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State of New York Public Employment Relations Board Decisions from December 19, 2005

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from December 19, 2005

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO,
NASSAU LOCAL 830,

Charging Party,

- and -

COUNTY OF NASSAU

Respondent.

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

LORNA B. GOODMAN, COUNTY ATTORNEY (NICOLE S. BOUTIS of
counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Nassau (County) to a decision of
an Administrative Law Judge (ALJ) that found a violation of §209-a.1(d) of the Public Employees’ Fair
Employment Act (Act) when the County unilaterally discontinued the past practice of assigning
County vehicles to certain employees of the County’s Department of Public Works (DPW) who are
represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO,
Nassau Local 830 (CSEA).

EXCEPTIONS

The County excepts to the ALJ’s decision, arguing that the ALJ misapplied the record evidence
and made erroneous conclusions of law. The County asserts that CSEA failed to meet its burden of
proof. CSEA supports the ALJ’s decision and argues that it proved its case.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

-and-

VILLAGE OF SUFFERN,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the units found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Unit I Excluded:  All other employees.

Unit II Included:  Assistant Operator Grade 3A/Supervisor, Maintenance Supervisor I, Motor Equipment Operator II/Supervisor, and Motor Equipment Operator II/Assistant Supervisor.

Unit II Excluded:  All other employees.

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

DATED:  December 19, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

Pursuant to the authority vested in the Board by the Public Employees' Fair Employment Act,
IT IS HEREBY CERTIFIED that the United Federation of Police Officers, Inc., has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties\(^1\) and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.


Excluded: All others.

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

\(^1\) See Town/City Poughkeepsie Water Treatment Facility and City of Poughkeepsie and Town of Poughkeepsie, 38 PERB ¶4008 (2005), aff'd 38 PERB ¶3017 (2005). The Board determined that a joint employer existed and remanded the case to the Director of Public Employment Practices and Representation for further proceedings. CSEA thereafter determined not to participate in any representation proceeding. The joint employer and the petitioner agreed to the composition of the unit.
proposal or require the making of a concession.

DATED: December 19, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

¹ The incumbent bargaining agent, United Public Service Employees Union, has disclaimed any interest in representing the existing bargaining unit.
IT IS HEREBY CERTIFIED that the International Brotherhood of Teamsters, Local 445 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All employees regularly scheduled to work more than fifteen (15) hours per week in the following titles: Typist, Laborer (part-time & full-time), Maintenance worker (part-time & full-time), Dispatcher (part-time & full-time), Clerk (part-time & full-time), Secretary to the Planning Board, Secretary to the Zoning Board of Appeals, Deputy Treasurer, Chief Waste Water Operator, Assistant to the Village Justice.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Local 445. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 19, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SOUTHERN CAYUGA ADMINISTRATORS ASSOCIATION,

Petitioner,

-and-

SOUTHERN CAYUGA CENTRAL SCHOOL DISTRICT,

Employer.

CASE NO. C-5537

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Southern Cayuga Administrators Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.
Included: Regularly appointed full-time administrators in the position of Secondary Principal, Middle School Principal, Elementary Principal, Assistant Principal/Athletic Director, and Director of Pupil Personnel Services.

Excluded: Substitutes, temporary, seasonal, part-time, casual, and all other employees.

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

DATED: December 19, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ.¹

FACTS

The record in this case consists of three ALJ exhibits, sixteen joint exhibits and the testimony of eight CSEA witnesses and one County witness.

The instant proceeding was commenced by an improper practice charge², sworn to on March 27, 2003. The charge was amended, on the record, to correct the name of the charging party,³ to withdraw the allegation of a violation of §209-a.1(a) of the Act,⁴ and to withdraw the allegations that Gerard Keller⁵ and Walter Lipinsky⁶ were affected by the charge.

The record establishes that the eight employees of the DPW's Division of Sanitation and Water Supply specifically named in the charge (Margaret Temme, August Eberling, Richard Kramer, James Gallagher, Edward Visone, Walter Henneberger, John Wetzel, and Emil Onolfi) were each assigned a County vehicle at times ranging from two to twenty-three years prior to the filing of the charge. The employees used the vehicles, to varying degrees, in the performance of work-related duties and to commute between home and their work locations.

In February 2002, each of the eight employees received from the County a form entitled, “Use Authorization Affidavit – County Vehicles”.⁷ The employees were to complete the portions of the form

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¹ 37 PERB ¶ 4590 (2004).
² ALJ Exhibit #1.
³ Transcript, p. 9.
⁴ Transcript, p. 10.
⁵ Id.
⁶ Transcript, p. 199.
⁷ The title “affidavit” does not accurately describe the document since the employees were neither requested to swear to nor to sign the completed form.
that requested the reason for their vehicle assignment, the number of times the employee was called into work after normal hours during the preceding twelve months, and the reason for such call-ins.

In January 2003, each of the eight employees received a memorandum from Peter Gerbase, the DPW Commissioner, advising that after a review of the employee’s duties, it was determined that the employee did not qualify for a take-home vehicle. The memorandum directed the employee to surrender the assigned vehicle within thirty days and advised that if the employee disagreed with the determination, the employee could provide an explanation of why the employee qualified for an assigned vehicle. Six of the eight employees sought a re-determination, but none of the determinations was changed, and all of the employees surrendered their assigned vehicles.

Each of the eight employees testified regarding his or her employment history with the County, the date when he or she was assigned a County vehicle, the name of the person assigning the vehicle, the conditions, if any, that they were informed of relative to their use of the vehicle, and whether their job duties changed during the course of the time that they had an assigned vehicle.

The County produced one witness, Joseph Davenport, the Chief Sanitary Engineer and Acting head of the Division of Sanitation and Water Supply. Davenport is responsible for the supervision and direction of the Division’s 450 employees, including the eight individuals named in the charge. Davenport testified about each of the employee’s job duties and the extent to which each needed a vehicle for the performance of his or her duties

None of the witnesses was asked about negotiations between CSEA and the County over the subject-matter of assigned vehicles or the County’s vehicle use policy and none testified about those issues. The County’s Use Authorization Affidavits that were completed by each of the eight employees, the appeals of six of the employees and the memoranda directing the return of the vehicles were received into evidence as joint exhibits.
DISCUSSION

In general, an employee’s use of his or her employer’s vehicle for transportation to and from work is an economic benefit which may not be unilaterally withdrawn by the employer. For our analysis, the key word in that general statement is “unilaterally”.

While a “past practice” may be established by demonstrating that the practice at issue affected a mandatory subject of bargaining, “was unequivocal and was continued uninterrrupted for a period of time sufficient under the circumstances [citation omitted] to create a reasonable expectation among the affected unit employees that the [practice] would continue⁹, a violation of §209-a. 1(d) of the Act requires proof of the additional element of the charge that the practice was unilaterally discontinued, that is, was discontinued without negotiations.

Here, the County does not dispute that a practice existed of assigning a County vehicle to the named employees that could be used by the employee to commute to and from work.¹⁰ However, the County contends that CSEA failed to prove its charge and even if CSEA proved a practice, the County is privileged to discontinue the practice since the vehicle assignments were conditioned upon the employee’s need for the vehicle in order to perform his or her work assignment. The County argues that for the employees involved either their work duties changed such as to justify the removal of the County vehicles or that the employee’s duties never necessitated the assignment of a vehicle. The County’s Answer further asserts that the charge failed to state a cause of action and now,

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¹⁰ See ALJ Exhibit #2. The County’s answer ¶14 admits upon information and belief the allegation contained in ¶5.6 of the details of CSEA’s improper practice charge.
additionally, argues that the employees involved in assigning County vehicles to the affected employees did not have the authority to make such assignment.

The charge, as amended during the proceedings, fails to allege County unilateral action. That the charge was inartfully drawn does not permit us to infer facts. We have consistently held parties to their pleadings.\(^{11}\)

A review of the entire record fails to disclose any evidence, testimonial or otherwise, of unilateral action by the County. The only acknowledgement of this critical element of the charge appears in CSEA’s opening statement where its attorney states, “This [assignment of county vehicles] was not negotiated with the union. I think there’s an agreement on that”.\(^{12}\) An attorney’s argument in an opening statement is not evidence.\(^{13}\) Further, there was no admission, stipulation or other agreement in the record to indicate that the County agreed that it had acted unilaterally or without negotiations with CSEA. CSEA did not move to amend the charge to include this allegation, even though it had made other motions to amend its charge during the opening statement.

The County’s attorney used her opening statement to outline her theory of the case, which was based upon our decision in \textit{County of Nassau}.\(^{14}\) From the development of the record, it is clear that the parties litigated this case with that prior decision in mind. In fact, both parties cite to that decision and urge us to take notice of its facts and holdings. The ALJ’s decision to disregard that prior decision involving the same parties, some of the same individual employees, similar facts and a very similar issue was error.

\(^{11}\) See \textit{New York City Transit Auth}, 31 PERB ¶3024 (1998).
\(^{12}\) Transcript, p. 13.
\(^{13}\) \textit{People v Musmacher}, 133 AD2d 352 (2d Dept 1987), \\textit{iv den} 70 NY2d 802 (1987).
\(^{14}\) 26 PERB ¶3040 (1993).
We recognize that our Rules\textsuperscript{15} require a specific statement of any affirmative defense and the principles of \textit{res judicata} and collateral estoppel are generally viewed as affirmative defenses in civil litigation under the Civil Practice Law and Rules.\textsuperscript{16} However, as noted in the case cited by the ALJ,\textsuperscript{17} the CPLR defines as affirmative defenses "all matters which if not pleaded would be likely to take the adverse party by surprise" and PERB has only applied the principles of the CPLR to its proceedings where fairness dictates.\textsuperscript{18} Here, fairness dictates that we take administrative notice of our prior proceedings as both parties have requested that we do so, since no one objected to the County’s opening statement, since the parties appear to have litigated the charge with the prior case holdings in mind and since to do so would assist the parties in understanding their rights and responsibilities in an area where they have spent much time on litigation.\textsuperscript{19}

In \textit{County of Nassau},\textsuperscript{20} we found that while the County vehicle use policy conditioned the assignment of vehicles upon the need for same in the performance of job duties, the charge then

\textsuperscript{15}Rules, §204.3(c)(2).

\textsuperscript{16}CPLR §3018(b).

\textsuperscript{17}In \textit{Triborough Bridge and Tunnel Auth}, 29 PERB ¶4529, at 4574, \textit{aff’d}, 29 PERB ¶3048 (1996), the ALJ permitted the affirmative defense to be to be raised in a motion to dismiss because was served on all parties, set forth with specificity the grounds upon which it was based and was sworn to as required of an answer.

\textsuperscript{18}See \textit{New York City Transit Auth}, 20 PERB ¶3037 (1987).


\textsuperscript{20}Supra, note 14.
before us involved the “withdrawal of the right to use the vehicles for transportation to and from work, not the conditions under which a vehicle will be assigned...”

Here, it is the withdrawal of the assignment of the vehicles that is at issue, not merely the right to use the vehicles for commuting purposes if one happens to have an assigned vehicle. As a general principle, a public employer need not bargain about the manner in which it provides services to the public or about the equipment that its employees will utilize in performing their job functions.\(^{21}\) The County has preserved its right to make such determinations regarding County cars through its vehicle use policy and its process for re-evaluating employees’ need of assigned vehicles.\(^{22}\) We have long held that when a benefit is granted under a stated condition or an express reservation of right, which remains unchanged by subsequent negotiations, the modification or cessation of the benefit in accordance with the stated condition or the retained right can not be considered an impermissible unilateral change\(^{23}\) (citation omitted). While CSEA attempted to demonstrate that the employees were not specifically told of any special conditions attached to their use of County vehicles, our prior decision and CSEA’s tacit admissions here in the charge and the joint exhibits demonstrate their knowledge of the County’s vehicle use policy. The Vehicle Use Affidavits, which were received as joint exhibits, demonstrate CSEA’s knowledge and its admission that the County had the right to re-evaluate vehicle assignments. To hold that the County was privileged to determine that the named


\(^{22}\) County of Nassau, 27 PERB ¶3049 (1994); State of New York (Div of Military and Naval Affairs), 24 PERB ¶3024 (1991); Schuylerville Cent Sch Dist, 14 PERB ¶3035 (1981).

\(^{23}\) Gananda Cent Sch Dist, 17 PERB ¶ 3095 (1984), affg 17 PERB ¶4589 (1984). See also County of Nassau, 27 PERB ¶ 3049 (1994), discontinuing tuition reimbursement conditioned upon the County’s financial ability upheld and conditional nature of the benefit did not have to be pled as an affirmative defense; New York City Transit Auth, 24 PERB ¶3013 (1991) grant of free parking on Authority property was a conditional benefit.
employees no longer required assigned vehicles, but to still require that they provide them to the employees for commuting purposes, would be nonsensical and in conflict with our prior decision.

Once it is established that the County has the right to re-evaluate which employees require vehicles and to make or change vehicle assignments, our assessment is done. It is not for us to determine whether the County’s individual assessments are correct. To do so would be to render the County’s prerogative illusory.

Based upon the foregoing, we hereby grant the County’s exceptions, reverse, the decision of the ALJ and dismiss the charge.

DATED: December 19, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF PUTNAM AND PUTNAM COUNTY
SHERIFF,

Charging Party,

- and -

PUTNAM COUNTY SHERIFF’S DEPARTMENT
POLICE BENEVOLENT ASSOCIATION, INC.,

Respondent.

ROEMER WALLENS & MINEAUX LLP (WILLIAM M. WALLENS of
counsel), for Charging Party

JOHN M. CROTTY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Putnam County Sheriff’s
Department Police Benevolent Association, Inc. (PBA) and by the County of Putnam
and Putnam County Sheriff (County) to a decision of an Administrative Law Judge (ALJ)
finding that the PBA violated §209-a.2 (b) of the Public Employees’ Fair Employment
Act (Act) when it submitted to compulsory interest arbitration certain proposals that were
not arbitrable under §209.4(g) of the Act.
EXCEPTIONS

The PBA excepts to the ALJ's determination that the Board's decision in City of Cohoes,¹ (hereafter, Cohoes), does not render certain of its demands arbitrable under §209.4(g) of the Act and also to the ALJ's determination that its proposals relating to overtime pay disputes, payments for accumulated sick leave and unused sick leave, retroactive wages and benefits, and to the 1997 stipulation of agreement are not arbitrable.

The County excepts to the ALJ's determination that the PBA's proposal relating to health insurance for retirees and their dependents is mandatory and arbitrable under §209.4(g) of the Act.

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

FACTS

In 2004,² the Legislature amended the interest arbitration provisions of the Act to add §209.4(g), which provides in relevant part, as follows:

With regard to members of any organized unit of deputy sheriffs . . . the provisions of this section shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions proscribed by law.

¹ 31PERB ¶3020 (1998, confirmed sub nom. Uniform Firefighters of Cohoes v Cuevas, 32 PERB ¶7026 (Sup Ct Albany County 1999), aff'd 276 AD2d 184, 33 PERB ¶7019 (3d Dep't 2000), leave to appeal denied 96 NY2d 711, 34 PERB ¶7018 (2001).

² L 2004, ch 286.
Pursuant to §209.4(g), the PBA filed a petition for compulsory interest arbitration with PERB, setting forth the proposals it alleged were open and arbitrable. The County filed the instant improper practice charge alleging that the PBA violated §209-a.2 (b) of the Act by submitting demands to interest arbitration which were nonmandatory and/or non-arbitrable under the Act.

The language of the in-issue demands are set forth in the DISCUSSION portion of this decision.

DISCUSSION

Access to the compulsory interest arbitration procedures of the Act were not extended by the Legislature to deputy sheriffs without limitation. Section 209.4(g) limits arbitration to only those terms which are directly related to compensation, including salary, stipends, location pay, insurance and medical and hospitalization benefits. Certain subjects are specifically excluded from arbitration, such as job security, disciplinary procedures and actions, deployment or scheduling and overtime compensation.

The PBA argues that notwithstanding the limitation on those subjects that may be arbitrated as set forth in §209.4(g), our decision in Cohoes renders arbitrable all of its demands which target a provision of its collective bargaining agreement with the County. It asserts that the Legislature must have intended this result because Cohoes was decided before the enactment of §209.4(g) and the Legislature is presumed to have adopted the interpretation of statutory language in existence at the time of the legislation. The ALJ rejected this argument, finding that the inquiry under §209.4(g) of
the Act is not whether a proposal submitted to interest arbitration is mandatory in nature but, in addition to being mandatorily negotiable, whether or not it is directly related to compensation.

The ALJ was correct in determining that Cohoes does not control the analysis of arbitrability under §204.9(g) of the Act. The conversion theory of negotiability in Cohoes was designed to render mandatory, as between the parties in a bargaining relationship, those terms of a collective bargaining agreement that are in issue in negotiations so that there can be finality in negotiations. A finding that a contract term is mandatorily negotiable does not necessarily resolve issues of arbitrability under §209.4(g). That analysis is totally different, requiring a determination as to whether a demand is directly related to compensation or is one of the subjects that the Legislature expressly excluded from arbitration. A demand may be a mandatory subject of negotiations and still not be arbitrable as to deputy sheriffs because of the express language of the statute.

In New York State Police Investigators Association (hereafter, State Police), we interpreted the meaning of language virtually identical to the language of §209.4(g) of the Act. That case involved the language of the former §209.4(e), granting interest arbitration to investigators, senior investigators and investigator specialists of the state police force, which limited arbitration to those items directly relating to compensation and excluded demands related to noncompensatory matters including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or

issues relating to eligibility for overtime compensation that were governed by other provisions prescribed by law. In defining what was meant by “directly relating to compensation”, we stated:

All noncompensatory demands are excluded from compulsory arbitration under §209.4(e) because they necessarily have no relationship to compensation. This does not mean, however, that all compensatory issues are arbitrable unless their relationship to compensation is as attenuated as the subjects which are specifically listed as examples of noncompensatory issues. That argument drains all significance from the word "directly." The subjects excluded from arbitration under §209.4(e) do not define the subjects which are included because a subject must satisfy two conditions simultaneously to be arbitrable under §209.4(e). It must fall within the included compensatory category and fall without the excluded category of noncompensatory subjects. Even if a subject is not excluded from arbitration as noncompensatory, it is not necessarily arbitrable. A subject does not fit within the included category, even if it is compensatory in nature, unless it also "directly" relates to compensation. The degree of a demand's relationship to compensation is measured by the characteristic of the demand. If the sole, predominant or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent directly relates to compensation. A demand has compensation as its sole, predominant or primary characteristic only when it seeks to effect some change in amount or level of compensation by either payment from the State to or on behalf of an employee or the modification of an employee's financial obligation arising from the employment relationship (e.g., a change in an insurance co-payment). If the effect is otherwise, then the relationship of the demand to compensation becomes secondary and indirect and the subject is, therefore, excluded from the scope of compulsory arbitration under the language of § 209.4(e).

Our analysis in State Police is dispositive of the issues before us here. As a result, we find, as did the ALJ, that certain of the PBA’s demands are not arbitrable and

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4 Section 209.4(e) was amended by Chapter 587 of the Laws of 2001 to repeal this restrictive language relating to binding arbitration.

5 30 PERB at 3028.
must be withdrawn from interest arbitration. Those demands are: Number 2, Recognition and Association Rights, Paragraph G; Number 5, Personal Leave; Number 6, Hours of Work, Overtime and Recall – paragraphs C(2) and C(3); Number 10, Vacations; Number 11, Grievance Procedure; Number 12, Sick Leave as to subparagraph A2, C and D; Number 13, Disciplinary Procedure; Number 15, Negotiations to delete subparagraph B; Number 16, Maintenance of Operations, Paragraphs A, B and C; Number 17, Separability; Number 19, Fully Bargained Agreement; and Number 20, Duration.

As to the remaining demands, we affirm the decision of the ALJ.

The PBA excepts to the ALJ’s determination that its proposals relating to overtime pay disputes, payments for accumulated sick leave and unused sick leave, retroactive wages and benefits and to the 1997 stipulation of agreement are not arbitrable.

PBA demand Number 6, Article 8 – Hours of Work, Overtime and Recall

D. Overtime Compensation

2. Overtime Compensation Dispute

In the event the overtime claimed by an employee is being denied in whole or in part, such employee will be so notified. Thereafter, if the employee wishes to object to such denial, he/she may do so in the following manner:

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6 The ALJ interpreted the PBA’s concession that, if State Police controlled, certain of its demands were not arbitrable under that decision, as providing a basis upon which to conclude that these demands had been withdrawn from arbitration. The PBA, however, argues in its exceptions that the demands have not been withdrawn.

7 PBA’s Petition for Compulsory Interest Arbitration.
a. The employee will reduce the complaint to writing and refer the matter to the President and Vice President of the Association.

b. The staff officer, President and Vice President and member of the Association involved will then confer with reference to the dispute and attempt to work out an agreement.

c. If an agreement is not reached, then a hearing will be held with the Sheriff, staff officer involved, President and Vice President and member of the Association involved in the dispute.

d. In the event the Sheriff, President and Vice President of the Association fail to reach an agreement as to the overtime for which an employee is to be compensated, then the dispute shall be submitted to the County as a grievance in accordance with the terms of this Contract.

The ALJ found that the PBA’s demand to delete the above provision from the collective bargaining agreement was not arbitrable because it dealt with overtime eligibility, which is specifically excluded from arbitration by the language of §209.4(g) of the Act. The PBA argues that the ALJ erred because the proposal does not deal with eligibility but with a procedure to resolve overtime pay disputes. We agree that the provision does not deal with eligibility for overtime, but neither does it deal directly with compensation. As only those items that deal directly with compensation are arbitrable, the PBA’s demand relating to a procedure for resolving overtime disputes, which is not directly related to compensation, is not arbitrable.

PBA proposal 12; Article 15 – Sick Leave

J. Amend the schedule to read as follows:

Days: 1 – 70 days - all days accumulated at 20% of daily rate
      71 – 110 days - all days accumulated at 40% of daily rate
      111 – 150 days - all days accumulated at 60% of daily rate
151 - 180 days - all days accumulated at 80% of daily rate
181 days and Above - all days accumulated at 100% of daily rate

NEW I:  The County shall pay, in first (1st) pay period of January of each year, the following sick leave incentive bonus:

<table>
<thead>
<tr>
<th>Sick Leave Days Used</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>0 – 1</td>
<td>4 days Base Wage</td>
</tr>
<tr>
<td>2</td>
<td>2 days Base Wage</td>
</tr>
<tr>
<td>3</td>
<td>1 day Base Wage</td>
</tr>
</tbody>
</table>

The ALJ found both demands to be improperly submitted to arbitration as not dealing directly with compensation, relying on *State Police*. There, we determined that proposals providing for sick leave accumulation were not arbitrable because, while such proposals “could eventually confer an economic benefit upon the employee”, they represented potential compensation and were not directly related to compensation. The PBA argues that the demands here in issue call for the payment of cash either upon separation from employment or at the first of each year in which sick leave has not been used or used sparingly. But, as Supreme Court found with the sick leave accrual demand in *State Police*, the mere fact that the demands could result in the payment of cash and as such seek to increase the rate of compensation is not a sufficient basis upon which to find that the demands are directly related to compensation. They are, therefore, not properly submitted to arbitration.

PBA demand Number 18; Article 21– Legislative Action and Retroactivity

B. Amend to read as follows:

All wages, economic and other benefits shall apply and be paid to any employee who worked during the expired term of this Agreement.

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8 30 PERB ¶7011, at 7019-20 (Sup Ct Albany County 1997).
The ALJ found that this demand, which covers both unit employees who are working at the time the arbitration award becomes effective as well as those employees who leave the County’s employ before that time, is not arbitrable as it seeks payment to former employees for whom the County has no obligation to negotiate. We disagree. In *Bridge and Tunnel Officers Benevolent Association*,\(^9\) in deciding the retroactivity of a demand, we held that:

"Current" employees, for purposes of assessing the negotiability of a demand in negotiations, and unless otherwise defined by the parties, must mean all employees who were employed during the term of the contract being negotiated, even if the negotiations continue, as they so often do, beyond the term of the prior contract and the demand in issue is not first presented until well into the negotiations. Just as a demand may be retroactive, so too may its application to the class of employees covered by the demand.

This demand deals solely with the retroactivity of wages and other economic benefits and is thus directly related to compensation. That it applies to employees who are still employed when the arbitration award is issued, as well as those who left the County’s service during the contract hiatus, does not render it non-arbitrable.


Replace the reference to CFR to CFR – Defibrillator

The ALJ determined that this demand is not arbitrable as it has no relation to compensation. The PBA argues that the April 29, 1997 Stipulation of Agreement contains provisions for the payment of tuition, equipment, supplies and stipends. This demand seeks to clarify who is eligible to receive the monies and benefits set forth in

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\(^9\) 29 PERB ¶3012, at 3033 (1996).
the Stipulation and, as such, the PBA argues that it is directly related to compensation. As the demand seeks merely to effectuate a technical change in the definition of those employees covered by the Stipulation, it is not directly related to compensation and is not properly submitted to arbitration under §209.4(g) of the Act.

The County excepts to the ALJ's determination with respect to retiree health insurance.

**Article 5 – Insurance – New: G**

Effective January 1, 2003, upon retirement the County shall pay one hundred percent (100%) of the health insurance premium or cost for the retiree and eligible dependents. The health insurance plan shall be the same as provided to active employees.

Health insurance benefits for current employees after they retire are mandatory subjects of negotiations.\(^{10}\) Section 209.4(g) of the Act specifically makes insurance and medical and hospitalization benefits arbitrable. The County argues that benefits for retirees that extend beyond the term of the collective bargaining agreement and/or arbitration award under which they retire and benefits for beneficiaries of employees are nonmandatory subjects of negotiations and not arbitrable within the meaning of §209.4(g) of the Act. In *Town of Shawangunk*,\(^{11}\) we held that "health insurance benefits extended to an individual upon that individual's retirement from employment are a form

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\(^{10}\) See *City of Cohoes*, supra; *Bridge and Tunnel Officers Benevolent Assn*, 29 PERB ¶3012 (1996); *Cohoes Police Benevolent and Protective Assn*, 27 PERB ¶3058 (1994).

of deferred compensation representing a payment in the future for services a former employee has rendered in the past. As both compensation and insurance, health insurance benefits for retirees are arbitrable under §209.4(g). To the extent that the County is urging this Board to reconsider its prior decisions holding health insurance coverage for current employees upon their retirement and for the dependents of such employees to be mandatory, the County articulates no new or compelling reasons for such reconsideration, even were it possible to do so in light of court decisions holding that such subjects are mandatorily negotiable.\textsuperscript{12}

Based on the foregoing, we deny the County’s exceptions, and grant the PBA’s exceptions as to clarifying that certain of its demands have not already been withdrawn and as to PBA Demand 18. We reverse the ALJ’s decision as to PBA Demand 18 and affirm, as modified, the ALJ’s decision as to the remaining PBA demands.

We find that the PBA violated §209.2(b) of the Act when it submitted to arbitration, pursuant to §209.4(g) of the Act, the following demands:

- Number 2, Recognition and Association Rights, Paragraph G;
- Number 5, Personal Leave;
- Number 6, Hours of Work, Overtime and Recall – paragraphs C(2) and C(3);
- Number 6, D. 2 (overtime disputes)
- Number 10, Vacations;
- Number 11, Grievance Procedure;
- Number 12, Sick Leave as to subparagraph A2, C and D;
- Number 12, 15(J) and new addition to Article 15;
- Number 13, Disciplinary Procedure;
- Number 15, Negotiations to delete subparagraph B;
- Number 16, Maintenance of Operations, Paragraphs A, B and C;
- Number 17, Separability;

Number 19, Fully Bargained Agreement; and
Number 20, Duration.

IT IS, THEREFORE, ORDERED that the PBA withdraw these demands from
arbitration. In all other respects, the charge is dismissed in its entirety.

DATED: December 19, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member
Board Decision and Order

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing its charge which alleged that the County of Westchester (County) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred messenger services exclusively performed by CSEA unit employees in the County’s Department of Social Services (DSS) to an independent contractor.

The ALJ found that the County’s use of independent contractors to perform messenger services for ten years, alongside unit employees, showed that the work was not exclusive bargaining unit work and dismissed the charge.
EXCEPTIONS

CSEA excepts to the ALJ’s decision arguing that the ALJ erred in failing to find that a discernible boundary could be drawn around the messenger services performed by unit employees and those that had been performed by outside contractors in the past. The County supports the ALJ’s decision.

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

FACTS

The parties entered into a stipulation of facts upon which the ALJ’s decision is based.¹ The parties stipulated to the following facts:

1. The County is a public employer as defined in the Taylor Law.
2. CSEA is a public employee organization as defined by the Taylor Law.
3. The County and CSEA are parties to a collective bargaining agreement that expires on December 31, 2005. The agreement is silent as to the subject matter of the instant charge.
4. For more than 10 years, DSS mailroom employees, who are CSEA [bargaining unit] members, have performed messenger services as part of their duties.
5. For more than 10 years, DSS has utilized the services of an outside contractor to supplement the messenger services performed by unit members on specific occasions.
6. Those occasions were when the County vehicles were “grounded” due to

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¹ 38 PERB ¶4573 (2005).
inclement weather and where all bargaining unit mailroom employees that were on duty on any given day were already engaged in messenger services for DSS or the mailroom was otherwise short staffed. In other words, DSS utilized a contractor for messenger services on occasions where bargaining unit mailroom employees were unable to perform such services.

7. On or about January 7, 2005, the County entered into a contract with Service Warehousing and Logistics, Inc. (Logistics). The County did not negotiate with CSEA prior to entering into the contract.

8. Under that contract, Logistics provides DSS with services for all of DSS’ messenger needs. Since the execution of that contract, DSS’ mailroom employees no longer provide messenger services for DSS.

9. Since January 7, 2005, no mailroom employees have lost their jobs as a result of the County’s contract with Logistics. However, as a result of the contract with Logistics, the County transferred four mailroom employees who previously performed messenger services out of the White Plains DDS office.

**DISCUSSION**

A transfer of unit work is mandatorily negotiable if the work has been performed by unit employees exclusively and the tasks as reassigned are substantially similar to those previously performed by unit employees.\(^2\) Here, the ALJ found that the messenger services performed by unit employees in the DSS mailroom had, for the preceding ten years, also been performed by an outside contractor. The outside

\(^2\) *Niagara Frontier Transportation Authority*, 18 PERB ¶3083 (1985).
contractor was used in situations when unit employees were not otherwise available to perform messenger services, when there was inclement weather and when County vehicles were “grounded”.

We have found that a regular and open assignment of nonunit personnel to work done by unit employees for a period in excess of one year constitutes a breach of exclusivity which precludes the union from establishing exclusivity in fact over the work allegedly transferred.\(^3\) It is only when the use of nonunit personnel to perform unit work is limited and incidental and occurs on a significantly small number of occasions when compared to the work performed regularly by unit employees, that such incursions into the performance of unit work is insufficient to defeat the unit’s claim of exclusivity.\(^4\)

Here, the stipulated record omits any reference to the job duties involved in the provision of messenger services and establishes that, for ten years, in three different sets of circumstances, the County regularly utilized a private contractor to perform messenger services for DSS. CSEA has the burden to demonstrate that it performed the work exclusively. Given the undisputed facts, CSEA has not shown that the use of nonunit employees by the County was so limited or insignificant as not to have breached CSEA’s claim of exclusivity.

CSEA argues that the ALJ erred by failing to find that there was a discernible boundary that could be drawn around the work retained by CSEA unit employees that would preserve exclusivity as to that portion of the messenger services. An analysis of "discernible boundary" is necessary when there are sufficient inroads into what is

\(^3\) State of New York (Division of Military and Naval Affairs), 27 PERB ¶3027 (1994).

\(^4\) County of Onondaga, 27 PERB ¶3048 (1994).
asserted to be the exclusive work of the bargaining unit\textsuperscript{5} and where the unit work involves multiple tasks, multiple-function jobs or multiple locations.\textsuperscript{6} The record here shows that when CSEA unit employees in the DSS mailroom were unavailable due to inclement weather, were already engaged in messenger services or the mailroom was short-staffed, nonunit personnel were utilized to perform the same messenger services that were regularly performed by unit employees. Those services are not described in enough detail in the record to enable us to determine that the messenger services are of the type that requires a discernible boundary analysis or to find that CSEA has retained exclusivity over any definable part of the messenger services.\textsuperscript{7}

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

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

DATED: December 19, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

\textsuperscript{5} See County of Westchester, 33 PERB ¶3057 (2000).

\textsuperscript{6} City of Rome, 32 PERB ¶3058 (1999).

\textsuperscript{7} To the extent that CSEA relies upon City of Syracuse, 31 PERB ¶4646 (1998), the Board is not bound by a decision of an ALJ.
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF ULSTER AND ULSTER COUNTY
SHERIFF,

Charging Party,

- and -

ULSTER COUNTY DEPUTY SHERIFF'S POLICE
BENEVOLENT ASSOCIATION, INC.,

Respondent.

CASE NO. U-25870

ROEMER WALLENS & MINEAUX LLP (WILLIAM M. WALLENS of counsel),
for Charging Party

JOHN M. CROTTY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Ulster and Ulster
County Sheriff (County) and by the Ulster County Deputy Sheriff’s Police Benevolent
Association, Inc. (PBA) to a decision by an Administrative Law Judge\(^1\) (ALJ) on a
charge filed by the County alleging that the PBA violated §209-a.2(b) of the Public
Employees’ Fair Employment Act (Act) when it submitted to compulsory interest
arbitration certain proposals that were not arbitrable under §209.4(g) of the Act.

\(^1\) 38 PERB ¶4563 (2005).
EXCEPTIONS

The County excepts to the ALJ’s finding that certain of the PBA’s proposals are arbitrable. The PBA excepts to the ALJ’s decision on the law and his determination that its proposals for membership dues and agency shop dues deduction are not arbitrable. The PBA filed a response to the County’s exceptions.

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

FACTS

The ALJ decided the case upon a stipulated record that included the improper practice charge, verified answer and the notice of conference. The improper practice charge alleged in substance that the County and the PBA previously negotiated a collective bargaining agreement for the term of January 1, 1999 through December 31, 2002.\(^2\) Subsequently, negotiations for a successor agreement reached impasse and, after mediation proved unsuccessful, the PBA filed a petition for compulsory interest arbitration, dated April 12, 2005.\(^3\)

Pursuant to §209.4(g) of the Act, the provisions for compulsory interest arbitration for County deputy sheriffs:

\[
\text{shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits . . . .}
\]

The County alleged that the PBA’s proposals for membership dues deduction, agency shop fee, retiree health insurance, sick leave and retirement were non-

\(^2\) Improper Practice Charge - Exhibit A.

\(^3\) Improper Practice Charge - Exhibit B.
arbitrable. The language of each proposal is set forth below in the DISCUSSION portion of this decision.

**DISCUSSION**

The Act was amended in 2004 to provide interest arbitration for bargaining units of deputy sheriff who are engaged in criminal law enforcement that comprises more than 50% of their duties. The amendment, §209.4(g), limits binding arbitration to the terms of the collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits.

The PBA contends that the language of §209.4(g) is exactly the same as former §209.4(e), which applied to interest arbitration for members of the New York State Police. In 1997, PERB decided an improper practice charge filed by the State of New York (Governor’s Office of Employee Relations) alleging that the New York State Police Investigators Association included demands which were not arbitrable in a petition for compulsory interest arbitration pursuant to §209.4(e) of the Act. 4 At that time, §209.4(e) specifically provided for interest arbitration of terms:

- directly relating to compensation, including, but not limited to, salary, stipends, location pay insurance, medical and hospitalization benefits;
- and shall not apply to non-compensatory issues including but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions prescribed by law.

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4 See New York State Police Investigators Assn, 30 PERB ¶3013, confirmed sub nom New York State Police Investigators Assn v PERB, 30 PERB ¶7011 (Sup Ct Albany County 1997).
Section 209.4(e) was amended in 2002\(^5\) to specifically prohibit from interest arbitration for members of State police bargaining units only issues relating to disciplinary procedures and investigations or eligibility and assignment to details and positions which shall be governed by other provisions prescribed by law.

The scope of interest arbitration for State police units is now contained in §209.4(d). This includes:

the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security.

The Board determined in *State Police Investigators Association* (hereafter, *State Police*),\(^6\) that “the phrase ‘directly relating to compensation’ does not and cannot mean... only ‘direct compensation’ to unit employees from the State”. The Board looked at the use of the word compensation in other parts of §209 and determined that the Legislature intended the word compensation to include a wide variety of subjects. The Board then tested the relationship between a particular bargaining demand and compensation:\(^7\)

If the sole, predominate, or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent directly relates to compensation. A demand has compensation as its sole, predominate or primary characteristic only when it seeks to effect some change in the amount or level of compensation by either payment from the State to or on behalf an employee or the modification of an employee’s financial obligation arising from the employment relationship (e.g. a change in an insurance co-payment). If the effect is otherwise, then the relationship of the demand to compensation becomes

\(^5\) L 2002, ch 232.

\(^6\) *Supra*, note 4, at 3027.

\(^7\) *Id.*
secondary and indirect and the subject is, therefore, excluded from the scope of compulsory arbitration under the language of §209.4(e).

This test was adopted by Supreme Court, Albany County, in its decision confirming the Board’s decision.\(^8\)

The PBA proposed to make certain additions and amendments to the parties’ collective bargaining agreement. The following proposals are in dispute:

1. **ARTICLE 2 - RECOGNITION, MEMBERSHIP DUES DEDUCTION, AGENCY SHOP FEE AND OTHER REDUCTIONS:** (pp. 1-2)

   **Section 2 - Membership Dues Deduction:**

   Add the following to the first (1\(^{st}\)) paragraph:

   The Employer shall provide, each payroll period to the Union Treasurer, the names and addresses of each employee represented by the Union and dues deductions made to date. The Employer shall deduct from part time employees, any and all arrearages of dues owed from the payroll periods not worked. The Employer shall forward all dues deductions to the Union on the same day as the payroll is made.

   **Section 3 - Agency Shop Fee:**

   Add the following to the second (2\(^{nd}\)) paragraph:

   The Employer shall provide, each payroll period to the Union Treasurer, the names and addresses of each employee represented by the Union and Agency Shop Fee deductions made to date. The Employer shall deduct from part time employees, any and all arrearages of Agency Shop Fee deductions owed from the payroll periods not worked. The Employer shall forward all Agency Shop Fee deductions to the Union on the same day as the payroll is made.

   The ALJ found that while the PBA’s proposals for membership dues deduction and agency shop are mandatory subjects of negotiations, they were not arbitrable. We agree. PBA’s proposal number 1, sections 2 and 3, Membership Dues Deduction and Agency Shop Fee, do not meet the test for compensation. There is no nexus between the dues deduction and the unit members’ relationship to the County. The relationship

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\(^8\) *State Police Investigators Assn.*, 30 PERB at 7018-19.
exists between the unit member and the PBA. The proposal is secondary to the employment relationship and must, therefore, be excluded from the scope of compulsory arbitration.  

2. ARTICLE 5 - EMPLOYEE BENEFITS: (pp. 5-15)

Section 1 - Health Insurance:

Paragraph 2 - Amend to read as follows:

The Employer agrees to pay 100% of the premium or cost for all full time employees and dependents health insurance coverage who have completed five (5) years or more of service.

Upon retirement, the Employer shall pay 100% of the premium or cost for full time employees and dependents health insurance coverage in effect at that time.

The County argues that PBA’s Proposal #2, Section 1 demanding that the County provide fully paid medical insurance to unit members and their dependents upon retirement is not subject to interest arbitration because it is not directly related to compensation within the meaning of §209.4(g) of the Act. Furthermore, the County argues that the duration of the benefit extends beyond the term of the collective bargaining agreement and/or the interest arbitration award. The County urges us to decline to follow our “conversion theory” of negotiability with regard to this proposal.

9 See also City of Troy, 28 PERB ¶3027 (1995).

10 See Village of Saugerties Police Benevolent Assn, 38 PERB ¶3034 (December 19, 2005).

because it will result in an undue burden. As we decided today in *Putnam County Sheriff's Department Police Benevolent Association, Inc.*\(^\text{12}\)

Health insurance benefits for current employees after they retire are mandatory subjects of negotiations.\[^{footnote omitted}\] Section 209.4(g) of the Act specifically makes insurance and medical and hospitalization benefits arbitrable. The County argues that benefits for retirees that extend beyond the term of the collective bargaining agreement and/or arbitration award under which they retire and benefits for beneficiaries of employees are nonmandatory subjects of negotiations and not arbitrable within the meaning of §209.4(g) of the Act. In *Town of Shawangunk*, [32 PERB ¶3042, at 3095 (1999)] we held that "health insurance benefits extended to an individual upon that individual's retirement from employment are a form of deferred compensation representing a payment in the future for services a former employee has rendered in the past." As both compensation and insurance, health insurance benefits for retirees are arbitrable under §209.4(g). To the extent that the County is urging this Board to reconsider its prior decisions holding health insurance coverage for current employees upon their retirement and for the dependents of such employees to be mandatory, the County articulates no new or compelling reasons for such reconsideration, even were it possible to do so in light of court decisions holding that such subjects are mandatorily negotiable.\[^{See Aeneas McDonald Police Benevolent Ass't., Inc. v City of Geneva, 92 NY 2d 326, 31 PERB ¶7503 (1998). See also Lynbrook, Police Benevolent Assn., 10 PERB ¶3067 (1977), rev'd in part sub nom. Incorporated Vil. of Lynbrook v PERB, 64 AD2d 902, 11 PERB ¶7012 (2d Dep't 1978), revd., 48 NY2d 398, 12 PERB ¶7021 (1979).}

**Section 17 - Retirement:**

Add the following:

3. The Employer shall adopt and implement the Special Retirement Plan for Sheriffs, Undersheriffs and Deputy Sheriffs (Article 14-B: Section 552, 20 Year Service Retirement and 553, the additional 1/60\(^{th}\) benefit) for all service.

The County contends that the PBA's Proposal #2, Section 17 requiring the County to adopt and implement the 20-year retirement plan and the additional 1/60\(^{th}\)

\[^{12}\] 38 PERB ¶3031 (December 19, 2005).
benefit is not subject to interest arbitration because it includes the nonunit titles of Sheriff and Undersheriff. The County also argues that the benefit does not directly relate to compensation and that, pursuant to Retirement and Social Security Law, §384-e(c), the 1/60th benefit for each year of service may not be negotiated under §209.4 of the Act.

The PBA correctly argues in its brief to the ALJ that the negotiability and arbitrability of retirement benefits available by law has been firmly established. The Court of Appeals in *Association of Surrogates and Supreme Court Reporters Within the City of New York v State of New York*\(^{14}\) (hereafter, *Surrogates*) interpreted compensation within the meaning of the Act to include such subjects as insurance, pensions, vacations, military leave, and even uniform allowances. The Court in *Surrogates* relied upon *Matter of Teachers Association, Central High School District No. 3 v Board of Education, Central High School District No. 3, Nassau County*\(^{15}\) (hereafter, *Teachers Association*) for its opinion that pensions are a form of compensation. In *Teachers Association*, the Appellate Division determined that\(^{16}\):

> [T]he courts have recognized that the State and its municipalities in granting pensions, vacations or military leave are not conferring gifts upon their employees, but that essentially the promised rewards are conditions of employment - a form of compensation withheld or deferred until the completion of continued and faithful service (citations omitted).

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\(^{15}\) 34 AD2d 351 (2d Dep't 1970).

\(^{16}\) Id., at 353.
The County’s argument that the proposal includes the Sheriff and Undersheriff and is, therefore, not arbitrable lacks merit. The PBA’s proposal is not ambiguous simply because the Sheriff’s and Undersheriff’s titles are mentioned in the proposal. Article 14-B of the Retirement and Social Security statute is entitled “Special Retirement Plans for Sheriffs, Undersheriffs and Deputy Sheriffs Engaged in Law Enforcement Activities”. The PBA’s proposals at §17 simply identify the origin of the plan. The County’s objection is, therefore, to the form of the proposal rather than its substance.

As to the arbitrability of the 1/60th benefit, the County contends that Retirement and Social Security Law, §384-e(c) excludes the benefit from interest arbitration for police units and should apply in the instant case. However, this proscription was not included in §553 of the Retirement and Social Security Law, entitled “Additional Pension Benefit for Members of Optional Twenty Year Retirement Plan”, and the PBA argues that its omission in §553 evidences the Legislature’s intent to permit negotiation over the benefit. It is axiomatic that, under the Taylor Law, the public policy of New York in favor of collective bargaining is strong and sweeping.17 The presumption in favor of bargaining may be overcome only in special circumstances where the legislative intent to remove the issue from mandatory bargaining is plain and clear, or where a specific statutory directive leaves no room for negotiation.18 Thus, only where a statute clearly forecloses negotiation of a particular subject may that subject be deemed a prohibited subject of bargaining.19 Since §553 does not foreclose negotiation over the subject matter, the demand is both mandatory and arbitrable.

18 Id., at 667.
19 City of Watertown, 95 NY2d 73 (2000).
Section 6 - Sick Leave:

Amend to read as follows:

All full-time employees shall be credited with eight (8) hours (1 work day) of sick leave on the first (1st) day of each calendar month, without limitation to accumulation.

The PBA argues that this proposal providing for unlimited sick leave accumulation is directly related to compensation. The ALJ found the subject excluded from interest arbitration under the test used to determine compensation in State Police. We agree with the ALJ.

One of the demands at issue before us in State Police also proposed sick leave accumulation. The demand, as here, concerned time off from work without loss of pay. We found the effect of such a demand on compensation was clear but nevertheless indirect. The PBA’s proposal simply maintains a member’s salary or wage at the negotiated rate during an employee’s absence from work. There is no change in compensation. Consequently, the predominant or, at least, primary characteristic of this proposal affects hours of work and not compensation. Thus, we find that the PBA’s sick leave proposal is non-arbitrable.

In reaching our conclusions regarding the aforementioned proposals, we are not deciding the merits of the proposals, only their negotiability. Our decision in any scope of negotiations case should be construed only as a determination of whether, as in this case, a proposal may properly be submitted to interest arbitration under §209.4(g) of the Act.
Based on the foregoing, the County’s exceptions are denied and the PBA’s specific exception as to membership dues deduction and agency shop fee is denied. The decision of the ALJ is affirmed.

IT IS, THEREFORE, ORDERED that the PBA withdraw from compulsory interest arbitration the proposals numbered:

1. Article 2, Section 2 - Membership Dues Deduction
   Section 3 - Agency Shop Fee
2. Article 5, Section 6 - Sick Leave.

In all other respects, the charge is dismissed.

DATED: December 19, 2005
Albany, New York

[Signatures]

Michael R. Cuevas, Chairman

John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF SAUGERTIES,
Charging Party,

- and -

VILLAGE OF SAUGERTIES POLICE BENEVOLENT ASSOCIATION,
Respondent.

ROEMER WALLENS & MINEAUX LLP (WILLIAM M. WALLENS of counsel),
for Charging Party

JOHN M. CROTTY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Village of Saugerties (Village) to a decision by an Administrative Law Judge (ALJ) on a charge filed by the Village alleging that the Village of Saugerties Police Benevolent Association (PBA) violated §209-a.2(b) of the Public Employees’ Fair Employment Act (Act) by submitting certain nonmandatory bargaining proposals for consideration at compulsory interest arbitration under §209 of the Act.

EXCEPTIONS

The Village excepts to the ALJ’s finding that the PBA’s proposal to convert accumulated leave into health insurance premiums for retirees or their dependents is mandatorily negotiable. The Village further excepts to the ALJ’s failure to address the
issue of whether providing health insurance beyond the term of the parties' collective bargaining agreement under which an employee retires and also providing health insurance for the employees' beneficiaries is a mandatory subject of bargaining.

The PBA submitted a response in support of the ALJ's decision.

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

FACTS

The case was decided by the ALJ on a stipulated record submitted by the parties.\(^1\)

The language of each demand is set forth below in the discussion of the mandatory or nonmandatory nature of the demands.

DISCUSSION

The PBA proposed to make the following additions and amendments to the parties' collective bargaining agreement.

5. ARTICLE 13 – HOLIDAYS: (pp. 10-11)

(NEW) 13.4 Add a new section to read as follows:

An employee shall be entitled to accumulate and carry over from year to year, any unused Holiday compensatory days, including floating Holidays. Any Holiday compensatory days off elected not to be used shall be placed in that employee's health insurance on retirement account for additional coverage as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4. However, in the event an employee uses all of his/her accumulated sick leave, he/she shall be entitled to use all or part of his/her accumulated Holiday compensatory days in the health insurance on retirement account to insure a paycheck for that period of time for which the Holiday compensatory days cover. However, in the event of a disability retirement as set forth in Article 23, Pension, Group Health and Life

\(^1\) 38 PERB ¶4565 (2005).
Insurance, Section 23.4, all unused Holiday compensatory days in the employee’s health insurance on retirement account shall be forfeited and returned to the Employer.

6. ARTICLE 14 – SICK LEAVE: (pp. 11-12)

14.2 Amend to read as follows:

All employees shall be entitled to unlimited accumulation of sick leave. All unused accumulated sick leave shall be carried over from year to year. Upon retirement, the employee shall be entitled to apply all or any part of his/her unused accumulated sick leave for additional health insurance on retirement as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4. However, in the event of a disability retirement as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4, all unused sick leave in the employee’s health insurance on retirement account shall be forfeited and returned to the Employer.

14.3 Delete in its entirety.

10. ARTICLE 18 – WORK DAY AND WORKWEEK: (pp. 14-15)

(NEW) 18.9 Add a new section to read as follows:

An employee shall be entitled to accumulate and carry over from year to year, any unused compensatory time. Any compensatory time elected not to be used shall be placed in that employee’s health insurance on retirement account for additional coverage as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4. However, in the event an employee uses all of his/her accumulated sick leave, he/she shall be entitled to use all or part of his/her accumulated compensatory time in the health insurance on retirement account to insure a paycheck for that period of time for which the vacation time covers. However, in the event of a disability retirement as set forth in Article 23, Pension, Group Health and Life Insurance, Section 23.4, all unused compensatory time in the employee’s health insurance on retirement account shall be forfeited and returned to the Employer.
12. ARTICLE 23 – PENSION, GROUP HEALTH AND LIFE INSURANCE PLANS: (pp. 18-19)

23.4 Amend to read as follows:

An employee who retires shall be provided with the same level of benefits contained in the Core Plus Medical and Psychiatric Enhancements Plan as described in the New York State Insurance Plan (known as the Empire Plan) provided to active employees, or if elected, the HMO MVP 10+. The Employer shall contribute towards the premium cost of 50% for individual and an additional 35% of the difference for dependent coverage without returning any paid leave accumulation set forth below. The Employer shall provide additional contribution towards the premium cost of health insurance based on the following schedule for the return of paid leave:

<table>
<thead>
<tr>
<th>Unused Sick Leave, Compensatory Time, Chart Days, Vacation, Holidays and/or Personal Leave Days</th>
<th>Percent of Health Insurance Premium Paid by the Employer</th>
</tr>
</thead>
<tbody>
<tr>
<td>105-114</td>
<td>Individual: 65%  Dependent: 65%</td>
</tr>
<tr>
<td>115-124</td>
<td>Individual: 70%  Dependent: 70%</td>
</tr>
<tr>
<td>125-134</td>
<td>Individual: 75%  Dependent: 75%</td>
</tr>
<tr>
<td>135-144</td>
<td>Individual: 80%  Dependent: 80%</td>
</tr>
<tr>
<td>145-154</td>
<td>Individual: 85%  Dependent: 85%</td>
</tr>
<tr>
<td>155-164</td>
<td>Individual: 90%  Dependent: 90%</td>
</tr>
<tr>
<td>165-174</td>
<td>Individual: 95%  Dependent: 95%</td>
</tr>
<tr>
<td>175</td>
<td>Individual: 100% Dependent: 100%</td>
</tr>
</tbody>
</table>

An employee who receives a disability retirement from the New York State Police and Fire Retirement System shall receive individual and/or dependent health insurance with the Employer paying one hundred percent (100%) of the premium cost without returning any accumulation as set forth above.

In the event an employee does not return any accumulation, as set forth above, for additional percent of health insurance premium paid by the Employer, that accumulation shall be paid to the employee in the first (1st) pay period following separation or retirement. However, in the event that an employee exceeds 175 days, he/she would be paid for all accumulated paid leave not returned.
The ALJ found each of the demands to be a mandatory subject of negotiation because each of the proposals implicate paid leave, which is compensation, and therefore a term and condition of employment that is mandatorily negotiable.

The Village argues in exceptions and brief that the PBA proposals provide a contractual benefit that enables an employee to accumulate unused leave and, upon retirement, convert the unused leave credits into additional health insurance for both the retiree and his/her dependents. The Village finds this concept objectionable because it extends the benefit beyond the term of any interest arbitration award or collective bargaining agreement and because it also extends the benefit to dependents. It is for these reasons that the Village argues the demands are nonmandatory.

Section 201.4 of the Act defines "terms and conditions of employment" as "salaries, wages, hours and other terms and conditions of employment provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void."

The PBA contends that our prior decision in Incorporated Village of Lynbrook (hereafter, Lynbrook)\(^2\) is dispositive of the issues. We agree. In Lynbrook Police Benevolent Association,\(^3\) the PBA submitted certain demands to interest arbitration that the Village considered nonmandatory. One such demand concerned hospitalization


\(^{3}\) 10 PERB ¶3067 (1977).
benefits for an employee or a retired employee or his immediate family at the time of his demise. The demand proposed that the same hospitalization benefits be received by the beneficiaries of retired employees. We agreed in that case that the Village had no statutory duty to negotiate for persons who were no longer public employees at the time of negotiations.\textsuperscript{4} The Village objected to continuing the hospitalization benefit to be received by current employees who die after they retire on the theory that it is a prohibited retirement benefit under §201.4 of the Act. We rejected this argument and analogized it to the issue of termination pay decided in the \textit{Incorporated Village of Lynbrook} case.\textsuperscript{5} There the Board distinguished supplements to pension payments, which are prohibited subjects of bargaining under §201.4, from termination pay, like the hospitalization benefit, which is a deferred payment for actual services rendered.

On appeal, the Appellate Division, Second Department, confirmed PERB’s determination regarding termination pay, however, it dismissed that part of the PBA’s demand proposing the hospitalization benefit on the grounds that such proposal constituted retirement benefits and was, thus, a prohibited subject of negotiation. The Court of Appeals reversed the Appellate Division’s decision regarding the hospitalization benefit. The Court noted that:

\begin{quote}
[PERB] could have reasonably concluded that this item, which is becoming an increasingly common term of employment in this country, [citation omitted] constituted neither "payments to a fund or insurer to provide an income for retirees" nor "payment to retirees or their beneficiaries."\textsuperscript{6}
\end{quote}

\textsuperscript{4} \textit{Id.}, at 3121.

\textsuperscript{5} \textit{Supra}, note 2, at 3115 (1977).

The Court stated that since the purpose of §201.4 was to insulate public employers from pension demands, the bargaining process itself provides a similar safeguard and there is no constitutional prohibition from abrogating such benefits in future contract years.\(^7\) While we have recognized the potential policy implications resulting from the *Lynbrook* decision,\(^8\) we are obliged to follow it.

The ALJ also correctly noted that under the “conversion theory” articulated by the Board in *City of Cohoes* (hereafter, *Cohoes*), the demands seek to modify existing terms of the parties’ expired agreement and, as such, are mandatorily negotiable.\(^9\) The Village urges us to reverse our decision in *Cohoes* on policy grounds because of the burden it places on public employers. We need not address this argument because, as the Court in *Lynbrook* opined, there is no constitutional prohibition from abrogating such benefits in future contract years. We leave to the parties and, perhaps the legislature, to address the “open-ended escalation factors” affecting health care costs for both public employers and public employees.

In reaching our conclusion that the aforementioned demands are mandatory subjects of negotiations, we are not deciding the merits of the demands, only their negotiability. Our decision herein should be construed only as a determination that the demands may properly be submitted to interest arbitration.

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\(^7\) *Id.*

\(^8\) 27 PERB ¶3058 (1994).

Based on the foregoing, the Village's exceptions are denied and the ALJ's decision is affirmed.

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

DATED: December 19, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member