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11-15-2016

## State of New York Public Employment Relations Board Decisions from November 15, 2016

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# State of New York Public Employment Relations Board Decisions from November 15, 2016

**Keywords**

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

**Comments**

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

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In the Matter of

**TEAMSTERS LOCAL 317,**

Petitioner,

-and-

**CASE NO. C-6370**

**TOWN OF MARCELLUS,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

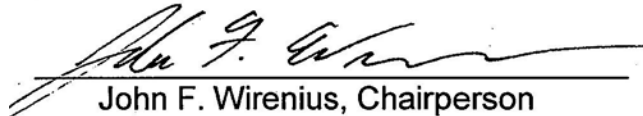
IT IS HEREBY CERTIFIED that the Teamsters Local 317 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time Motor Equipment Operators and Deputy Highway Superintendent.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 317. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 15, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-6396**

**TOWN OF BERNE,**

Employer,

-and-

**INTERNATIONAL UNION OF OPERATING ENGINEERS,  
LOCAL 158,**

Incumbent.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their

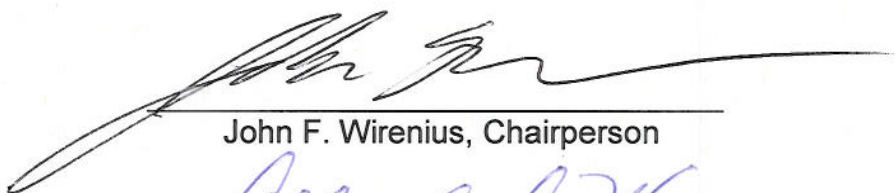
exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time employees of the Highway Department and the Transfer Station Operator.

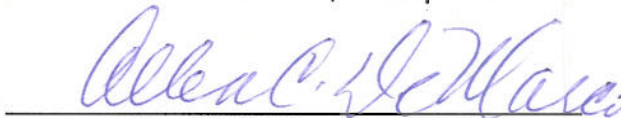
Excluded: Superintendent of Highways, Deputy Superintendent of Highways, and all part-time employees, clerical employees, seasonal employees, and supplemental employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. 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.<sup>1</sup>

DATED: November 15, 2016  
Albany, New York



John F. Wirenius, Chairperson



Allen C. DeMarco, Member

<sup>1</sup> Member Robert S. Hite did not participate in the deliberations and decision concerning this matter.

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

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In the Matter of

**BROTHERHOOD OF WESTERN NEW YORK  
WATER WORKS,**

Petitioner,

-and-

**CASE NO. C-6400**

**ERIE COUNTY WATER AUTHORITY,**

Employer,

-and-

**LOCAL 930, AFSCME, COUNCIL 66,**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

IT IS HEREBY CERTIFIED that the Brotherhood of Western New York Water Workers 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: Cleaner, Automotive Mechanic Helper, Automotive Mechanic, Water Utility Worker, Stores Clerk, Line Maintenance Operator, Water Plant Helper, Water Treatment Plant Operator Trainee, Water Treatment Plant Operator, Meter Service Worker, Dispatcher, Bill Collector, Control Operator, Pump Mechanic and Diesel Generator Mechanic.

Excluded: All others.

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

DATED: November 15, 2016  
Albany, New York

  
\_\_\_\_\_  
John F. Wirenius, Chairperson

  
\_\_\_\_\_  
Allen C. DeMarco, Member

  
\_\_\_\_\_  
Robert S. Hite, Member



STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**ARLENE MOREL,**

Petitioner,

-and-

**CASE NO. C-6405**

**VILLAGE OF SLEEPY HOLLOW,**

Employer,

-and-

**LOCAL 456, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,**

Incumbent/Intervenor.

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**BOARD DECISION AND ORDER**

On May 27, 2016, Arlene Morel (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition for decertification of the Local 456, International Brotherhood of Teamsters (intervenor), the current negotiating representative for employees of the Village of Sleepy Hollow.

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

Included: Assistant Court Clerk, Bookkeeper (Part-time), Court Clerk, Crossing Guard (Hourly), Intermediate Clerk (Part-time) (Hourly), Office Assistant, Parking Enforcement (Hourly), Payroll Clerk, Recreation Assistant, Recreation Assistant (Part-time), Recreation Supervisor, Staff Assistant Finance & Administration and Assistant Building Inspector.

Excluded: All other employees.

Pursuant to that agreement, a secret-ballot election was held on September 21, 2016, at which a majority of ballots were cast in favor of the intervenor.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots desire to be represented by the intervenor for the purpose of collective negotiations, the incumbent remains the exclusive representative of the unit employees and IT IS ORDERED that the petition is dismissed.

DATED: November 15, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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

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In the Matter of

**TOWN OF CANANDAIGUA HIGHWAY  
EMPLOYEES' ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-6425**

**TOWN OF CANANDAIGUA,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

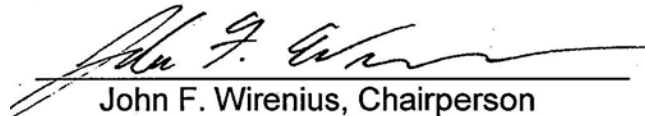
IT IS HEREBY CERTIFIED that the Town of Canandaigua Highway Employees' Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective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

Included: All full-time and regular part-time Motor Equipment Operators, Working Supervisors and Motor Equipment Operator IVs employed in the Town Highway, Water and Recycling Departments working at least fifteen (15) hours per work week.

Excluded: All other titles.

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

DATED: November 15, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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

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In the Matter of

**BUFFALO TEACHERS FEDERATION,**

Charging Party,

**CASE NO. U- 26208**

- and -

**BUFFALO CITY SCHOOL DISTRICT,**

Respondent.

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**RICHARD E. CASAGRANDE, GENERAL COUNSEL (TIMOTHY CONNICK  
of counsel), for Charging Party**

**JAECKLE FLEISCHMAN & MUGEL, LLP (JAMES N. SCHMIT of counsel),  
for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions to a decision of an administrative law judge.<sup>1</sup> In her decision, the ALJ found that the Buffalo City School District (District) violated § 209-a.1 (a) of the Public Employees' Fair Employment Act (Act) by threatening members of the Buffalo Teachers Federation (BTF) with layoffs unless they convinced the BTF to abandon a grievance, and then carrying out that threat.

**EXCEPTIONS**

The District excepts to the ALJ's decision on four grounds. First, the District contends that the record did not support the ALJ's finding that the layoffs constituted a violation of the Act as the final step of a preconceived plan to pressure the BTF into withdrawing the grievance. Second, the District maintains that the ALJ erred because she "failed to acknowledge that the District's decision to lay off the teachers was made prior to the July 29,

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<sup>1</sup> 47 PERB ¶ 4501 (2014).

2005 letter and prior to the August 5, 2005 meeting, and, therefore improperly found that the alleged employer misconduct caused the adverse employment action.”<sup>2</sup>

The District’s third exception asserts that the remedy of reinstatement with back pay was inappropriate on the ground that, in cases of direct dealing, the employee organization’s rights, and not those of individual employees, are infringed. Finally, the District contends that the ALJ erred by “refusing to give any weight to the Fourth Department’s ruling that [the arbitrator] exceeded his authority in ordering that the laid off teachers be reinstated.”<sup>3</sup>

The BTF filed a response supporting the ALJ’s decision and remedial order.

We affirm as modified the ALJ’s decision and remedial order.

### FACTS

The parties entered into a stipulation of facts, dated June 25, 2012, and supporting exhibits upon which the ALJ based her factual findings. The District and the BTF are parties to a collective bargaining agreement covering the period July 1, 1999 through June 30, 2004.<sup>4</sup> The expired agreement provides unit members and retirees a choice of four health insurance alternatives.<sup>5</sup>

The parties have been engaged in negotiations for a successor agreement since February 2004; as of the date of the stipulation, no agreement had been reached. On February 19, 2004, the District provided the BTF with a written proposal regarding health insurance, which included changing to a single health insurance carrier.<sup>6</sup>

On May 11, 2005, the District’s Board of Education passed a resolution, effective July 1, 2005, naming Blue Cross and Blue Shield as the District’s single health insurance carrier for its

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<sup>2</sup> Exceptions, ¶ 2.

<sup>3</sup> *Id.*, ¶ 4.

<sup>4</sup> Joint Exhibit A.

<sup>5</sup> Agreement, Article XXVI (2), at p. 68, *et seq.*

<sup>6</sup> Joint Exhibit B.

employees.<sup>7</sup> On May 12, 2005, the interim superintendent of schools sent a letter to all District employees informing them that the Board of Education voted to have all District health care benefits provided through a single carrier.<sup>8</sup> On or about May 20, 2005, BTF filed a grievance regarding the District's change to a single health insurance carrier.<sup>9</sup> The grievance was denied by the District at level III by letter dated June 8, 2005.<sup>10</sup> Although the implementation date for the unilateral change to a single health insurance carrier was initially announced as July 1, 2005, the District subsequently changed the date of implementation to September 1, 2005.

On July 29, 2005, the District sent a letter to approximately 88 then-current BTF members, stating that:

This letter is to inform you that the District does not anticipate being able to offer you an opportunity to work as a teacher in the coming school year.... As you may have heard, the District will be moving its teachers, engineers, white collar and blue collar unions to a single health insurance carrier. However, because of the pending arbitration hearings which might force the District back to multiple carriers, the District must make cuts now, and bring employees back only if and when it is clear that the single health issue is decided in the District's favor....It is our sincere hope that we can call employees back to work at the earliest possible date. **If we had agreement on single provider health insurance, that would be immediately.**

\*\*\*

The Superintendent wants to meet with any laid-off employee who wishes to do so. A meeting time has been set up for affected members of the Buffalo Teachers Federation on Friday, August 5, from 9:00 a.m. until 10 a.m. in Room 801 City Hall.<sup>11</sup>

The District's superintendent, James Williams, met with BTF unit members on August

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<sup>7</sup> Joint Exhibit C.

<sup>8</sup> Joint Exhibit D.

<sup>9</sup> Joint Exhibit E.

<sup>10</sup> Joint Exhibit F.

<sup>11</sup> Joint Exhibit G (emphasis in original).

5, 2005 in the District's board room. The meeting was attended by approximately 43 of the to-be-laid-off BTF unit employees. As of the meeting on August 5, 2005, the employees notified that they would be laid off had not yet been laid off and were current employees.

At the arbitration hearing over the grievance filed by BFT, the parties adduced testimony from three witnesses who were present at the August 5, 2005 meeting. Hoa Mai, an attendance teacher laid off at the end of August 2005, testified that the superintendent told those present that they had been laid off as a result of the rising cost of health insurance and that if "we went to one single carrier and dropped the arbitration we would be hired back."<sup>12</sup>

Similarly, Laurie Twistbinder, another teacher, testified that the superintendent said "that if we who had lost our jobs would go back and pressure our union to drop the [single health carrier] grievance, we would have our jobs back immediately."<sup>13</sup> Edith Lewin, BTF vice president and assistant to the president, also testified that the superintendent told the teachers they could all be rehired if only the union would agree to go to a single health insurance carrier and withdraw the grievance.<sup>14</sup>

The record also included the arbitration testimony of Sharon Alexander, an attendance teacher notified of her impending layoff. Alexander testified that at a second level grievance meeting in the superintendent's office, she asked him why the teachers were being laid off, to which he replied "if the union would go to a single health carrier provider, that he would hire us back immediately and he wanted the . . . the unions [*sic*] to drop the arbitration."<sup>15</sup>

The BTF did not withdraw the single carrier grievance. On August 24, 2005, the District laid off approximately 88 teachers. On September 1, 2005, the District implemented the

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<sup>12</sup> Joint Exhibit H.

<sup>13</sup> Joint Exhibit I, at p.132.

<sup>14</sup> Joint Exhibit K.

<sup>15</sup> Joint Exhibit J, at 139.



change to a single health insurance carrier.

The arbitrator issued an interim award in March 2006 in which he determined that the District violated the agreement by unilaterally implementing the resolution in question, and the arbitrator retained jurisdiction “to receive further evidence at additional hearings now scheduled to commence on April 11, 2006 and to determine what remedy, if any, is appropriate in this case.”<sup>16</sup>

In October 2006, after the further proceedings referenced in the initial award, the arbitrator issued the award on the appropriate remedy.<sup>17</sup> Based on the “unrefuted, mutually corroborating testimony” of the witnesses, the arbitrator found that “[a]ny doubts about the District’s coercive intent in issuing these letters [of July 29, 2005] or the arrogance of power exhibited therein is obviated.”<sup>18</sup> The arbitrator found that the teachers were “laid off wrongfully, in furtherance of its ill-conceived effort to force the Union into submissive acceptance of the unilateral modification of [the agreement] which the District imposed, effective September 1, 2005.”<sup>19</sup> The arbitrator further explained that, “[i]n the final analysis, those pre-emptive lay-offs in anticipation of the predictable reversal of its unilateral contract modification by an impartial arbitrator seriously compounded the District’s culpability and liability in this case.”<sup>20</sup>

The arbitrator ordered that, effective January 1, 2007, the District rescind and cease the unilateral implementation of the resolution and “shall reinstate forthwith all teachers laid-off on September 1, 2005 . . . with seniority unimpaired, with ‘make whole’ monetary damages for back-pay and benefits from lay-off date to reinstatement date and with interest thereon

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<sup>16</sup> Joint Exhibit L.

<sup>17</sup> Joint Exhibit M.

<sup>18</sup> *Id.*, at p. 14.

<sup>19</sup> *Id.*, at pp. 12-13.

<sup>20</sup> *Id.*, at p. 13.

calculated at the statutory judgment rate.”<sup>21</sup>

The BTF filed a proceeding to confirm the award, and the District filed a cross-petition to vacate. Although the Supreme Court, Erie County confirmed the award in its totality, the Appellate Division, Fourth Department affirmed only as to the unilateral implementation of single carrier. With respect to the remedy, the Court concluded that:

the arbitrator acted in excess of the power granted to him with respect to that part of the award concerning the teachers. . . . Here, article V (D) (4) (c) of the CBA provides in relevant part that “arbitrators shall limit their decisions strictly to the application and interpretation of the provisions of this contract, and shall be without power or authority to modify or amend it.” [The BTF] does not dispute that the CBA does not prohibit respondent from reducing its workforce, and we thus conclude that the arbitrator conferred a benefit on teachers to which they were not contractually entitled, i.e., a job security clause, and thereby modified the terms of the CBA in contravention of the explicitly enumerated limitation on his powers.<sup>22</sup>

### DISCUSSION

We have long held that an employer violates § 209-a.1(a) of the Act where its statements are “intended or likely to coerce employees to relinquish rights guaranteed by the Taylor Law.”<sup>23</sup> In determining whether specific speech constitutes a violation we have looked to the specific context of the speech:

Specifically with respect to employer speech, we have held that an employer may communicate directly with unit employees about employment issues so long as the communication does not contain threats of reprisal for their exercise of protected rights and does not promise them benefits for refraining from exercising those rights.

In assessing whether any speech violates the Act, we reject

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<sup>21</sup> *Id.*, at p. 17.

<sup>22</sup> *Buffalo Teachers Fedn, Inc v Board of Educ of City School Dist of City of Buffalo*, 50 AD3d 1503, 1506-1507 (4<sup>th</sup> Dept), *lv. denied*, 11 N.Y.3d 708 (2008).

<sup>23</sup> *City of Albany*, 17 PERB ¶ 3068, 3107 (1984).

the [ ] argument that the speaker's subjective intent or the recipient's subjective reaction to it is relevant. The test for whether speech violates the Act is a purely objective one. With employer speech, we examine only whether a reasonable employee would view the speech as threatening or coercive in the context in which the speech is delivered.<sup>24</sup>

However, in applying that test the Board has also long "distinguished between a threat of retaliation because either a union or covered employees exercises protected rights and a statement that there might be layoffs if the exercise of protected rights results in cost increases for the employer."<sup>25</sup> In *City of Albany*, the Board acknowledged that "[t]his is a subtle distinction, but we conclude it is a sound one."<sup>26</sup>

The July 29 letters "inform [the affected unit members] that the District does not anticipate being able to offer you an opportunity to work as a teacher in the coming school year." The statement is made, effectively, as announcing a determination that has already been made, and explains the reason leading to that decision. Under *City of Albany* and its progeny, therefore, the July 29 letters do not violate the Act to the extent that they informed the affected employees of their anticipated layoff and the reasons underlying that layoff. Similarly, the Superintendent's statements, to the extent they addressed the layoffs and their cause, fall within the zone of protected employer speech.

However, that does not conclude our inquiry. An employer's representatives "are entitled to express opinions regarding the merits" of the subject at issue "so long as they do not

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<sup>24</sup> *Town of Greenburgh*, 32 PERB ¶¶3025, 3054 (1999) (notes, citations and editing marks omitted).

<sup>25</sup> *City of Albany*, 17 PERB ¶ 3068, at 3106; *City of Yonkers*, 23 PERB ¶ 3055, 3116 (1990) see also *Town of Greenburgh*, 32 PERB ¶ 3025, at 3055 ("The expression of opinion alone is not unlawful even if the effect of that expression is to cause a grievance to be dropped or others never to be filed").

<sup>26</sup> *Id.*

do so in a coercive manner nor subvert the authority of the [Union's] negotiators."<sup>27</sup> In urging the affected employees to pressure the BTF to drop its grievance, the District's letters and the Superintendent crossed both of those lines.

The stipulated record amply supports the conclusion that a reasonable employee would have viewed the written and spoken statements made on behalf of the District as coercive and as subverting the authority of the BTF in pursuing the grievance. The July 29 letters and the unrefuted testimony explicitly linked the BTF's grievance to the layoffs as cause and effect, and affected employees' success in obtaining the BTF's agreement to single carrier insurance to the rescission of the layoffs.<sup>28</sup>

The District claims that the ALJ erred in finding that the July 26 letter and the August 5 meeting as well as the subsequent layoffs were part of a "preconceived scheme designed to pressure the BTF to drop the single carrier grievance."<sup>29</sup> We agree in part. The District properly relies on the fact that the July 29 letter establishes that the layoff decision was made prior to the August 5 meeting took place. While this evidence is consistent with the ALJ's finding as to the coercive and subversive effect of the July 29 letter and the August 5 meeting, it does not support the ALJ's finding that the decision to excess the affected employees was made in bad faith. Indeed, no evidence can be gleaned from the record that the decision to layoff the affected employees was made for any other than economic reasons predicated upon the District's exposure from the grievance. Even the offer of rehiring the excessed employees

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<sup>27</sup> *City of Albany*, 17 PERB ¶ 3068, at 3106; *Town of Huntington*, 26 PERB ¶ 3073, 3140 (1993); see also *County of Monroe*, 43 PERB ¶ 3025, 3097 (2010), *confd sub nom Monroe Co v NYS Pub Empl Relations Bd*, 85 AD3d 1439 (3d Dept 2011).

<sup>28</sup> We note that the BTF in its response to exceptions specifically disavows any intention to plead or prove direct dealing (Response at ¶ 3; Brief in Support of Response at 10-11). Therefore we do not address whether the conduct at issue additionally constitutes direct dealing in violation of § 209-a(1) (a) and (d) of the Act.

<sup>29</sup> 47 PERB ¶ 4501, at 4503.

upon the BTF's withdrawal of the grievance is consistent with the rationale expressed in the July 29 letter and at the August 5 meeting that the decision to excess the affected employees resulted from the District's recognition of its economic exposure from the grievance.

Our review of the record likewise does not find support for the ALJ's finding that "the layoffs were directly intertwined with the letter of July 26, and the meeting and statements made by the superintendent on August 5, in that they were the final step in the preconceived scheme designed to pressure the BTF to drop the single carrier grievance," and thus "they establish a violation of the Act."<sup>30</sup> Neither the stipulated facts nor the exhibits contain any factual support, even by indirect or circumstantial evidence, that the District's decision to lay off the affected employees was based on any other reason than the financial exposure of the District resulting from the well-founded grievance predicated on what the arbitrator quite properly found to be a blatant breach of the parties' collective bargaining agreement. Indeed, as the arbitrator ultimately found, the "pre-emptive lay-offs" were "in anticipation of the predictable reversal of its unilateral contract modification by an impartial arbitrator."<sup>31</sup> Accordingly, the ALJ erred in awarding reinstatement and back pay, because the unlawful conduct was not established to have a causal relationship to the losses that remedy was intended to redress.

Despite reversing this prong of the remedy, we do not mean to in any way condone the District's unlawful acts here. While the record does not establish that the decision to layoff affected employees was made in bad faith, the record does show a blatant attempt by the District to coerce the affected employees to act as its bargaining agents against the BTF, thereby subverting the BTF's duly elected leadership, an act which is "inherently destructive of

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<sup>30</sup> *Id.*

<sup>31</sup> Joint Exhibit M, at p. 13.

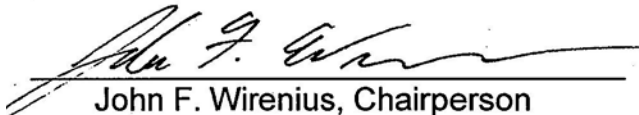
the rights of organization granted by § 202 of the Act.”<sup>32</sup> Because of the unusual procedural posture of this case, in which the parties have repeatedly requested that we defer issuance of a decision pending the result of now-complete negotiations, resulting in the first collective bargaining agreement in over a decade, no remedial order other than the issuance of a cease and desist order is appropriate at this time to redress the fruits of the violation.

Based upon the foregoing, we find that the ALJ properly found on the record before her that the District had violated § 209-a.1(a) of the Act by making coercive statements and in promising benefits to BTF unit employees in exchange for their efforts to persuade the BTF to relinquish its statutory rights.

Accordingly, the District is hereby ordered to forthwith:

1. Cease and desist from making statements to BTF unit employees intended to or having the effect of interfering with rights protected under the Act;
2. Sign and post the attached notice at all locations customarily used to communicate with BTF unit employees both in writing and electronically.

DATED: November 15, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

<sup>32</sup> *County of Monroe*, 43 PERB ¶ 3025, at 3097.

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

**we hereby notify all employees of the Buffalo City School District in the unit represented by the Buffalo Teachers Federation (BTF) that the District will:**

Not make statements to BTF unit employees intended to or having the effect of interfering with rights protected under the Act, to wit, that if employees would pressure the BTF to drop the single health carrier grievance they would be hired back immediately; and

**Dated** . . . . .

**By** . . . . .  
on behalf of the ***Buffalo City School District***

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

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

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO, WESTCHESTER  
COUNTY LOCAL 860, UNIT 9200,**

Charging Party,

**CASE NO. U-32413**

- and -

**COUNTY OF WESTCHESTER,**

Respondent.

---

**STEVEN A. CRAIN & DAREN RYLEWICZ, GENERAL COUNSELS (STEVEN  
A. CRAIN of counsel), for Charging Party**

**ROBERT F. MEEHAN, COUNTY ATTORNEY (FREDERICK M. SULLIVAN of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the County of Westchester (County) to a decision and order of an Administrative Law Judge (ALJ).<sup>1</sup> The ALJ held that the County violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) when it abolished the position of Secretary I (Word Processor) in a collective bargaining unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester County Local 860, Unit 9200 (CSEA). After a hearing, the ALJ concluded that the County would not have abolished the position if the incumbent and the local president, Karen Pecora, had not exercised her contractual right to full-time Employee Organization Leave (EOL), a protected right under the Act.

As a remedy, the ALJ directed the County:

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<sup>1</sup> 47 PERB ¶ 4596 (2004).



Not [to] consider Karen Pecora's use of union leave time when considering positions that it will eliminate from its budget; [to] [r]reinstate Karen Pecora to her position as Secretary I (Word Processor) within the County's Department of Parks, Recreation and Conservation; and [to] [m]ake Karen Pecora whole for lost wages and benefits, if any, suffered as a result of the elimination of her position from the County's Department of Parks, Recreation and Conservation, with interest at the maximum legal rate.

The ALJ also directed the County to sign and post a notice reflecting the remedial order at various locations used to communicate with unit employees. For the reasons below, we affirm the ALJ's finding of a violation of the Act, but modify her remedial order.

#### EXCEPTIONS

The County's 17 exceptions can be distilled into two arguments. First, it argues that the ALJ erred in concluding that it abolished Pecora's position because she was on EOL and by rejecting its argument that it abolished her position for legitimate budgetary reasons. Second, assuming the finding of a violation is sustained, the County alleges that the ALJ erred in directing it to reinstate Pecora to her former position in the Parks Department. The County asserts that CSEA's successful contract grievance on the same subject has already made Pecora whole and relies on its compliance with the arbitrator's order that Pecora "be reinstated to her former position of Secretary I, Salary Grade 7, *or equivalent position*, and be made whole for lost wages and/or benefits."<sup>2</sup> Since it has complied with the award by restoring Pecora to a Secretary I, Salary Grade 7 position in the Department of Social Services, the County argues that the ALJ should not have directed it to restore her position in the Parks Department.

CSEA supports the ALJ's decision and order in all respects.

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<sup>2</sup> Brief in Support of Exceptions at 14 (emphasis added) (quoting award of arbitrator, dated December 13, 2013 (Arbitration Award), attached thereto as Exhibit A, at p 17).

For the reasons that follow, we affirm the ALJ's decision to the extent that she found that the County's abolition of Pecora's position violated the Act, but we modify the remedial order.

### FACTS

Having carefully reviewed the full record, including the findings of fact made by the arbitrator regarding Pecora's grievance contesting the abolition of her position, and the parties' stipulations, we find that the ALJ accurately described the material events. Indeed, although the County challenges the ALJ's conclusions and remedial order, it does not dispute her factual findings in any material respect.

The County hired Pecora in February 1990 as a receptionist in the Department of Parks Recreation and Conservation. Nine years later, in 1999, she was promoted to Secretary I, also in the Parks Department.

Pecora was elected as CSEA's First Vice President in 2001, and elected as CSEA's President in 2009. The County approved Pecora to receive full-time EOL under Article XIII, §2 (A) (3) of the parties' collective bargaining agreement, which provides, in relevant part: "The Unit President and Unit First Vice-President and two (2) other Unit employees appointed by the Unit President and subject to the County's approval shall, at all times, be free of assigned duties." Thus, while Pecora provided secretarial services for the Parks Department as a Secretary I between 1999 and 2001, she was on full-time EOL and provided no such services from 2001 until the elimination of her position by the County.

While Pecora was on full time EOL, her position as a Secretary I in the Parks Department was abolished by the County effective December 31, 2012, as part of a

budget reduction plan for 2013. Because Pecora did not have “bumping rights” to other positions, she was terminated from employment. Shortly thereafter, Pecora was hired by the County’s Board of Elections on January 7, 2013, as an Intermediate File Clerk, a position included in CSEA’s unit but that pays a lower salary than Pecora earned in her prior position as a Secretary I, Grade 7.<sup>3</sup>

Kathleen O’Connor, Commissioner of the Parks Department since 2011, is responsible for developing the Department’s budget, including the identification of positions for elimination, subject to final approval by the County’s Board of Legislators. She testified that she first proposed eliminating Pecora’s position in 2011, pursuant to the County’s 2012 budget reduction requirements. That proposal was submitted to the Board of Legislators, which restored Pecora’s position in the 2012 budget. In 2012, the County again required O’Connor to cut her budget for the 2013 year. O’Connor again submitted a budget eliminating Pecora’s position. She testified that she proposed cutting Pecora’s position in 2013 because the Parks Department’s need for secretarial services had diminished over the years due to the elimination of Deputy Commissioner positions, of which only one remained. Although there is no evidence that Pecora had been assigned clerical duties for a Deputy Commissioner, O’Connor testified that eliminating Pecora’s position would be the least painful to the Department. The parties stipulated that since 2011, when O’Connor became Commissioner, the Parks Department abolished 7 clerical positions for budgetary reasons after the incumbents retired. O’Connor explained that she eliminated Pecora’s position because it was no

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<sup>3</sup> The Board of Elections did not approve Pecora for full-time EOL. Therefore, she provided part-time work as a Clerk for the Board of Elections and had part-time EOL until she lost her bid to be CSEA’s President in 2013 for a term commencing June 30 of that year.

longer needed. However, the the same clerical functions that Pecora would have performed if she had not been on full-time EOL were in fact being performed by two retired employees who had been rehired on a part-time basis shortly after their retirement.<sup>4</sup> Nevertheless, O'Connor testified that her decision to eliminate Pecora's position had nothing to do with who occupied it, and the record reveals no animus on O'Connor's part against Pecora because of her contractual EOL position.

Following the County's abolition of Pecora's position in the Parks Department and Pecora's termination from employment, CSEA filed and pursued to arbitration a contract grievance alleging that the County's action breached the EOL term in Article XIII, § 2 (A) (3). By Opinion and Award dated December 13, 2013, the arbitrator sustained CSEA's grievance. Emphasizing that the County could properly eliminate positions performing functions that the County no longer required, for example where the position was included in a department that was abolished, the arbitrator held that the County could not eliminate positions performing services that the County needed simply because the incumbent was absent due to the use of contractual EOL.

Based largely on the record created before the ALJ, the arbitrator found that the clerical functions associated with Pecora's position had not been eliminated, but were being performed by the two recently retired part-time employees. According to that record, the following colloquy took place:

Q. I mean isn't the fact that Karen been working as a secretary in your department all along once Regina and Nancy retired, some of

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<sup>4</sup> Tr, at p. 112, 114-115, 116 (Nancy Roach, retired in 2009); 115-116 (Regina Birkenstock, date of retirement unspecified). By hiring the part-time employees, the County obtained a significant savings because, as part-time employees, they were not entitled to certain benefits, including medical benefits.

those duties would have been assigned to Karen?

A. Possibility.

Q. That is possible, correct?

A. Possible.

Q. And if she was then performing these duties, perhaps she wouldn't have been laid off, correct?

A. Possible.<sup>5</sup>

When asked why these recently retired employees were rehired on a part-time basis, O'Connor testified that they possessed institutional memory and experience within the Parks Department that Pecora lacked because she had been on full-time EOL since 2001. Finally, the arbitrator found it telling that since 2011 the Parks Department had eliminated seven clerical positions for budgetary reasons after the incumbents retired. In contrast, the arbitrator emphasized that while Pecora's position was vacant because she was on EOL, Pecora was the only clerical employee who was affirmatively laid off. To the arbitrator, the County's decision to lay Pecora off, unlike the positions that it abolished after they became vacant, while rehiring retirees to perform the clerical work that Pecora would have performed had she not been on full-time EOL was indicative "of bad faith."<sup>6</sup> The arbitrator concluded that by abolishing Pecora's position because it was vacant, albeit fully funded, the County effectively nullified the contractual EOL rights.

To remedy the County's breach of contract, the arbitrator directed that Pecora "be reinstated to her former position of Secretary I, Salary Grade 7, or equivalent position, and be made whole due to lost wages and/or benefits of the difference she earned in the County's Board of Elections and what she would have earned if she

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<sup>5</sup> Tr., at p. 117.

<sup>6</sup> Arbitration Award at 16.

remained continuously employed in her former position of Secretary I, salary grade 7.”<sup>7</sup>

The County has fully complied with the arbitrator’s award.

Based on substantially the same facts on which the arbitrator relied, and for the same reasons, the ALJ held that the County would not have abolished Pecora’s position and laid her off “but for” her use of contractual EOL, a protected activity well known to the County. The ALJ rejected the County’s claim that its decision was predicated on legitimate economic grounds, finding the County’s explanation that it no longer needed the work was pretextual, noting, as well, that the only clerical positions that the County eliminated since 2011 were vacant positions owing to the incumbents’ retirement. Therefore, the ALJ held that the County violated §§ 209-a.1 (a) and (c) of the Act. As a remedy, the ALJ ordered the County not to consider employees’ use of EOL in making decisions to eliminate positions; that Pecora be reinstated to her former position with the Parks Department; that the County make Pecora whole for lost wages and benefits plus interest, and directed the County to post a notice reflecting her remedial order, whereas the Arbitrator ordered no similar posting.

#### DISCUSSION

The dispute presented here is not unique. In *County of Nassau*,<sup>8</sup> the employer abolished a position where the incumbent was on full-time EOL under the terms of the parties’ collective bargaining agreement. In finding a violation, the Board observed:

The issue before us is easily stated: Did the County eliminate [an employee’s] position because [the employee] used EOL or did it do so, as it claims, only because budgetary constraints forced that decision? If the former, the

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<sup>7</sup> *Id* at 17.

<sup>8</sup> 27 PERB ¶ 3011, at 3022 (1994), *confd sub nom. County of Nassau v New York State Pub Empl Relations Bd*, 221 AD2d 339, 28 PERB ¶ 7014 (2d Dept 1995).

County's action violated both § 209-a.1(a) and (c) because the elimination of a position for that reason discriminates against [an employee] individually for the exercise of clear contract rights [citing *County of Albany*, 25 PERB ¶ 3026 (1992)] and interferes with [that] and all other employees' participation in protected union activities. . . . [A] position eliminated for this reason necessarily suggests to employees that there may be adverse employment-related consequences for either membership or active participation in a union or for securing to oneself the benefits of the collective bargaining agreement. [citing *Hudson Valley Community College*, 18 PERB ¶ 3057 (1985)] Alternatively, a position's abolition for economic reasons does not violate either § 209-a.1(a) or (c) of the Act even though the occupant of that position is a union officer, activist, or agent. The Act does not insulate union officers of any type or at any level from the adverse effects of an employer's properly motivated managerial decisions. [citing *State of New York(Unified Court System)*, 26 PERB ¶ 3046 (1993)] The Act ensures that employees are not interfered with, discriminated against or improperly advantaged in their employment relationship because of their decisions with respect to union membership, office or participation.<sup>9</sup>

In that case, the record showed that the employer's decision was predicated on the cost savings it would obtain by eliminating the funded, non-productive position; that is, it eliminated the position because the employee exercised his protected contractual right to EOL, a violation of §§ 209-a.1 (a) and (c).

In finding a lack of malice on the part of O'Connor, we note the incongruity of the County's requiring the Parks Department to bear in its budget the cost of the County's contractual obligation to provide a full-time EOL position while at the same time requiring the Parks Department to reduce that budget. Consistent with *County of Nassau*, however, we have long held that malice is "not an essential element of a

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<sup>9</sup> *Id.*

violation of § 209-a.1(a), (b) or (c) of the [Act].”<sup>10</sup> Rather, where the record does not support the conclusion “that the [employer] would have eliminated [the employee’s] position even if [the employee] had not used the contractual leave,” an ALJ’s finding of a violation of the Act will be upheld.<sup>11</sup>

This is not to say that employees on EOL are *per se* exempt from generally applicable policies or from decisions made under such policies. For example, a generally applicable policy denying overtime to “employees on extended leave of various types regardless of purpose” does not violate the Act as long as the policy is applied consistently and in a non-discriminatory manner.<sup>12</sup>

Here, we find, as did the ALJ and the arbitrator, that the County abolished Pecora’s position and laid her off because it obtained no benefit by continuing to fund the position. As was the case in *County of Nassau*, the precipitating factor in the selection of Pecora for layoff was her “use of EOL because [s]he was not of use to the Department in that capacity.”<sup>13</sup> Although the decision was economic, and not the result of animus or spite, as the County argues, the lack of any productive benefit from Pecora’s position was owing entirely to Pecora’s exercise of her protected, contractual right to EOL. This is borne out by the fact that the City did not eliminate the functions associated with Pecora’s position, but rather continued to have those functions performed by other employees. Thus, we find, as did the ALJ and the arbitrator, that Pecora’s position would not have been eliminated and she terminated if she had not exercised her protected contractual right to EOL. The County had not eliminated a filled

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<sup>10</sup> *Rochester City School Dist*, 10 PERB ¶ 3097, 3167 (1977).

<sup>11</sup> *County of Nassau*, 27 PERB ¶ 3011, at 3023.

<sup>12</sup> *State of New York (Unified Court System)*, 26 PERB ¶ 3046, 3080 (1993).

<sup>13</sup> *County of Nassau*, 27 PERB ¶ 3011, at 3023.



Parks Department clerical position since 2011, other than Pecora's, showing disparate treatment.

Each of the County's additional arguments to the ALJ in defense of its conduct, reiterated in its exceptions to us, was raised to and rejected by the arbitrator for the same reasons that the ALJ rejected them. We similarly reject them here for the same reasons.

In reaching our conclusion, we reject the County's argument that the abolition of Pecora's position cannot violate §§ 209-a.1 (a) and (c) of the Act because the decision was, ultimately, a legislative action. Not only did O'Connor testify that it was she who determined whether to abolish the position, but, as the Board explained in *County of Suffolk Legislature*, "legislative bodies often act in an executive capacity," and "[w]hen so acting, legislative bodies are equally subject to the proscriptions of the Act."<sup>14</sup> Such is the case here, where the County Legislature has adopted a proposed budget that abolishes a single position, selected for abolition based upon the protected status of the incumbent.<sup>15</sup>

We also reject the County's exception to the ALJ's ruling at the hearing to accept the parties' collective bargaining agreement into the record. The County offers no argument in support of this exception and we find none apparent from the record.

Finally, we affirm the ALJ's conclusion that Pecora's position would not have

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<sup>14</sup> 34 PERB ¶ 3034, 3080 (2001), *confd sub nom Suffolk Co. Legislature v Cuevas*, 303 AD2d 415, 36 PERB ¶ 7006 (2d Dept 2003); *see also, Town of Tuscarora*, 45 PERB ¶ 3044, 3112 (2012) (improper practice charge claiming that Town Board's adoption of budget that abolished position of employee based on protected activity stated claim under the Act); *see generally County of Suffolk and Suffolk County Legislature*, 15 PERB ¶ 3021 (1982).

<sup>15</sup> *Town of Tuscarora*, 45 PERB ¶ 3044, at 3112; *County of Suffolk Legislature*, 34 PERB ¶ 3034, 3080.

been abolished and she terminated “but for” her exercise of her protected contractual right to EOL in violation of §§ 209-a.1 (a) and (c) of the Act. We have long held that “[c]redibility determinations by an ALJ are generally entitled to ‘great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.’”<sup>16</sup> Here, no such objective evidence demonstrating that the ALJ’s credibility determinations are manifestly incorrect has been adduced, and we therefore will not reverse them.

On the question of the remedy, our remedial authority under § 205.5 (d) of the Act, as relevant here, is “to issue a decision and order directing an offending party to cease and desist from any improper practice, and to take such affirmative action as will effectuate the policies of [the Act].” Where appropriate, we are authorized to direct “the reinstatement of employees with or without back pay.” In addition, we require the posting of a notice reflecting the order to advise employees in the affected bargaining unit of their rights under the Act. Our “make whole” orders effectuate the policies of the Act by restoring, as nearly as possible, the status quo ante. Thus, while our orders of reinstatement with back pay may inure to the private benefit of the affected employees, it remains that our orders are necessarily designed to vindicate the public interest by effectuating the policies of the Act.<sup>17</sup> By contrast, the arbitrator’s award at issue here is fundamentally to enforce the parties’ collective bargaining agreement, and his remedial

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<sup>16</sup> *Elwood Teachers Alliance (Neithardt)*, 48 PERB ¶ 3020, text at n. 40, citing *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014) (quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019 (2008), citing *County of Tioga*, 44 PERB ¶ 3016, at 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain’s Endowment Assn*, 10 PERB ¶ 3034 (1977)).

<sup>17</sup> *Cf. Union Free Sch Dist No. 6 of Towns of Islip & Smithtown v New York State Human Rights Appeal Bd*, 35 NY2d 371, 380 (1974).

authority extends no further than the authority that the parties agree to confer upon him. Accordingly, the arbitrator's award neither defines nor limits our remedial authority under the Act.

The County argues that the ALJ should not have ordered Pecora reinstated "to her position as Secretary I (Word Processor) within the County's Department of Parks, Recreation and Conservation," but that she should have adopted the arbitrator's award which permitted it to reinstate Pecora "to her former position of Secretary I, Salary Grade 7, *or equivalent position.*"<sup>18</sup> It is undisputed that the County has complied with the arbitrator's order by reinstating Pecora with back pay to a Secretary I, Salary Grade 7 position in its Department of Social Services. The County contends that it should not be required to reinstate her to the same position in the Parks Department. CSEA's position in response is that she should be restored to a position in the Parks Department because that is where her former position was.

Provided that the County complies with all other elements of the ALJ's remedial order, we find that the policies of the Act are sufficiently effectuated by the County's reinstatement of Pecora to a Secretary I, Salary Grade 7 position in the Department of Social Services. We note that CSEA offers no basis to conclude that such a reinstatement has prejudiced Pecora in any way, whereas requiring the County to remove Pecora from her current position as Secretary I, Salary Grade 7 in the Department of Social Services and restoring her to a like position in the Parks Department would necessarily cause disruption to the current status quo as defined by the arbitrator's award, implemented over two years ago. We further note that the

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<sup>18</sup> Arbitration Award at p 17 (emphasis added).

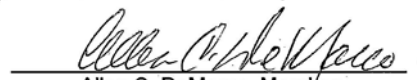
arbitrator's award was issued in a proceeding that CSEA successfully pursued at the same time that it pursued the instant improper practice proceeding. Indeed, the record of the improper practice proceeding formed the basis of the record before the arbitrator. The arbitrator and the ALJ reached the same factual conclusions, and each ordered that Pecora be reinstated to her former position of Secretary I, Salary Grade 7. Although the arbitrator's award permitted the County to reinstate Pecora to "an equivalent position," the County reinstated her to the very position she previously held, albeit in the Department of Social Services. Under the circumstances present here, we find that is sufficient.

Accordingly, as limited by the facts and circumstances of the instant matter, particularly the issuance of an arbitrator's award that parallels, in all material respects, what we conclude to be an adequate remedy, the County is hereby ordered to:

1. Not consider use of union leave time when considering positions that it will eliminate from its budget;
2. To the extent, if any, not already effectuated by the arbitrator's award, make Karen Pecora whole for lost wages and benefits, if any, suffered as a result of the elimination of her position from the County's Department of Parks, Recreation and Conservation, with interest at the maximum legal rate; and
3. Sign and post the attached notice at all physical and electronic locations customarily used to communicate with unit employees.

DATED: November 15, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Westchester (County) in the unit represented by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester County Local 860, Unit 9200 that the County will forthwith:

1. Not consider use of union leave time when considering positions that it will eliminate from its budget; and
2. To the extent, if any, not already effectuated by the arbitrator's award, make Karen Pecora whole for lost wages and benefits, if any, suffered as a result of the elimination of her position from the County's Department of Parks, Recreation and Conservation, with interest at the maximum legal rate.

**Dated** .....

**By** .....  
on behalf of the **COUNTY OF WESTCHESTER**

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

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

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In the Matter of

**COUNTY OF MADISON and MADISON COUNTY  
SHERIFF,**

Charging Party,

-and-

**CASE NO. U-33656**

**MADISON COUNTY DEPUTY SHERIFF'S POLICE  
BENEVOLENT ASSOCIATION, INC.,**

Respondent.

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**HANCOCK ESTABROOK, LLP (JOHN F. CORCORAN, ESQ. of counsel), for  
Charging Party**

**JOHN M. CROTTY, ESQ., for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) finding that the Madison County Deputy Sheriff's Police Benevolent Association, Inc. (PBA) violated § 209-a.2 (b) of the Public Employees' Fair Employment Relations Act (Act).<sup>1</sup> The ALJ found that the PBA violated the Act by submitting to compulsory interest arbitration certain proposals that are not arbitrable under § 209.4(g) of the Act.

**EXCEPTIONS**

The PBA excepts to the ALJ's decisions on three grounds. First, the PBA asserts that the ALJ erred in finding non-arbitrable the PBA's demand that an employee on disciplinary suspension receive pay after thirty days. The PBA's second exception contends that the ALJ erred in finding non-arbitrable its demand for an increased amount of compensatory time provided an employee in lieu of overtime pay. Finally, the

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<sup>1</sup> 48 PERB ¶ 4514 (2015).

PBA claims that the ALJ erred in finding non-arbitral the demand allowing it to grieve the Sheriff's denial of an employee's request for an education stipend based on the Sheriff's determination that a college degree is not job related.

For the following reasons, we affirm the ALJ's decision.

### DISCUSSION

Section 209.4 (g) of the Act limits the availability of interest arbitration for "members of any organized unit of deputy sheriffs who: (1) are engaged directly in criminal law enforcement activities that aggregate more than" 50 % of their service, and (2) are encompassed within the definition of "police officers" pursuant to § 1.20 (34) of the Criminal Procedure Law, with certification requirements for both qualifications. For such employees, inclusive of the unit members at issue here, interest arbitration:

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 [prescribed] by law.

In construing this language, the Board has repeatedly reaffirmed the test for determining whether a particular demand is directly related to compensation, and therefore arbitrable under § 209.4 (g) of the Act, first articulated in *New York State*

*Police:*

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 copayment). If the effect is otherwise, then the relationship of the demand becomes secondary and indirect and the subject is, therefore, excluded from the scope of compulsory arbitration under the language of § 209.4 [g].<sup>2</sup>

As the Board further explained in *County of Orange*:

Under that test, each proposal must be examined separately to discern whether its sole, predominant or primary characteristic is a modification in the amount or level of compensation. Consistent with *State Police*, in applying that test, we will compare a proposal with the subjects specifically identified by the Legislature as being arbitrable: “salary, stipends, location pay, insurance, medical and hospitalization benefits.” In addition, we will compare the proposal with those subjects declared by the Legislature to be nonarbitrable: “job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation.”<sup>3</sup>

In the instant case, the PBA challenges the ALJ’s ruling that three specific demands were not “directly related to compensation” and thus not arbitrable under § 209.4(g) of the Act. We address them in turn.

### **Demand No. 1: Limiting Suspension Without Pay**

In its Demand No. 1, the PBA seeks to amend § 11.2 of the parties’ collective bargaining agreement to “[c]larify that an employee cannot be suspended without pay for a period in excess of thirty (30) calendar days when served with a notice of discipline.”<sup>4</sup> As the PBA concedes, a substantially identical demand was found by the

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<sup>2</sup> 30 PERB ¶ 3013, 3028 (1997), *confd sub nom New York State Police Investigators Assn v NYS Pub Empl Rel Bd*, 30 PERB ¶ 7011 (Sup Ct Albany County 1997) (emphasis in original); see also *County of Broome*, 44 PERB ¶ 3046, 3137 (2011).

<sup>3</sup> 44 PERB ¶ 3023, (2011).

<sup>4</sup> Amended Charge, Ex. 3, at 2, Demand No. 5. Because of the resolution of various of the demands at issue prior to the issuance of the ALJ’s decision, the numbering of the demands provided in ALJ’s opinion differs from that of the exhibit in the record, which is, as the ALJ notes, agreed to be accurate. 48 PERB ¶ 4514, at 4550. For the purpose of clarity, we use the ALJ’s numbering in the text of the opinion, while providing a citation to the original in the notes.



Board to be non-arbitrable in a prior case involving the same parties, in *County of Madison*.<sup>5</sup> As the board explained in that earlier decision:

While the proposal would change the amount or level of compensation of an employee suspended without pay at the time he or she is served with a notice of discipline, the issue of compensation in the proposal is inextricably intertwined with the contractual disciplinary procedures, a nonarbitrable subject under § 209.4(g) of the Act.<sup>6</sup>

In this case, as in the prior iteration of the identic demand found to be non-arbitrable, the PBA sought to amend Section 11, entitled “Discipline,” of the parties’ collective bargaining agreement (Agreement), which provides for disciplinary penalties and procedures, though not predicates.<sup>7</sup>

Although not clearly stated in our prior decision involving this same demand, it is beyond peradventure that suspension without pay is a disciplinary action.<sup>8</sup> The statutory exclusion from interest arbitration of demands including “disciplinary procedures and actions” would on a plain meaning reading of the statute render this demand non-arbitrable.<sup>9</sup> Indeed, the parties’ own understanding, as reflected in the Agreement, is consistent with our reading of the statutory exclusion’s scope; § 11.1 of

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<sup>5</sup> 44 PERB ¶ 3035, 3117 (2011).

<sup>6</sup> *County of Madison*, 44 PERB ¶ 3035, at 3117.

<sup>7</sup> Amended Charge, Ex 1, at 7.

<sup>8</sup> See, eg, *Lovejoy–Wilson v. NOCO Motor Fuel, Inc.*, 263 F.3d 208, 223–24 (2d Cir.2001); *New York City Transit Auth*, 35 PERB ¶ 3029, *confd sub nom. NYC Transit Auth v. NYS Pub Empl Relations Bd.*, 196 Misc.2d 532 (Sup Ct Kings Co. 2003), *affd*, 27 AD3d 11 (2d Dept 2005), *revd*, 8 N.Y.3d 226 (2007).

<sup>9</sup> At a minimum, the statutory language excluding “disciplinary procedures and actions” obviates the PBA’s effort to analogize the instant demand to *City of White Plains*, 12 PERB ¶ 3046 (1979), in which the Board found negotiable a demand that an employee could not be suspended without pay upon services of disciplinary charges, as Civil Service Law § 75 did not preclude such negotiations. First, the inquiry as to what is a mandatory subject of bargaining under the Act is wholly distinct from whether such a demand falls within the drastically more limited scope of subjects eligible for interest arbitration under § 209.4(g). Moreover, while the PBA is technically correct that “[t]he statute does not use the word ‘discipline,’” (Brief in Support of Exceptions at 7), the analogy founders on the express exclusion from interest arbitration of “disciplinary procedures and actions.”

the Agreement provides that “[d]isciplinary action shall include, but is not limited to, written reprimands, *suspension*, demotion, discharge, fines, or any combination thereof, or other such penalties as may be imposed by the Sheriff.”<sup>10</sup>

However, we do not rely solely on a plain meaning reading of the text here. The demand would limit the duration of suspensions and eliminate their economic effect beyond the 30-day maximum length of such a suspension without pay. In other words, the demand seeks to change not merely the compensation of the employees affected, but also the nature of one form of disciplinary action expressly provided for in the Agreement.<sup>11</sup> We adhere to the Board’s prior ruling that the demand is at a minimum inextricably intertwined with “disciplinary procedures and actions” excluded from interest arbitration by § 209.4(g), and is thus non-arbitrable.<sup>12</sup>

### **Demand No. 2: Increase Limit of Banked Compensatory Time**

Demand No. 2, seeks to “[i]nset eighty (80) where sixty (60) appear in the following contract provision: ‘Employees may not bank more than sixty (60) hours of compensatory time at any given time.’”<sup>13</sup> The PBA candidly acknowledges that the ALJ was obliged to find this demand non-arbitrable under the Board’s decision in *County of Orange*,<sup>14</sup> but argues that we should reverse that decision, and that *State Police*, upon which the Board relied in *County of Orange*, should be distinguished, or, if not

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<sup>10</sup> *Id.* (emphasis added).

<sup>11</sup> *County of Suffolk*, 40 PERB ¶ 3022, 3088-3089 (2007).

<sup>12</sup> *County of Madison*, 44 PERB ¶ 3035, at 3117. As we endorse the Board’s prior holding on the merits, we need not address the County’s arguments based on *res judicata*. We note, as we have previously stated, strict application of New York or federal civil practice precedent may be inappropriate due to the distinct procedures in the Rules along with the public policy underlying the Act, and declined to blanketly apply [*res judicata*] as governing [in] all circumstances, while also allowing that under appropriate circumstances, *res judicata* and collateral estoppel may constitute appropriate bases for dismissing a charge.” *County of Nassau*, 49 PERB ¶ 3014, 3057, n. 20 (2016) (citations, quotation marks, and editing marks omitted).

<sup>13</sup> Amended Charge, Ex. 3, at 4, Demand No. 6, amending Agreement § 13.2.4.

<sup>14</sup> 44 PERB ¶ 3023 (2011).

distinguishable, overruled in part.

In *County of Orange*, the Board reaffirmed that:

a unitary demand that includes leave accumulation and compensation to unit members for unused leave does not satisfy the arbitrability test under *State Police*. A demand that includes an inseparable component calling for an increase in leave accumulation cannot be characterized as being solely, predominantly or primarily related to increasing the level or amount of compensation under *State Police*.<sup>15</sup>

The instant demand poses the same problem as that found to be excluded from compulsory arbitration in *County of Orange*; it requests an increase not in the amount of compensation, but in the ability to store up leave which, if not used, could then be monetized. As the Board explained in *State Police*, a subject is directly related to compensation “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.”<sup>16</sup> Here, the demand does not change the amount of leave an employee can earn, and thus either use or monetize; it relates solely to the amount of leave that be accumulated at any one time. In other words, the demand relates to the time at which accumulated leave must be paid out or used, and not to the amount of leave an employee can earn.<sup>17</sup> Thus, the demand’s “sole, predominant or primary characteristic” is not to “effect some change in amount or level of compensation,” but to change the frequency with which such leave must be used or paid out.<sup>18</sup> As such, the demand is not directly related to compensation.

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<sup>15</sup> 44 PERB ¶ 3023, at 3081.

<sup>16</sup> 30 PERB ¶ 3013, at 3028.

<sup>17</sup> For this reason, we need not address the PBA’s argument that we should revisit the holding of *State Police* and find that a demand for an increase in the amount of paid leave time that an employee could earn should be found to be arbitrable.

<sup>18</sup> 30 PERB ¶ 3013, at 3028.

**Demand No. 5: Grievance Review of Sheriff's Determination  
as to Eligibility for Educational Allowance Benefit**

The final demand at issue seeks to “[d]elete in its entirety” § 40.3 of the Agreement.<sup>19</sup> Section 40.1 provides for an educational allowance to be provided to “[f]ull-time employees who have completed at least one (1) year of continuous service and who possess an academic degree in the field of criminal justice, law enforcement, political science, or a closely related field.”<sup>20</sup> Section 40.3 provides that the “Sheriff shall determine if the degree is job related, and such determination shall not be subject to the grievance procedure specified in Section 9 of this Agreement.” Thus, as the note accompanying the demand specifies, the demand “[r]efers to [the] determination not being subject to the Grievance Procedure.”<sup>21</sup>

The Board’s prior decisions in *County of Putnam*<sup>22</sup> and *County of Sullivan*<sup>23</sup> both found that demands regarding procedures to contest adverse determinations by an employer as to eligibility for benefits were not directly related to compensation, because, as the Board explained in *Sullivan County*, “the proposal primarily deals with the procedure and not with compensation.”<sup>24</sup> The PBA does not dispute that, under these decisions, the demand is non-arbitrable; rather, it contends that these holdings of *Putnam* and *Sullivan* should be overruled.

In support of its argument, it relies on the more recent decision of the Board in *County of Tompkins*.<sup>25</sup> In that case, the Board found non-arbitrable a unitary demand that encompassed procedures “not directly related to whether a unit member is eligible

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<sup>19</sup> Amended Charge, Ex. 3 at 8, Demand No. 18.

<sup>20</sup> Amended Complaint, Ex. 1, at 39.

<sup>21</sup> Amended Charge, Ex. 3 at 8, Demand No. 18.

<sup>22</sup> 38 PERB ¶ 3013, 3106 (2005).

<sup>23</sup> 39 PERB ¶ 3034, 3112 (2006).

<sup>24</sup> *Id.*

<sup>25</sup> 44 PERB ¶ 3024 (2011).

to receive, or to continue to receive, monetary benefits pursuant to G[eneral] M[unicipal] L[aw] § 207-c.”<sup>26</sup> In the same decision, however, the Board found arbitrable a health insurance buy-out proposal. As the Board explained its reasoning:

The primary and predominant characteristic of this proposal is to increase the level of compensation for unit employees based upon declination and waiver of employer health insurance coverage, and the conversion of that benefit into compensation. Following a declination and waiver, the employee is eligible to receive additional compensation under a formula set forth in the proposal. In addition, the proposal would allow an employee to terminate receipt of the additional compensation through a request to re-establish health care coverage. While there are components of the proposal that are procedural in nature, those procedures directly relate to whether a unit employee is eligible for an increase or decrease in the level of compensation.<sup>27</sup>

The PBA reads this passage as an implicit repudiation of the holdings of *County of Sullivan* and *County of Putnam* that all procedural demands are not directly related to compensation. We do not find *Tompkins* inconsistent with *Sullivan* or *Putnam*, as none of these cases speaks in such categorical terms. In *Sullivan County* the Board expressly stated that a proposal limited to procedures to contest adverse determinations by an employer as to eligibility for benefits was not directly related to compensation because “the proposal *primarily* deals with the procedure and not with compensation.”<sup>28</sup>

The ALJ correctly found the instant case to be more analogous to *Putnam County*, and, especially, *Sullivan County*, than to *Tompkins County*. In *Tompkins County*, “[t]he primary and predominant characteristic of this proposal [was] to increase the level of compensation for unit employees based upon declination and waiver of employer health insurance coverage, and the conversion of that benefit into

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<sup>26</sup> *Id* at 3088.

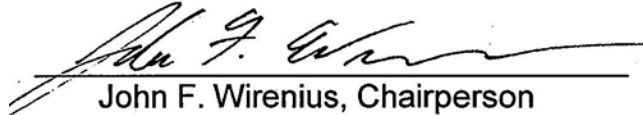
<sup>27</sup> *Id.*

<sup>28</sup> 39 PERB ¶ 3034, at 3112 (emphasis added).

compensation.”<sup>29</sup> The Board found in that case that the procedural components of the demand were merely incidental to that demand. Here, however, as in *Sullivan County* and in *Putnam County*, the proposal deals in its entirety with procedure and not with the level of compensation.

Accordingly, we affirm the ALJ's findings that the PBA violated § 209-a.2(b) of the Act by submitting Demand No.1, Demand No. 2, and Demand No. 5 to interest arbitration, and affirm in full the ALJ's remedial order.

DATED: November 15, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

<sup>29</sup> 44 PERB ¶ 3024, at 3088.

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

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In the Matter of

**CITY OF ITHACA,**

Charging Party,

**CASE NO. U-34078**

- and -

**ITHACA POLICE BENEVOLENT  
ASSOCIATION, INC.,**

Respondent,

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**ROEMER WALLENS GOLD & MINEAUX LLP (MATTHEW P. RYAN  
of counsel), for Charging Party**

**JOHN M. CROTTY, ESQ., for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by both the Charging Party, the City of Ithaca (City) and the Respondent, the Ithaca Police Benevolent Association, Inc. (PBA), to a decision and order of an Administrative Law Judge (ALJ).<sup>1</sup> The ALJ dismissed the City's charge that the PBA violated § 209-a.2 (b) of the Public Employees' Fair Employment Act (Act) when it declined to negotiate with the City for a successor agreement with a starting date of January 1, 2014.

**EXCEPTIONS**

The City excepts to the ALJ's decision on, essentially, two grounds. First, the City contends that the ALJ erred in finding that the PBA's refusal to consent to compulsory interest arbitration did not result in the imposition of the *status quo* for the two years that would have been addressed by the interest arbitration award. Second,

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<sup>1</sup> 48 PERB ¶ 4568 (2015).

the City asserts that the ALJ erred in finding that the PBA did not violate its duty to bargain in good faith by demanding to negotiate a successor agreement covering the same two years that an interest arbitration award would have covered after the PBA refused to consent to interest arbitration, thus electing to extend the terms of the expired agreement.

The PBA excepts to the ALJ's decision, claiming that the ALJ erred in reaching the merits of the City's charge, as to both the City's claims.<sup>2</sup> As to the merits of the PBA's position on the duration of a successor the agreement, the PBA asserts that the ALJ should have found that the PBA was engaged in bargaining and/or a protected expression of opinion. Moreover, the PBA contends that the ALJ erred in allowing the City to collaterally challenge the Director of Conciliation's decision to not process the City's petition for interest arbitration. Rather, the PBA argues, the ALJ erred by "not addressing the PBA's threshold arguments for dismissal of the City's charge."<sup>3</sup>

For the reasons that follow, we affirm the ALJ's decision.

### FACTS

The parties presented this matter to the ALJ on a stipulated record consisting of the charge and the exhibits annexed to the charge, and the answer. Accordingly, the material facts are not in dispute, and are presented here based upon that stipulated record.

On or about March 8, 2012, the PBA and the City began negotiations for a successor to the January 1, 2008 through December 31, 2011 collectively negotiated agreement between them. The PBA filed a declaration of impasse on or about July 10,

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<sup>2</sup> PBA Exceptions, Nos. 1, 2.

<sup>3</sup> *Id.*, at No. 3.



2013. A mediator was appointed and mediation sessions were held. The mediator formally terminated the mediation process on January 14, 2014.

On or about May 12, 2014, the City filed a petition for interest arbitration.<sup>4</sup> By letter dated May 13, 2014 to the Director of Conciliation (Director), the PBA acknowledged receipt of the petition, stating:

This will advise that the PBA does not consent to the interest arbitration sought by the City, and that the PBA does not waive or relinquish its rights under the Act to a continuation of the terms contained in the parties' expired collective bargaining agreement until such time as a successor agreement is reached, or the PBA files for interest arbitration.<sup>5</sup>

This letter went on to request that the City's petition for interest arbitration not be processed.

By letter dated May 30, 2014, the Director issued a determination that the Office of Conciliation would not process the City's petition "at this time."<sup>6</sup> The City did not file exceptions to this determination.

In a letter dated December 23, 2014, the City's Mayor summarized the procedural history of the impasse process and demanded that negotiations begin:

After negotiations failed, [the PBA] declared impasse on July 10, 2013. After mediation failed in the fall of 2013, the City filed a Petition for Interest Arbitration with the Public Employment Relations Board as is required by the Taylor Law. Rather than participating in the Interest Arbitration phase of the impasse procedure ... the Ithaca Police Benevolent Association, Inc., elected to stand on the continuation of the expired agreement for the two year period over which an Interest Arbitration Panel would have had jurisdiction, namely 2012 and 2013. Based upon that

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<sup>4</sup> Charge, Exhibit 2.

<sup>5</sup> Charge, Exhibit 3.

<sup>6</sup> Charge, Exhibit 4.

position, the Public Employment Relations Board's Director of Conciliation...declined to process the City's Petition for Interest Arbitration....

The need to address the economic realities of providing the citizenry of Ithaca with an affordable police service are even more compelling today than they were three years ago. 2012 and 2013 are now resolved by virtue of the PBA electing to stand on the expired agreement by refusing to participate in the Interest Arbitration process. It is time to begin bargaining for a new agreement beginning January 1, 2014.<sup>7</sup>

The City's letter ended with a request that the PBA contact the City's counsel to schedule mutually agreeable dates.

By letter dated December 30, 2014, the PBA responded, stating:

In response to your letter of December 23<sup>rd</sup>, you are incorrect that the PBA's insistence on a continuation of the expired contract terms unless those terms are changed in accordance with law forfeits the PBA's right to negotiate terms for a successor contract covering 2012 and 2013. It was PERB's Director of Conciliation who declined to process the City's petition for interest arbitration. If the City objected to that decision, it should have filed the appropriate appeal in a timely manner....

Demand is hereby made on behalf of the PBA to continue negotiations for a successor agreement with an effective date of January 1, 2012 not, as you have demanded, January 1, 2014.<sup>8</sup>

The PBA's letter ended with a request that the City contact the PBA to schedule mutually agreeable dates. On January 26, 2015, the City filed the improper practice proceeding at issue.

#### DISCUSSION

The PBA's threshold argument can be distilled down to a claim that the charge

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<sup>7</sup> Charge, Exhibit 5.

<sup>8</sup> Charge, Exhibit 6.

was facially deficient and to an assertion that the City's claim pursuant to § 209.6 of the Act constitutes a collateral attack on the Director's decision not to process the City's interest arbitration petition.

The argument that the charge constitutes an improper collateral attack is not tenable in light of the Board's decision in *City of Yonkers*.<sup>9</sup> That case involved an employer's claim that a union had, by refusing to consent to interest arbitration, waived its right to negotiate over the two year period which the interest arbitration would have covered, and which was held in status quo by the union's action. The City sought to pursue its claim by filing exceptions to the Director's determination refusing to process the City's petition for interest arbitration. The Board upheld the Director's determination based on well-established precedent holding that "an employer does not have the right to proceed to interest arbitration without the employee organization's consent."<sup>10</sup> In declining to address the merits of the City's waiver argument, the Board explained that it:

den[ied] the City's request that we make a determination that [a union] has waived its right to negotiate over, or to subsequently seek to arbitrate, the terms and conditions of employment for the at-issue two year periods following the expiration of the parties' agreement. *The appropriate procedure for seeking a determination as to whether a party has violated its duty to negotiate in good faith is through the filing of an improper practice charge pursuant to § 209-a of the Act.*<sup>11</sup>

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<sup>9</sup> 46 PERB ¶ 3027 (2013).

<sup>10</sup> *Id* at 3059, citing *City of Kingston*, 18 PERB ¶ 3028 (1985); see also *County of Niagara*, 16 PERB ¶ 3071 (1983), *vacated sub nom County of Niagara, New York v Newman*, 122 Misc2d 749, 17 PERB ¶ 7003 (Sup Ct Niagara Co 1984), *revd*, 104 AD2d 1, 17 PERB ¶ 7021 (1984); *Town of Southampton v. NYS Pub Empl Relations Bd*, 2 NY3d 513, 37 PERB ¶ 7001 (2004) (citing and relying on *City of Kingston*). See generally Act, § 209-a(1)(e).

<sup>11</sup> 46 PERB ¶ 3027, at 3060 (emphasis added).

The PBA is effectively asking us to penalize the City for following the guidance the Board provided only three years ago in *City of Yonkers*. Indeed, the PBA expressly contends that the appropriate vehicle by which the City could raise its waiver claim is that which the Board in *Yonkers* expressly disallowed, that is, appeal of the Director's decision to not process the City's interest arbitration petition. We adhere to the Board's guidance in *City of Yonkers* that the proper procedural vehicle to litigate such claims is through the filing of an improper practice charge. We accordingly deny the PBA's exceptions.

However, as the ALJ correctly held, the mere fact that an improper practice proceeding provides the appropriate procedural vehicle by which such claims may be resolved, does not necessarily mean that any individual charge has or lacks merit. We therefore turn to the City's exceptions to the ALJ's dismissal of its charge.

We begin by examining the City's argument that the PBA's refusal to consent to mandatory interest arbitration waived its right to negotiate for a successor agreement covering the years 2012 and 2013. We agree with the ALJ that the record does not support a finding of "a clear, intentional, and unmistakable relinquishment of the right to negotiate the particular subject at issue."<sup>12</sup>

As the ALJ correctly found, the PBA's letter does not expressly waive the right to negotiate the effective period of any contract. Indeed, the PBA's letter expressly recites that "the PBA does not waive or relinquish its rights under the Act," and thus cannot be viewed as supporting by its terms any such finding. The City does not contest this.

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<sup>12</sup> *Orchard Park Central School District*, 47 PERB ¶¶3029, 3089 (2014), quoting *Dutchess Comm College*, 46 PERB ¶¶3009, 3016 (2013); see also *County of Nassau*, 48 PERB ¶¶ 3014, 3051 (2015) (following *Orchard Park*).

Rather, it argues that the PBA's actions—that is, standing on its *status quo* rights and declining to participate in interest arbitration that would have covered 2012 and 2013—were inconsistent with any intention to negotiate for the two years following the expiration of the agreement. Waiver may be demonstrated both by express language, not present here, and by conduct, such as silence or inaction, that clearly demonstrates an unequivocal intention not to assert the right alleged to have been waived.<sup>13</sup>

However, the course of dealing here does not support a finding of waiver by conduct inconsistent with subsequent assertion of the right to bargain.

Under the Act, “an employer does not have the right to proceed to interest arbitration without the employee organization’s consent,” but, absent that consent, can only continue to maintain the *status quo*.<sup>14</sup> Likewise, under the Act, the duration of an agreement is a mandatory subject.<sup>15</sup> Put another way, the Board has found that the Act protects both the right of an employee organization to withhold consent to interest arbitration and the right to negotiate the duration of an agreement. As the ALJ correctly found, nothing in our prior cases suggests that the exercise of one right entails the waiver of the other right.

Indeed, such an interpretation of the Act falls afoul of several basic canons of

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<sup>13</sup> *Orchard Park Central School District*, 47 PERB ¶3029, at 3089 (“waiver may accurately describe a loss of right, such as one relinquished by silence, inaction, or certain other types of conduct”); see also *Hadden v. Consolidated Edison Co.*, 45 N.Y.2d 446, 469 (1978) (“A waiver, the intentional relinquishment of a known right ... may be accomplished by express agreement or by conduct or by failure to act so as to evince an intent not to claim the purported advantage”).

<sup>14</sup> *City of Yonkers*, 46 PERB ¶ 3027, at 3059, reaffirming *City of Kingston*, 18 PERB ¶ 3036, at 3075-3076.

<sup>15</sup> *Inc Village of Old Brookville*, 16 PERB ¶ 3094, 3156 (1983), citing *Village of Lynbrook*, 10 PERB ¶ 3067 (1977), confirmed *Village of Lynbrook v. Pub Empl Relations Bd*, 48 NY2d 398, 12 PERB ¶ 7021 (1979).

statutory construction, notably that “statutes should be construed to avoid results which are absurd, unreasonable or mischievous or produce consequences that work a hardship or an injustice.”<sup>16</sup> In particular, “an interpretation of an act should be avoided which would injuriously affect the rights of others, and that sense should be attached to its provisions which will harmonize its objects with the preservation and enjoyment of all existing right.”<sup>17</sup> In sum, a statute should only be construed to require the forfeiture of one statutory right as the price of exercising another when such a reading is compelled by the statutory text or other evidence that so harsh a result was intended.<sup>18</sup> In the absence of language in the Act supporting, let alone compelling, our treating the PBA’s exercise of its statutory right to withhold consent to interest arbitration as waiving its right to negotiate the duration of a subsequent agreement, we decline to so interpret that Act.

For all these reasons, we deny the City’s exceptions to the extent they sound in waiver. However, that does not end our inquiry. The stipulated facts do not make out a claim that the PBA waived its right to negotiate for an agreement covering 2012 and 2013, but they do establish that the City fully satisfied its duty to negotiate in good faith for that period.

Although the City has incorrectly characterized the nature of its objection to the PBA’s demand, the unusual facts here establish a highly atypical instance of duty

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<sup>16</sup> *People v. Dozier*, 78 N.Y.2d 242, 249 (1991) (citing McKinney’s Cons. Laws of N.Y., Book 1, Statutes §§ 141, 143, 145, 146, 148); see also *ATM One, LLC v. Landaverde*, 2 N.Y.3d 472, 477 (2004) (same).

<sup>17</sup> Statutes § 146, Comment at 299 (citing cases).

<sup>18</sup> See, eg, *County of Albany v Hudson River-Black River Regulating Dist*, 97 AD3d 61, 73 (3d Dept 2012) (“the plain language of a statute may not be overridden to avoid an undesirable result in a particular situation”).

satisfaction, not of waiver. That mislabeling does not bar us from considering whether the City, having satisfied its duty to negotiate in good faith as to an agreement covering 2012 and 2013, can be required to revisit those years in negotiations for a successor agreement. Our Rules of Procedure do not “impose a heightened pleading standard such that the use of an incorrect characterization of the legal theory supporting the [duty satisfaction claim] waives it.”<sup>19</sup>

Because duty satisfaction and waiver have often been confused, the Board clarified the distinction between them in *Orchard Park Central School District*:

In contrast to duty satisfaction, waiver involves either the express relinquishment of specified rights or the use of language that establishes “a clear, intentional, and unmistakable relinquishment of the right to negotiate the particular subject at issue” by relieving the other party of the duty to negotiate on that subject.

In short, duty satisfaction is found when the duty to negotiate the specific subject at issue has been in fact satisfied, while waiver relieves the beneficiary of the specified statutory duties, including the duty to negotiate under the Taylor Law.<sup>20</sup>

In prior cases, the Board has generally found duty satisfaction “when a specific subject has been negotiated to fruition and may be established by contractual terms . . . demonstrat[ing] that the parties had reached accord on that specific subject.”<sup>21</sup> Here, however, we are confronted with an almost paradoxical fact pattern: although the parties here are entitled to a final determination of their contractual rights through mandatory interest arbitration, one party can, by standing on its *status quo* rights,

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<sup>19</sup> *County of Nassau*, 49 PERB ¶ 3001, 3003 (2016).

<sup>20</sup> 47 PERB ¶ 3029, 3089 (2014), quoting *Dutchess Comm College*, 46 PERB ¶ 3009, 3016 (2013); see also *County of Nassau*, 48 PERB ¶ 3014, 3051 (2015).

<sup>21</sup> *Id.*

prevent such a final determination from taking place. As a result, the corollary question arises of whether the other party, which has exhausted all statutory negotiation and conciliation processes in good faith, can be compelled to negotiate over the *status quo* period even though agreement was prevented by external circumstances wholly outside that party's control. We find, as explained more fully below, that the duty to negotiate in good faith over the *status quo* period, here 2012 and 2013, has been satisfied.

In the instant case, there is no basis to believe that either party failed to bargain in good faith prior to the declaration of the impasse and the exhaustion of conciliation procedures. Indeed, interest arbitration is only available under the Act "when efforts of the parties themselves to reach agreement through true negotiations and conciliation procedures have actually been exhausted."<sup>22</sup> Here, although "[i]t is well-settled that the duty to negotiate in good faith under the Act extends to conduct following a declaration of impasse,"<sup>23</sup> the City participated in all conciliation proceedings and itself appropriately invoked mandatory interest arbitration.

Nor can the PBA's invocation of its right to decline to participate in interest arbitration be characterized as bad faith bargaining. The PBA merely exercised a statutory right to stand on the *status quo* that has been recognized by the Board for over three decades. Thus, we are confronted with a situation in which neither party has acted wrongfully, and yet the process designed to achieve finality was effectively thwarted, despite the City's best efforts to achieve that finality. The policies underlying

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<sup>22</sup> *Town of Haverstraw*, 9 PERB ¶ 3063, 3109 (1976); see also *Village of Wappingers Falls*, 40 PERB ¶ 3020, 3083 (2007) (quoting and following *Haverstraw*); *City of Newburgh*, 15 PERB ¶ 3116, 3180 (1982).

<sup>23</sup> *Village of Wappingers Falls*, 40 PERB ¶ 3020, at 3083 (citing *City of Mount Vernon*, 11 PERB ¶ 3095, 3156 (1978); *Poughkeepsie Public School Teachers Assn*, 27 PERB ¶ 3079, 3182 (1994); *County of Rockland*, 29 PERB ¶ 3009 (1996)).



§ 209(4) of the Act are best served by treating the *status quo* right as a shield, and not allowing it to be deployed as a sword to reopen the negotiations for which interest arbitration and its resultant finality was avoided.

In sum, the City at no point ceased to pursue a final resolution of the impasse, and only the PBA's exercise of its right to decline to participate in interest arbitration prevented such a final resolution. Although no accord was actually reached here, the record is clear that the City exhausted all available avenues for negotiation and conciliation, thereby satisfying its duty to negotiate in good faith under the Act for the applicable duration of an interest arbitration award, which we find here to be the presumptive default period of two years from the expiration of the previous agreement, that is, calendar years 2012 and 2013.<sup>24</sup>

However, the mere fact that the City had satisfied its duty to negotiate for that time period does not mean that the PBA's effort to re-negotiate the subject violated the duty to negotiate in good faith. Since the negotiations had just commenced, and the City has neither pleaded nor proven that the PBA's demand constituted a condition on bargaining, the fact the demand was made well prior to any declaration of impasse means that no improper practice has taken place.<sup>25</sup> We therefore affirm the ALJ's finding that no improper practice was committed by the PBA, and her dismissal of the charge. Accordingly, we deny the exceptions filed by the PBA and the exceptions filed

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<sup>24</sup> We express no opinion as to whether an arbitration award must cover this default period or if the two years covered by such an award under the Act may have a different start and end time based upon the facts, circumstances, and demands appropriately presented to the panel.

<sup>25</sup> *Town of Wallkill*, 43 PERB ¶ 3026, 3102 & n. 8 (2010), *confd* *Town of Wallkill v NYS Pub Empl Relations Bd*, 44 PERB ¶ 7004 (Sup Ct Alb Co 2011), citing *Peekskill Cent Sch Dist*, 16 PERB ¶ 3075 (1983); *Monroe-Woodbury Teachers Assn*, 10 PERB ¶ 3029 (1977).

by the City, and affirm the decision of the ALJ.

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

DATED: November 15, 2016  
Albany, New York

  
John F. Wirenius, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member