed upon a finding that Macfarlane's discipline did not constitute a change in prevailing departmental disciplinary policy or practice.

The PBA argues in its exceptions that the ALJ should not have given collateral estoppel effect to the findings and conclusions of a Civil Service Law (CSL) §75 hearing officer who had found Macfarlane guilty of a number of misconduct charges, all centering on the letter he had written. The PBA argues that the ALJ also erred in concluding that Macfarlane's letter was not protected under the Act and in finding that his discipline did not constitute a bargainable change in disciplinary policy and practice.

The Village argues that the ALJ did not give collateral estoppel effect to the CSL §75 hearing officer's findings and that his own decision on the merits of the charge was correct on the facts and law in all respects.

Having reviewed the record and considered the parties' arguments, we reverse the ALJ's decision in part and affirm in part.

Although the ALJ made reference to collateral estoppel, it is clear from his decision that he did not apply that doctrine in dismissing the charge. The issues in this case are entirely distinct from those raised and decided under the disciplinary charges and collateral estoppel does not apply to prevent us from deciding an alleged improper practice within our exclusive jurisdiction under §205.5(d) of the Act. Although expressing his agreement with the CSL hearing officer's decision, which found that Macfarlane had violated departmental rules of conduct by making the statements about the Chief of Police and Mayor in his letter, the ALJ stated specifically that he was not bound by that determination. Instead, the ALJ reached his own merits determination on the charge before him and held Macfarlane's letter unprotected under the Act and his demotion and discipline, accordingly, not an improper practice. We now turn to those issues.

Macfarlane is the PBA's former president and was its vice-president on the relevant dates. His letter arose out of a lengthy dispute between the Village and the PBA over the Village's participation in a centralized 911 dispatch system. The PBA was concerned that the proposed system might impact upon the work of its unit employees. Macfarlane, who also served as a representative on the PBA dispatch committee, and other PBA officers, wrote letters to the Village critical of the proposed dispatch plan, negotiations about it were demanded, and an improper practice charge was threatened.

On April 11, 1995, Macfarlane wrote a two-page letter to the Village trustees about various issues involving the merits of the proposed dispatching system. Macfarlane's letter was in part a response to a letter to the editor of a local newspaper written by the Chief of Police. The Chief's letter to the editor was itself a response to a March 24 letter to the editor from Macfarlane.

Macfarlane's March 24 letter to the editor is critical of the dispatch proposal, and in it, Macfarlane questions the Mayor's motivation for a plan which Macfarlane believed would cede the Village's control to another municipality and "lock up our building, reduce services and still have the villagers pay the town $60,000."

In the Chief's letter to the editor, he characterizes Macfarlane's March 24 statements as "untrue", or ones based upon a "distortion of the truth" or a "misunderstanding" of the proposal. The Chief offers in his letter a summary of the proposed dispatch system, its cost, an explanation as to why decisions regarding certain features were made, and a defense of the Mayor's efforts to solicit comments from all affected by the proposal.

Macfarlane's April 11 letter to the Village trustees was not on PBA letterhead,[1/] although it was delivered to the trustees in a sealed PBA envelope. Like his March 24 letter to the

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[1/]The record shows that Macfarlane simply did not have letterhead available when he wrote the letter.

editor, Macfarlane's April 11 letter was signed by him individually. Macfarlane was demoted and disciplined for only one paragraph in this letter. We have set forth the complete text of the letter to place Macfarlane's comments in proper context. That part of the letter which formed the basis for Macfarlane's demotion and discipline is underlined.

> Dear Trustees,
>
> I would like to touch on a few points regarding the dispatch issue that have come up over the past few weeks.
>
> A. The letter to the editor from Dispatcher Gallop is so distorted that it will undoubtedly confuse many Scotians. Including: the figures I stated came from the Village, not from me; Scotia was not the hold up on 911. We were tested and were ready several weeks ago, the hold up is radio equipment for SP Duanesburg (June 95); Mr. Gallop-a janitor with 2 weeks dispatcher training is not more qualified than a trained, certified police officer! Using Montgomery County's 911 as an example of what they can do, shows me that he did not read the Article 4 weeks ago in the Gazette explaining how messed up their 911 system is. Mr. Gallop is a frustrated "want a be" and is trying to kiss up to the chief to get the park watchman position he asked for. Why didn't he suggest also locking up the Glenville Police Station and save the Town the cost of 9 employees if it is such a great idea? Mr. Gallops [sic] comments about this department were totally unprofessional, uncalled for and untrue! I would hope Chief Purdy would correct his employee and ask for a public apology. The sad part of the editorial is that some people from Scotia may believe it...
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> B. It is the Chief's letter to the editor I find more interesting. As president of the PBA when Paul Boyarin came to Scotia and current VP, I have made it very clear to our members that Chief Boyarin is a provisional chief and as such is subject to the whim and pleasure of the Mayor. Until he becomes permanent (10/95?) and can speak freely he is a tool of the Mayor. With this in mind we have not said anything to, for, or against the Chief, and have kept him out of our comments about plan, three etc. I was very surprised (as were many people I talked to) that the Chief of Police would jump into this political pot to publicly shaft his men and the P.B.A. and suck up to the Mayor in the same article. This was uncalled for and did harm to

the Department and the Chief's image. His comments about 911 I also disagree with. In our meetings with the Mayor, they will not allow us to discuss any other plans, only plan three. They have not produced any procedures that they say they have in place (in the article). They have no written figures or proposals from the Town about this $60,000 figure (20% of $300,000) and when we show that this is not possible, they now say this amount will now be smaller. Where does this come from? The article said that the Town plan will handle our workload, the Town has already planned to have two dispatchers working 911 before this plan three was even thought of, our workload has not even been considered... The Chiefs' [sic] article stated they have control of the dispatchers already worked out. Ask to see this plan. Who will be on this committee? Who are we turning total control of the Village police services over to? We have shown that by hiring two more police officers, we would have the same staffing result and it would only cost about $20,000 more (2 officers $80,000-$60,000 above =$20,000). I also believe that we can get three civilians for the above $60,000 and cover the off day, with current staff (like Niskayuna does). I believe that we could also use Denise Malcolm at the desk and then only have to hire one person to get the same desired policemen on the street. Why aren't these options being looked at? I agree that our current staffing level is a problem. But, the Chief has taken the D/C from the desk position, (always worked 4-12 in the past), Malcolm's issue is still on hold, Clark is still in school and Dick is out with a broken leg. These are four positions that we are short. These are not the men's fault and beyond our control. I believe the Chief is taking advantage of a short term problem with an overkill solution. Remember we did try using a civilian at the desk many years ago, and gave up on the idea when the officer had to keep being called back to the station. Many of our calls are resolved at the desk and over the phone just by having a police officer handle the calls. We solved a felony DWI hit and run this past Saturday within minutes; simply because the witness was able to walk into the station.

I believe that Glenville could handle the 911 with the transfer to the Scotia PD and Scotia FD by a one button transfer (my 4 year old can press a "P" for police and "F" for fire) without any problems or loss of services to the Village... But to decrease services and increase cost to the Village makes no sense to me. Unlike the above two people I have no personal gain either way.

Although no one will admit it, I believe that this is no more than a back-door consolidation plan. If the phones

> are gone, the radio dispatch is gone and the 911 is gone, the only thing left is to change the color of the cars! (If it walks like a duck... its [sic] a duck.) If this is the Villages [sic] plan, lets [sic] be open about it and put it on the ballot and be done with it. Whatever the Villagers decide, do it.
>
> If you wish to talk to me about this, or any other issue, I can be reached at 382-0527.
>
> Thank you for taking the time to listen to me.

The ALJ found Macfarlane's comments unprotected under the Act for two reasons. First, the ALJ concluded that Macfarlane's comments "bore no indicia of union involvement." Second, the ALJ held that the content of the statements themselves deprived Macfarlane of the Act's protections because the "offending language is so egregious as to overstep the bounds of propriety." As such, the ALJ held that Macfarlane's comments were neither concerted nor protected under the Act. We disagree with both conclusions and, therefore, reverse the ALJ's dismissal of the §209-a.1(a) and (c) allegations.

As to the concerted[2/] nature of Macfarlane's letter, it did not represent, as the ALJ apparently concluded, merely Macfarlane's individual opinion on a matter of personal concern to him only. Whether the paragraph for which Macfarlane was disciplined and demoted is read apart from the rest of his letter or, as we believe it must for purposes of the Act, in the context of the whole letter and the circumstances leading up to it, the

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[2/]See generally New York City Transit Auth., 20 PERB ¶3065, aff'g 20 PERB ¶4575 (1987).

statements therein clearly are intended to reflect the position of the PBA and its membership, and were written on their collective behalf.

Macfarlane's status as a PBA officer and PBA dispatch committee member was well known to all of the Village officials. Macfarlane's letter refers to his PBA office and to conversations he had had with the PBA membership concerning the Chief generally and with specific reference to the Village's dispatch proposal. There are references to "we" and "our" throughout the letter. Macfarlane's testimony also establishes that he issued the letter in his capacity as a PBA officer and representative and intended to convey the position of the PBA, an intent confirmed by Theodore Cayer, the PBA secretary. Macfarlane and Cayer discussed the letter before it was sent to the Village trustees. Although Cayer was personally uncomfortable with some of the statements in the letter, including the statements about the Chief, Cayer approved the release of the letter as written on behalf of the PBA because he did not believe it was "too offensive" and he believed that there was not enough time to edit the letter and retype it onto PBA letterhead before the Village trustees were scheduled to meet about the dispatch proposal. Cayer, as did Macfarlane, considered the letter to be "a statement by the PBA of the PBA position" consistent with the PBA's practice of having "the president or the other officers ... basically guide the PBA."

The basis for the ALJ's conclusion that Macfarlane's letter was not concerted activity appears to be that the letter was not signed by Macfarlane with a reference to his PBA office and was not typed on PBA letterhead. The concerted nature of any activity, however, must be evaluated in the totality of all relevant circumstances, with a focus upon the purpose and effect of that activity. Although the factors noted by the ALJ are relevant to an analysis regarding the concerted nature of Macfarlane's letter, they are not dispositive. Had we, for example, concluded on a totality-of-circumstances examination that Macfarlane's statements represented only his personal opinion in pursuit of purely personal interests, the simple expedient of his typing the letter on PBA letterhead and signing it over a line giving his union office would not have served to convert that individual activity into concerted activity. If the presence of those factors would not be dispositive, then their absence is no more conclusive. Under the same reasoning, delivery of the letter in the PBA envelope, although relevant, does not itself make the letter concerted. Ultimately, it is the content of the letter as a whole in light of all relevant surrounding circumstances which determines the concerted nature of Macfarlane's comments. Examining those relevant circumstances, we find the letter and the paragraph for which Macfarlane was disciplined and demoted to have been concerted activity because there was concert in fact by Macfarlane who undertook action after discussion with and on behalf of other

employees to protest a matter that was of known group and organizational concern.

This brings us to the second basis for the ALJ's decision on the interference and discrimination allegations. Not only must the activity be concerted - as we have found Macfarlane's letter to be - it must also be protected in its nature. The ALJ concluded that the part of the letter for which Macfarlane was demoted and disciplined was not protected because the comments were offensive, egregious and overstepped the bounds of propriety. We disagree with the ALJ's conclusion.

Our case law clearly emphasizes the breadth of protection afforded by the Act to employee speech and the expression of opinion regarding employment issues, particularly statements made by representatives of the employees' bargaining agent. We have protected a range of employee speech[3/] because we believe firmly that the labor relations process must tolerate robust debate of employment issues, even if occasionally intemperate.

Although conveyed with an unfortunate choice of words - which we certainly do not condone - Macfarlane's message in the paragraph for which he was demoted and disciplined is not particularly controversial or offensive in a labor relations setting. Discussion regarding the Village's dispatch proposal,

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[3/]See, e.g., Binghamton City Sch. Dist., 22 PERB ¶3034 (1989) (unit president's public statement that supervisor had lied during arbitration hearing); Plainedge Pub. Sch., 13 PERB ¶3037 (1980)(inaccurate and exaggerated public statements critical of employer's proposed policy); Ellenville Cent. Sch. Dist., 9 PERB ¶3067 (1976)(vulgar reference directly to and about supervisor).

for example, had been heated on both sides. In the very letter which triggered Macfarlane's April 11 letter, the Chief of Police characterizes Macfarlane's previous statements in opposition to the dispatch proposal as lies, distortions or the product of a misunderstanding. The content of the paragraph for which Macfarlane was demoted and disciplined was that the Chief had to defend a proposal even he considered unwise because a permanent job was dependent upon the Mayor's approval of the Chief's actions and statements, a circumstance the PBA believed should diminish the weight which the Village's Board of Trustees would normally give to the opinion of the Chief concerning a departmental matter. The letter goes on to state that the PBA considered the proposal and the Chief's support of it to be detrimental to the best interests of the Village residents, the PBA membership and the police department.

If the paragraph for which Macfarlane was demoted and disciplined had been written as summarized above, there could be little question as to the protected nature of such statements. To hold the statements unprotected, not because of their message, but because of the words used to convey it, would make the scope of protection afforded under the Act to statements by employees about their employment relationship dependent upon the ability of speakers or writers to express themselves in a manner which might be considered polite or civil in general society. Even were we able to define some minimum standard of labor relations civility which would serve to guide employees and their representatives,

the Act's protections are not, cannot, and should not be restricted to the best educated and most articulate among those who are elected or choose to protect and advance the employment interests of an employer's employees.

We are also cognizant of the need to consider the context and the recipients of the words and the message conveyed by them in determining whether statements are protected by the Act. Had Macfarlane's statements been made to the Chief in the presence of the police department staff, their impact on the Chief's authority would be more of an issue to consider. Similarly, if the letter had been published in the local press (as had some of Macfarlane's previous letters), its distribution to the public might have been a factor to be considered. However, the letter in this case was sent to the legislative body of the employer as part of a political process, which the Act acknowledges is intertwined in the collective bargaining process, in an effort by the PBA to persuade the legislative body not to take an action the PBA believed would be detrimental to the interests of the public, the PBA and the department. In this context, latitude of expression is properly afforded under the Act.

We fully realize that there may be times when the words chosen to convey a message may be so extreme as to render the statements containing those words themselves unprotected under the Act, notwithstanding the legitimacy of the message being conveyed or the identity or status of the person or persons making them. We conclude, however, for the reasons set forth

above, that Macfarlane's statements in this case are not of that type.

Our decision in Kings Point Central School District (hereafter Kings Point),[4/] relied upon by the ALJ in dismissing the interference and discrimination aspects of the charge, is not inconsistent with or contrary to our decision in this case. In Kings Point, an employee's letter to a board of education president contained a threat that the education of the board president's son, and other students whom the employee taught, would be made to suffer if an impasse in collective negotiations were not resolved quickly. It was the threatened enmeshing of students in the labor dispute which we held unprotected in Kings Park. Macfarlane's letter does not contain any threats of harm of any type and was restricted to an employment issue in dispute between the Village and the PBA, circumstances bearing no resemblance to those in Kings Point.

As Macfarlane's comments constituted concerted protected activity under the Act, the Village was not permitted to subject Macfarlane to discipline or other adverse personnel action for having made those statements. As the Village's actions were admittedly taken because of the statements Macfarlane made, it violated §209-a.1(a) and (c) of the Act.

The refusal to bargain allegation, premised upon a unilateral change in practice regarding standards of employee

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[4/]24 PERB ¶3026 (1991).

conduct, was properly dismissed by the ALJ. The basis for the misconduct charges against Macfarlane rests in existing departmental rules. That no officer has previously been disciplined for misconduct arising from oral or written comments made in alleged violation of those rules is immaterial. An employer does not unilaterally change a disciplinary system grounded upon misconduct by charging an employee with misconduct upon specifications which have not arisen before. To hold otherwise would mean that every "first instance" discipline of an employee would constitute a unilateral change in terms and conditions of employment in violation of the bargaining obligations under the Act under even the broadest of disciplinary systems.

For the reasons set forth above, the ALJ's decision is reversed insofar as it dismisses the allegations that the Village violated §209-a.1(a) and (c) of the Act and is otherwise affirmed.

IT IS, THEREFORE, ORDERED that the Village:

1. Immediately restore Macfarlane to the rank of sergeant and to the duties and privileges appropriate to such rank.
2. Make Macfarlane whole for any loss of wages or benefits occasioned by the loss of sergeant rank and by the discipline imposed pursuant to the disciplinary charges filed against him, with interest at the currently prevailing maximum legal rate.

3. Expunge from any personnel or employment records any reference to Macfarlane's loss of rank or to any discipline imposed upon him as a result of his April 11, 1995 letter to the Village Board of Trustees.

4. Post notice in the form attached in all locations ordinarily used by the Village to post notices of information to employees in the unit represented by the PBA.

DATED: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, 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 in the unit represented by the Scotia Patrolmen's Benevolent Association that the Village of Scotia (Village) will:

1. Immediately restore Timothy Macfarlane to the rank of sergeant and to the duties and privileges appropriate to such rank.

2. Make Timothy Macfarlane whole for any loss of wages or benefits occasioned by the loss of sergeant rank and by the discipline imposed pursuant to the disciplinary charges filed against him, with interest at the currently prevailing maximum legal rate.

3. Expunge from any personnel or employment records any reference to Timothy Macfarlane's loss of rank or to any discipline imposed upon him as a result of his April 11, 1995 letter to the Village's Board of Trustees.

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

VILLAGE OF SCOTIA

. . . . . .

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

GENESEE EDUCATIONAL ASSOCIATION, NEA/NY,

Charging Party,

-and-

CASE NO. U-16937

GENESEE COMMUNITY COLLEGE,

Respondent.

JANET AXELROD, GENERAL COUNSEL (HAROLD G. BEYER, JR. of counsel), for Charging Party

ROBERT E. GRAY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Genesee Educational Association, NEA/NY (Association) to a decision by an Administrative Law Judge (ALJ) dismissing its charge that the Genesee Community College (College) violated §209-a.1(c) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented a new evaluation form for all nonteaching personnel in the unit represented by the Association.

The parties' collective bargaining agreement, in effect through June 30, 1996, provides that evaluations are to be completed annually and

> will include a conference(s) between the individuals and their immediate supervisor, [and] a completed evaluation which will become part of the individual's professional file, which may be followed by individual conferences with appropriate administrative personnel.

The parties' contract also provides that

> to such extent as Board Policy #236[1/] applies to unit members on continuing contracts and is not inconsistent with this Agreement, the evaluation standards therein set forth shall be controlling. Except as may be otherwise provided in this Agreement, the Board retains exclusive authority to amend and set policy relating to faculty evaluation but shall consult with the Association not less than thirty (30) days prior to any

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[1/]As here relevant, Board Policy #236 provides:

> The evaluation of non-teaching staff with continuing appointments shall be referenced to one or more performance standards. Supervisors may establish a plan of performance standards for any staff member holding a continuing appointment covering two or more years, but no such plan shall exceed the length of the appointment period.
>
> Performance standards shall be developed by supervisors in consultation with affected staff members and furnished to the latter in a timely manner; and they shall be addressed to any facet of professional responsibility including specific items in position descriptions and professional growth and development.
>
> The annual evaluation of each non-teaching staff member on continuing appointment may involve, besides performance standards, the use of one method of evaluation chosen by supervisors after consultation with affected staff members.
>
> Methods of evaluation for non-teaching staff members include: peer evaluation, self critique, user/client evaluation, critiques of materials and procedures developed and implemented by the non-teaching staff member, or any other method which in the judgement of the supervisor discloses the substance of job responsibilities. If using the method of user/client evaluation, non-teaching staff members may choose or design the form to be administered to users/clients, after consultation with their respective supervisors, but the administration and collection of forms and tabulation of responses therein shall be handled by some other professional staff member designated by the supervisor.

change in said Board policy #236 which relates to evaluation standards. Any such change will be prospective in effect.

In March 1995, the College announced that a new form would be used to evaluate nonteaching academic affairs employees. Thereafter, a unit employee, Lisa Giallella, was evaluated by her supervisor, John Murray, Interim Associate Dean of Off-Campus Affairs. For previous evaluations, Giallella had used information that she had gathered to establish that she had achieved the goals set for her in prior evaluations. Her previous supervisor had used a two-page narrative evaluation form, with spaces for the supervisor to comment on "methods of evaluation used since last evaluation" and "supervisor's recommendation for action". For the evaluation conducted in April 1995, Murray used the new evaluation form, which is nine pages in length and which measures numerous criteria for "behavior" in seven separate "skill categories",[2/] with spaces for the supervisor's comments. The form also has a one-page space for the supervisor's comments on "evaluation of previous performance standards" and a similar space for comments about the coming year's performance standards. In preparation for the evaluation, Murray instructed Giallella to provide documentation in support of her achievement of the goals established in her

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[2/]The skills evaluated are: initiative, integrity, tenacity, oral communication, functional/technical, organizing, and thoroughness.

prior evaluation. Giallella compiled the information as instructed and filled in her rankings on the new evaluation form.

The ALJ found that there had been no change in the procedure because Giallella had, as before, gathered information relevant to her performance evaluation and had met with her supervisor. The ALJ also found that the form merely reflected new performance evaluation criteria established by the College. Noting that the criteria upon which employees are evaluated are nonmandatory subjects of negotiation,[3/] the ALJ determined that the College had not violated §209-a.1(d) of the Act.[4/]

The Association excepts to the ALJ's decision, arguing that the ALJ erred in concluding that the change in the evaluation form was not mandatorily negotiable and in concluding that Giallella was not compelled to perform a self-evaluation beyond the scope of those she had done previously. The College has not filed a response.

Based upon a review of the record and consideration of the parties' arguments, we affirm the ALJ's dismissal of the charge, although on jurisdictional grounds.

The parties' collective bargaining agreement sets forth in detail the evaluation procedure and incorporates by reference Board Policy #236, which not only further details the evaluation

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[3/]Elwood Union Free Sch. Dist., 10 PERB ¶3107 (1977).

[4/]The ALJ dismissed the §209-a.1(c) allegation as no facts were alleged and no proof offered which would support the finding of such a violation. No exceptions were taken to this determination.

procedure, but also covers evaluation standards and criteria. We have held repeatedly that the jurisdictional limits of §205.5(d) of the Act are triggered if the contract is a reasonably arguable source of right to a charging party with respect to the subject matter of its charge.[5/] We do not have jurisdiction over violations of an existing contract under §205.5(d). The charge alleges changes in evaluation standards and procedures which arguably violate those parts of the parties' contract regarding conferencing and consultation prior to making such changes. As we are without jurisdiction over this charge, we make no determination as to whether the establishment and use of an evaluation form which includes new evaluation criteria would violate the Act.

Based on the foregoing, the Association's exceptions are denied.

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

DATED: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

[5/]See County of Nassau, 23 PERB ¶3051 (1990).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF CARMEL POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-17383

TOWN OF CARMEL,

Respondent.

RAYMOND G. KRUSE, P.C. (RAYMOND G. KRUSE of counsel), for Charging Party

ANDERSON, BANKS, CURRAN & DONOGHUE (STUART S. WAXMAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Carmel Police Benevolent Association, Inc. (PBA) to a decision by an Administrative Law Judge (ALJ) rendered on the PBA's charge against the Town of Carmel (Town). In relevant part, the PBA alleges in its charge that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed a practice pursuant to which unit employees were granted vacation time which overlapped vacation time selected by other police department personnel so long as predetermined minimum staffing levels were maintained.

After a hearing, the ALJ dismissed the charge on the ground that the restrictions on overlapping vacations effected by the Town's change in the prior practice were not mandatory subjects of negotiation because, by restricting overlapping, the Town was determining the number of employees who would be on duty at any given time. Citing the Board's decision in City of Yonkers,[1/] the ALJ held that the number of employees who are to be on duty at any one time is a decision which an employer need not negotiate.

The PBA argues that the ALJ's decision is factually and legally incorrect. The Town states in response that certain of the PBA's exceptions are themselves inaccurate. The Town otherwise argues that the ALJ's decision is correct on the material facts and the law and should be affirmed.

Having reviewed the record and considered the parties' arguments, we conclude that the charge should be deferred and conditionally dismissed because it raises contractual questions arguably beyond our jurisdiction and which, to the extent the allegations may be within our jurisdiction, are better resolved, if possible, in the grievance arbitration context.

Although this charge is pleaded as a unilateral change in practice, testimony at the hearing reveals clearly that the alleged practice which was changed was actually the subject of an

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[1/]10 PERB ¶3056 (1977).

explicit agreement reached in December 1994 after negotiations between the parties. Those negotiations were held pursuant to the PBA's demand because the Town had also promulgated a policy that year which prohibited overlapping on any vacation selections. According to William Masterson, president of the PBA, "the final agreement out of the meeting was that overlapping would be permitted on vacation selection so long as we did not violate minimum manning and there would be no overlapping on the Fourth of July."

The policy memorandum of October 1995, which is the subject of this charge, arguably violated that agreement. As we have no jurisdiction under §205.5(d) of the Act when an agreement is an arguable source of right to a charging party with respect to the subject matter of its improper practice charge,[2/] ordinarily we would unconditionally dismiss this charge for lack of jurisdiction.[3/] It is not clear from the record, however, that the vacation pick agreement was in effect at the relevant date. Although there is no fixed duration to this agreement, it concerned vacation picks for 1995. As such, it is possible that the parties intended the agreement to a vacation pick system to be in effect for 1995 only. Questions concerning the parties' intent regarding the duration of their agreement are best

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[2/]See, e.g., County of Nassau, 23 PERB ¶3051 (1990).

[3/]City of Glens Falls, 25 PERB ¶3011 (1992), conf'd, 195 A.D.2d 933, 26 PERB ¶7009 (3d Dep't 1993) (arguable breach of oral agreement revealed for first time at hearing).

resolved, if possible, in the context of the parties' grievance arbitration procedure[4/] rather than by us.

We already have an established policy of deferring jurisdictional questions when a contractual grievance has been filed.[5/] Even though a grievance has not been filed in this case, we advance the policy rationale underlying such deferral by declining to reach, unless later necessary, what is essentially a question of arbitrability arising from the uncertain duration of this agreement and the applicability of the parties' grievance arbitration procedure to this agreement. A contractual grievance filed hereafter by the PBA should permit for a determination as to whether the vacation pick agreement reached in 1994 was in effect at the relevant date and whether the grievance procedure applies to this dispute. Should the Town successfully raise in the grievance arbitration context any argument which forecloses a determination regarding the merits of the PBA's grievance, the PBA may move to reopen this charge for a determination regarding the jurisdictional issue raised on the existing record. We see no prejudice to either the PBA or the Town by our deferral of the jurisdictional issue and we promote the policies of the Act by avoiding an interpretation of contract which the legislature has declared is preferably made by others in different forums.

[4/]We take administrative notice of the parties' contract last filed with us pursuant to §214.1 of our Rules of Procedure, which contains a grievance arbitration procedure.

[5/]Herkimer County BOCES, 20 PERB ¶3050 (1987).

Wholly apart from our jurisdictional deferral policy, we also have had a much longer standing policy of deferring the determination of the merits of refusal to bargain charges within our jurisdiction.[6/] When, as here, the disposition of a refusal to bargain charge necessitates an interpretation of an agreement which is arguably a source of right to the charging party, and an award rendered under a binding grievance arbitration procedure is potentially dispositive of the issues underlying the charge, we have been persuaded that the policies of the Act favoring an accommodation of the parties' dispute resolution procedures are again advanced by a conditional dismissal of the charge, even when the charging party union has elected not to invoke the grievance arbitration provisions of its contract.[7/] Therefore, even were we willing to assume that the vacation pick agreement expired in 1995, such that we were not presented with any jurisdictional issue, we would still defer any determination regarding the merits of this charge to the parties' uninvoked grievance arbitration procedure. As with the jurisdictional deferral, our merits deferral will permit for a reopening of this charge on motion in appropriate circumstances.

[6/] New York City Transit Auth., 4 PERB ¶3031 (1971); City of Buffalo, 4 PERB ¶3090 (1971). Our merits deferral has been judicially approved. CSEA v. PERB, 213 A.D.2d 897, 28 PERB ¶7004 (3d Dep't 1995).

[7/] City of Saratoga Springs, 18 PERB ¶3009 (1985); City of Buffalo, 17 PERB ¶3090 (1984).

For the reasons set forth above, the charge is conditionally dismissed subject to a motion to reopen in accordance with our decision herein. SO ORDERED.

DATED: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROCHESTER POLICE LOCUST CLUB, INC.,

Charging Party,

-and- **CASE NO. U-16722**

CITY OF ROCHESTER,

Respondent.

HARRIS BEACH & WILCOX (LAWRENCE J. ANDOLINA of counsel), for Charging Party

LINDA S. KINGSLEY, CORPORATION COUNSEL (YVETTE C. GREEN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Rochester (City) to a decision by an Administrative Law Judge (ALJ) on a charge against the City filed by the Rochester Police Locust Club, Inc. (Locust Club). The Locust Club alleges in its charge that the City violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it refused the Locust Club's demand for certain factual information regarding police officers who are assigned as investigators.

After a hearing, the ALJ held that the charge was timely filed, that the demand for information was reasonable and relevant both to the administration of the parties' collective bargaining agreement and to issues raised in negotiations which were then pending for resolution by an interest arbitration

panel, and that the information demanded was not exempt from disclosure either as attorney work product or material prepared solely for litigation. The ALJ held, therefore, that the City had violated the Act as alleged.

The City argues in its exceptions that the charge is untimely, at least to the extent that it complains about the City's refusal to provide the Locust Club with a departmental document known as the "Weisner Report"; that the charge as filed concerns only the Weisner Report and, as such, the ALJ's order to produce anything other than that report exceeds the scope of the charge as filed; and finally, that the information demanded is not subject to compulsory disclosure under the Act because it is privileged. The Locust Club argues in its response that the ALJ's decision is correct and should be affirmed.

Having reviewed the record and considered the parties' arguments, we affirm the ALJ's decision.

As a threshold matter, we must address an issue which was not specifically discussed by the parties or the ALJ. A refusal to provide information is typically the subject of a charge alleging a refusal to negotiate under §209-a.1(d) of the Act. This charge alleges only a §209-a.1(a) violation. Section 209-a.1(a) of the Act makes it improper for an employer to interfere with the statutory rights of its public employees. The question presented, therefore, is whether a refusal to provide information pursuant to demand which is relevant to a union's exercise of its rights and duties under the Act constitutes an

interference with employees' rights. The parties and the ALJ have assumed that a refusal to provide such information, which is not otherwise exempt from disclosure, may constitute a violation of §209-a.1(a) of the Act. For the reasons set forth below, we so hold.

Public employees' statutory rights of organization and representation have meaning only to the extent that their chosen bargaining agent is positioned to effectively represent their interests. The Act extends to a bargaining agent, both explicitly and implicitly, certain basic rights to give effect to the rights of the public employees represented by the bargaining agent. A right to the receipt of information relevant to collective negotiations and contract administration is one such fundamental right.[1/] The denial of a reasonable demand for information which is relevant to collective negotiations, grievance adjustment, the administration of a collective bargaining agreement, or the resolution of impasses arising in the course of collective negotiations impairs the union's ability to effectively represent the interests of the employees in its unit. By rendering the union less able to represent the interests of its unit employees, an employer which improperly refuses a demand for information interferes per se with the statutory rights of its employees, in violation of §209-a.1(a) of the Act.

[1/] Board of Educ., City Sch. Dist. of the City of Albany, 6 PERB ¶3012 (1973).

Having concluded that §209-a.1(a) is applicable to an alleged improper refusal by an employer of a demand for information, we turn to the City's exceptions. All of the City's exceptions are based directly or indirectly on the claim that the Locust Club's January 25 demand for information was for a particular document, i.e., the Weisner Report. A demand for that document was made and refused earlier, but the demand in January was only for the following four specific pieces of factual information: 1) the names of the police officers assigned as investigators; 2) their current assignment; 3) their date of appointment; and 4) their date of assignment into positions where they performed the functions of an investigator.

The Locust Club's demand for this information is not the same as its earlier demands for a copy of the Weisner Report, even if that document contained the information which was subsequently requested. As the charge was filed within four months of the City's refusal of the January demand for information only, the charge is timely. We do not decide, therefore, whether the charge would be timely under any other theory.

As the demand refused was for specific information, not a departmental document, it is also clear that the City's various privilege defenses are inapplicable. The demand made in January was for factual information regarding departmental work assignments. Those facts existed apart from any litigation and they were not created as the product of any attorney's work.

The incorporation of those facts into a document does not make the facts themselves privileged. Whether the Weisner Report would be privileged on these or other grounds is an issue which is simply not presented in this case. Although a comment made by the City's attorney during oral argument of a case before the Court of Appeals[2/] triggered the Locust Club's January demand for information, that does not make the factual information sought pursuant to the demand privileged and exempt from disclosure. It is the nature of the information demanded which is relevant to any privilege defense, not the reasons prompting the demand. The information demanded in January was not privileged on the grounds asserted by the City. The Locust Club was not seeking any document prepared by an attorney or any material preparefor litigation, only some facts within the City's possession related to ongoing departmental operations and which existed independently of any attorney work product or litigation papers. Moreover, the City attorney's reference to and use of one of the facts made subject to the Locust Club's January demand for information, if anything, would seem to waive any privilege, even assuming one were to exist.

The ALJ found the Locust Club's demand for information reasonable, relevant to the carrying out of its responsibilities under the Act, and not burdensome to the City. The City takes no

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[2/]That litigation involved a City police investigator who had sued the City because he had not received a permanent appointment to an investigator's position. The City attorney's comment was about the number of officers assigned as investigators.

exception to these findings, with which we agree. The charge is timely, the City's refusal to provide the information demanded was not privileged, and the ALJ's decision and order is restricted to the charge as filed and established on the record. Accordingly, we affirm the ALJ's decision.

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

IT IS, THEREFORE, ORDERED that the City:

1. Immediately provide to the Locust Club the information it requested on January 26, 1995 in regard to police officers assigned to the position or functions of investigator.
2. Sign and post the notice in the form attached at all locations ordinarily used to post notices of information to employees in the unit represented by the Locust Club.

DATED: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, 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 in the unit represented by the Rochester Police Locust Club, Inc., that the City of Rochester will:

1. **Immediately provide to the Rochester Police Locust Club, Inc., the information it requested on January 26, 1995 in regard to police officers assigned to the position or functions of investigator.**

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

CITY OF ROCHESTER

. . . . . .

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

MAHMOOD YOONESSI, M.D.,

Charging Party,

-and-

CASE NO. U-17976

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK AT BUFFALO) and UNITED UNIVERSITY PROFESSIONS,

Respondents.

MAHMOOD M. YOONESSI, M.D., pro se

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Mahmood M. Yoonessi, M.D., to a decision of the Acting Director of Public Employment Practices and Representation (Acting Director) dismissing his improper practice charge, which alleges that the State of New York (State University of New York at Buffalo) (State) and United University Professions (UUP) violated, respectively, §209-a.1(a) and (c) and §209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) in the handling and settlement of several grievances filed by UUP on behalf of Yoonessi.

Yoonessi was notified by the Acting Director that the charge was untimely in most respects and failed to set forth facts which, if proven, would support either a finding that the State had discriminated against Yoonessi for the exercise of rights

protected by the Act or that UUP's conduct was arbitrary, discriminatory or in bad faith. In response, Yoonessi filed an amendment to the charge, but the Acting Director, finding that the amendment had failed to correct the noted deficiencies, dismissed the charge.

Yoonessi excepts to the Acting Director's decision on the grounds that his charge is not untimely and that new evidence, which he has included in his exceptions, establishes the alleged violations by the State and UUP.

Based upon a review of the record and Yoonessi's arguments, we affirm the decision of the Acting Director.

Yoonessi, a doctor and associate professor at the State University of New York at Buffalo School of Medicine from 1976 to 1991, filed contract grievances relating to the management of clinical practice income, denial of due process, and harassment, and disciplinary grievances protesting misconduct charges. UUP processed each grievance through various stages of the grievance procedure, up to and including arbitration on his earliest grievances. Some grievances were held pending the outcome of the earlier grievances. Yoonessi was terminated by the State in 1991 for failing to adhere to the terms of an earlier disciplinary arbitration award and for failing to follow appropriate billing and reimbursement procedures. Among the grievances UUP was pursuing for Yoonessi was a grievance challenging the termination.

In May 1996, UUP advised Yoonessi that it had entered into a settlement with the State of all the outstanding grievances.[1/] Yoonessi was to receive a lump sum settlement in the amount of $75,000, the State agreed that it would not interfere with his physician's privileges at any of its affiliated hospitals, and nothing in the agreement was to be construed as an admission of guilt or wrongdoing by any party to the agreement. All of the grievances were withdrawn with prejudice. Yoonessi did not agree with the settlement terms and filed this charge.

Yoonessi's charge was filed with PERB on June 19, 1996. Any allegations which relate to actions by the State or UUP which occurred more than four months before that date are untimely.[2/] The only allegation in the charge which is timely relates to the UUP - State grievance settlement reached in May 1996. The Acting Director, therefore, correctly dismissed those aspects of the charge which occurred before February 19, 1996.

As to the settlement of the grievances entered into by UUP and the State in May 1996, Yoonessi has provided no facts which would support a finding that the State was improperly motivated in reaching the grievance settlement or that UUP was arbitrary, discriminatory or acting in bad faith when it accepted the

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[1/]Yoonessi is also proceeding in the Court of Claims in an action against the State for monies he claims are due from his employment with the State. He is represented in that action by private counsel. By our decision in this case, we express no opinion regarding the merit of Yoonessi's claim.

[2/]Rules of Procedure, §204.1(a).

settlement.[3/] That the money portion of the settlement was far less than Yoonessi claims is due and owing to him does not by itself establish a violation of the Act by either the State or UUP.

Yoonessi seeks by this charge a review of UUP's performance in the settlement of his several grievances. It is not the policy of this Board to substitute its view of a proper settlement for that reached by a union. Indeed, it has been long-recognized by labor relations agencies and the courts that

> any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities. For that reason, the final product of the bargaining process may constitute evidence of a breach of the duty only if it can be fairly characterized as so far outside a "wide range of reasonableness that it is wholly "irrational" or "arbitrary". (citations omitted)[4/]

Here, Yoonessi offered evidence that his claim of the monies due him was far in excess of the monetary portion of the settlement agreement UUP reached with the State after pursuing numerous grievances for Yoonessi over several years. However, his own papers show that the settlement was multifaceted and avoided

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[3/]Yoonessi included with his exceptions excerpts from a deposition in his case at the Court of Claims. We decline to accept such evidence, offered for the first time in Yoonessi's exceptions, because the deposition took place on June 18, 1996, the day before Yoonessi filed the instant charge. As he had knowledge of the testimony given at the deposition before he filed the charge, it was not, as he characterizes it in his exceptions, "new evidence".

[4/]Air Line Pilots Ass'n Int'l v. O'Neill, 499 U.S. 65, 136 LRRM 2721, 2726 (1991).

litigation of allegations of misconduct which had been raised against him by the State. In these circumstances, and there being no other facts alleged which would support a finding that UUP's agreement with the State was arbitrary, the Acting Director correctly dismissed his charge.

Based upon the foregoing, the exceptions are denied and the decision of the Acting Director is affirmed.

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

DATED: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, 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-4487**

COUNTY OF GENESEE,

Employer.

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Petitioner

HARTER, SECREST & EMERY (RONALD J. MENDRICK and DAVID M. KRESOCK of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Genesee (County) to a decision issued jointly by the Acting Director of Public Employment Practices and Representation (Acting Director) and an Administrative Law Judge (ALJ)[1/] on a petition filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). After a hearing, the Acting Director/ALJ found that a unit consisting of four head nurses and

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[1/]The decision was issued by both the ALJ and the Acting Director in response to a decision by Supreme Court in Union-Endicott Cent. Sch. Dist. v. PERB, 29 PERB ¶7004 (March 1996). In relevant part, Supreme Court held that a decision in a representation case must be made by the person who conducted the hearing, in this case, the ALJ. Supreme Court's decision was recently reversed on appeal. ____ A.D.2d ____, 29 PERB ¶7020 (3d Dep't Nov. 7, 1996).

six supervising nurses employed at the County's nursing home was most appropriate. The County had argued that these ten unrepresented employees were most appropriately added to CSEA's existing unit of approximately 200 nursing personnel. The primary basis for the Acting Director's/ALJ's contrary conclusion was that the head and supervising nurses directly supervised the employees in CSEA's existing unit and that the supervision was "of a nature likely to cause a conflict of interest . . . ." Also cited as factors favoring a separate unit were the head nurses' and supervising nurses' exercise of professional judgment and the head nurses' involvement in obtaining reimbursement funds and their attendance at monthly meetings chaired by the administrator of the nursing home.

The County argues in its exceptions that the Acting Director/ALJ misapplied precedent in a decision which is not supported by the facts in the record. According to the County, the record establishes that head nurses and supervising nurses do not have any significant supervisory duties or responsibilities which might warrant a separate unit for them. There being no reasonable basis to conclude that the addition of the head nurses and supervising nurses to CSEA's existing unit would create any sharp conflicts of interest, the County argues that a separate unit should not have been found most appropriate.

CSEA argues in response that there is established on the record a reasonable basis to conclude that the inclusion of the head and supervising nurses within the rank-and-file unit would

create a conflict of interest arising from their supervisory status, a conflict exacerbated by the disparity in certain of the terms and conditions of employment applicable to the current unit employees and the head nurses and supervising nurses.

Having reviewed the record and considered the parties' arguments, we reverse the Acting Director/ALJ decision.

There is no prohibition against mixed units of supervisors and rank-and-file employees. Such units are not and never have been per se inappropriate under the Act. It is the nature and level of supervisory functions which have always determined whether a mixed unit of supervisors and subordinates is most appropriate or a unit of supervisors separate from the rank-and-file is most appropriate. As summarized in Uniondale Union Free School District,[2/] it is the community/conflict of interest and the employer's administrative convenience standards set forth in §201.7(a) and (c) of the Act which determine the appropriate uniting of previously unrepresented supervisors. Here, the County's articulated administrative convenience favors a placement of the head and supervising nurses within CSEA's existing unit to avoid a proliferation of units. Relevant factors in the community/conflict of interest inquiry center on the significance of the supervisory responsibilities and the alleged disparity of benefits for we do not consider the other factors mentioned in the Acting Director/ALJ decision to establish a community or conflict of interest which would dictate

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[2/]21 PERB ¶3060 (1988).

either their inclusion within or exclusion from CSEA's existing unit. These other factors simply have not been shown to have any real effect upon unit employees' terms and conditions of employment and they are not inherently likely to be any source of working or bargaining conflict.

In Unatego Central School District (hereafter Unatego),[3/] the Board rejected a disparity of benefits as a basis to exclude a group of unrepresented employees from an existing unit where the inclusion of the unrepresented employees within an existing unit would otherwise be most appropriate. In Unatego, the benefits enjoyed by the teachers in the existing unit were "substantially greater" than those of the long-term substitutes the incumbent union sought to add to its existing unit. Notwithstanding this disparity, the Board reversed the Director's decision, in which the Director had found a separate unit for the substitutes to be most appropriate, and ordered them added to the existing teachers' unit notwithstanding the employer's opposition.

The disparity in benefits between the head and supervising nurses and the nursing personnel in CSEA's existing unit is substantially less than the disparity in Unatego. If the greater disparity of benefits in Unatego did not preclude a finding that an overall unit was most appropriate, a fortiori, the much lesser disparity here cannot dictate the appropriateness of separate units.

[3/]15 PERB ¶3097 (1982).

We are, therefore, left with the primary basis for the Acting Director/ALJ decision and the focus of the parties' arguments on appeal. The question is whether the supervisory duties and responsibilities of either or both the head nurses and supervising nurses are of a nature and level "significant" enough to create a reasonable likelihood that a combined unit will create conflicts of interest and outweigh the strong community of interest arising from a common professional status and mission. The analysis necessary to answer the question presented is essentially fact specific and it is a disagreement with the Acting Director's/ALJ's findings of fact which constitutes the essence of the County's exceptions. In general summary, it is quite simply the County's position that the record does not establish that either the head nurses or the supervising nurses perform any significant supervisory duties or have any significant supervisory responsibilities. The primary responsibility of head nurses, according to the County, is the coordination of resident care within the nursing units, one shared equally by the supervising nurses, who also coordinate staffing levels under established procedures.

Because the uniting determination in this type of case is so highly fact specific, we have carefully reviewed the record and have concluded from that review that, contrary to the Acting Director's/ALJ's findings, head nurses and supervising nurses do not have duties of a nature and level significant enough to necessitate a separate unit for them.

As the County emphasizes in its arguments, and CSEA admits, the nurses who are the subject of this petition do not have a supervisory role in hiring, discharge, promotion or grievance administration. Indeed, the head nurses and supervising nurses have responsibility on a regular basis for only two supervisory functions of significance to us. Both the head and supervising nurses have as the defining characteristic of their job a responsibility to ensure that resident care is delivered according to prescribed plans. To that end, the County requires that they direct their subordinates on a daily basis and that they both formally and informally evaluate their subordinates' job performance. Their daily direction of staff, however, is but an incident of control attributable to their professional status, higher skills, or nursing experience. That direction is given in the interest of patient care and is exercised pursuant to relevant professional nursing standards, much as direction is offered by others in the existing unit. For example, registered nurses may direct licensed practical nurses who in turn may direct nursing assistants. We simply do not consider direction of this type for this purpose to constitute significant supervisory authority requiring or warranting an exclusion of the head and supervisory nurses from a rank-and-file unit.

The implications of a contrary conclusion for the uniting of professional employees is of great concern to us. As with mixed units of supervisors and subordinates, mixed units of professional and other employees are not <u>per se</u> inappropriate

under the Act. Most professionals supervise in the sense that they have authority to assign tasks to others and to responsibly direct their work. If any person who regularly assigns tasks to others or who directs their work is possessed of significant supervisory authority for that reason alone, then most professional employees would be entitled to separate units as of right. Such overfragmentation and undue proliferation of units would be flatly contrary to the policies of the Act.

Although the head nurses' and supervising nurses' responsibility to evaluate subordinates is a more typical example of significant supervisory authority, it is one which is ultimately unpersuasive to us of a need for a separate unit in this case. These evaluations, required by law and County policy, do not effect changes in employees' terms and conditions of employment. Any action to be taken pursuant to these evaluations, favorable or unfavorable, is within the control of the County's Director of Nursing and its Nursing Home Administrator, who approve all evaluations.

We are not unmindful, as this record confirms, that the direction and evaluation functions can and have caused tensions between supervisors and subordinates, the latter at least perceiving the direction and evaluation as criticism or as actions which can lead to discipline or other adverse personnel actions. There are, however, multiple sources of tension within a workplace cutting across all levels of employees. Unless we were to establish a <u>per se</u> supervisory exclusion rule, which we

never have been willing to do, tensions, real or imagined, stemming from supervisor-subordinate relationships are not entitled to more weight in making a unit determination than any other of the myriad sources of workplace pressures and strains which can affect employees.

We are also aware that the supervising nurses in this case have other supervisory responsibilities such as making overtime assignments, granting or denying requests for emergency leaves of absence, setting and maintaining staffing levels on shifts and verifying time and attendance for payroll purposes. The duties in these areas, however, either occupy only a small part of the supervising nurses' job, are undertaken by them irregularly, are performed within specific guidelines, or are insubstantial in their effect upon employees. None of these several miscellaneous duties, singly or in combination, would warrant a separate unit for supervising nurses only.

In summary, we conclude that neither head nurses nor supervising nurses have any significant supervisory duties or responsibilities which would preclude their being represented within CSEA's existing unit. However, should substantial conflicts in fact arise in the future as a result of the inclusion of the head and supervising nurses into CSEA's existing unit, we would be willing to consider a petition seeking a reconfiguration of that unit.

For the reasons set forth above, the Acting Director's/ALJ's decision is reversed and the County's exceptions are granted.

There being no question of CSEA's majority status, the head nurses and supervising nurses are hereby added to CSEA's existing nursing unit at the Genesee County Nursing Home. SO ORDERED.

DATED: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

PRASANNA W. GOONEWARDENA,

Charging Party,

-and-

CASE NO. U-14748

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

Respondent,

-and-

STATE OF NEW YORK (SUNY HEALTH SCIENCE CENTER AT BROOKLYN),

Employer.

PRASANNA W. GOONEWARDENA, pro se, and BERNARD W. GOONEWARDENA, for Charging Party

NANCY E. HOFFMAN, GENERAL COUNSEL (PAMELA BAISLEY of counsel), for Respondent

WALTER J. PELLEGRINI, GENERAL COUNSEL (RICHARD MCDOWELL of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Prasanna W. Goonewardena to a decision of an Administrative Law Judge (ALJ) dismissing his improper practice charge alleging that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) violated §209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) by refusing to represent him at a March 10,

1993 interrogation[1/] and by coercing him to sign a settlement agreement on sexual harassment charges in an attempt to cover up the alleged misconduct of another employee in the unit represented by CSEA. Goonewardena's employer, the State of New York (SUNY Health Science Center at Brooklyn)(State), was made a party to the proceeding pursuant to §209-a.3 of the Act.

The ALJ dismissed as untimely the allegations in the charge relating to the March 10, 1993 questioning of Goonewardena without representation. The charge was filed on July 26, 1993. Therefore, as the March 10, 1993 interrogation occurred more than four months prior to the filing of the charge,[2/] the ALJ correctly dismissed the allegations related to it.

The remainder of Goonewardena's charge alleges that as a result of the March 10 questioning, during which the other employee's alleged misconduct on January 31, 1993 and in February 1993 was discussed, allegations of Goonewardena's own sexual harassment of the employee were also investigated. Goonewardena, who was at all times relevant to the charge a probationary employee, could have been terminated with two weeks notice

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[1/]Goonewardena was to be questioned by Steven Greenblatt, the Director of Labor Relations at the SUNY Health Science Center at Brooklyn, about another employee's abrupt departure, in February 1993, from the switchboard area where they both worked. During the interrogation of both Goonewardena and the other employee on March 10, Goonewardena was questioned about an incident of sexual harassment which allegedly occurred on January 31, 1993, and a confrontation arising from that incident between Goonewardena and the other employee in February, which prompted the other employee to leave Goonewardena alone in the switchboard area.

[2/]Rules of Procedure, §204.1(a).

because of his actions.[3/] However, Rick Ford, the CSEA local vice-president, who had represented the other employee, who is permanent, at the March 10 interrogation, interceded on Goonewardena's behalf with Greenblatt. Ford testified that Goonewardena had sought his assistance in retaining his position and that he wanted to help Goonewardena because he was young, had not intended to sexually harass the other employee by his remarks and was sincerely interested in continuing his employment with the State. Therefore, Ford, after learning that Greenblatt intended to terminate Goonewardena because of his conduct, advocated for Goonewardena. As Greenblatt testified, Ford wore him down and Greenblatt agreed on or about March 30 that Goonewardena could continue his employment if he agreed to the terms set forth by Greenblatt in the settlement agreement. Greenblatt gave the agreement to Ford to obtain Goonewardena's signature.

Goonewardena alleges that Ford coerced him into signing a "last chance" settlement agreement on March 31, 1993, by physically threatening him and by telling him that if he did not sign the agreement, he would be terminated. The agreement, while allowing Goonewardena to keep his job, contained an admission that Goonewardena had engaged in sexual harassment toward a co-

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[3/]Provisions in the State-CSEA collective bargaining agreement setting forth the disciplinary procedure specifically exclude probationary employees.

worker which could have resulted in his termination.[4/] Goonewardena also acknowledged in the agreement that he had consulted with his CSEA representative and that he was voluntarily entering into the agreement. Goonewardena was subsequently terminated by the State in June 1993 due to various complaints by other co-workers and his supervisors. Goonewardena argues that his termination would not have taken place but for the provisions of the March 31, 1993 agreement.

The ALJ dismissed the charge, finding that CSEA had not breached its duty of fair representation.

Goonewardena excepts to the ALJ's decision, arguing that the ALJ erred in crediting the testimony of Ford and Greenblatt, in her conduct of the hearing and in finding that CSEA had not violated the Act. CSEA and the State support the decision of the ALJ.

After a review of the record and consideration of the parties' arguments, we affirm the ALJ's decision.

Goonewardena argues in his exceptions that the ALJ suppressed evidence, disallowed questions and refused to subpoena

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[4/] The agreement also extended Goonewardena's probationary period from December 3, 1993 to June 3, 1994, changed his shift, imposed a monetary penalty and the loss of one week of annual leave accruals, and contained an agreement to attend sexual harassment training and to avoid the other employee, and a waiver of any rights to appeal in any forum a termination for violating the terms of the agreement.

witnesses on his behalf.[5/] A careful review of the record reveals that this was not the case. To the contrary, the ALJ allowed Goonewardena and his representative a great deal of latitude in pleading and presenting Goonewardena's case. We, therefore, find no merit in Goonewardena's argument that the ALJ erred in either her rulings or the general conduct of the hearing.

There is no credible evidence in the record to support Goonewardena's assertion that Ford coerced him into signing the March 31 settlement agreement. The ALJ credited the testimony of Ford and Greenblatt and we find nothing in the record which would warrant disturbing her credibility resolution. Ford, recognizing that Goonewardena was likely to be terminated after the March 10 interrogation, convinced Greenblatt to continue Goonewardena's employment. Greenblatt imposed certain conditions which Ford related to Goonewardena with the accurate statement that Goonewardena would be terminated if he did not agree to Greenblatt's conditions and sign the agreement. This was not a threat but a statement of fact. The ALJ further found no credible evidence that Ford physically threatened Goonewardena. Indeed, it is extremely unlikely that such a threat was made, given the efforts Ford expended to save Goonewardena's job. If, as posited by Goonewardena, Ford was trying to make Goonewardena

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[5/]Neither Goonewardena nor his uncle, Bernard Goonewardena, who represented him at the hearing and filed the exceptions on his behalf, are attorneys or labor relations professionals.

a scapegoat to cover up the alleged misconduct of the other employee who was interviewed on March 10, he could have legitimately done nothing for Goonewardena, who would have then been terminated by Greenblatt.

There is no evidence on this record that CSEA acted in an arbitrary or discriminatory manner toward Goonewardena or that it acted in bad faith. The settlement agreement, while containing stringent conditions, did allow Goonewardena to continue his employment. The agreement did extend Goonewardena's probationary term, but it was his subsequent actions, which were unrelated to the settlement agreement and which arose during his original probationary period, that caused Greenblatt to terminate him. Neither the settlement agreement itself nor Ford's actions in bringing it about breach CSEA's duty of fair representation. To the contrary, CSEA, through Ford, gave Goonewardena help when it had no obligation to do so and it is this type of union representation which should be encouraged, not condemned as improper.

Based on the foregoing, Goonewardena's exceptions are dismissed and the ALJ's decision is affirmed.

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

DATED: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JAMES J. BURTON,

Charging Party,

-and-

CASE NO. U-17390

VERNON VERONA SHERRILL TEACHERS ASSOCIATION,

Respondent.

JAMES J. BURTON, pro se

JAMES R. SANDNER, GENERAL COUNSEL (IVOR R. MOSKOWITZ of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Vernon Verona Sherrill Teachers Association (Association) to a decision by an Administrative Law Judge (ALJ). The ALJ held that the Association had violated §209-a.2(a) of the Public Employees' Fair Employment Act (Act) by failing to provide James J. Burton, a unit member who is not a member of the Association, with an advance reduction of his agency shop fee for 1995-96 and by refusing to allow him to appeal the Association's calculation of the amount of the agency shop fee under its agency shop fee procedure. The Association denied that Burton had filed an agency shop fee objection for 1995-96.

Burton is not now, nor has he ever been, a member of the Association. He has filed agency shop fee objections for each of

the three years prior to 1995-96 that the Association has had an agency shop fee refund procedure in place.[1/] In each of those years, Burton placed his agency shop fee objection in the school mailbox of the Association's president, Edward Patricia. The Association acquiesced in Burton's use of the school mailbox; indeed, Patricia utilized the school mailboxes to communicate with Burton on agency fee matters over a period of years. The ALJ found that on May 15, 1995, Burton placed his written objection in Patricia's school mailbox. The ALJ further found that Patricia did not receive the objection. In September, 1995, an agency shop fee was deducted from Burton's paycheck.[2/] He objected in writing, placing his complaint in Patricia's school mailbox on October 2, 1995. Patricia replied by a memo dated October 17, 1995, apprising Burton that as he had not received Burton's objection during the appropriate time frame, his request for an agency fee reduction was denied, but noting that if Burton could produce a copy of his letter and proof of mailing, Patricia would consider his request. Burton provided Patricia with a copy

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[1/]The Association's procedure for 1995-96 provides that "objections shall be made, if at all, by individually notifying the Union President by mail during the period between May 15 and June 15, 1995."

[2/]Under the Association's 1995-96 agency shop fee refund procedure, Burton should have received an advance reduction of the agency shop fee in August 1995. Burton testified that he believed that the Association had decided, pursuant to his objections in prior years, not to deduct any agency fees from him for 1995-96 and, therefore, an advance reduction was not necessary.

of his objection letter and proof that his objection was computer-generated on the date he claimed. He further noted:

> As has been done in the past, without your objection, I personally placed my original objection in your school mailbox on May 15, 1995. Due to circumstances which were out of my control, you are now denying that you ever received this objection letter.
>
> ...I made that notification to you via the school mail system.
>
> ...I assume at this time that we must proceed to arbitration as established in your procedure.

Patricia responded by a memo of November 30, 1995, denying Burton's request and further informing him:

> After several communications with NYSUT staff, I have been instructed to inform you of the following:
>
> The procedures adopted by [the Association] with respect to the Agency Fee are designed to comply with the law and to avoid disputes over compliance. The procedures require the use of mail. Most legal experts advise Registered Mail for your own protection. You chose to follow your own procedure, and we did not receive a timely objection. We, therefore, have no further obligation to you for the current year. (Emphasis in original.)

The ALJ found that Burton had properly filed his objection for 1995-96 and that Patricia never received it. The ALJ also determined that service by using the U.S. Postal Service was not, and never had been, a requirement of the Association's procedure. Having found that Burton had met the procedure's filing requirements, the ALJ found that the Association violated §209-a.2(a) of the Act when it refused to process Burton's objection, and she ordered the Association to refund to Burton

the total amount of agency shop fees deducted from his salary for the 1995-96 fiscal year, with interest at the maximum legal rate.

The Association excepts to the ALJ's decision, arguing that she erred in finding that Burton had properly complied with the procedure. The Association further argues that even if it were found that Burton had complied with its procedure's filing requirements, the appropriate remedy is to order the Association to process Burton's objection. Burton supports the ALJ's decision.

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

The ALJ's credibility resolutions are consistent with the record and are not mutually exclusive. Burton, following the procedure he utilized in each of the prior three years, filed a timely objection. The Association failed to process the objection because it did not receive it. However, the Association's procedure is keyed to filing, not receipt. Having been made aware of Burton's objection, the Association, by its own procedure, was obligated to process it. When the Association refused to do so, it violated §209-a.2(a) of the Act.

As to the remedy ordered by the ALJ, we have generally found that a failure to abide by the requirements of the Act regarding the collection of agency shop fees warrants a refund of any fees

collected from the objector in the year in question.[3/] Unlike those cases, where the procedure itself was found defective, thus depriving those employee organizations of their right to agency shop fee deductions, Burton does not here allege that the Association's agency shop fee refund procedure is defective, but rather, that it was not properly followed. In this case, Burton complied with the steps of the Association's agency shop fee refund procedure, as implemented by the Association. The Association should have then processed Burton's objection upon notification that he had complied with its procedure. As the Association did not do so, the appropriate remedy is to place Burton in the position in which he would have been if the Association had continued with its procedure. Had Burton's objection been noted, he would have received an advance reduction of the agency shop fee for 1995-96 and then he could have sought a refund of any amounts in excess of the reduction to which he thought he was entitled. By ordering the Association to process the objection, we address and remedy the violation alleged and found, making Burton whole for the consequences of the Association's violation in a manner that is not punitive in nature.[4/]

[3/]See, e.g., United Univ. Professions, 20 PERB ¶3039 (1987).

[4/]Section 205.5(d) of the Act prohibits the award of punitive damages and affords us the power to order make-whole relief only.

For the reasons set forth above, we deny the Association's exceptions and we affirm the decision of the ALJ, except as to the remedy.

IT IS, THEREFORE, ORDERED that the Association immediately process Burton's objection for the 1995-96 fiscal year, and that interest be paid at the rate of nine percent per annum on any advance reduction and/or subsequent refund from the time that Burton would have received them if his objection had been processed as timely filed under the Association's 1995-96 agency shop fee refund procedure.

We concur with the ALJ that given the unique circumstances of this case and as no other unit employees were affected, a posting of notice of violation is not necessary or appropriate.

DATED: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORLEANS COUNTY DEPUTY SHERIFFS' ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4442

COUNTY OF ORLEANS and ORLEANS COUNTY SHERIFF'S DEPARTMENT,

Joint-Employer,

-and-

SECURITY AND LAW ENFORCEMENT EMPLOYEES, COUNCIL 82, AFSCME, AFL-CIO,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Orleans County Deputy Sheriffs' Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective

negotiations and the settlement of grievances.

Unit: Included: All full-time employees in the following titles: deputy sheriff, deputy sheriff investigator, lieutenant-road patrol, major.

Excluded: All other employees of the Sheriff's Department.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Orleans County Deputy Sheriffs' 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: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ROOSEVELT ISLAND PUBLIC SAFETY OFFICERS BENEVOLENT ASSOCIATION,

Petitioner,

-and-

CASE NO. C-4550

ROOSEVELT ISLAND OPERATING CORPORATION,

Employer,

-and-

UNITED FEDERATION OF POLICE,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

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

Unit: Included: Employees employed by the employer as public safety officers and sergeants.

Excluded: All other employees, including supervisory, confidential, office, executive and managerial employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Roosevelt Island Public Safety Officers Benevolent 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: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

I.B.E.W., LOCAL UNION #363,

Petitioner,

-and- **CASE NO. C-4585**

TOWN OF GREENVILLE,

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,

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

IT IS HEREBY CERTIFIED that the I.B.E.W., Local Union #363 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit: Included: All highway department employees.

Excluded: All elected officials.

FURTHER, IT IS ORDERED that the above named public employer

shall negotiate collectively with the I.B.E.W., Local Union #363. 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: November 20, 1996
Albany, New York

Pauline R. Kinsella, Chairperson

Eric J. Schmertz, Member

GRIEVANCE AND INTEREST ARBITRATION PANELS

A candidate for appointment to the grievance arbitration panel must demonstrate satisfactory experience as a labor arbitrator. Applications for appointment to the panel must include the applicant's vita, five recent arbitration awards written by the applicant, and a listing of all awards rendered in the past two years, such listing to include the names of the parties, the nature of the issue(s) involved, and the appointing authority. Exceptions to the arbitration award requirements may be made for persons who have five or more years of relevant and appropriate professional employment with a federal, state or municipal agency charged with the administration of a labor relations statute and who, by education, training, experience or other objective criteria, can demonstrate such outstanding competence and stature in the field of labor relations as to assure the Board of their ability to serve effectively as a labor arbitrator, and such that their appointment to the panel would be of substantial value to the agency, its clientele and public. Individuals having at least ten years of professional employment with a federal or state agency responsible for administration of a public sector labor relations statute are deemed qualified by the Board for admission to the panel, and will be appointed to the panel on request. Candidates must be residents of, or maintain bona fide business offices within, the State of New York, or a location immediately contiguous thereto. Consistent with staffing needs and caseload demands, the Director of Conciliation should recommend to the Board such persons as are determined to have met the necessary standards and criteria.

A candidate for appointment to the interest arbitration panel must demonstrate substantial experience both as a labor mediator and labor arbitrator, and must be a member of PERB's mediation, fact-finding and grievance arbitration panels. Individuals having at least ten years of professional employment with a federal or state agency responsible for administration of a public sector labor relations statute are deemed qualified by the Board for admission to the panel, and will be appointed to the panel on request. Consistent with staffing needs and caseload demands, the Director of Conciliation should recommend to the Board such persons as are determined to have met the necessary standards and criteria.

A member of the grievance or interest arbitration panel may be removed by the Board for good reason as determined by the Board, including, without limitation, a failure, refusal or inability to comply with or maintain any of the standards, criteria or policies governing appointment to or service on a panel, such as service as an advocate in matters of labor relations or labor standards, or extended periods in which a member is not selected or assigned to a dispute despite availability.

MEDIATION AND FACT-FINDING PANELS

A candidate for appointment to the mediation and fact-finding panels must demonstrate by education, training and experience, or other objective criteria, an ability to serve effectively as a labor mediator or fact finder. Individuals having at least ten years of professional employment with a federal or state agency responsible for administration of a public sector labor relations statute are deemed qualified by the Board for admission to the panels, and will be appointed to the panels on request. Candidates must be residents of, or maintain bona fide business offices within, the State of New York, or a location immediately contiguous thereto. Consistent with staffing needs and caseload demands, the Director of Conciliation should recommend to the Board such persons as are determined to have met the necessary standards and criteria.

A member of the mediation or fact-finding panel may be removed by the Board in the same manner and upon the same terms as members of the grievance and interest arbitration panels.