Panel Handout: Higher Education Issues at Public Sector Labor Boards - A Primer on New York Law Governing Negotiating Units for Faculty Employed by Public Institutions of Higher Education

Seth Agata
New York State Public Employment Relations Board

Follow this and additional works at: http://thekeep.eiu.edu/jcba
Part of the Collective Bargaining Commons, and the Higher Education Commons

Recommended Citation
Available at: http://thekeep.eiu.edu/jcba/vol0/iss11/7

This Proceedings Material is brought to you for free and open access by The Keep. It has been accepted for inclusion in Journal of Collective Bargaining in the Academy by an authorized editor of The Keep. For more information, please contact tabruns@eiu.edu.
A PRIMER ON NEW YORK LAW GOVERNING NEGOTIATING UNITS FOR FACULTY EMPLOYED BY PUBLIC INSTITUTIONS OF HIGHER EDUCATION

Presented by:
Seth H. Agata, Chairperson
New York State Public Employment Relations Board
April 3, 2016
I. Statutory and Regulatory Framework

a. Civil Service Law § 207 (copy attached)
   i. PERB looks at administrative convenience standards in § 207, subd. 1 along with “community of interest” which is given "predominant consideration". *St. Paul Boulevard Fire Dist, 42 PERB ¶ 3009, 3027 (2009).*
   ii. In determining whether there is a “community of interest”, PERB (examined as recently as *Cayuga Community College and County of Cayuga, 49 PERB ¶ 3007 (2016)* citing *County of Franklin, 48 PERB ¶ 3025 (2015)*) considers:
       1. similarities in terms and conditions of employment,
       2. shared duties and responsibilities,
       3. qualifications,
       4. common work location,
       5. common supervision, and
       6. an actual or potential conflict of interest between the members of the proposed unit, and
   iii. PERB also looks at bargaining history including history of collectively bargained agreements with contractual recognition clause where proposed placement is in pre-existing unit. *County of Monroe, 47 PERB ¶ 3001 (2014).*

b. Rules and Regulations of PERB, Parts 201 and 202 (copy attached)

c. Note: “Collateral consequences” for adjunct faculty (and graduate assistants) if considered public employees – coverage under Public Officers Law §§ 73 (regulates behavior and includes 2-year and lifetime “revolving door” bans), 73-a (“Mandatory Financial Disclosure”), and 74 (“Code of Ethics”).
   i. Graduate students subject to §§ 73 and 74 as “state employees” – *Advisory Op. 92-21 (1992, State Ethics Commission)* (copy attached) (working 15-20 hours per week throughout the academic year are regular part-time employees and covered); in footnote, if they earn in excess of filing rate (job rate of SG-24 as set forth in Civil Service Law § 130 (1) (a) as of April 1 of the year in which an annual Financial Disclosure Statement is filed -- $91,821), would have to file financial disclosure forms.
   ii. Adjunct faculty also subject to same provisions; in addition, even if not earning in excess of filing rate, may be required to file financial disclosure statement if employer designates individual as “policy maker”
       2. *Advisory Op. 03-6 (2003, State Ethics Commission)*; applies financial disclosure provisions in § 73-a to SUNY academic titles; individuals who are not engaged in grant activity or any
other activity as specified in Executive Law §94(9)(k), may seek an exemption from filing the statutory disclosure statement.

II. Procedure for Unit Determination

a. PERB Rules of Procedure govern; in the process of being amended pursuant to State Administrative Procedure Act.

b. Employer and employee organization may agree on unit composition; if not, PERB decides:
   i. Employees do not vote or determine whether titles are included or excluded;
   ii. PERB is final arbiter of that issue.

c. An employee organization is either voluntarily recognized by an employer or by PERB certification; the rights and obligations of the parties are identical regardless.

d. If only one employee organization seeks bargaining rights, it may be certified if it produces evidence, e.g., designation cards or petitions, that it represents a majority of the employees in the unit. Otherwise, the Director of Public Employment Practices and Representation (Director) conducts a representation election which may be at the work site or by mail.
   i. In both cases, employees in the bargaining unit cast their ballots in secret.
   ii. A majority of the valid votes that are cast will be dispositive; there can be observers at the election.
   iii. A run-off election may be conducted when no choice on the ballot receives a majority of the valid votes that are cast.

e. If the petition raises a representation question, the Director may assign the matter to an administrative law judge (ALJ) to conduct a conference to limit, clarify, and attempt to resolve the issues and a hearing may be conducted to resolve any dispute.
   i. **Note:** “Pursuant to § 201.9(a)(2) of the Rules, a hearing is not required during the course of an investigation into a question of representation. As a result, an investigation can be completed without holding an evidentiary hearing, [citation omitted]. Under the Rule, whether a hearing is necessary is left to the discretion of the Director.” *Mohawk Valley Community College, 45 PERB ¶ 3050 (2012)* (In which PERB upheld the discretion of the Director to not hold a formal hearing where the ALJ conducted 3 conference calls, held direct communications between and with the parties, and a
majority of employees in the proposed unit designated the petitioning union as exclusive representative and the parties made progress so that certification was held without an election.)

f. A petition for unit clarification or unit placement can also be filed in accordance with § 201.5(e) of the Rules.
   i. A unit placement petition seeks to place an unrepresented position into an existing unit by applying the Act's uniting criteria.
   ii. A unit clarification petition seeks a finding that a position is already included within a unit.
   iii. No showing of interest need be filed with the petition, therefore, it cannot be used where the number of employees sought to be added to a unit affects the majority status of the incumbent.

g. If PERB designates employees as managerial or confidential, they are excluded from representation in any bargaining unit.
   i. Managerial employees are those who formulate policy or may be required to assist directly in the preparation for and conduct of negotiations or have a major role in contract or personnel administration. Confidential employees are those who assist and act in a confidential capacity to managerial employees with labor relations responsibilities.

1. **Note:** Supervisors are not *per se* excluded from representation rights, unless they meet the definition of managerial employees.

2. In Cayuga Community College, 44 PERB ¶ 4012 (2011), the ALJ found that the title of “dean of communication education and workforce development” was managerial. The individual was a member of the executive committee and was involved in short- and long-term planning for the college, assisted the college president in staffing, personnel (including layoffs) and budgeting matters.
ii. An employer may file an application for designation of employees as managerial or confidential with PERB pursuant to § 201.10 of the Rules at any time.

h. Absent the consent of all parties, the employer and bargaining agent may not bargain for the titles at issue until the matter is concluded.

III. Ultimate Discretion in Determining Units with PERB


b. New York Court of Appeals ultimately affirmed PERB’s discretion in defining units (THE landmark decision on PERB’s authority and discretion). Civil Service Employees Assn v. Helsby, 2 PERB ¶ 7013 (1969) affg without opinion 2 PERB ¶ 7007 (3rd Dept 1969) (copies of decisions attached). Per Appellate Division per curiam opinion:

i. “Upon the record of the hearings held upon the petitions filed and the recommendation of its director of representation, the Board determined that neither the general unit designated by the employer nor the units claimed' by the petitioning employee organizations were appropriate under the standards prescribed by the statute (Civil Service Law, § 207, subd. 1, par. [a]), upon findings that: The enormity of this diversity of occupations and the great range in title qualifications requisite for employment in these occupations would preclude effective and meaningful representation in collective negotiations if all such employees were included in a single unit. The occupational differences found here give rise to different interests and concerns in terms and conditions of employment. This, in turn, would give rise to such conflicts of interest as to outweigh those factors indicating a community of interest. Thus, the implementation of the rights granted by the Act to all public employees mandates a finding that a single unit would be inappropriate.

ii. “On the other hand, to grant the type of narrow occupational fragmentation requested by the petitioners would lead to unwarranted and unnecessary administrative difficulties. Indeed, as the State contends, it might well lead to the disintegration of the State’s current labor relations structure.

iii. “Having rejected the units designated or proposed by the litigants, the Board determined that five units, based on occupational groupings, were appropriate under the statutory standards: an
operational services unit, a security services unit, an institutional services unit, an administrative services unit, and a professional services unit.

iv. "Petitioner contends that the Board's determination, insofar as it rejects the general unit designated by the State negotiating committee and establishes five units not requested by any of the parties before it, is arbitrary, capricious, and not supported by substantial evidence, and urges that the public employer's designation of the general unit be reinstated.

v. "While the public employer, in the course of extending recognition to employee organizations, may initially designate bargaining units [the statute] expressly authorizes the Board to establish appropriate employer-employee negotiating units, applying those standards prescribed by the Legislature. Such determination must be made by providing a resolution of a particular dispute as to representation status on petitions filed with it pursuant to § 205, but we do not construe the Board's function as being limited to a review of the employer's designation or to approving or disapproving units proposed by the parties to the dispute."

IV. Non-Faculty, Instructional Higher Ed Units – Teaching Assistants

a. SUNY (Communications Workers of America), 24 PERB ¶ 3035 (1991) in which PERB reversed Director's decision (20 PERB ¶ 4063 (1987) and found that graduate assistants and teaching assistants are employees under the Taylor Law.


i. "Nor are we persuaded by petitioner's claim that the Taylor Law is in pari materia with Labor Law § 511(15). Unlike the Taylor Law, Labor Law § 511(15) specifically excludes from "employment" for the purpose of determining unemployment compensation eligibility 'services rendered for an educational institution by a person who is enrolled and is in regular attendance as a student in such an institution' (see, e.g., Matter of Mitromaras [Roberts], 122 A.D.2d 368, 369–370, 504 N.Y.S.2d 331; Matter of Johnson [Roberts], 101 A.D.2d 622, 623, 474 N.Y.S.2d 882).

ii. "It is true that both statutes concern employment; however, they plainly serve different public policy objectives (compare Civil
Service Law § 200, with Labor Law § 501) and have different administrative mechanisms for interpretation and enforcement (compare Civil Service Law § 205, with Labor Law §§ 530–535). Because both statutes are complete unto themselves, they need not be construed in connection with one another (see, McKinney's Cons. Laws of N.Y., Book 1, Statutes § 221).

c. Symbiosis – the State Ethics Commission looked at the aforementioned PERB and Appellate Division opinions to inform its decision that graduate students are employees under the Public Officers Law.

V. Separate Unit for Non-Tenured Track Instructional Staff? Board of Higher Education of the City of New York, 2 PERB ¶ 3056 (1969).

a. Seminal case from 1969 and still good law. (copy attached) Three parties to the case:

i. Legislative Conference of CUNY filed petition seeking certification as negotiating representative for all members of the instructional staff at CUNY; sought 2 separate units –
   1. One for all members of permanent instructional staff with tenure and those temporary instructional staff on tenure track; and
   2. Another for all other temporary staff (excluding those who work less than 6 hours).

ii. CUNY/Employer wanted a single unit of ALL instructional personnel.

iii. Third-party intervenor (United Federation of College Teachers, AFL-CIO) wanted a single unit of all instructional personnel excluding college science technicians and assistants and college engineering technicians.

b. PERB found that at the time CUNY was “unusual among institutions of higher education because of the very high proportion of nontenured faculty in relation to the total instructional staff.” Nontenured track faculty approached 75% of the number of total instructional staff. (Compare below to PERB’s most recent case, Cayuga Community College and County of Cayuga, 49 PERB ¶ 3007 (January 2016) and consider if this is becoming the norm).

c. First, PERB looked at fundamental differences between faculty-rank-status (FRS) personnel and nonannual lecturers and found they should be in separate units. It found:
i. FRS personnel receive many and various fringe benefits; nonannual lecturers do not.

ii. FRS personnel “exercise important responsibilities regarding the operation of the university” by serving on departmental committees; nonannual lecturers “rarely” serve on those committees.

iii. FRS personnel have loyalty to CUNY as primary personal commitment; nonannual lecturers typically do not.

iv. It rejected notion that because FRS personnel and nonannual lecturers have primary assignment of teaching (often same subjects to same students), there should be amalgamation of titles.

1. Differences alone would not warrant fragmentation;

2. Similarities in mission do not warrant amalgamation.

v. PERB found it proper that FRS personnel and nonannual lecturers be in separate units.

vi. Quoting the Board (2 PERB ¶ 3056, at 3469-3470):

1. “Inasmuch as the nontenured instructional staff comprises a large number of persons who hold other positions from which they receive substantial fringe benefits and to which they owe their primary professional loyalty, their interests and ambitions relative to the City University are different from those of faculty-rank-status personnel.

2. “The faculty-rank-status personnel are the heart of the university. It might be compromising to their independence and to the very stability of the university for nontenured instructional personnel, in numbers almost equal to that of faculty-rank-status personnel, to be included in the unit of faculty-rank-status personnel.”

vii. Also to be included in FRS personnel unit:

1. College science technicians (do not teach or serve on departmental committees but have tenure and salary and fringe benefits);

2. Higher education research and miscellaneous specialized personnel (do not have tenure but are career personnel at CUNY and have other similarities in benefits to tenured personnel).

3. Board found that while there are distinctions between technicians and other specialized personnel and FRS, they did not appear to be “substantial” to warrant separate units.
viii. Titles included in FRS unit, among many, were registrar, assistant registrar and chairman of department (Hunter High School or Elementary School).

d. PERB assigned annual lecturers to same unit as nonannual lecturers.
   i. They received most of the fringe benefits available to permanent staff except with respect to leave.
   ii. They served on some university committees but not what were characterized as certain “important committees.”
   iii. They are not tenured. Indeed, a lecturer could be paid one year on annual line basis then the next year on a nonannual basis.

e. Unusual for PERB – a dissent in which member stated that employee organization had “heavy burden of establishing” that that tenured faculty and nonannual lecturers have interests in conflict. He rejected argument that part-time affiliation with a university means less primary professional loyalty and that there was a significant difference in benefits.

VI. Relevant PERB Decisions Since Board of Higher Education

   i. PERB upheld the decision of the Director that PERB could not process a petition for unit clarification or placement for the “position” of “mini-semester instructor.” Petition dismissed.
   ii. The term “position” to which § 201.2(b) of PERB’s Rules refers is an actual job title, not merely an assignment to perform certain work. “We intended ‘position’ for purposes of § 201.2(b) of our Rules to refer to that for which there exists a title with a duties description and a specification of qualifications as generally required, for example for positions under the Civil Service Law.” 31 PERB ¶ 3059, at 3130.
   iii. “Operative assumption is that unit description corresponds to job titles.” Id.
   iv. Here, no title of “mini-semester instructor” – only an opportunity for persons already employed in other titles and represented by other employee organizations in other units to teach for a short, period of time between semesters.

   i. PERB relied heavily on Nassau Community College, discussed above, in reversing Director.
ii. PERB would not defer to an arbitrator's determination that teachers assigned to work in the "Summer Live" program were clearly excluded from the bargaining unit under the terms of the parties' collective bargaining agreement.

iii. It noted that it was not bound by the parties' interpretation of an arbitration award with regard to unit clarification or placement determinations. Although the Board found that teaching in the at-issue programs constituted an assignment for faculty who were already members of the bargaining unit, PERB rejected the finding that the assignments were excluded from the bargaining unit because they were for less than three months duration.

iv. The contractual recognition clause referenced "positions of limited duration" as opposed to assignments of limited duration, and the "Live" program faculty held regular or part-time positions, the Board granted the FIT's exceptions and dismissed the unit placement portion of the petition.

v. "As there is no separate position of instructor in the Live programs and since full and part-time faculty, who are providing the instruction in the Live programs, are already in the UCE bargaining unit, the unit placement petition, must be dismissed. We have held that for purposes of § 201.2(b) of our Rules a "position" refers to that for which there is a title with a duties description and a specification of qualifications as generally required, for example, for positions under the Civil Service Law." 39 PERB ¶ 3026, at 3084.

Cayuga Community College and County of Cayuga, 49 PERB ¶ 3007 (2016) (copy attached).

i. PERB upheld ALJ's finding that adjunct faculty belonged in unit separate from full-time faculty.

ii. It was found that if adjunct faculty were added to full-time faculty unit, as sought by the employer, then they "would effectively drown out of the voice of the full-time faculty, who would . . . be outnumbered by a more than three-to-one ratio." Part-time faculty numbered 193 and would be members of the Part-Time Faculty Association; Faculty Association had 66 members. There was concern about dilution of the full-time faculty if new members added to the unit.

iii. PERB and ALJ considered that adjunct faculty had been asked to teach courses on a take-it-or-leave-it basis only after full-time faculty selected "overload" courses (additional courses) first.
iv. Full-time faculty benefits were truly comprehensive including longevity increases, promotional stipends, paid sick/personal leave and participation in various retirement options; adjunct faculty compensated strictly on per credit hours basis with no other paid benefits and no leave time or eligibility for any insurance coverage and no participation in any of the governing committees of the college.

v. In addition, neither party wanted to be in the same unit and bargaining history made it clear that since the 1990's, the Faculty Association rejected the opportunity to organize and represent the adjunct faculty. Indeed, the contract defined the bargaining unit to exclude part-time faculty.

vi. PERB rejected what it termed a "conclusory, non-specific claim of administrative convenience." More was needed to raise that as an issue.

vii. PERB also rejected argument by college that Part-Time Faculty Association affiliation with NYSUT (to which Faculty Association was also affiliated), created a conflict. This was consistent with precedent, notably 

City of Binghamton, 9 PERB ¶ 3022 (1976).

viii. Board was asked to overrule Board of Higher Education and specifically declined to do so and reaffirmed its vitality.

VII. NON-BOARD DETERMINATIONS SINCE BOARD OF HIGHER EDUCATION CASE

a. Decisions by ALJ's or the Director do not bind PERB and are not precedential as they are not Board decisions, but they illustrate the application of the Taylor Law, the Rules, and the criteria in Board of Higher Education and other decisions discussed herein.


i. The case involved Adirondack Community College and the Adirondack Community College Faculty Association.

ii. The Association represented two units of full-time day session professional employees at the College, one comprising approximately 58 members of the instructional staff (including department heads), and the other including five “support” personnel--three counselors and two assistant librarians. It sought to consolidate these units into one and also to include certain
unrepresented people in that unit—three assistant instructors and all full-time evening and summer session employees in various job categories.

iii. The employer wanted to continue the unit separation of academic and nonacademic professionals and sought to add to each unit the full-time evening and summer session professional employees the Association desired to represent and assistant instructors in the "support" unit.

iv. The Director found that a single unit of academic and nonacademic personnel was most appropriate.

1. He found a close community of interest between the two groups. The primary function of both academics and assistant instructors is instruction of students. Although the counselors and assistant librarians are not required to teach, they "are engaged in directly supportive activities that are clearly and closely associated with the function of teaching."

2. Moreover, some of them have taught or assisted in courses. Members of both groups, except for assistant instructors, serve together on faculty governance committees.

3. Negotiations for the "support" unit awaited agreement in the academic unit; and many contract provisions were identical for both groups. Furthermore, the nonacademics wanted to be included in the larger academic unit.

4. He rejected the employer's argument for separating the two groups on the basis of differences in working conditions (e.g., structured vs. unstructured workweeks) and special interests (e.g., academic freedom).

5. Specifically, he found that somewhat different working conditions or special concerns do not justify separate negotiating units.

6. "It is necessary to demonstrate that the distinctions have caused, or are likely to create, conflicts at the negotiating table which will frustrate the statutory policy of meaningful negotiations. No such showing has been made here and there is no reason to believe that either group will be precluded from negotiating its particular concerns by the other's presence."

i. The case involved Genesee Community College and SEIU, Local 227 and Genesee Faculty Association.

ii. The Acting Director found that a single unit of faculty and administrative personnel was most appropriate as sought by Genesee Faculty Association as opposed to separate unit sought by SEIU for full-time administrative personnel.

iii. He excluded some titles of individuals who participated in or were otherwise involved in labor negotiations (managerial or confidential) and excluded the campus chief security officer and certain other employees.

iv. In particular, he found that the mission of administrative personnel and instructional personnel were complementary (support activities in support of furthering the teaching mission) and that benefits were substantially the same for both groups.

v. He also found that the argument in favor of an overall unit was supported by the College’s claim of “administrative convenience” on the record and the lack of evidence of actual or potential conflicts between the two groups.

vi. He noted, in addressing the SEIU’s claims, that “apart from their desire for a salary schedule, there is no indication that administrators have any specific negotiating objectives.” 7 PERB ¶ 4044, at 4073.
The Taylor Law
(Public Employees' Fair Employment Act)
Civil Service Law, Article 14

§207. Determination of Representation Status.
For purposes of resolving disputes concerning representation status, pursuant to section two hundred five or two hundred six of this article, the board or government, as the case may be, shall

1. define the appropriate employer-employee negotiating unit taking into account the following standards:

   (a) the definition of the unit shall correspond to a community of interest among the employees to be included in the unit;

   (b) the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate; and

   (c) the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.

2. ascertain the public employees' choice of employee organization as their representative (in cases where the parties to a dispute have not agreed on the means to ascertain the choice, if any, of the employees in the unit) on the basis of dues deduction authorization and other evidences, or, if necessary, by conducting an election.

3. certify or recognize an employee organization upon (a) the determination that such organization represents that group of public employees it claims to represent, and (b) the affirmation by such organization that it does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike.
PART 201
DETERMINATION OF REPRESENTATION STATUS UNDER SECTION 207 OF THE ACT
(Statutory Authority: Civil Service Law, art. 14)

Sec.
201.1 Scope
201.2 Petition; filing
201.3 Time for filing of petitions
201.4 Showing of interest
201.5 Contents of petition for certification; contents of petition for decertification; contents of petition to clarify existing unit or to determine unit placement of positions; response to petition
201.6 Publication
201.7 Intervention
201.8 Notice of pending petitions
201.9 Investigation and elections
201.10 Employer applications for designation of persons as managerial or confidential
201.11 Decision by administrative law judge
201.12 Exceptions to decision of administrative law judge; action by board

§201.1 Scope.

(a) The following relates to all public employees except:

(1) those employees employed by a government that has adopted procedures by local law, ordinance or resolution, pursuant to section 212 of the act, and with respect to which there is in effect a determination by the board that such provisions and procedures are substantially equivalent to the provisions and procedures set forth in the act and in pertinent rules with respect to the State (see Part 203 of this Chapter); and

(2) those covered by chapter 54 of the Charter and Administrative Code of the City of New York.

(b) Except for section 201.10, this Part does not relate to public employees employed by a government which has acted through its legislative body pursuant to section 206.1 of the act and established an impartial agency to administer procedures not inconsistent with section 207 of the act (see Part 202 of this Chapter).
§201.2 Petition; filing.

(a) A petition for investigation of a question concerning representation of public employees under the act (hereinafter called a petition for certification), or a petition alleging that an employee organization which has been certified or is being currently recognized should be deprived of representation status as to all or part of a unit (hereinafter called a petition for decertification), may be filed by one or more public employees or any employee organization acting in their behalf, or by a public employer, provided that individual employees may not file a petition for certification.

(b) A petition may be filed at any time by a public employer or a recognized or certified employee organization to clarify whether a position is encompassed within the scope of an existing unit (hereinafter called a unit clarification petition), or to determine the unit placement of a position (hereinafter called a unit placement petition). The filing and processing of the petition shall be in accordance with sections 212.1(a), 201.5(c), 201.5(d), 201.8, 201.9(a) and (g), and 201.11 of this Part, and Part 212. Section 201.4 of this Part shall not apply. In determining the unit placement of a position, the administrative law judge shall consider whether the placement would be consistent with the criteria set forth in section 207 of the act. The administrative law judge may decline to make any clarification or placement not otherwise consistent with the purposes or policies of the act. Exceptions to any determination of the administrative law judge may be filed pursuant to Part 213.

(c) Petitions under this section shall be on a form provided by the board for this purpose, and signed. An original and four copies of the petition shall be filed with the director. Petition forms will be supplied by the director upon request. Prior to the issuance of a decision by the administrative law judge, a petition may be withdrawn only with the consent of the director. After the issuance of a decision by the administrative law judge, the petition may be withdrawn only with the consent of the board. Whenever the director or the board, as the case may be, approves withdrawal of any petition, the case shall be closed.

§201.3 Time for filing of petitions.

(a) A petition for certification may be filed between 30 and 120 days after a public employer has been asked to recognize an employee organization, if the request has not been denied and no employee organization has been recognized or certified as majority representative of any of the employees within the unit alleged to be appropriate; provided, however, that the petition may be filed by the public employer within such 120 days. Unless filed by a public employer, such a petition shall be supported by a showing of interest of at least 30 percent of the employees within the unit alleged to be appropriate.

(b) A petition for certification may be filed by an employee organization within 30 days after it has been refused recognition by the public employer. Such a petition shall be supported by a showing of interest of at least 30 percent of the employees within the unit alleged to be appropriate.
(c) A petition for certification or decertification may be filed within 30 days after publication of notice as described in section 201.6 of this Part, or receipt of written notice, that another employee organization has been recognized. Such a petition shall be supported by a showing of interest of at least 30 percent of the employees in the unit deemed appropriate by the employer or alleged to be appropriate by the petitioner.

(d) A petition for certification or decertification may be filed during the month before the expiration, under section 208.2 of the act, of the period of unchallenged representation status accorded a recognized or certified employee organization, provided, however, that a public employer may not file a petition challenging the majority status of a recognized or certified employee organization in an existing negotiating unit unless it has a demonstrable, good-faith belief that the employee organization is defunct. Unless filed by a public employer, a petition for certification or decertification shall be supported by a showing of interest of at least 30 percent of the employees in the unit already in existence or alleged to be appropriate by the petitioner.

(e) A petition for certification or decertification may be filed by an employee organization other than the recognized or certified employee organization and a petition for decertification may be filed by one or more public employees, if no new agreement is negotiated, 120 days subsequent to the expiration of a written agreement between the public employer and the recognized or certified employee organization or, if the agreement does not expire at the end of the employer's fiscal year, then 120 days subsequent to the end of the fiscal year immediately prior to the termination date of such agreement. Thereafter, such a petition may be filed until a new agreement is executed. Such a petition shall be supported by a showing of interest of at least 30 percent of the employees in the unit already in existence or alleged to be appropriate by the petitioner.

(f) A petition for certification or decertification which seeks to review a determination of representation status of public employees made under provisions and procedures established by a local government pursuant to section 212 of the act may be filed together with a petition for review under section 203.8 of this Chapter. Such a petition will not be processed unless the board determines that the continuing implementation of the provisions and procedures of the local government has not been substantially equivalent to the provisions and procedures set forth in the act and these rules. Unless filed by a public employer, such a petition shall be supported by a showing of interest of at least 30 percent of the employees in the unit deemed appropriate by the local government or an impartial agency or alleged to be appropriate by the petitioner.

(g) No petition may be filed for a unit which includes job titles that were within a unit for which, during the preceding 12-month period, a petition was processed to completion.
§201.4 Showing of interest.

(a) Proof of showing of interest shall be filed simultaneously with a petition or motion to intervene.

(b) In determining whether the evidence submitted to establish a showing of interest is timely, the director will accept evidence of dues deduction authorizations which have not been revoked, evidence of current membership, original designation cards or petitions which were signed and dated within six months of the submission, or a combination of the three. Designation cards shall be submitted in alphabetical order.

That part of any showing of interest consisting of employee petitions, signed or dated on or after March 15, 1996, shall be submitted on a form prescribed by the director, which shall include the name of the petitioner, the unit alleged by the petitioner to be appropriate, and shall represent that the showing of interest is in support of the certification and/or decertification petition as applicable.

The director may require that an alphabetized listing of the names of the signatories on individually signed and dated petitions be filed within a reasonable period of time after submission of the showing of interest petitions. If such an alphabetized listing is required, the person or persons filing the listing shall simultaneously file with the director a signed attestation that the listing sets forth only the names of the signatories on the showing of interest petitions.

(c) The determination by the director as to the timeliness of a showing of interest and of its numerical sufficiency is a ministerial act and will not be reviewed by the board.

(d) A declaration of authenticity, signed and sworn to before any person authorized to administer oaths, shall be filed by the petitioner or movant with the director simultaneously with the filing of the showing of interest or any evidence of majority status for the purpose of certification without an election, pursuant to section 201.9(g)(1) of this Part. Such declaration of authenticity shall contain the following:

1. the name of the individual executing the declaration, and a statement of the declarant's authority to execute it; if on behalf of an employee organization, the declarant's position with the employee organization, and a statement of the declarant's authority to execute the declaration on its behalf; and

2. a declaration that, upon the declarant's personal knowledge, or inquiries that the declarant has made, the persons whose names appear upon the evidence submitted have themselves signed such evidence on the dates specified thereon, the persons specified as current members are in fact current members, and, as to any persons whose signatures were solicited on or after March 15, 1996, that inquiry was made regarding their inclusion in any existing negotiating unit which is the subject of the representation petition. If the
declaration is upon inquiries the declarant has made, and not upon the declarant’s personal knowledge, the declarant shall specify the nature of those inquiries.

(e) The director may direct an investigation and, if necessary, a hearing whenever the director deems it appropriate to ascertain whether the evidence submitted is accurate. If it is determined after investigation or hearing that the evidence is fraudulent or that the declaration is false, such reasonable action as is appropriate to protect the integrity of the procedures of the board in connection with the pending matter shall be taken. Such a determination and such action taken shall be reviewable by the board pursuant to Part 213.

201.5 Contents of petition for certification; contents of petition for decertification; contents of petition to clarify existing unit or to determine unit placement of positions; response to petition.

(a) A petition for certification shall contain the following:

(1) the name, affiliation, if any, and address of petitioner;

(2) the name and address of the public employer involved;

(3) a description of the negotiating unit which the petitioner claims to be appropriate;

(4) the names and addresses of any other employee organizations which claim to represent any public employees within the allegedly appropriate unit. If there is any contract covering public employees in such unit, petitioner shall specify the duration, the parties, and the unit involved in the contract, or attach a copy of the contract, and the date of the commencement of the fiscal year of the employer;

(5) the number of employees in the allegedly appropriate unit;

(6) if an employee organization, whether the showing of interest requirement, as set forth in sections 201.3 and 201.4 of this Part, is met;

(7) if an employee organization, the date on which it asked the public employer for recognition;

(8) Reserved for future use.

(9) if an employee organization, an affirmation that petitioner and the employee organization, if any, with which it is affiliated does not assert the right to strike against any
government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike; and

(10) a clear and concise statement of any other relevant facts.

(b) Petitions for decertification shall contain the following:

(1) the name, affiliation, if any, and address of petitioner;

(2) the name or names of the employee organization(s) which have been certified or are currently recognized by the public employer and which claim to represent the employees in the unit involved, the expiration date of any contract covering such employees, and the date of the commencement of the fiscal year of the employer;

(3) the name and address of the public employer involved;

(4) whether the employee organization(s) which have been certified or are currently recognized by the public employer have engaged in a strike or have caused, instigated, encouraged or condoned a strike against any government;

(5) the grounds upon which decertification or revocation of recognition is sought;

(6) a description of the unit, including the number of employees;

(7) if an employee organization, whether the showing of interest requirement, as set forth in sections 201.3 and 201.4 of this Part, is met;

(8) Reserved for future use.

(9) a clear and concise statement of any other relevant facts.

(c) Petitions filed pursuant to section 201.2(b) of this Part shall contain the following:

(1) the name, affiliation, if any, and address of the recognized or certified employee organization;

(2) the name and address of the public employer involved;

(3) a description of any affected existing negotiating unit, a copy of any applicable certification or recognition, and the date thereof;

(4) the number of employees in the existing unit and in the unit proposed in the petition;
(5) the job description and classification of each position;

(6) the name and address of any other employee organization which claims to represent the position;

(7) a copy of any contract affecting the position; and

(8) a statement by the petitioner setting forth the details of the desired clarification or placement and the reasons therefor.

(d) Response. Except for the petitioner, all parties shall file with the director within 10 working days after receipt of a copy of the petition from the director, an original and three copies of a response to the petition containing a signed declaration of its truthfulness by an identified representative of the responding party, with proof of service of a copy thereof upon all other parties. The response shall include a specific admission, denial or explanation of each allegation made by the petitioner, a description of the unit claimed to be appropriate by the responding party for the purpose of collective negotiations and a clear and concise statement of any other facts which the responding party claims may affect the processing or disposition of the petition.

(e) Notice of filing of petition. In any case in which the director determines that notice in accordance with this section may be reasonably given by a party filing a petition for certification or a petition under section 201.2(b) of this Part, which seeks a review of a managerial or confidential designation made pursuant to section 201.10 of this Part, that party shall mail notice thereof in conformity with the director's determination to each managerial or confidential designee named in the petition and state in writing to the director that it has mailed the notice of filing in accordance with this section. The notice shall include the date the petitioner filed the petition with the director and a copy of the petition and such attachments thereto as pertain to the named designee.

§201.6 Publication.

(a) A public employer must publish notice of recognition, which shall be accomplished in the following manner:

(1) posting of a written notice in a conspicuous place at suitable offices of the public employer for not less than five working days;

(2) inclusion in a public advertisement of a newspaper of general circulation in the area of the public employer for not less than one day; and

(3) notification to any employee organizations that have, in a written communication within a year preceding the recognition, claimed to represent any of the employees in the unit.
(b) The information published shall include:

(1) specification of the name of the employee organization which has been recognized;

(2) the job titles included in the unit for which it has been recognized; and

(3) the date of recognition.

(c) If the public employer fails to publish notice of recognition promptly, the employee organization may do so.

(d) If notice of recognition has not been published, neither the recognition nor a contract entered into pursuant thereto will bar a petition for certification or decertification unless the petitioner has received written notice of such recognition more than 30 days prior to the filing of the petition.

§201.7 Reserved for future use.

(a) Reserved for future use.

(b) Reserved for future use.

(c) Reserved for future use.

(d) Reserved for future use.

§201.8 Notice of pending petitions.

Upon the filing of a petition under this Part, notice thereof, including the date when such petition was filed, the name and address of the petitioner, the name and address of the public employer involved, and the unit claimed to be appropriate shall be maintained by an agent of the board on a public docket to be kept by the board at its principal office.

§201.9 Investigation and elections.

(a) Ascertainment of desires of parties.

(1) Investigation. Subsequent to the filing of a petition, the director shall direct an investigation of all questions concerning representation, including, if applicable, whether the showing of interest requirement, as set forth in sections 201.3 and 201.4 of this Part, has been met; whether more than one employee organization seeks to represent some or all of the employees in the allegedly appropriate unit; and whether there is agreement among the parties as to the appropriateness of the alleged unit.
(2) **Hearing.** The director may direct a hearing, in which event a notice of hearing before an administrative law judge, at a time and place fixed therein, shall be prepared and served upon the parties. A copy of the petition shall be served with the notice of hearing. The conduct of the hearing shall be in accordance with the procedures specified in Part 212.

(b) Reserved for future use.

(b)(1) Reserved for future use.

(b)(2) Reserved for future use.

(c) (1) Reserved for future use.

(c)(2) Reserved for future use.

(c)(3) Reserved for future use.

(c)(4) Reserved for future use.

(d) Reserved for future use.

(e) Reserved for future use.

(e)(1) Reserved for future use.

(e)(2) Reserved for future use.

(e)(3) Reserved for future use.

(f) **Determination of representatives on consent.** Subject to approval of the director, the parties to a representation proceeding may agree on a method by which the director may determine the question of representation.

(g) **Action by director.** After completion of the investigation or hearing, as the case may be, or upon the consent of the parties, the director shall dispose of the questions concerning representation.

(1) Certification without an election. If the choice available to the employees in a negotiating unit is limited to the selection or rejection of a single employee organization, that choice may be ascertained by the director on the basis of dues deduction authorizations and other evidence instead of by an election. In such a case, the employee
organization involved will be certified without an election if a majority of the employees within the unit have indicated their choice by the execution of dues deduction authorization cards which are current, or by individual designation cards which have been executed within six months prior to the date of the director's decision recommending certification without an election. The determination by the director that the indications of employee support are not sufficient for certification without an election is a ministerial act and will not be reviewed by the board. The director shall inform all parties in writing if the director determines that the indications of employee support are sufficient for certification without an election. The director's determination in this respect is reviewable by the board pursuant to a written objection to certification filed with the board by a party within five working days after its receipt of the director's notification. An objection to certification shall set forth all grounds for the objection with supporting facts and shall be served on all parties to the proceeding. A response to the objection may be filed within five working days after a party's receipt of the objection. A copy of any response shall be served on all other parties. Section 201.12(h) of this Part and sections 213.2(b)(1) and 213.4 of Part 213 shall apply.

(2) Direction of an election. An election will be held whenever the choice available to the employees within a negotiating unit includes more than one employee organization, or when the only employee organization seeking certification does not produce indications of employee support sufficient for certification without an election. If the director determines that an election shall be held, such election shall be conducted by an agent of the board at such time and place and upon such terms and conditions as the board, the director or the agent may specify.

(h) Election procedure. (1) Unless otherwise directed by the board, all elections shall be conducted under the supervision of the director. All elections shall be by secret ballot. Absentee ballots will not be permitted. An employee organization other than the petitioner shall be permitted to intervene and be placed on the ballot upon submission to the director of a showing of interest of at least 30 percent of the employees in the unit found to be appropriate, which is accompanied by the affirmation required by section 207.3(b) of the act, as long as notification of such desire is given to the director within what the director deems to be a reasonable time prior to the scheduled date of the election; except that no showing of interest shall be required of an employee organization that is the recognized or certified representative of employees in the unit found to be appropriate. Whenever two or more employee organizations are included as choices in an election, any participant may, upon prompt request to and approval thereof by the director, have its name removed from the ballot; provided, however, that with respect to a petition for decertification, the employee organization certified or currently recognized may not have its name removed from the ballot without giving due notice in writing to all parties and the director, disclaiming any representation interest among the public employees in the unit. Any party may be represented by observers of its own selection, subject to such limitations as the director may prescribe. Any party or the board's agent may challenge, for good cause, the eligibility
of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the director shall cause to be furnished to the parties a tally of ballots.

(2) Any party may file with the director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election within five working days after its receipt of a final tally of ballots. Such objections shall contain a clear and concise statement of the facts constituting the bases for the objection, including the names of the individuals involved and the time and place of occurrence of each particular act alleged. The objections shall be in writing and be signed and sworn to before any person authorized to administer oaths. Copies of such objections shall simultaneously be served upon each of the other parties by the party filing them, and proof of service shall be filed with the director.

(3) An answer shall be filed within five working days after receipt of the objections. One copy of the answer shall be served on each party and the original, with proof of service and three copies, shall be filed with the director. The answer shall contain a specific admission, denial or explanation of each allegation of the objection and a clear and concise statement of any other relevant facts. The original shall be signed and sworn to before any person authorized to administer oaths:

If a party fails or refuses to file a required answer, such failure or refusal may be deemed to constitute that party’s admission of the material facts in the objections and a waiver by that party of a hearing.

(4) If objections are filed to the conduct of the election or conduct affecting the results of the election, or if challenged ballots are sufficient in number to affect the results of the election, the director shall investigate such objections or challenges, or both, and shall take the appropriate action which may include the direction of a hearing in accordance with the provisions of Part 212 and the issuance of a decision.

(i) Runoff election. (1) The director may conduct a runoff election without further order of the board when an election in which the ballot provides for not less than three choices (i.e., at least two employee organizations and "neither") results in no choice receiving a majority of the valid ballots cast. Only one runoff shall be held pursuant to this section, unless the board directs otherwise.

(2) The ballot in the runoff election shall provide for a selection among the two or more choices receiving the largest number of votes, the sum of whose votes aggregate at least one more than half of the total votes cast. Upon the conclusion of the runoff election, the provisions of subdivision (h) of this section shall govern insofar as applicable.
§201.10 Employer applications for designation of persons as managerial or confidential.

(a) Application; parties.

(1) An application by a public employer seeking a designation by the board that certain persons are managerial or confidential shall be on a form provided by the board for this purpose, and signed. An original and four copies of the application shall be filed with the director. Application forms will be supplied by the director upon request. Prior to the issuance of a decision by the administrative law judge pursuant to section 201.11 of this Part, an application may be withdrawn only with the consent of the director. After the issuance of a decision by the administrative law judge, the application may be withdrawn only with the consent of the board. Whenever the director or the board, as the case may be, approves withdrawal of any application, the case shall be closed.

(2) The parties are the applicant and the persons who are within any of the job titles which the public employer is seeking to have designated as managerial or confidential; provided, however, that if any such persons are represented by a recognized or certified employee organization, such employee organization is a party in their stead.

(b) Time for filing of applications. An application may be filed at any time; provided, however, that with respect to any persons who are in a unit for which an employee organization has been recognized or certified, only one application which has been processed to completion may be filed during a period of unchallenged representation status.

(c) Notice of filing of application. Simultaneous with the filing of an application under this section, notice thereof, including the date when such application was filed with the director, shall be served by the public employer upon each of the persons who are within any of the job titles which the public employer is seeking to have designated as managerial or confidential, and upon any employee organization which has been recognized or certified to represent any of them.

(d) Contents of application. An application shall contain the following:

(1) the name and address of the public employer filing the application;

(2) the name and address of the attorney or representative of the public employer;

(3) Reserved for future use.

(4) each of the job titles that the public employer seeks to have designated as managerial or confidential, and the number of persons in each job title;
(5) a statement as to whether any of these job titles are within a unit presently represented by a recognized or certified employee organization or whether an employee organization is presently seeking to represent the persons occupying any of these job titles. If the answer is yes, the name of the employee organization;

(6) Reserved for future use.

(7) if there is any contract covering the persons within the job titles which it claims are managerial or confidential, the public employer shall specify the duration, the parties, and the unit involved in the contract;

(8) Reserved for future use.

(9) a statement as to whether the employer has ever filed a previous application seeking the designation of any of these job titles as managerial or confidential;

(10) a statement as to whether copies of the relevant job descriptions are attached;

(11) a statement that notice of the filing of an application has been mailed to each of the persons who are within any of the job titles which it is alleged are managerial or confidential, and to any employee organization which has been recognized or certified to represent any of them; and

(12) a clear and concise factual statement in support of the application.

(e) Response. The parties, as defined by paragraph (a)(2) of this section, except the applicant, shall file with the director within 10 working days after receipt of a copy of the application from the director, an original and three copies of a response to the application containing a signed declaration of its truthfulness by an identified representative of the responding party, with proof of service of a copy thereof upon all other parties. The response shall include a specific admission, denial or explanation of each allegation made by the applicant and a clear and concise statement of any other facts which may bear on the application. If a responding party objects to the processing of an application on the ground that it was filed earlier than the time provided in subdivision (b) of this section, the response shall include a specific, detailed statement of why the application is untimely. Such objection to the processing of the application, if not duly raised, may be deemed waived.

(f) Reserved for future use.

(g) Investigation. Subsequent to the filing of an application, the director shall direct an investigation of all questions raised by the application.
(h) **Hearing.** The director may direct a hearing, in which event a notice of hearing before an administrative law judge, at the time and place fixed therein, shall be prepared and served upon the parties. A copy of the application shall be served with the notice of hearing.

(i) **Conduct of hearing.** The conduct of the hearing shall be in accordance with the procedures specified in Part 212.

§201.11 Decision by administrative law judge.

Upon completion of proceedings, the administrative law judge shall issue a decision and submit the record of the case to the board. The record shall include the petition or application, notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exceptions, documentary evidence, any briefs or other documents submitted by the parties, objections to the conduct of an election or conduct affecting the results of an election, and the decision of the administrative law judge.

§201.12 Exceptions to decision of administrative law judge; action by board.

(a) Exceptions to a decision by an administrative law judge may be filed pursuant to Part 213.

(b)(1)-(4) Reserved for future use.

(c) Reserved for future use.

(d) Reserved for future use.

(e) Reserved for future use.

(f) Reserved for future use.

(g) Reserved for future use.

(h) The board shall designate an employee organization as the exclusive representative of public employees within a negotiating unit if the employee organization has demonstrated that it has majority status among the employees within the negotiating unit.
PART 202
PROCEDURE FOR THE REVIEW OF QUESTIONS CONCERNING
THE CERTIFICATION OF EMPLOYEE ORGANIZATIONS UNDER SECTION 206.1
OF THE ACT
(Statutory Authority: Civil Service Law, art. 14)

Sec.
202.1 Scope
202.2 Petitions; filing
202.3 Time for filing of petitions
202.4 Contents of petition for review
202.5 Intervention
202.6 Notice of pending review
202.7 Investigation and hearing
202.8 Decision by administrative law judge
202.9 Exceptions to decision of administrative law judge; action by the board

§202.1 Scope.

The following relates to public employees of a local government which has acted through
its legislative body pursuant to section 206.1 of the act and established an impartial agency
to administer procedures not inconsistent with section 207 of the act and pertinent sections
of this Chapter.

§202.2 Petitions; filing.

A petition to review a question concerning the certification of an employee organization
under procedures established by a local government pursuant to section 206.1 of the act
(hereinafter called a petition for review), may be filed by one or more public employees or
any employee organization acting in their behalf, or by a public employer; provided,
however, that individual employees may not seek certification. Petitions under this section
shall be in writing and signed. An original and four copies of the petition shall be filed with
the director. Petition forms will be supplied by the board upon request. Prior to the
submission of a case to the board pursuant to section 202.8 of this Chapter, the petition
may be withdrawn only with the consent of the director. After the submission of a case to
the board, the petition may be withdrawn only with consent of the board. Whenever the
director or the board, as the case may be, approves withdrawal of any petition, the case
shall be closed.
§202.3 Time for filing of petitions.

(a) A petition for review may be filed within 30 days after an impartial agency designated by a local government pursuant to section 206.1 of the act has certified or decertified an employee organization, determined that no employee organization should be certified in an appropriate negotiating unit, or refused to decertify an employee organization.

(b) A petition for review which alleges that an impartial agency has not begun to process a petition expeditiously may be filed not less than 30 days after petitioner has filed a petition for certification or decertification with the impartial agency.

§202.4 Contents of petition for review.

A petition for review shall contain the following:

(a) The name, affiliation, if any, and address of petitioner.

(b) The name and address of the public employer involved.

(c) A summary of the proceedings, if any, before the impartial agency established under section 206.1 of the act, including copies of the petition and other documents filed in such proceedings or issued by the impartial agency.

(d) A clear and concise statement of the grounds for alleging that the procedures established by the local public employer are not consistent with the provisions of sections 206.1 and 207 of the act and pertinent sections of this Chapter, or that the decision of the impartial agency is repugnant to the act and pertinent sections of this Chapter.

(e) A statement that the matter is not subject to section 212 of the act.

(f) If petitioner is seeking certification:

(1) an affirmation that petitioner does not assert the right to strike against any government, to assist or participate in any such strike, or to impose an obligation to conduct, assist or participate in such a strike;

(2) a description of the negotiating unit which petitioner claims to be appropriate;

(3) a statement of whether petitioner seeks exclusive rights of representation within the negotiating unit or units alleged to be appropriate;

(4) the number of employees in the allegedly appropriate unit;
(5) whether the showing of interest requirement, as set forth in sections 201.3 and 201.4 of this Chapter, is met;

(6) the date upon which petitioner asked the public employer for recognition; and

(7) the names and addresses of any other employee organizations which claim to represent any public employees within the allegedly appropriate unit. If there is any contract covering the public employees in such unit, petitioner shall specify the duration, the parties and the unit included in the contract, or attach a copy of the contract.

(g) If the petitioner is seeking decertification:

(1) the name or names of the employee organization(s) which have been certified or are currently being recognized by the public employer and which claim to represent the employees in the unit involved, and the expiration date of any contract covering such employees;

(2) whether such representation is exclusive;

(3) the grounds upon which decertification or revocation of recognition is sought;

(4) a description of the unit including the number of employees;

(5) if an employee organization, whether the showing of interest requirement, as set forth in sections 201.3 and 201.4 of this Chapter, is met; and

(6) whether the employee organization(s) which have been certified have engaged in a strike or have caused, instigated, encouraged or condoned a strike against any government.

(h) A clear and concise statement of any other relevant facts.

§202.5 Intervention.

Intervention is permitted in accordance with the procedures specified in section 212.1 of this Chapter.

§202.6 Notice of pending petitions.

Notice of pending petitions shall be provided in the manner specified in section 201.8 of this Chapter.
§202.7 Investigation and hearing.

(a) The director shall direct an investigation of questions raised by the petition including, if applicable, whether the showing of interest requirement, as set forth in sections 201.3 and 201.4 of this Chapter, has been met. The investigator shall also consider whether the procedures established by the local public employer are consistent with the provisions of sections 206.1 and 207 of the act and pertinent sections of this Chapter, and whether the decision of the impartial agency is repugnant to the act and pertinent sections of this Chapter.

(b) The director may direct a hearing, in which event the proceedings shall be those specified in Part 212.

§202.8 Decision by administrative law judge.

Upon completion of the proceedings, the administrative law judge shall issue a decision and submit the record of the case to the board, as specified in section 201.11 of this Chapter.

§202.9 Exceptions to decision of administrative law judge; action by the board.

Exceptions to a decision of the administrative law judge and final action by the board shall be as set forth in section 201.12(a) of this Chapter and Part 213.
Advisory Opinion No. 92-21

Amendment of Advisory Opinion No. 91-1, regarding the application of Public Officers Law §§73 and 74 to graduate assistants and teaching assistants at the State University of New York.

In Advisory Opinion No. 90-8, dated May 10, 1990, the State Ethics Commission ("Commission") suspended application of the two-year bar of the "revolving door" provision of Public Officers Law §73(8) to students in part because the Public Employment Relations Board ("PERB") had not yet reached a final decision whether graduate assistants ("GAs") and teaching assistants ("TAs") at the State University of New York ("SUNY") are employees for purposes of the Taylor Law. On September 13, 1990, in Advisory Opinion No. 90-20, the Commission extended its suspension of the two-year bar of §73(8) until January 15, 1991.

In Advisory Opinion No. 91-1, dated January 10, 1991, the Commission determined that students as defined therein are not "State officers or employees" for the purposes of Public Officers Law §73 and are therefore not subject to either the two-year or the lifetime post-employment restrictions in Public Officers Law §73 or to §74. In that opinion, the Commission reiterated its position that, should PERB reverse the determination of its Director that GAs and TAs are not employees under the Taylor Law, the Commission might revisit the issue.

On October 8, 1991, PERB issued its final order concerning GAs and TAs at SUNY, concluding that these individuals are regular, part-time employees entitled to coverage under the Taylor Law. The Board cited several bases for its reversal, including the absence of an explicit student exclusion in the Taylor Law's broad definition of "public employee," the absence of any statutory provisions which would indicate a general legislative intent to exclude the GAs and TAs, experience in other jurisdictions, and a belief that the policies of the Taylor Law are best carried out by a finding that the GAs and TAs hold employment covered under the Taylor Law.

Following PERB's determination, SUNY commenced an Article 78 proceeding alleging inter alia that PERB's determination was "arbitrary and capricious, unreasonable, an abuse of discretion and not supported by substantial evidence." On July 23, 1992, the Appellate Division of the New York State Supreme Court upheld PERB's determination that GAs and TAs are public employees. SUNY has informed the Commission that it will not appeal the court decision.

The broad definition of the term "state officer or employee" in Public Officers Law §73 provides no basis for a conclusion contrary to PERB's interpretation of the Taylor Law's definition of "public employee" which was upheld by the Appellate Division. Based upon the foregoing, the Commission finds that those students at SUNY who hold State-funded positions as GAs or TAs are "State employees" covered by Public Officers Law §§73 and 74. Such GAs and TAs who regularly work for the State 15 to 20 hours per week throughout the academic year are, by virtue of the PERB and Appellate Division decisions, regular, part-time employees and are covered fully under the provisions of the Taylor Law, entitled to benefits and to be represented by a negotiating representative and to join an employee organization for the purposes of negotiation and representation.
Conclusion

The Commission believes that it is unlikely that the Legislature intended this category of students to be covered by Public Officers Law §§73 and 74. Unlike traditional State employment, the "short and intermittent" employment status of certain GAs and TAs does not seem likely to provide the same opportunities to develop contacts and associations that can be capitalized on later for private gain that Public Officers Law §73(8) was enacted to prevent. However, in light of the ruling by the Appellate Division, the Commission must conclude that, from the date of this Advisory Opinion, GAs and TAs at SUNY are "State employees" for the purposes of Public Officers Law §§73 and 74 and are fully subject to those provisions. Public Officers Law §73(8) will apply to students who are graduate assistants or teaching assistants at SUNY who hold State-funded positions, are covered under the provisions of the Taylor Law, and who terminate State service on or after the date of this opinion.

This opinion, until and unless amended or revoked, shall be binding on the Commission in any subsequent proceeding.

All concur:

Joseph M. Bress, Chair

Barbara A. Black
Angelo A. Costanza
Robert E. Eggenschiller
Donald A. Odell, Members

Dated: October 26, 1992

Endnotes

1. Advisory Opinion No. 90-8 provides, on page 7 in footnote 5, the following statement of the Commission regarding the pendency of this determination:

See In the Matter of Communications Workers of America/Graduate Students Employees Union, AFL-CIO and State of New York and United University Professions, 20 PERB 4063 (1987). The Director's determination, issued September 3, 1987, has been appealed to the Public Employment Relations Board which has not yet issued an opinion. If the Board were to reverse the determination of the Director that graduate assistants and teaching assistants were not employees under the Taylor Law, the Commission would be constrained to find that they are also covered by §73(8) of the Public Officers Law.

2. See Advisory Opinion No. 91-1, p. 9 (footnote 14).

3. See Communications Workers of America/Graduate Student Employees Union, AFL-CIO v. State of New York (State University of New York), 24 PERB 3035 (1991) issued by the State of New York Public Employment Relations Board on October 8, 1991, reversing the finding of the Director. PERB notes that about 15% of approximately 27,000 graduate students in the SUNY system are GAs or TAs. As such, they receive a stipend and/or a tuition waiver and perform a maximum of 20 hours/week service.
5. As State employees, GAs and TAs would also be covered by Public Officers Law §73-a. However, the students described and affected by the PERB decision do not receive an annual compensation in excess of the filing rate (i.e., $53,171) and would likely not be designated by SUNY as holding policy-making positions; therefore, they would not file an annual statement of financial disclosure.
In the Matter of

CAYUGA COMMUNITY COLLEGE PART-TIME FACULTY ASSOCIATION,

- and -

CAYUGA COMMUNITY COLLEGE and COUNTY OF CAYUGA,

- and -

CAYUGA COMMUNITY COLLEGE FACULTY ASSOCIATION,

CASE NO. C-6254

TRUDY RUDNICK, LABOR RELATIONS SPECIALIST AND ORGANIZER, for Petitioner

BOND, SCHOENECK & KING (COLIN M. LEONARD of counsel), for Employer

SUSAN M. DECARLO, LABOR RELATIONS SPECIALIST, for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions by Cayuga Community College and the County of Cayuga (collectively, the College) to a decision of an Administrative Law Judge (ALJ) defining an appropriate bargaining unit and ordering the College to produce a list of the employees within the bargaining unit as defined.\(^1\) The ALJ found, over the College’s objection, that adjunct faculty at the College were most appropriately placed in a separate appropriate bargaining unit from the full-time faculty.

EXCEPTIONS

The College excepts to the ALJ’s decision on multiple grounds. First, the College

\(^1\) 48 PERB ¶ 4003 (2015).
excepts to the ALJ’s finding that the full-time faculty and the adjunct faculty do not share a strong community of interests, and to not weighing facts supporting the existence of a community of interests, such as the same core duties, educational qualifications, supervision, and advancement on the pay scale. Second, the College contends that the ALJ erroneously found “significant conflicts” existed between full-time faculty and adjunct faculty, and in relying on the predicates supporting that finding. Third, the College excepts to the ALJ’s failure to accord significant weight to its claim of administrative convenience.

In addition to these primary exceptions, the College raises several of a subsidiary nature. The College excepts to the ALJ’s reliance on a specified decision, and her not considering others in which the Board found that part-time and full-time employees are appropriately placed in a single unit. Likewise, the College contends that the ALJ should have addressed the fact that many other colleges have both full-time and adjunct faculty in a combined unit. The College asserts that the ALJ should have found that if a conflict does exist the New York State United Teachers (NYSUT) should not represent both groups. Finally, the ALJ erred, the College argues, by not finding the petition subject to the contract bar rule.

FACTS

The currently represented employees at the College fall into four units: (1) the

---

2 Exception Nos. 1, 10, 11, 12, 13, 14, 15, 16, 17.
3 Exception Nos. 3, 5, 6, 7, 8, 9.
4 Exception No. 2.
5 Exception Nos. 4 and 19.
6 Exception No. 18.
7 Exception No. 20.
8 Exception No. 21.
full-time faculty represented by the Cayuga Community College Faculty Association ("Faculty Association"); (2) administrative professional staff; (3) clerical staff; and (4) maintenance and custodial staff.\(^9\)

The current contract between the Board of Trustees of the College and the Faculty Association (Contract) includes, among its definitions, the "Negotiating Unit," defined as:

The negotiating unit shall consist of faculty members (instructional and non-instructional) who are full-time professional staff employees holding academic rank and shall exclude administrators excepting those serving as division chairs as provided under Section 13 below.\(^10\)

Section 13 defines a "Division Chair" as "a teaching faculty member temporarily assigned to administrative duties" under the Contract.\(^11\)

The Faculty Association has approximately 66 members, including division chairs.\(^12\) By contrast, the unit petitioned for by the Cayuga Community College Part-Time Faculty Association consists of approximately 193 adjunct faculty members (each of whom can teach up to 12 credits per semester), nine coaches and nine members of

\(^9\) Stipulation of Facts, Joint Ex 1 at ¶ 5.
\(^10\) 2011-2016 Contract, Joint Ex 3, Art I, ¶ 11. The 2004-2011 Contract contains an identical definition of the negotiating unit. Joint Ex 2, Art. I, ¶ 11. The 1970-1972 Contract between Auburn Community College (the College's original name) and the Auburn Community College Faculty Association, provides that the terms "Faculty Member, or Instructional Staff or Academic Staff shall mean a member of the negotiating unit, which consists of all full time professional staff employees who hold faculty rank." Joint Ex 4, Art. I, ¶1.6 (emphasis in original).
\(^11\) Id., ¶ 13. The 2004-2011 Contract contains an identical definition of Division Chair. Joint Ex 2, Art. I, ¶ 13. The definition of "Department Chairman" similarly limits the position to full-time staff, requiring as the sole qualification "the rank of Associate Professor or above." Joint Ex 4, Art. IX, ¶ 6.2.
\(^12\) Joint Ex 1, ¶ 14.
the administrative professional staff.\textsuperscript{13}

For the 2013-2014 academic year, the minimum full-time faculty starting salaries were $54,024\textsuperscript{1} for an Instructor; $60,874 for an Assistant Professor; $67,351 for an Associate Professor; and $80,016 for a Professor.\textsuperscript{14} For these salaries, a member of the full-time faculty is required to carry a full teaching load of no more than 17 credit hours per semester or 30 per year, and no less than 80\% of that load.\textsuperscript{15}

In addition to their salaries, full-time faculty members may teach additional courses, known as "overload" courses, and be compensated at a per credit hour rate ranging, in academic year 2013-2014, between $966 per credit hour (for an Instructor) to $1,301 (for a full professor) set forth in the Contract.\textsuperscript{16} Adjunct faculty are offered courses on a take-it-or-leave-it basis only after the full-time faculty have selected the "overload" courses they want to teach.\textsuperscript{17}

Full-time faculty members receive, and are eligible to receive, among other benefits: paid sick and personal leave time, paid sabbatical leave after six years of service with the College, longevity increases, faculty development funds, special service work, and promotional stipends. In addition, they are eligible to receive the Faculty Award for Excellence, an enhancement of their base pay. Full-time faculty also receive health and dental insurance, and have the option of an early retirement incentive. Full-time faculty may participate in the Employee Retirement System, the Teacher

\textsuperscript{13} \textit{ld.; see also} Tr, vol. 2, at p. 15.
\textsuperscript{14} Joint Ex 1, \& 17. The rates for 2015-2016 academic year are, respectively, $56,538; $63,988; $70,032; and $83,068. Joint Ex 3, Art. XV, \& 1.
\textsuperscript{15} Joint Ex 3, Art. XIV \& 1.1. 2.2.
\textsuperscript{16} Joint Ex 1, \& 6; Joint Ex 3, Art. XV, \& 4. In 2015-20916, overload rates range between $995-1339.
\textsuperscript{17} Tr, vol 1 at 96-97.
Retirement System, or a TIAA-CREF retirement option.\(^{18}\)

Adjunct faculty are compensated on a per credit hour basis, at a rate equivalent to the rate paid to full-time faculty for teaching an “overload” course. Adjunct faculty receive no other paid benefits or leave time. They are not eligible for health or dental insurance coverage.\(^{19}\) Adjuncts are not required to be available to students for office hours, as are full-time faculty, nor are they required to attend division meetings.\(^{20}\) Adjunct faculty may teach at other schools, or have other full-time employment elsewhere or at the College.\(^{21}\)

According to Steven Keeler, Division Chair of the English, Humanities and Telecommunications Division, “we don’t consider adjuncts to be members of the division in terms of attending division meetings, and they have no vote at the division meetings” if they do attend.\(^{22}\) Keeler further testified that full-time faculty participate in curriculum and course development, but that adjunct faculty have no role in governing the college.\(^{23}\) Keeler explained that, since the 1990s, the Faculty Association had rejected the notion of representing the adjunct faculty, due to a perceived conflict of interest between them; he explained that “the objection always centered around the idea that the adjuncts would take away the full-time faculty courses.”\(^{24}\)

All college staff, including adjunct faculty, receive a tuition waiver for family

---

\(^{18}\) Joint Ex 1, ¶¶ 18, 11; Joint Ex 3, Art. XVI.

\(^{19}\) Joint Ex 1, ¶ 12.

\(^{20}\) Joint Ex 1, ¶ 13; Tr, vol 1, at pp. 31-32 (Sevik); 97-98 (Keeler).

\(^{21}\) See, e.g., Tr, vol 1, at p. 20 (Adjunct lecturer Gregory Sevik also teaches at LeMoyne College); Joint Ex 1, ¶ 11 (“Certain adjuncts participate in TIAA CREF based on being a member through employment at another institution”); Tr, vol 1, at p. 101 (College administrator taught a telecommunications course as an adjunct).

\(^{22}\) Tr, vol 1, at pp. 97-98 (Keeler).

\(^{23}\) Tr, vol 1 p. at 98.

\(^{24}\) Tr, vol 1, p. at 77.
members attending the College. Adjuncts may participate in the State and Local Employees’ Retirement System or the Teachers’ Retirement System. Adjuncts who are former full-time faculty or administrators, or who are currently employed as full time administrative professionals, may participate in the TIAA-CREF retirement option.

The four division chairs of the College assign courses to both full-time faculty members and to adjunct faculty. Division chairs are also responsible for hiring and firing adjunct faculty, either directly or through a designee. Full-time faculty members may avail themselves of just cause disciplinary process that culminates in binding arbitration; adjunct faculty members have no such protection.\(^{25}\) Full-time faculty members must be hired pursuant to a contractually agreed process that includes a recommendation by a search committee to the appropriate vice president and then to the College president, and finally ends with the approval of the Board of Trustees.\(^{26}\)

**DISCUSSION**

The unit placement petition here “presents an initial uniting situation because it seeks representation rights for unrepresented employees.”\(^{27}\) In such cases, the Board must determine the most appropriate unit because “[t]he statutory grant of authority to this Board to resolve disputes concerning representation status mandates this Board to define appropriate units and does not restrict its power simply to the approval or disapproval of units sought by the party or parties to the proceeding.”\(^{28}\) In making such a determination, the Board has long applied “the community of interest and administrative convenience standards set forth in § 207.1 of the Act, with the community

\(^{25}\) Joint Ex 3, Art. VI; Tr, at pp. 108-109.

\(^{26}\) Joint Ex 3, Art. X.

\(^{27}\) *Clinton Comm College*, 31 PERB ¶ 3070, 3155 (1998).

\(^{28}\) *Id*, quoting *State of New York*, 1 PERB ¶ 399.85, 3231 (1969).
of interest given predominant consideration.\textsuperscript{29}

As we have recently reaffirmed:

Under this standard, the Board has consistently held that, among the factors to be considered in determining whether a community of interest exists are similarities in terms and conditions of employment, shared duties and responsibilities, qualifications, common work location, common supervision, and an actual or potential conflict of interest between the members of the proposed unit.\textsuperscript{30}

Additionally, the Board has, where proposed placement in a pre-existing unit is at issue, looked to the parties’ contractual recognition clause in determining whether the unrepresented employees were properly encompassed in the proposed unit.\textsuperscript{31} Finally, where relevant, the Board has looked to the bargaining history of the parties and to the extent of supervisory authority of the unrepresented employees over the represented employees in determining the existence of a conflict of interest.\textsuperscript{32}

The instant case bears several indicia of conflict of interest. First, as correctly found by the ALJ, we find that the fundamentally different institutional roles played by

\textsuperscript{29} St. Paul Boulevard Fire Dist, 42 PERB ¶ 3009, 3027 (2009), citing Board of Educ of the City Sch Dist of the City of Buffalo, 14 PERB ¶ 3051 (1981); City of Rye, 33 PERB ¶ 3035 (2000); NYCTA, 36 PERB ¶ 3038 (2003); see also Niagara Frontier Transp Auth, 45 PERB ¶ 3020, 3050 (2012).

\textsuperscript{30} County of Franklin, 48 PERB ¶ 3025, ___ (2015) (quotation and editing marks omitted), quoting Niagara Frontier Transportation Auth, 45 PERB ¶ 3020, at 3050 (2012); citing Sachem Cent Sch Dist, 42 PERB ¶ 3030 (2009); St. Paul Boulevard Professional Firefighters Assn, 42 PERB ¶ 3009; Monroe #1 BOCES, 39 PERB ¶ 3024 (2006); Somers Cent Sch Dist, 12 PERB ¶ 3068 (1979); East Ramapo Cent Sch Dist, 11 PERB ¶ 3075 (1978); Somers Cent Sch Dist, 12 PERB ¶ 3068 (1979).

\textsuperscript{31} County of Monroe, 47 PERB ¶ 3001, 3003 (2014).

\textsuperscript{32} Sachem Cent Sch Dist, 42 PERB ¶ 3030, at 3112 (bargaining history showed unrepresented employees who had at one time been placed within unit had functioned harmoniously in bargaining with rest of unit); County of Monroe, 47 PERB ¶ 3001, at 3003 (nurse managers, though entitled to representation, not properly placed in a unit with their subordinates when they have a supervisory role in hiring, discharge, promotion or grievance administration enabling them to significantly affect the terms and conditions of employment of those whom they supervise).
the full-time faculty and the adjunct faculty are sufficient to create a conflict of interest precluding placing the adjunct faculty in the same bargaining unit as the full-time faculty. In *Board of Higher Education of the City of New York*, the Board found that adjunct faculty and permanent faculty (that is, tenured faculty and tenure-track faculty) should be in different bargaining units. The Board found it to be “significant” in that matter that “the non-tenured faculty almost matches the faculty-rank-status personnel in numbers.” The Board explained the diverging interests of the two groups:

> [A]s the nontenured instructional staff comprises a large number of persons who hold other positions from which they receive substantial fringe benefits and to which they owe their primary professional loyalty, their interests and ambitions relative to the City University are different from those of faculty-rank-status personnel.

The faculty-rank-status personnel are the heart of the university. It might be compromising to their independence and to the very stability of the university for nontenured instructional personnel, in numbers almost equal to that of faculty-rank-status personnel, to be included in the unit of faculty-rank-status personnel.

We believe that the differences between faculty-rank-status employees and nonannual lecturers—whether they teach more or less than six hours a week—are of sufficient magnitude to preclude their being placed in the same negotiating unit. Faculty-rank-status personnel are all permanent staff in that they are tenured or hold positions leading to tenure. Nonannual lecturers, on the other hand, are appointed and reappointed for only one semester at a time. Faculty-rank-status employees receive many and various fringe benefits, the cost and value of which are considerable. Nonannual lecturers, on the other hand, do not receive these fringe benefits.

Faculty-rank-status personnel exercise important responsibilities regarding the operation of the university by

---

33 2 PERB ¶ 3056 (1969).
34 *Id.* at 3469.
their service on departmental committees. Nonannual lecturers, on the other hand, rarely serve on departmental committees. Faculty-rank-status personnel have their primary personal commitment to the City University; nonannual lecturers, on the other hand, are likely to be full-time high school teachers working at the university at night, or businessmen, accountants, lawyers, or graduate students whose primary professional commitments are elsewhere.\textsuperscript{35}

The decision in \textit{Board of Higher Education} closely matches the facts here. Indeed, the conflict is starker and sharper in this case, as adding the adjunct faculty to the full-time faculty's bargaining unit would effectively drown out the voice of the full-time faculty, who would, at a stroke, be outnumbered by a more than three-to-one ratio. We note also that the approximately 200 adjunct faculty members petitioned for are sufficient to create a viable and coherent unit of employees with a genuine community of interest and absent conflict.

The College asserts that \textit{Board of Higher Education} “was wrongly decided and has not stood the test of time,”\textsuperscript{36} relying on \textit{Warren County}\textsuperscript{37} and \textit{County of Genesee}.\textsuperscript{38} As a threshold matter, these decisions were rendered not by the Board, but by the then-

Acting Director of Representation and Employee Practices, and therefore are “not binding on the Board and ha[ve] no precedential value.”\textsuperscript{39}

Moreover, far from being inconsistent with \textit{Board of Higher Education}, the cases relied upon by the College are applications of its fact-specific analysis to differing factual scenarios. Thus, in \textit{Warren County}, the Director had found that academic and non-academic staff had a “community of interest” as they “serve[d] together on faculty

\textsuperscript{35} \textit{Id.} at 3469-3470.
\textsuperscript{36} Brief in Support of Exceptions, at 16.
\textsuperscript{37} 7 PERB ¶ 4032 (1974).
\textsuperscript{38} 7 PERB ¶ 4044 (1974).
\textsuperscript{39} \textit{County of Nassau}, 48 PERB ¶ 3023, n. 89 (2015).
governance committees," worked closely and in consultation together with overlapping duties, and desired to be part of the same unit. Under the specific factual circumstances of that case, the Director found that the employer’s claim of potential conflict did not suffice to warrant separating the titles into two units. Likewise, County of Genesee also involved a different constellation of facts than that involved here, in that the administrators at issue had faculty status, participated in college governance, and enjoyed similar benefits and work conditions to the academic faculty as well as having overlapping job functions. In both cases, the Director found the factual distinctions between the case before him and Board of Higher Education made all the difference. Without reviewing those director’s decisions on the merits, we reject the College’s claim that, as a matter of precedent, Board of Higher Education “is out of step with modern PERB policy and should be disregarded.”

Moreover, the bargaining history of the parties supports separate representation of adjunct faculty. The fact that neither group wishes to be jointly represented with the other, while not dispositive, is salient, as is the fact that the Faculty Association has since the 1990s rejected the opportunity to organize and represent adjunct faculty because of a felt conflict between the two groups. Likewise, the fact that the College and the Faculty Association have stipulated in their collectively bargained Contract that the unit to be represented by the Faculty Association is limited to full-time academic staff is germane and supports our conclusion that adjuncts, while entitled to representation, are not properly placed in the Faculty Association.

This is particularly the case since the College deploys against the fundamental

---

40 7 PERB ¶¶ 4032, at 4044-4045.
41 Brief in Support of Exceptions, at 17.
alteration of the bargaining unit, the conflict delineated in our most directly applicable precedent, and the expressed wishes of both the full-time and the adjunct faculty only a conclusory, non-specific claim of administrative convenience. That claim is undermined by the fact that the College has, in a series of collectively bargained agreements, the latest of which remains in effect through August 31, 2016, expressly agreed upon a definition of the “negotiating unit” represented by the Faculty Association. While the parties’ agreements are not binding on us, the addition of the adjunct faculty members to the Faculty Association would either require an abrogation of this provision of the parties’ collectively bargained agreement or would require separate negotiations by the Faculty Association on behalf of adjunct faculty, thereby eliminating the very administrative convenience upon which the College relies.

Because we affirm the ALJ’s finding as to the appropriate bargaining unit and, more specifically, her finding that conflict between the interests of full-time faculty and adjunct faculty warrant a separate unit, we need not address the College’s exception based on the contract bar rule. Nor do we find persuasive the College’s contention that the Part-Time Faculty Association should be deemed an inappropriate placement because it is affiliated with NYSUT. The College asserts that the “the reality is that this is a single, NYSUT organization, with both the Faculty Association and the Part-Time Faculty Association ‘represented’ out of the same office.”42 We have long rejected the notion that placement of two units within locals affiliated with the same parent union, without anything more, perpetuates the conflict between the two units.43 As the only specific allegation is that the two locals are represented herein by advocates in the

42 Brief in Support of Exceptions, at 19.
43 See City of Binghamton, 9 PERB ¶ 3022 (1976).
same office building, we decline to find any conflict in having two locals affiliated with NYSUT represent separate bargaining units employed by the College.

Accordingly, we affirm the ALJ’s decision and find that a separate unit, defined to include all adjunct faculty, and to exclude all other employees, is most appropriate.

DATED: January 25, 2016
Albany, New York

Seth H. Agata, Chairperson

Allen C. DeMarco, Member

Robert S. Hite, Member
§ 1–399.84

Board Decisions

There were isolated instances wherein the strategy or conduct of the employer might be subject to criticism such as the failure of the employer to give to respondent relevant cost data which respondent felt was necessary for effective negotiation. However, this denial was not prejudicial to respondent in that the data were obtained, albeit indirectly, a few days later.

We realize that the negotiating processes in the field of public employment are relatively new, and more experience is necessary to bring such negotiations up to the level of sophistication and competence that is found in the private sector. However, public employers, public employees and their employee organizations must be mindful of the obligations owing to the public generally and particularly to the mandates of the public as expressed in legislation. The public employer, in view of the statutory scheme, has a clear obligation to bargain in good faith. In the instant case, while we have noted the existence of isolated instances of variance from this statutory duty, we do find substantial compliance with the obligation of good faith bargaining.

Conversely, it appears to be established in the record that respondent was using the threat of a strike and the strike itself as part of the negotiating process. This the Act does not countenance.

Respondent has cited, as acts of extreme provocation, conduct of the employer which took place subsequent to the commencement of the strike. We do not believe that the Legislature intended such ex post facto or nasc pro tunc application of extreme provocation.

We find, therefore, that respondent has violated § 210.1 of the Act.

We adopt the recommendation of the hearing officer with respect to the penalty imposed. The threat of the strike and the strike itself were premeditated, having been authorized by respondent's membership more than a month in advance of the strike itself. As noted previously, this conduct is not countenanced by the Act and is disruptive of the statutory procedures prescribed for the resolution of impasses in collective negotiations.

IT IS ORDERED that the right of the Associated Teachers of Huntington, Inc., to membership dues deduction shall be forfeited for a period of twelve months commencing on the first practicable date, and that it shall be restored at the end of such period of twelve months only after the Associated Teachers of Huntington, Inc., has affirmed that it no longer asserts the right to strike against any government.

Dated: November 22, 1988

§ 1–399.85

In the Matter of

STATE OF NEW YORK,

Employer,

and

NEW YORK STATE EMPLOYEES COUNCIL 50, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, et al.,

Petitioners,

and

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.

Intervenor.

Case Nos. C-0002, et al.

Before: ROBERT D. HELSBY, Chairman; JOSEPH R. CROWLEY, GEORGE H. FOWLER

The State Negotiating Committee was ordered to refrain from negotiating with CSEA on an exclusive basis. Further, the Committee was ordered to be neutral in its treatment of employee organizations which are parties herein until the Board certifies employee organizations in the units determined to be appropriate.
Agata: Panel Handout: Higher Education Issues at Public Sector Labor Boa

Board Decisions

The State Negotiating Committee recognized the CSEA as the exclusive negotiating representative of the general unit of State employees. Various other employee organizations filed petitions contesting the designation of the general unit and the recognition of CSEA, all of which proposed one or more negotiating units alternative to the unit designated by the employer.

The initial authority of the public employer to make a determination as to the representation status of an employee organization is subject to the overriding responsibility of the Board (§ 305.5(b), (c) CSL).

The right of employees to be represented by an organization of their choice is a right basic to all labor relations acts, whether it be in the public or private sector.

Order

On November 27, 1968, this Board issued a decision in the above-entitled matter, in which we determined that a general unit of employees of the State of New York is inappropriate for the purposes of collective negotiations. We further determined that five negotiating units of State employees are appropriate and that there should not be negotiations on the basis of the general unit in order to insure fairness to all employee organizations competing in forthcoming elections and to assure public employees the right to choose their representatives freely. Accordingly, we herewith issue the first of a series of orders implementing this decision.

IT IS ORDERED that the State Negotiating Committee shall forthwith refrain from negotiating with the Civil Service Employees Association, Inc., on the basis of the general unit, with respect to the terms and conditions of employment of employees of the State of New York, until this Board certifies employee organizations in the units determined to be appropriate.

IT IS FURTHER ORDERED that the State Negotiating Committee be neutral in its treatment of all employee organizations which are parties herein until

1-69

Decision

On November 15, 1967, the State of New York, herein referred to as the employer, recognized the Civil Service Employees Association, Inc., herein referred to as CSEA, as negotiating representative of employees in a general unit made up of all State employees other than professional members of the State University of New York and members of the State Police. Timely petitions contesting the designation of the general unit and the recognition of CSEA were filed by many organizations, all of which proposed one or more negotiating units alternative to the unit designated by the employer.

The Petitioners and the Units

They Claim

New York State Employees Council 50, American Federation of State, County and Municipal Employees, AFL-CIO, herein referred to as Council 50, directly and through several of its affiliated locals, seeks the following units:

1. All correction officers, correction youth camp officers and correction hospital officers in the Department of Correction, excluding all supervisors and all other persons.

This identical unit is claimed by another of the petitioners, Local 456 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as IBT.

2. All employees in the Psychiatric Attendant Series, including psychiatric attendant, psychiatric senior attendant, psychiatric staff attendant, psychiatric supervising attendant, psychiatric head attendant, psychiatric chief supervising attendant and all (T.B.) titles in this series.

3. All nonsupervisory employees in the Rehabilitation Counselor Series in the Department of Education, including counselors and senior counselors. There are a few rehabilitation counselors in the Department of Social

3227
1. All nonsupervisory safety officers. SOBA leaves to the discretion of this Board whether all nonsupervisory safety officers should be included in a single unit or whether there should be separate units for those employees in the Department of Mental Hygiene, Department of Correction, and the State University, respectively. It takes no position with respect to the inclusion or exclusion from the proposed unit or units of safety officers, if any, in the Department of Health.

Local 381 of the Building Service Employees International Union, AFL-CIO, herein referred to as BSEIU, seeks two units consisting, respectively, of:

16. Lifeguards employed by Long Island State Park Commission.
17. Seasonal patrolmen employed by Long Island State Park Commission.

District 15, International Association of Machinists and Aerospace Workers, AFL-CIO, herein referred to as IAM, seeks a unit of:

18. Long Island State Park Police, Grade 14 and Grade 16.

The Police Conference of New York, Inc., through two of its affiliates, seeks units of:

19. Niagara State Park Police, excluding the captain and lieutenants.
20. All Capital Buildings Police.

The Correction Officers Association claims a unit of:

21. All correction officers and their supervisors, excluding the deputy warden and correction deputy superintendent.

Local 223 of the Building Service Employees International Union, AFL-CIO, seeks a unit of:

22. Inspectors in the Division of Industrial Safety Service of the Department of Labor, excluding chief inspectors.

The Association of New York State Civil Service Attorneys, Inc., seeks a unit of:
Board Decisions ¶ 1–399.85

28. Lawyers holding competitive class positions in the attorney series of titles for which permission to practice law in the State of New York is a mandatory requirement, and persons holding training-level positions whether or not admitted to practice law in New York State. It would exclude lawyers who hold competitive class positions as counsel to a department or agency.

The New York State Nurses Association seeks a unit consisting of:

24. All registered professional nurses and every person lawfully authorized by permit to practice as a registered professional nurse in nursing service or in nursing education. The proposed unit would include persons on the faculty of the State University and, therefore, not within the general unit designated by the employer.

The American Physical Therapy Association claims a unit of:

25. All physical therapists. This unit would include physical therapists employed on the faculty of the State University and, therefore, not within the general unit designated by the employer.

Petitions were also filed by SOBA for a unit of nonsupervisory narcotics security assistants in the Department of Mental Hygiene, by the New York State Council of Carpenters, AFL-CIO, for a unit comprising all carpenters; and by Local 200 of the Building Service Employees International Union, AFL-CIO, for a unit consisting of all nonsupervisory employees of the Syracuse State School. Each of these petitions was withdrawn, as was a petition of the Police Conference, Inc., on behalf of a unit of police officers of the Palisades Interstate Park Commission.

Council 50 and BSEIU both filed timely petitions to decertify CSEA as the negotiating representative of employees in the general unit, on the ground that the general unit is inappropriate for the purpose of collective negotiations.

Motions to Dismiss

Some of the petitioners moved to disqualify CSEA from participating in this matter on the ground that it is not an employee organization within the meaning and intent of § 201.6 of the Public Employees' Fair Employment Act, herein referred to as the Act. The Director of Representation reviewed the arguments relating to this motion and rejected them. We affirm that ruling of the Director of Representation.

CSEA, in turn, moved to dismiss seven of the petitions on the grounds that the organizations which filed them do not qualify as employer organizations as that term is defined in § 201.6 of the Act. The Director of Representation reviewed the arguments relating to this motion and rejected them with respect to five employee organizations and accepted them with respect to the American Physical Therapy Association and the Association of New York State Civil Service Attorneys, Inc. With respect to the American Physical Therapy Association, he found that the majority of its members are not employed by public employers and that there is no organizational differentiation between such members and other members of the Association. Such differentiation exists in the case of the New York State Nurses Association and other petitioners which admit both public and nonpublic employees to membership. With respect to the Association of New York State Civil Service Attorneys, Inc., he found that it has not claimed to be an employee organization and does not comply with provisions of the Labor Law1 and the Membership Corporation Law applicable to employee organizations.2 We affirm these rulings of the Director of Representation.

---

1 The American Physical Therapy Association also does not file reports pursuant to Labor Law § 724.
2 No organization may qualify as an employee organization under the definition of § 201.6 of the Act and fail to qualify as a labor organization under the definition contained in § 721 of the Labor Law. This Board will not grant status to an organization that is not in compliance with the New York State Labor Law.

Labor Law § 721.

Definitions. When used in this article, the term: "Labor organization" means any organization of any kind which exists for the purpose, in whole or in part, of representing employees employed within the state of New York in

3229
Unit Determination of Director of Representation

With respect to the unit claims of the petitioners, the Director of Representation gave full consideration to the evidence produced and to the arguments made. He found that the employees within the general unit did not share a community of interest in that the range of their work assignments and of the training required for the performance of such assignments was inordinately broad. On the other hand, he found that, in the language of the employer:

none [of the petitioners] has related its unit to a meaningful pattern of collective negotiation. Each would leave the State with a jumble of mixed vertical and horizontal units. They would leave it to the State to bring order out of the chaos they had created.

We agree with this analysis of the Director of Representation.

The employees concerned in this representation dispute are employed in over 3,700 job classifications, categorized in some 90 occupational groupings. These job classifications far surpass in diversity and number those usually found in public or private employment. These classifications run the gamut from Aircraft Pilot to Wild Life Trapper.

The enormity of this diversity of occupations and the great range in the qualifications requisite for employment in these occupations would preclude effective and meaningful representation in collective negotiations if all such employees were included in a single unit. The occupational differences found here give rise to different interests and concerns in terms and conditions of employment. This, in turn, would give rise to such conflicts of interest as to outweigh those factors indicating a community of interest.

Thus, the implementation of the rights granted by the Act to all public employees mandates a finding that a single unit would be inappropriate.

On the other hand, to grant the type of narrow occupational fragmentation requested by the petitioners would lead to unwarranted and unnecessary administrative difficulties. Indeed, as the State contends, it might well lead to the disintegration of the State’s current labor relations structure.

Having rejected the unit designated by the employer and those proposed by petitioners, the Director of Representation decided that there should be six negotiating units, as follows:

1. Operational Services Unit, Inspection and Security Services Unit, Health Services and Support Unit, Administrative Services Unit, Professional, Scientific and Technical Services Unit.
2. A unit of seasonal employees of the Long Island State Park Commission.

Excluded from all units are all seasonal and part-time employees inasmuch as there is not sufficient evidence in the record to determine their proper unit placement, and persons claimed to be managerial or confidential employees by the employer. With respect to the latter group, the Director stated that further proceedings would be necessary to develop criteria to be utilized in categorizing an employee as managerial or confidential and to determine the desirability and practicality of their inclusion in the negotiating structure of State employees.

Both the employer and CSEA have contended on this appeal that the decision of the Director constitutes error, dealing with employers or employer organizations or with any political or civil subdivision or any agency thereof, concerning terms and conditions of employment...

Labor Law §726, subd. 1 provides:
Every labor organization and employer organization shall file with the industrial commissioner within six months after this article becomes effective and thereafter annually within five months after the end of its fiscal year, a verified report showing the financial condition and financial transactions of the organization during the fiscal year...

Membership Corporation Law, §13, subd. 1(a) provides:
If the certificate of incorporation specifies among the purposes the organization of working men and women and wage earners for their mutual betterment, protection and advancement or for the regulation of hours of labor, working conditions and wages, the approval of the board of standards and appeals of the state of New York shall be endorsed thereon and annexed thereto...
in that the units found in his decision do not coincide with any of the units petitioned for in this proceeding. Thus, a most basic question presented on this appeal is whether this Board, in a representation proceeding, may devise a unit that it seems to be most appropriate although such a unit is not sought by any of the parties.

We are convinced that this question must be answered in the affirmative. The statutory grant of authority to this Board to resolve disputes concerning representation status mandates this Board to define appropriate units and does not restrict its power simply to the approval or disapproval of units sought by a party or parties to the proceeding. Even apart from such clear statutory intent, the logic of the situation compels the same conclusion. If the Board's power herein were so restricted, a representation dispute might be interminable, in that it would continue until a party to the proceeding petitioned for a unit which the Board found to be appropriate in the light of statutory criteria. Such a restrictive interpretation of the Act would delay unduly participation by public employees in the determination of their terms and conditions of employment. It is for this reason that the Director of Representation has, in many proceedings, devised negotiating units which were not sought by any of the parties.4

We believe that the statutory criteria that "the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public" (Civil Service Law, § 207(c)) requires us to designate negotiating units which provide the employer with a comprehensive and coherent pattern for collective negotiations. Moreover, we believe that this statutory standard requires the designation of as small a number of units as possible consistent with the overriding requirement that the employees be permitted to form organizations of their own choosing to represent them

---

4 See, e.g., In the Matter of Board of Higher Education of the City of New York, 1 P E R B 407 (1968), adopted by the Public Employment Relations Board, 1 PERB (1968).

3231
3. Institutional Services Unit:
This unit is an expansion of the Health Services and Support Unit determined to be appropriate by the Director of Representation in that the unit now includes those occupations associated with institutions and related to the preparation and distribution of food and to personal and domestic services. We find that working conditions in institutions are significantly different from working conditions elsewhere. Accordingly, we conclude that employees engaged in these occupations—which are unique to institutions—have a greater community of interest with their fellow institutional employees than with operational services employees.

4. Administrative Services Unit:
This unit is similar to the unit determined to be appropriate by the Director of Representation except that it also includes certain inspectors, investigators and examiners who were deleted from Unit 2. All inspectors, investigators and examiners are placed in this unit unless their responsibilities are of a professional, scientific or technical nature.

5. Professional, Scientific and Technical Services Unit:
This unit is similar to that determined to be appropriate by the Director of Representation except that it includes inspectors, investigators, and examiners, the nature of whose responsibilities are of a technical, professional or scientific nature.

The implementation of these units in this representation proceeding requires a determination as to those eligible for inclusion in each unit. In making this determination, we must consider these as yet unanswered questions—

First—A determination as to which job titles shall be included in each unit. We feel that the delineation of the units heretofore made provides sufficient specificity to allocate the majority of job titles to their respective units. However, there may be a question with respect to some job titles as to which unit they belong.

Second—In his decision, the Director included in each unit those responsible for the supervision of the activities of that unit. It is our policy not to exclude all supervisors arbitrarily from a rank-and-file unit. Rather, supervisors have been excluded when there was a showing that their supervisory duties and obligations were of such a nature to give rise to such a conflict of interest as to preclude their inclusion in the same unit with rank-and-file. Thus, a determination must be made as to what supervisors will be excluded from any unit and the disposition of those excluded.

Third—The dimensions of the exclusion of managerial and confidential employees.

We believe that these specific questions of eligibility and exclusion can be resolved most expeditiously in the following manner: This Board shall prepare a list of job titles to be placed in each unit. This list shall include the Board's disposition of the supervision question. A second list prepared by the Board will indicate those excluded as managerial or confidential. Within seven days after these lists have been submitted to the parties, a conference will be scheduled by the Board, at which time the Board will consider and rule on any objections of the parties to such lists.

Majority Status

Section 207.1 of the Act requires this Board to "ascertain the public employees' choice of employee organization as their representative . . . on the basis of dues deduction authorization and other evidence, or, if necessary, by conducting an election." The procedures of the Board which permit certification without an election would, in this matter, inordinately time-consuming. The Director of Representation has noted in his decision that:

---

See, e.g., In the Matter of New York State Division of State Police, Case Nos. C-0062, C-0130, C-0133 (1968).
See Rules of Procedure of PERB, § 201.6 (b)(1).

3232
Board Decisions

The circumstances herein are unique; no case heretofore presented to the Board has involved comparable conditions. This employer has 167,000 employees, of whom it would place 149,270 in the general unit. In no case before the Board heretofore has anyone alleged the propriety of a unit larger than approximately 9,000 employees.

In a case with as many employee organizations as are present here, and with units as large as those which will be forthcoming, the burden of checking the names submitted by each of the employee organizations against the lists of each of the others would occasion unconscionable delay prior to the certification of any negotiating representatives. Accordingly, we conclude that meaningful and effective implementation of the intent, purpose and language of the Act mandates an election to ascertain the public employees' choice of an employee organization as their representative. This election will be scheduled immediately upon the establishment of the lists of employees within each unit as provided above.

Current Negotiations

There remains one further matter that should be considered herein: namely, the status of current negotiations concerning terms and conditions of employment of the employees involved in this proceeding. The question has not been placed before us by any of the parties, but the realities of the situation impel us to review briefly the powers and limitations of this Board to deal with this question.

In November 1967, a motion was made before this Board by six employee organizations seeking an order directing the State Negotiating Committee, acting on behalf of the public employer, to cease from negotiating with CSEA. The State Negotiating Committee, exercising the prerogative which the Act gives to a public employer, had designated a general unit and recognized CSEA as the representative of the employees in that unit.

This Board, in response to this motion, issued a provisional order directing the

1-69

State Negotiating Committee to cease negotiating with CSEA on an exclusive basis and to be neutral in its treatment of all employee organizations until the Board resolved the issues raised in this representation dispute. This order was reversed by the Court of Appeals, which stated:

An organization which disputes the representation status of an employer-recognized organization may invoke the procedures of the Board under sections 205 and 207 to obtain Board certification. In that event it may displace the previously employer-recognized organization and the Board, under paragraph (k) of subdivision 5 of section 204, may "exercise such other powers, as may be appropriate." Presumably, the Board may then issue orders to enforce its determinations, although the statute contains no other direct delegation of such powers (see § 210, subd. 4). But the condition precedent to such orders is the making of a determination by the Board (§ 205, subd. 5, paras. [b], [c]; § 206).\(^1\)

While the provisional order issued by this Board was in effect, the State Negotiating Committee refrained from negotiating with any employee organization. After the order was vacated by the Court of Appeals, agreement was reached with CSEA with respect to matters which required the approval of the State Legislature.

This fall, negotiations between the State Negotiating Committee and CSEA resumed. These negotiations were aimed at arriving at an agreement with respect to the terms and conditions of employment during the next fiscal year. At the time these negotiations began, this Board had not rendered a decision with respect to the appropriateness of the general unit. The conditions which existed subsequent to the decision of the Court of Appeals on March 7, 1968, have continued to exist until our unit determination to-

\(^1\) In the Matter of State of New York and Council 20, American Federation of State, County and Municipal Employees, AFL-CIO, et al., 1 PERB 301 (1967).

\(^2\) CSEA v. Healey et al., 21 N.Y.2d 541, 547 (1968).
Board Decisions

Onondaga County Water Authority, Employer,

and

Truck Drivers and Helpers, Local Union 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner.

Case No. C-0297

Before: ROBERT D. HELSBY, Chairman; JOSEPH R. CROWLEY, GEORGE H. FOWLER

After a timely petition for certification, Local Union 317 was certified as the exclusive representative for the purpose of collective negotiations for a group of employees of the Onondaga County Water Authority.

Decision

On August 5, 1968, Truck Drivers and Helpers, Local Union 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein referred to as the petitioner, filed, in accordance with the Rules of Procedure, herein referred to as the Rules, of the New York State Public Employment Relations Board, herein referred to as the Board, a timely petition for certification as the exclusive negotiating representative of all employees of the Onondaga County Water Authority, herein referred to as the employer, excluding supervisory and confidential employees.

On October 3, 1968, at a hearing presided over by a trial examiner of the Board, the parties entered into a consent agreement which provides, inter alia, that the appropriate unit in this matter is as follows:

UNIT:

Included: Typist, clerk, engineering aide, senior engineering aide, water meter repair man, senior water meter reader, water meter reader, engineering technician No. 1, labor foreman, water maintenance man (I and II), laborer, water plant operator, water plant 1-69.

Dated: November 27, 1968

3234
¶ 2–7006
In the Matter of the Application of

NASSAU CHAPTER CIVIL SERVICE
EMPLOYEES ASSOCIATION, INC., for
a Judgment pursuant to CPLR, Article
78,

Petitioner,

against

ROBERT D. HELSBY, JOSEPH R.
CROWLEY, and GEORGE H. FOWLER,
constituting the PUBLIC EMPLOY-
MENT RELATIONS BOARD,

and

NASSAU LIBRARY SYSTEM,
Respondents,

Supreme Court, Nassau County, Special
Term, May 19, 1969

In this proceeding pursuant to Article
78 of the CPLR judgment is GRANTED
in favor of the respondents dismissing
the petition.

The petitioner, an employee organi-
zation within the meaning of CSL § 201
(6) has been denied certification as exclu-
sive negotiating agent for the employees
of the respondent Nassau Library System
by the respondent Public Employment
Relations Board (hereafter PEBB). The
PERB, in a comprehensive decision dated
August 14, 1968 held that the Nassau
Library System was not a “government”
or “public employer” within the meaning
of CSL § 201(7), and, therefore, the
PERB had no authority to exercise juris-
diction over it, Nassau Library System.
With that conclusion the Court agrees.
No useful purpose will be served by re-
stating the substance of that decision.

Moreover, contrary to the allegations
in paragraph “32” of the supplemental
petition and in agreement with affirm-
ative defense pleaded in the answers of a
respondent the Court holds that the hear-
ing held by the respondent PEBB at
which evidence was taken was not a “hearing
held, and at which evidence was
taken, pursuant to direction by law”
which would require a transfer of the
proceeding to the Appellate Division pur-
suant to CPLR 7304(g), 7308(4).

Submit judgment on notice.

¶ 2–7007
In the Matter of

CIVIL SERVICE EMPLOYEES
ASSOCIATION,

v.

ROBERT D. HELSBY, et al, constitut-
ing the PUBLIC EMPLOYMENT RELA-
TIONS BOARD, et al,

Respondents.

Appellate Division, 3rd Department
June 4, 1969

Proceeding under CPLR article 78
(transfered to the Appellate Division
of the Supreme Court in the Third Judicial
Department by order of the Supreme
Court at Special Term, entered in Albany
County) to review a decision of the
Public Employment Relations Board
which, in a representation status dispute,
established five employer-employee negoti-
ating units for State employees.

Opinion for Confirmation

Per Curiam.

This proceeding was brought under
CPLR Article 78, (transfered to the
Appellate Division of the Supreme Court
in the Third Judicial Department by
order of the Supreme Court at Special
Term entered in Albany County) to re-
view a decision of the Public Employment
Relations Board which, in a representa-
tion status dispute, established five em-
ployer-employee negotiating units for
State employees.

Following the enactment of the Public
Employees' Fair Employment Law (Civil
Service Law, art. 14; L. 1967, ch. 392
also known as the Taylor Act) the State
of New York, as employer (acting
through the State negotiating com-
mittee) announced that it would negotiate
collectively with three units of State
employees: professional employees of the
State University, members of the State
police, and a general unit of all other
State employees except members of the
militia and those deemed to be manage-
ment. The petitioner was recognized to
negotiate on behalf of employees of the
general unit for a one-year period. Pur-
suant to procedures established by respondent Board in accordance with the statute (Civil Service Law, § 205, subd. 5, par. [a]; 4 NYCRR 201.1-201.7) various other employee organizations, some of which are respondents herein, filed petitions with the Board contesting the appropriateness of the general unit designated by the State negotiating committee and objecting to the recognition of the petitioner as representative for the employees of that unit. As required by the procedures established by the Board (4 NYCRR 201.4, subd. 66) each petition for certification contained a description of the negotiating unit claimed to be appropriate, but permission to amend was freely granted in the course of the administrative hearings, with the result that the Board considered some 25 proposed negotiating units.

Upon the record of the hearings held upon the petitions filed and the recommendation of its director of representation, the Board determined that neither the general unit designated by the employer nor the units claimed by the petitioning employee organizations were appropriate under the standards prescribed by the statute (Civil Service Law, § 207, subd. 1, par. [a]), upon findings that:

The enormity of this diversity of occupations and the great range in the qualifications requisite for employment in these occupations would preclude effective and meaningful representation in collective negotiations if all such employees were included in a single unit. The occupational differences found here give rise to different interests and concerns in terms and conditions of employment. This, in turn, would give rise to such conflicts of interest as to outweigh those factors indicating a community of interest.

Thus, the implementation of the rights granted by the Act to all public employees mandates a finding that a single unit would be inappropriate.

On the other hand, to grant the type of narrow occupational fragmentation requested by the petitioners would lead to unwarranted and unnecessary administrative difficulties. Indeed, as the State contends, it might well lead to the disintegration of the State's current labor relations structure.

Having rejected the units designated or proposed by the litigants, the Board determined that five units, based on occupational groupings, were appropriate under the statutory standards: an operational services unit, a security services unit, an institutional services unit, an administrative services unit, and a professional services unit.

Petitioner contends that the Board's determination, insofar as it rejects the general unit designated by the State negotiating committee and establishes five units not requested by any of the parties before it, is arbitrary, capricious, and not supported by substantial evidence, and urges that the public employer's designation of the general unit be reinstated.

While the public employer, in the course of extending recognition to employee organizations, may initially designate bargaining units (Matter of Civil Serv. Employees Assn. v. Helebey, 21 N Y 2d 541, 549), the statute (§ 207, subd. 1) expressly authorizes the Board to establish appropriate employer-employee negotiating units, applying those standards prescribed by the Legislature. Such determination must be made by providing a resolution of a particular dispute as to representation status on petitions filed with it pursuant to § 205, but we do not construe the Board's function as being limited to a review of the employer's designation or to approving or disapproving units proposed by the parties to the dispute.

In any event, there was testimony, particularly that of Daniel Nelson and Gerald McEntee, from which the Board could reasonably infer that the divergent interests and aspirations concerning terms and conditions of employment between employees in non-related occupations would give rise to conflicts which would prevent all employees in a single unit from being represented effectively.
The testimony introduced by the petitioning employee organizations does indicate that each sought a unit or units consistent with its own organizational pattern without regard to a rational pattern applicable to all employees, as required by the Act.

It cannot be said that the Board's determination of the appropriate units lacks evidentiary support, or was arbitrary or capricious, or that the Board deviated from the statutory standards. The evidence in this record was comprehensive. It includes a description of the training required for every position in State service; the duties and functions of every position; the promotional opportunities of State employees; the grievances articulated by diverse groups of employees within State service; the problems created by too large a unit in Philadelphia and in Rochester; and the problems created by too many small units in New York City. The parties were not denied an opportunity to present evidence relating to the appropriateness of the units ultimately defined by the Board. The procedures established pursuant to the statute (§ NYCCRR 201.7, subd. [b]) permit the Board to conduct further hearings upon the report and recommendation of the director of representation. The counsel to respondent Board stated, upon the argument, that no party requested the Board to conduct such a hearing. The units defined by the Board appear to be reasonable and in accord with the standards laid down by the Legislature.

The determination should be confirmed and the petition dismissed, without costs.

Gibson, P. J., Cooke and Greenblatt, JJ., concur. Herlihy and Staley, Jr., JJ., concur in the result, in an opinion.
Herlihy and Staley, Jr., JJ. (concurring in result).

We concur in the result but on the sole and limited ground that the present record contains substantial evidence to sustain the Board's finding, and that the determination is neither arbitrary nor capricious.

In addition, we agree with the position taken by the intervenor State of New York that in the interest of expediting the resolution of the issues the determination of the Board should be confirmed.

In the Matter of the Application of
LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Petitioners,

v.

ROBERT D. HELSBY, GEORGE H. FOWLER, and JOSEPH R. CROWLEY, together constituting the PUBLIC EMPLOYMENT RELATIONS BOARD and UNION FREE SCHOOL DISTRICT NO. 12, BRENTWOOD, NEW YORK, and BRENTWOOD CHAPTER, CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,

Respondents.

Supreme Court, Suffolk County, Special Term, June 4, 1969

Cohan, Jr. This is an Article 78 Proceeding. Petitioner seeks a reversal of the determination of the Public Employment Relations Board, dated January 29, 1969 and further seeks direction for a de-certification of the Brentwood Chapter, Civil Service Employees Association, Inc. as the representative for the Brentwood clerical and secretarial employees and for a direction for a further election to be held.

It appears that petitioner was advised that an election would be held on January 16, 1968 to designate the negotiating representative for the unit consisting of clerical and secretarial employees of the school district. Petitioner did not participate in that election and the Brentwood Chapter, Civil Service Employees Association, Inc., was designated as the
There is an uncertainty as to whether a summer school program will operate and whether a teacher will be accepted if the summer school program is conducted. The summer school program is, by its nature, of very short duration, and from year to year, there are changes in its curriculum. After the summer school terminates, the great majority of the summer school teachers employed therein return to their regular full time positions as teachers in the public school system. Their involvement with the summer school program has ceased and does not reappear again until a summer school program is established for the following summer.

The Court finds no language in the statute (Civil Service Law article 14) which indicates an intention on the part of the legislature to give PERB the power to exercise any control over non-employees. (See Helsby v. Board of Education of Central School District #2, 491 N.Y.S.2d 353)

The petitioners contend that the rights granted to public employees as set forth in the Taylor Law, section 202—Right of Organization, section 203—Right of Representation, and section 205—Rights Accompanying Certification or Recognition, do not terminate at the conclusion of the summer session. The six week summer school program is too short a period for summer school teachers to have a real opportunity to form, join and participate in an employee organization or to meaningfully negotiate collectively with a public employer or to form an organization which will be certified or recognized to represent the summer school teachers. Since summer school would end before effective negotiations could be completed, recognition of a summer school teachers association as an “employee organization” under Civil Service Law section 240(6) is meaningless.

The intent of the legislature in adopting the Taylor Law is expressed in § 200 of the Civil Service Law and throughout the statement of policy therein contained appears the term “employees.” The intent of the legislature is the primary object sought in the interpretation of statutes (McKinney’s Cons. Laws of N.Y., Book 1, Statutes, sections 92 and 111). The legislature did not intend to include within the scope of the term “employees” a person employed in a summer school program whose nature as herein discussed does not justify the application of the Taylor Law.

The petitioner had no power or jurisdiction concerning the Poughkeepsie Area Summer School Teachers’ Association since this unit was not comprised of any employees at the time it filed its petition. Accordingly, the petition is dismissed and the findings and order of PERB are hereby set aside.

Submit judgment on notice.
Dated: September 26, 1969

In the Matter of the Application of
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
Appellant,
v.
ROBERT D. HELSBY, et al, constituting the PUBLIC EMPLOYMENT RELATIONS BOARD,
Respondents.

Court of Appeals, July 1, 1969

Order affirmed, without costs, on the opinion at the Appellate Division. Concur: Fuld, Ch. J., Burke, Scileppi, Breitel and Jasen, JJ. Bergan, J., dissents and votes to reverse in an opinion.

BERGAN, J. (dissenting): The decision of the Board reviewed in this proceeding superseded the arrangement which the Governor had made for discussions with groups of State employees. The Governor’s budgetary powers under the New York Constitution (Art VII § 1) are broadly framed.

In construing the statute creating the Public Employment Relations Board (L 7040 10-89
the statement of policy in § 200 and proceeds on to the power to “define” representative units of employees for the purpose of negotiations (§ 207), suggests that it was intended the Board could undo arrangements for representation made by the Governor or to “overturn” them, in the language of the State’s brief summarizing the decision of the Board’s director of representation.

The conflict of power which could occur, and here did occur, is left unresolved by the statute, and a court must resolve such a conflict in favor of constitutional officers and against officers created by statute.

But, if the power clearly existed, its exercise in this case is arbitrary as a matter of law on the present record. It has no rationally demonstrated basis in the total statutory criteria according to which the Board must function. There are three standards by which the Board must act under § 207.

All three must be complied with. For the purpose of this discussion, the first two dealing with “community of interest” among employees and the power of officials to agree on terms of employment, may be left aside since, even if these are met and the third is not met or its resolutions are arbitrary, the determination cannot stand.

The third criterion which must be considered in defining a unit is that it “shall be compatible with the joint responsibilities of the public employer and public employees to serve the public” (§ 207 (1) (e)).

There is no base in the record to support the view of the Board that its larger number of units is better suited, i.e., more “compatible” with the “responsibilities” of the State and its employees to “serve the public” than the general unit fixed by the Governor. On the contrary, this record demonstrates strongly the decision by the Board is less compatible with that responsibility and is potentially harmful to the public service and, therefore, arbitrary.

The arbitrary nature of the determination is made manifest in this respect by the rationalization in the Board’s de-
§ 2–7013

Courtd

decision dealing with this responsibility to serve the public. It is worthwhile to read it in text:

We believe that the statutory criteria that “the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public” (Civil Service Law, § 207(1)(C)), requires us to designate negotiating units which provide the employer with a comprehensive and coherent pattern for collective negotiations. Moreover, we believe that this statutory standard requires the designation of as small a number of units as possibly consistent with the overriding requirement that the employees be permitted to form organizations of their own choosing to represent them in a meaningful and effective manner.

It is not easy to see just what a “comprehensive” and “coherent pattern” for “collective negotiations” has to do with “joint responsibilities” of the State and its employees. The statute was here obviously dealing with the obligation of public employees to render good public service (and not with their “patterns” of labor negotiations) (§ 207(1)(c)).

The next sentence is even more puzzling and irrelevant, i.e., that “this statutory standard” [for responsibility] “requires the designating of as small a number of units as possible.” This means, as one would normally read it, that a large unit would provide better public responsibility than several small units.

But the Board was in the process of substituting the Governor’s general unit for five small units of its own creation.

The rest of the words of rationalization “consistent with the overriding requirement that the employees be permitted to form organizations of their own choosing to represent them in a meaningful and effective manner” are not readily to be accorded relevance to the question of public responsibility to which they purport to be directed.

The result is that the Board has not, in this area, demonstrated a rational basis for superseding the Governor’s arrangement of appropriate negotiating units related to joint responsibility to serve the public. All that the Board shows is that it has a different philosophical view from the Governor in this issue. That is not enough.

The classic judicial test in a mandamus-type review for this kind of determination, involving the exercise by a public agency of judgment in the area committed to its discretion, was stated by Haight, J., in People ex rel. Lodes v. Dept. of Health (189 N.Y. 187, 184). It is whether the determination is “arbitrary, tyrannical and unreasonable, or is based on false information.”

The court, applying these or similar standards, has not hesitated to annul determinations which could be seen to have been rationally unsupported or arbitrary (Matter of Forman v. N.Y.S. Lbr. Auth., 17 NY2d 224; Matter of Nationwide Co. v. Supt. of Ins., 16 NY 2d 287; Matter of Matty’s Rest, Inc. v. N.Y.S. Lbr. Auth., 15 NY2d 659; Matter of Mundle v. Brown, 5 NY2d 51; Matter of Tracy Development Co. v. Malbie, 283 NY 500).

Rationalization of the kind which the Board has indulged in this decision is not rationality which has been the common ground for the acceptance of administrative determination by the court.

It was emphasized in the present argument that the Board here acted with some special kind of “expertise.” No such expertise is demonstrated in this record as might, for example, be shown in rate making by public service examiners or engineers. The Board members have shown no experience by dealing in any place of responsibility with a unit of government of the size, complexity and constitutionally prescribed fiscal structure as the New York State government; and, indeed, only the Governor and his predecessors, the budget directors and officers of the Legislature’s fiscal committees have had any such experience. The State as an employer is unique.

One of the Board members in a current publication concludes that “[t]he policies of the PERB obviously do not constitute an inflexible or unchanging approach to the question. Experience will be a teacher; undoubtedly there will be changes as a result of the lessons taught
by experience."1 The judgments of experienced public officials ought not be cast aside while new officials are gaining experience in the field.

Finally, if the text of the statute, that in the "definition" of units there must be compatibility with the duty of the employees to "serve the public" be kept in mind, present decision indicating the direction of the Board's policy creates an atmosphere of grave danger and uncertainty in the State's labor relations.

All this does not suggest that the Board's policies and proceedings will help the State avoid strikes, as the statute requires, or promote the "joint responsibilities" of the State and State employees "to serve the public." The determination runs against the purpose of the statute; it is arbitrary; it should be annulled.

---

In the Matter of State of New York (State University of New York), Petitioner, v. New York State Public Employment Relations Board et al., Respondents.

Supreme Court, Appellate Division, Third Department, New York July 23, 1992


SUMMARY
Proceeding pursuant to CPLR article 78 (transferred to the Appellate Division of the Supreme Court in the Third Judicial Department by order of the Supreme Court, entered in Albany County) to review a determination of respondent Public Employment Relations Board which held that certain graduate students of petitioner are public employees within the meaning of the Public Employees' Fair Employment Act.

HEADNOTES
Proceeding against Body or Officer
Transfer to Appellate Division
Retention of Proceeding Improperly Transferred

Civil Service
Public Employees' Fair Employment Act
Determination of Public Employment Relations Board-- Graduate and Teaching Assistants

[(1)] In a proceeding to review a determination of the Public Employment Relations Board (PERB) that certain graduate students of petitioner State University of New York are public employees within the meaning of the Public Employees' Fair Employment Act, the matter should have been disposed of by Supreme Court and not transferred to the Appellate Division where petitioner does not dispute that there is substantial evidence to support the finding of fact that such students are employed in the sense that they are paid for services rendered under the direction of the University, but contends that substantial evidence is lacking to justify finding such employment covered under a balancing test that PERB should have employed, since the issue raised is not one of substantial evidence, but rather a challenge to the legality of the test employed. Nevertheless, in the interest of judicial economy, the court will retain jurisdiction.

Civil Service
Public Employees' Fair Employment Act
Determination of Public Employment Relations Board-- Graduate and Teaching Assistants

[(2)] In a proceeding to review a determination of the Public Employment Relations Board (PERB) that graduate and teaching assistants employed by petitioner State University of New York are public employees within the meaning of the Public Employees' Fair Employment Act, the contention that PERB erred because it did not use a balancing test in which the assistants' dual status as students and employees is weighed is unavailing since nothing obliges PERB to use the balancing test. Given PERB's expertise in this area, the scope of judicial review of its determination is narrow (see, Civil Service Law § 205 [5]), and the standard employed by PERB, that of requiring an employment relationship to exist, that it be regular and substantial in nature, and that there be no evidentiary showing that the Legislature intended to exclude said employment relationship from Taylor Law coverage, is consistent with this and other prior PERB determinations. Inasmuch as PERB's interpretation is rational, the court may not substitute a different one and, hence, the decisions of other jurisdictions and the National Labor Relations Board have no force here. *392

Civil Service
Public Employees' Fair Employment Act
Determination of Public Employment Relations Board-- Graduate and Teaching Assistants

[(3)] In a proceeding to review a determination of the Public Employment Relations Board (PERB) that graduate and teaching assistants employed by petitioner State University of New York are public employees within the meaning of the Public Employees' Fair Employment Act, petitioner's claim that the Taylor Law is in pari materia with Labor Law § 511 (15), which specifically excludes from "employment" for the purposes of determining unemployment compensation eligibility services rendered for an educational institution by a person who is enrolled and in regular attendance as a student in that institution, is rejected since the two statutes serve
different public policy objectives (cf. Civil Service Law § 200; Labor Law § 501) and have different administrative mechanisms for interpretation and enforcement (cf. Civil Service Law § 205; Labor Law §§ 530-535). Accordingly, inasmuch as both statutes are complete unto themselves, they need not be construed in connection with one another.

Civil Service
Public Employees' Fair Employment Act
Determination of Public Employment Relations Board--Graduate and Teaching Assistants--Public Policy

([4]) In a proceeding to review a determination of the Public Employment Relations Board (PERB) that graduate and teaching assistants employed by petitioner State University of New York are public employees within the meaning of the Public Employees' Fair Employment Act, petitioner's public policy argument, that the collective bargaining process that will be the result of PERB's decision is so antithetical to academic affairs and concerns that graduate students ought not to be permitted to engage in it, was not urged upon PERB and, thus, need not be considered. Moreover, petitioner has not pointed to any important constitutional or statutory duty or responsibility to justify its contention.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

Civil Service Law §§ 200, 205 (5); Labor Law §§ 501, 511 (15); §§ 530-535.

NY Jur, Unemployment Insurance, §§ 40, 42.

NY Jur 2d, Civil Servants and Other Public Officers and Employees, §§ 350, 351, 368, 396.

ANNOTATION REFERENCES
Part-time or intermittent workers as covered by or as eligible for benefits under State unemployment compensation act. 95 ALR3d 891.

APPEARANCES OF COUNSEL
Robert Abrams, Attorney-General (Daniel Smirlock and Nancy A. Spiegel of counsel), for petitioner. *393

Ernest F. Hart (Seyden M. Nathan of counsel), for New York State Public Employment Relations Board, respondent.
David A. Mintz for Communications Workers of America, District One, respondent.
Bernard F. Ashe (Ivor R. Moskowitz of counsel), for United University Professions, respondent.

OPINION OF THE COURT

Yesawich Jr., J.

In December 1984 respondent Communications Workers of America/Graduate Employees Union, AFL-CIO (hereinafter CWA) petitioned respondent Public Employment Relations Board (hereinafter PERB) to certify it as the bargaining representative of all graduate and teaching assistants employed by petitioner at various State University of New York campuses. In January 1985 PERB's Director of Public Employment Practices and Representation (hereinafter the Director) served a notice of petition and a hearing upon petitioner regarding CWA's certification petition. An Administrative Law Judge subsequently granted a motion by respondent United University Professions (hereinafter UUP), an organization representing faculty and other professionals employed by petitioner, to intervene; UUP contended that it, rather than CWA, should represent the graduate and teaching assistants.

Upon completion of 11 days of hearings, the Director issued a decision dismissing CWA's petition on the ground that graduate and teaching assistants are not "public employees" (Civil Service Law § 201 [7] [a]) and, therefore, are not entitled to the rights of organization, representation and collective negotiation provided by the Public Employees' Fair Employment Act (hereinafter the Taylor Law) (Civil Service Law art 14; see, 4 NYCRR 202.8). In reaching this conclusion, the Director resorted to a balancing test which he derived from Matter of State of New York (Department of Correctional Servs.) (6 PERB ¶ 3033, confirmed sub nom. Matter of Prisoners' Labor Union [Women's Div.] v. Helsby, 44 AD2d 707, lv denied 35 NY2d 641). The Director found that the graduate and teaching assistants are dual status personnel for they are simultaneously students at the institutions which employ them and that whether the Taylor Law is applicable to them turns on "whether the employment relationship, which is covered, is subordinate to the relationship which the [Taylor Law] does not cover". Although it adopted the Director's findings of fact, PERB rejected his balancing test in favor of a standard which requires a determination to be made respecting "whether
an employment relationship [with petitioner] exists and, if so, whether it is regular and substantial” and, beyond that, whether the Legislature “intended to exclude that employment relationship from coverage”. Invoking this standard, PERB found that graduate and teaching assistants are covered employees, reversed the Director’s decision, and determined that a separate bargaining unit consisting of only graduate and teaching assistants is appropriate.

Petitioner commenced the instant CPLR article 78 proceeding to annul PERB’s determination claiming, inter alia, that it is arbitrary and capricious, unreasonable, an abuse of discretion and not supported by substantial evidence. Upon the parties’ consent, Supreme Court transferred the proceeding to this court.

The two arguments advanced by petitioner on appeal are: (1) that PERB erred as a matter of law in failing to apply the balancing test used by the Director to conclude that the assistants are primarily students and hence not “public employees”; and (2) that PERB’s petition should have been dismissed because it is against public policy, as now will be the case, to subject fundamentally academic issues to the collective bargaining process.

Petitioner’s contrary view notwithstanding, nothing in the language of Matter of State of New York (Department of Correctional Servs.) (6 PERB ¶3033, supra) obliges PERB to use the balancing test. Indeed, in that case involving inmates employed in a prison, PERB’s decision focused not on a balancing test, but on the fact that the Legislature did not intend to extend the benefits of the Taylor Law to inmate labor (see, supra, at 3068). The standard employed by PERB, that of requiring that an employment relationship exists, that it be regular and substantial in nature, and that there be no evidentiary showing that the Legislature intended to exclude that employment relationship from Taylor Law coverage, is consistent with this and other prior PERB determinations (see, Matter of Great Neck Bd. of Educ., 5 PERB ¶4028, at 4052; Matter of Pearl Riv. Pub. Lib., 7 PERB ¶4034, at 4051; Matter of King, 6 PERB ¶3083, at 3155). Given that PERB’s interpretation is rational, we may not substitute a different one, and hence the decisions of other jurisdictions and the National Labor Relations Board, pressed upon us by petitioner, have no force here (see, Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd., supra, at 404; Matter of West Irondequoit Teachers Assn. v Helsby, 35 NY2d 46, 50).

(1) Petitioner does not dispute that there is substantial evidence to support the Director’s finding of fact, accepted by PERB, that the assistants “are employed in [the] sense [that they] are paid for services rendered under the direction of the University”, but contends that substantial evidence is lacking to justify finding such employment covered under the balancing test that PERB should have applied. The issue raised being not one of substantial evidence, but rather a challenge to the legality of the test employed, this matter should have been disposed of by Supreme Court (CPLR 7804 [g]; see, Matter of Margolin v Newman, 130 AD2d 312, 315, appeal dismissed 71 NY2d 844); nevertheless, in the interest of judicial economy, we will retain jurisdiction and address it (see, Matter of Dixon v Coughlin, 178 AD2d 984).

(2) The contention that PERB erred because it did not use the balancing test adopted by the Director is to no avail. Given PERB’s expertise with respect to the fundamental policies underlying the Taylor Law, the scope of our review of its determination is narrow (see, Civil Service Law § 205 [5]); essentially, as long as PERB’s interpretation is reasonable and legally permissible—and we are satisfied that it is—it must be upheld (see, Matter of Incorporated Vil. of Lynbrook v New York State Pub. Empl. Relations Bd., 48 NY2d 398, 404).

(3) Nor are we persuaded by petitioner’s claim that the Taylor Law is in pari materia with Labor Law § 511 (15). Unlike the Taylor Law, Labor Law § 511 (15) specifically excludes from “employment” for the purpose of determining unemployment compensation eligibility “services rendered for an educational institution by a person who is enrolled and is in regular attendance as a student in such an institution” (see, e.g., Matter of Mitromaras [Roberts], 122 AD2d 368, 369-370; Matter of Johnson [Roberts], 101 AD2d 622, 623). It is true that both statutes concern employment; however, they plainly serve different public policy objectives (compare, Civil Service Law § 200, with Labor Law § 501) and have different administrative mechanisms for interpretation and enforcement (compare, *396 Civil Service Law § 205, with Labor Law §§ 530-535). Because both statutes are complete unto themselves, they need not be construed in connection with one another (see, McKinney’s Cons Laws of NY, Book 1, Statutes § 221).

(4) Regarding petitioner’s public policy argument, that the “collective bargaining process that will be the result of [PERB’s] decision ... is so antithetical to academic affairs and concerns that it is against public policy to permit graduate students to engage in it”, we note first that this contention
was not urged upon PERB and for that reason also the claim not be considered (see, Matter of Bork v Newman, 122 AD2d 329, 330). Apart from that, PERB has proffered a number of persuasive reasons why this argument lacks merit, not the least of which is that petitioner points to no "important constitutional or statutory duty or responsibility" justifying it (see, Matter of Board of Educ. v New York State Pub. Empl. Relations Bd., 75 NY2d 660, 668, quoting Matter of Port Jefferson Sta. Teachers Assn. v Brookhaven-Comsewogue Union Free School Dist., 45 NY2d 898, 899).

Mikoll, J. P., Mercure, Crew III and Casey, J.J., concur. Adjudged that the determination is confirmed, without costs, and petition dismissed. *397

Copr. (C) 2016, Secretary of State, State of New York

Certification of Representative and Order to Negotiate

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected; pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act, IT IS HEREBY CERTIFIED that Local 1088, American Federation of State, County and Municipal Employees, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit described below, as their representative for the purpose of collective negotiations and the settlement of grievances.

UNIT:
Included: All full-time cleaners, clerks, secretary to the administrator, secretary to the director of nurses, cooks, food service helpers, hospital guard, laborers, laundry workers, maintenance helpers, maintenance men, medical records clerk, medical records librarian, medical typist, relief cooks, senior account clerk typists, typists, telephone operators, and typists.

Excluded: All other employees.

Further, IT IS ORDERED that the above-named public employer shall negotiate collectively with Local 1088, American Federation of State, County and Municipal Employees, AFL-CIO and enter into a written agreement with such employee organization with regard to terms and conditions of employment, and shall negotiate collectively with such employee organization in the determination of, and administration of, grievances.

Dated: June 19, 1969

3467
Board Decisions

While the professional loyalty of non-annual lecturers, who have only a part-time affiliation with the university, may be to some other institution, professional loyalty should not serve as a basis for dividing the faculty into two units.

Decision and Order

The Legislative Conference of the City University of New York filed its petition in accordance with the Rules of Procedure, herein referred to as the Rules, of the New York State Public Employment Relations Board, herein referred to as the Board, on November 22, 1967. That petition sought Board certification as negotiating representative for all members of the instructional staff of the Board of Higher Education for the City of New York, herein referred to as the employer. The Legislative Conference contends that the instructional staff should be divided to form separate negotiating units as follows:

(1) All members of the permanent instructional staff with tenure and all those members of the temporary instructional staff serving in jobs which automatically lead to tenure upon completion of the applicable period of continuous employment specified in the employer's bylaws (these personnel will be herein referred to as the permanent staff), and all other members of the temporary instructional staff (herein referred to as the temporary staff) paid on an annual basis.

(2) All other temporary staff, except those who work less than six hours.

The employer contends that only one unit, consisting of all instructional personnel, is appropriate for purposes of collective negotiations. However, the employer further contends that lecturers working less than six hours should either be excluded from any unit or, if included in a unit, deemed ineligible to vote in any election that might be held.

The intervenor contends that an overall unit of instructional personnel is appropriate, except that college science technologists and assistants, and college engineering technicians should be in a separate unit.

All the parties have stipulated that supervisors, visiting professors and adjunct professors should be excluded from any unit deemed appropriate for the purpose of collective negotiations.

A hearing was held before Cole Pilcher, Esq., a trial examiner of this Board, on the issues raised by the petitions on February 27, 28, 29 and March 15, 18, and 22, 1968. After reviewing the record of such hearing, the evidence and briefs submitted by the parties, Paul B. Klein, Esq., Director of Representation of this Board, issued a decision on May 1, 1968.

In his decision, Mr. Klein determined that there should be two negotiating units for the instructional staff of the employer.

The decision of Mr. Klein was appealed by the employer. The employer, the intervenor and the Legislative Conference filed briefs with this Board and, on June 28, 1968, argued in support of their positions. Upon consideration of the entire record, the Board renders the following decision:

Facts

The employer is a municipal corporation created by Education Law § 6201 to "govern and administer that part of the public school system within the city which is of collegiate grade and which leads to academic, technical and professional degrees." There are presently 13 institutions subject to the jurisdiction of the employer, including seven senior colleges and six community colleges. As of July 1, 1968, two senior colleges will be added. There is also a graduate division and a teachers' education division.

Under the employer's bylaws, its employees have always been divided throughout its constituent institutions into three categories: the instructional staff, the administrative staff and the custodial staff. The instant case involves only the instructional staff.

The following table lists the various classes of employees in the instructional staff of the employer by the designations most frequently used by the parties:
Board Decisions

<table>
<thead>
<tr>
<th>Group</th>
<th>Class of Position</th>
<th>Tenure</th>
<th>Number of Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>Permanent</td>
<td>Faculty-rank-status ¹</td>
<td>Tenured or leading to tenure</td>
<td>4,380</td>
</tr>
<tr>
<td>Staff</td>
<td>College science technician and assistant, and college engineering technician</td>
<td>Tenured or leading to tenure</td>
<td>382</td>
</tr>
<tr>
<td>Permanent</td>
<td>Other members of the permanent staff ²</td>
<td>Tenured or leading to tenure</td>
<td>115</td>
</tr>
<tr>
<td>Staff</td>
<td>Higher education, research and miscellaneous specialized personnel ³</td>
<td>Nontenured</td>
<td>170</td>
</tr>
<tr>
<td>Temporary</td>
<td>Annual lecturer and teaching assistant</td>
<td>Nontenured</td>
<td>1,000</td>
</tr>
<tr>
<td>Staff</td>
<td>Nonannual lecturers who teach 6 hours or more</td>
<td>Nontenured</td>
<td>1,841</td>
</tr>
<tr>
<td>Temporary</td>
<td>Nonannual lecturers who teach less than 6 hours</td>
<td>Nontenured</td>
<td>1,247</td>
</tr>
<tr>
<td>Staff</td>
<td></td>
<td>Total</td>
<td>9,005</td>
</tr>
</tbody>
</table>

¹ This term includes members of the faculty and those who will automatically become members of the faculty upon achieving tenure. The faculty, generally speaking, consists of members of the permanent staff in the academic titles of professor, associate professor, assistant professor and instructor.

² This class includes clinical assistant, chairman of department (Hunter High School or Elementary School), critic teacher, education and vocational counselor, teacher, teacher of library, and tutor.

³ This class includes higher education officer, associate, and assistant, fellow (part-time), college physician, college dentist, research associate, and research assistant.

The employer's bylaws provide that all members of the permanent staff shall have tenure, and all members of the temporary staff shall not. A tenured employee has the right to hold his position during good behavior and efficient and competent service, and thus cannot be removed from his position except for cause, and by presentation and investigation of formal charges. Tenure also bestows rights of transfer, retention and preference if a position is discontinued.

All members of the instructional staff may teach the same subjects to the same students. All teachers grade, evaluate and are authorized to discipline students. They instruct in the same buildings, use the same classrooms and laboratories, and have the same privileges with regard to use of the dining room and other facilities.

As the above table indicates, the instructional staff has a very definite series of status stratifications by rank and tenure, with certain definite rights, privileges and benefits going with each higher step in the ranking order. This situation creates both major and minor areas of difference in terms and conditions of employment. The ultimate question in this case is whether any of these differences are sufficiently important or significant to justify division of the instructional staff into separate units for purposes of collective negotiations.

Opinion

The University of the City of New York is unusual among institutions of higher education because of the very high proportion of nontenured faculty in relation to the total instructional staff. The number of nonannual lecturers alone approaches 75% of the number of faculty-rank-status personnel and, when the number of annual lecturers is added to that of nonannual lecturers, the nontenured faculty almost matches the faculty-rank-status personnel in numbers. This circumstance is significant. Inasmuch as the nontenured instructional staff comprises a large number of persons who hold other positions from which they receive substantial fringe benefits and to which they owe their

3469
primary professional loyalty, their interests and ambitions relative to the City University are different from those of faculty-rank-status personnel.

The faculty-rank-status personnel are the heart of the university. It might be compromising to their independence and to the very stability of the university for tenured instructional personnel, in numbers almost equal to that of faculty-rank-status personnel, to be included in the unit of faculty-rank-status personnel.

We believe that the differences between faculty-rank-status employees and nonannual lecturers—whether they teach more or less than six hours a week—are of sufficient magnitude to preclude their being placed in the same negotiating unit. Faculty-rank-status personnel are all permanent staff in that they are tenured or hold positions leading to tenure. Nonannual lecturers, on the other hand, are appointed and reappointed for only one semester at a time. Faculty-rank-status employees receive many and various fringe benefits, the cost and value of which are considerable. Nonannual lecturers, on the other hand, do not receive these fringe benefits. Faculty-rank-status personnel exercise important responsibilities regarding the operation of the university by their service on departmental committees. Nonannual lecturers, on the other hand, rarely serve on departmental committees. Faculty-rank-status personnel have their primary personal commitment to the City University; nonannual lecturers, on the other hand, are likely to be full-time high school teachers working at the university at night, or businessmen, accountants, lawyers, or graduate students whose primary professional commitments are elsewhere.

The most cogent argument against the allocation of faculty-rank-status personnel and nonannual lecturers to distinct units is the fact that both have the same primary assignment, that is to teach the same subjects to the same students. This Board has already ruled that occupational differences alone do not warrant fragmentation (see In the Matter of Saranac Lake Central School District #1, Case No. C-0146, and Malone Central School District, Case No. C-0149). It follows that occupational similarities alone do not warrant amalgamation.

Accordingly, we adopt the action of the director of representation and hold that faculty-rank-status personnel and nonannual lecturers must be placed in separate negotiating units. The proper allocation to unit of the other classes of positions is less obvious. College science technicians do not engage in teaching, nor do they serve on departmental committees, but they do have tenure, are paid in accordance with salary schedules set by law, and are eligible for all the fringe benefits available to faculty-rank-status personnel, except that they receive only six weeks of paid vacation. Higher education research and miscellaneous specialized personnel do not hold tenured positions. It appears, however, that they are career personnel in the City University and they may have moved into their present titles by leave of absence from a tenured position. In their work with the university, their rights, privileges and benefits, except for tenure, are similar to those of faculty-rank-status personnel. While it could be argued that these two classes of positions are somewhat different from faculty-rank-status employees, it does not appear to us that these distinctions are substantial. On the other hand, they appear to have little in common with the nonannual lecturers. Accordingly, we adopt the action of the director of representation and allocate them to the unit of faculty-rank-status employees.

A greater difficulty is posed by the annual lecturers. They receive most of the fringe benefits made available to permanent staff, with the exception of sabbatical, personal and terminal leave. Moreover, they do serve on some university committees, but inasmuch as they are not members of the faculty, there are other important committees on which they do not serve. They are similar to nonannual lecturers in that they do not have tenure. The employer has most clearly portrayed the community of interest between annual lecturers and nonannual lecturers by noting the possibility . . . of a lecturer paid one year on an
Board Decisions

2. ORDERED that there be a unit of all members of the temporary instructional staff, except those employed in positions carrying tenure upon completion of the relevant period of continuous service specified in the bylaws of the City University of New York, but excluding higher education officer, associate and assistant, fellow (part-time), college physician, college dentist, research associate, research assistant, teacher of library, clinical assistant, visiting professor, visiting associate professor, visiting assistant professor and visiting lecturer; it is DIRECTED that an election by secret ballot be held under the supervision of the director of representation unless the petitioner or intervenor submits to the director of representation, within seven days from receipt of this order, dues deduction authorizations and other evidences sufficient to satisfy the requirements of Rules § 201.6(h) (1) for certification without an election.

3. The City University shall, within seven days from the receipt of this order, submit to the director of representation an alphabetized list of all employees of the City University in the units who were employed on the last payroll date prior to today and are still employed.

Dated: August 9, 1968

Dissent

I dissent from the determination of the majority that there should be two units for members of the faculty of the City University.

Section 207 of the Taylor Law sets forth three criteria which must be considered in defining negotiating units. The first relates to the community of interest among the employees to be included in the unit. By way of guidance, the Taylor Committee stated, at page 24 of its report of March 31, 1968:

Community of interest of employees with respect to the continuation of a traditional, workable, and, on the whole, satisfactory negotiating pattern... A presumption exists that, in the absence of compelling evidence to the contrary, these groups, as appropriate units, should not be disturbed.

8-69

3471
Board Decisions

The application of this criteria to the evidence before us indicates that a single unit for all instructional personnel of the City University would be appropriate. The Taylor Committee further stated, at pages 24 and 25:

Community of interest of employees with respect to specialization of occupation according to a craft or profession... This guide would, a priori, appear applicable at the present time to school teachers, ...

The second statutory criteria is that: the officials of government at the level of the unit shall have the power to agree, or to make effective recommendations to other administrative authority or the legislative body with respect to, the terms and conditions of employment upon which the employees desire to negotiate;

This criteria would be satisfied equally well whether there be two negotiating units for the faculty, as determined by the majority of the Board, or a single negotiating unit, as advocated by me.

The third statutory criteria is that: the unit shall be compatible with the joint responsibilities of the public employer and public employees to serve the public.

This criteria is discussed by the Taylor Committee on pages 27 and 28 of their report, where it said:

The normal criteria used in determining the unit for representation are those relevant to the community of interests of employees, which we have discussed above. This is very appropriate because it is the employees who are being represented. It is not suggested that these criteria be replaced by those related to the administrative convenience, orderliness and effectiveness. We suggest only that these latter be given due consideration when the boundaries of the appropriate employee-employer unit are being determined.

Reflecting the same attitude, this Board stated in its summary of the Rules of FERB (A Guide to the Taylor Law, page 7):

the State Board will give weight to the units which the public employer has determined to be appropriate in the light of responsibilities of the employer to serve the public.

The City University advocates the designation of a single unit for all its instructional personnel.

In view of the above, the petitioner bears the heavy burden of establishing that the interests of faculty holding tenure-bearing positions and those who serve as nonannual lecturers are in conflict. In support of its position, petitioner has shown little more than that many nonannual lecturers have a part-time affiliation with the University, their primary professional loyalty being to some other institution. Conjecture with respect to the professional loyalty of some of the faculty of the City University is not a sound basis for the division of the faculty into two units. Neither is the difference in benefits as enjoyed by faculty-rank personnel and nonannual lecturers sufficient to overcome the community of interest which they enjoy by reason of their common profession and which is apparent in the traditional pattern of their relationship with the University.

I would designate the entire faculty of the City University as a single negotiating unit.

Dated: August 9, 1963

3472