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State of New York Public Employment Relations Board Decisions from November 4, 2002

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from November 4, 2002

Keywords

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

In the Matter of

SHERIFF OFFICERS ASSOCIATION, INC.,

Charging Party,

- and -

CASE NO. U-22837

COUNTY OF NASSAU,

Respondent.

CERTILMAN BALIN ADLER & HYMAN, LLP (Wayne Schaefer and Scott B. Black of counsel), for Charging Party

CULLEN & DYKMAN, LLP (Thomas B. Wassell of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Nassau (County) to a decision of an Administrative Law Judge (ALJ) finding that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued the assignment of County vehicles to two employees in the bargaining unit represented by the Sheriff Officers Association, Inc. (Association), the charging party herein.

The ALJ found that there was an established past practice of the County assigning County-owned vehicles for use on a twenty-four hours, seven days a week basis, to the commanding officer of its training academy and the commanding officer of its data processing unit. The Sheriff of Nassau County (Sheriff) decided to reduce the number of County vehicles assigned to Sheriff's Department employees and unilaterally

discontinued this practice on May 7, 2001. The instant charge was then filed on September 7, 2001.

EXCEPTIONS

The County excepts to the ALJ's finding that there is an established past practice of these employees being assigned County-owned cars and that the assignment was not conditioned on job duties, which the County argues, are no longer performed by these two commanding officers. The Association supports the ALJ's decision.

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

FACTS

The facts are set forth in detail in the ALJ's decision and are repeated here only as relevant to our determination.

Paul Mumford was assigned as commander of the data processing unit in July 2000. His predecessor had been assigned a County vehicle on a "round the clock" basis from the time of his appointment until he was replaced by Mumford. Mumford was assigned a County vehicle on the same basis upon his appointment to the command position.

James Michaud was named the commander of the training academy in July 2000. He was, at that time, assigned a County vehicle for his own use in performing his job and traveling to and from home. Since 1990, all the commanders of the training unit have been assigned a County vehicle.

Edward Reilly, appointed Sheriff in 2000, instituted a policy shortly thereafter to reduce the personal use of County vehicles by employees of the Sheriff's Department. On

May 7, 2001, both Mumford and Michaud were informed that they were no longer permitted personal use of County vehicles. Reilly issued a written policy to that effect on August 6, 2001.

DISCUSSION

The employee "benefit of County-owned vehicles, which were available on a 24-hour basis for use in connection with their employment as well as for driving to and from work . . ." ¹ is a term and condition of employment for employees, the unilateral elimination of which constitutes a violation of §209-a.1(d) of the Act. Historically, the commanders of the training academy and the data processing unit have enjoyed the use of a County vehicle on a twenty-four hours a day, seven days a week basis. The record establishes that the practice of assigning vehicles to the incumbents of these positions has been in existence for over ten years on a continuous and uninterrupted basis. There is no record evidence that the assignment of the vehicles was contingent upon the rank of the employee holding the commander position, nor is there any evidence that specific duties assigned to either of the commander titles were a condition precedent to the personal use of a County vehicle. Nor has it been established that the duties of the commander of the training academy or the commander of the data processing unit have changed significantly since Mumford and Michaud were appointed. Indeed, both employees enjoyed the unlimited use of a County-owned vehicle for almost a year after their respective appointments.

¹ *County of Nassau*, 13 PERB ¶3095, at 3152 (1980), *aff'g* 13 PERB ¶4570 (1980), *conf'd*, 14 PERB ¶7017 (Sup. Ct. Nassau County 1981), *aff'd.*, 87 AD2d 1006, 15 PERB ¶7012 (2d Dep't. 1982), *motion for leave to appeal denied*, 57 NY2d 601, 15 PERB ¶7015 (1982).

As we noted recently in *Bellmore Union Free School District*.²

[a] past practice must be unequivocal and have been in existence for a significant period of time such that the employees in the unit could reasonably expect the practice to continue without change [citation omitted]. A past practice will generally be viewed as a practice that affects the unit as a whole.

We there cited to *County of Nassau*,³ where we held that where a practice involving a mandatory subject of negotiations was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that it would continue, a past practice that could not be changed unilaterally was established.

Here, the ALJ correctly found that the personal use of an employer-provided vehicle is a mandatory subject of negotiations and that the County had a long-standing practice of providing the incumbents of the two commander positions with a County-owned vehicle. We find that the County violated the Act when it unilaterally discontinued the availability for personal use of County-owned vehicles by the commanders of the training academy and the data processing unit. That not every employee in the unit was affected by the County's unilateral action does not warrant a contrary conclusion. There are practices which affect all employees in a bargaining unit and there are practices that are limited to certain titles or circumstances. As we noted in *Bellmore, supra*, where a practice, as relevant to a case before us, is title-specific, it need not affect the unit as a

² 34 PERB ¶3009, at 3018 (2001).

³ 24 PERB ¶3029 (1991).

whole for an enforceable past practice to be found. Where the practice pertains to a subject of unit-wide concern, it is to be tested on a unit-wide basis.⁴

Based upon the foregoing, we find that the County violated §209-a.1(d) of the Act by unilaterally discontinuing the past practice of assigning County-owned vehicles on a twenty-four hours, seven days a week basis to the commanding officers of the training academy and the data processing unit.

IT IS, THEREFORE, ORDERED THAT the County shall:

1. Forthwith make James Michaud and Paul Mumford whole, upon a showing of reasonable documentary evidence, and/or affidavits, demonstrating that they incurred expenses which would not have been incurred but for the elimination of the term and condition of employment described in paragraph 2, below, together with interest at the maximum legal rate allowed;
2. Forthwith restore the past practice of assigning vehicles on a twenty-four hours, seven days a week basis to the commanding officers of the training academy and the data processing unit;
3. Cease and desist from unilaterally rescinding the past practice of assigning vehicles on a twenty-four hours, seven days a week basis to the commanding officers of the training academy and the data processing unit.

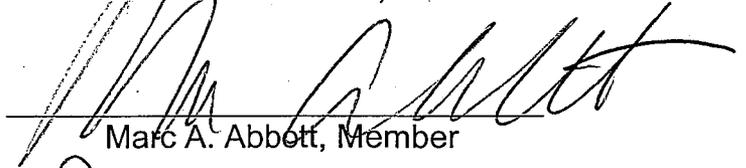
⁴ See *State of New York (Dep't of Corr. Serv. – Groveland Correctional Facility)*, 35 PERB ¶3030 (2002), where we found that a practice at one of sixty-two facilities which dealt with the use of sick and vacation leave accruals was not an unequivocal unit-wide practice that all unit employees could reasonably expect to continue.

4. Forthwith sign and post the attached notice at all locations customarily used to communicate with Association bargaining unit members.

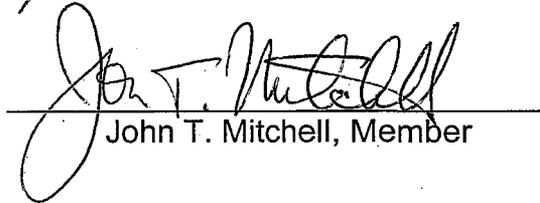
DATED: November 4, 2002
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbett, Member



John T. Mitchell, 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 Nassau in the unit represented by the Sheriff Officers Association, Inc., that the County of Nassau will:

1. Forthwith make James Michaud and Paul Mumford whole, upon a showing of reasonable documentary evidence, and/or affidavits, demonstrating that they incurred expenses which they not have been incurred but for the elimination of the term and condition of employment described in paragraph 2, below, together with interest at the maximum legal rate allowed;
2. Forthwith restore the past practice of assigning vehicles on a twenty-four hours, seven days a week basis to the commanding officers of the training academy and the data processing unit; and
3. Not unilaterally rescind the past practice of assigning vehicles on a twenty-four hours, seven days a week basis to the commanding officers of the training academy and the data processing unit.

Dated

By
(Representative) (Title)

County of Nassau
.....

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

HOPE SOBIE,

Charging Party,

CASE NO. U-21606

- and -

**NEW ROCHELLE FEDERATION OF UNITED
SCHOOL EMPLOYEES, LOCAL 280, AFT/NYSUT,
AFL-CIO,**

Respondent,

- and -

**THE CITY SCHOOL DISTRICT OF THE CITY OF
NEW ROCHELLE,**

Employer.

MERRIL SOBIE, ESQ., for Charging Party

**JAMES R. SANDNER (CHRISTOPHER M. CALLAGY of counsel), for
Respondent**

**McGUIRE, KEHL & NEALON, LLP (JEFFREY A. KEHL of counsel), for
Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Hope Sobie to an Administrative Law Judge's (ALJ) decision dismissing her improper practice charge which, as amended, alleged that the New Rochelle Federation of United School Employees,

Local 280, AFT/NYSUT, AFL-CIO (FUSE) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it refused her request to assist her in the processing of a grievance against the City School District of the City of New Rochelle (District). Sobie alleges that she was eligible for a longevity increase as the result of the parties' recently-negotiated collective bargaining agreement.

EXCEPTIONS

Sobie excepts to the ALJ's decision, arguing that the ALJ erred on the law and the facts.

The District responded to the exceptions and argued in support of the ALJ's dismissal of the charge. FUSE has not responded. Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

Since this matter is a continuation from a prior decision of this Board remanding the matter to the ALJ for further development of the record¹ and the subsequent facts as adduced by the ALJ,² we will not repeat the facts except as necessary to our decision herein.

The ALJ found that FUSE and the District entered into a collective bargaining agreement for the period July 1, 1998 to June 30, 2001. In that agreement, Article 4.03:15 sets forth the terms and conditions for the computation of a "service increment".

¹ 34 PERB ¶3028 (2001).

² 35 PERB ¶4559 (2002).

The parties to the agreement testified through their representatives that the language of 4.03:15 incorporated the language of Article 2.02:01(F) of the agreement which explained how part-time employees accrue seniority.

Sobie began her employment with the District in 1967 as a full-time employee. In 1972, she resigned her employment with the District. In 1976, she returned to the District in a part-time capacity and, in the 1986-1987 school year, she became a full-time employee. The dispute thus focused on the computation of Sobie's part-time employment *vis-à-vis* her entitlement to a service increment.

The ALJ found that, prior to the execution of the 1998-2001 successor agreement, FUSE notified its members of the agreement's terms. The ALJ further found that once Sobie did not receive her alleged longevity increase in September 1999, she had extensive communications with representatives of FUSE. During these conversations, FUSE representatives explained to Sobie why they believed that, under the terms of the successor agreement, she was not entitled to a longevity increase. Sobie, not satisfied with these explanations, filed a grievance on December 8, 1999.

On December 17, 1999, the District's superintendent of schools denied Sobie's grievance. On December 29, 1999, Sobie requested in writing that FUSE appeal the superintendent's denial to arbitration. Thereafter, on January 11, 2000, Sobie met with the grievance committee to present her arguments. Sobie was accompanied by her husband, an attorney, who was acting as her legal counsel. The grievance committee discussed the issues presented by Sobie; however, it decided not to appeal Sobie's grievance. Subsequently, the FUSE leadership council unanimously adopted the grievance committee's recommendation.

DISCUSSION

The duty of fair representation is breached only by conduct which is arbitrary, discriminatory or in bad faith.³ Allegations that a union has been careless, inept, ineffective or negligent in the investigation and presentation of a grievance do not evidence a breach of a union's duty of fair representation.⁴ Sobie argues in her exceptions that FUSE is mistaken in its interpretation of the contract language which she alleged entitled her to a longevity increase. We have consistently held that a mere difference of opinion between an employee organization and an employee about the interpretation of a contractual provision or practice is not sufficient to establish a breach of the duty of fair representation in violation of §209-a.2(c) of the Act.⁵ Thus, absent evidence of improper motivation on the part of the bargaining agent, its decision not to pursue a grievance which is contrary to its interpretation of the contract is not violative of its duty of fair representation.⁶

Although Sobie alleged in her charge that FUSE harbored animus towards her because of the past use of maternity leave and/or her part-time employment, the ALJ found no evidence of animus in the record, nor do we. Sobie also attempted to demonstrate that FUSE's refusal to appeal the grievance denial was arbitrary. Such a

³See *CSEA v. PERB and Diaz*, 132 AD2d 430, 20 PERB ¶¶7024 (3d Dep't 1987), affirmed on other grounds, 73 NY2d 796, 21 PERB ¶¶7017 (1988).

⁴*District Council 37, AFSCME*, 28 PERB ¶¶3062 (1999).

⁵See *Amalgamated Transit Union Div. 580, AFL-CIO and Central New York Reg. Transport Authority*, 32 PERB ¶¶3053 (1999).

⁶*Nanuet Union Free Sch. Dist. And Nanuet Teachers Ass'n.*, 17 PERB ¶¶3005 (1984).

conclusion could only be reached upon a reading of the contract language as proposed by Sobie. There is no evidence that Sobie's interpretation of the contract is the only possible one,⁷ and there is no evidence of conduct that is either arbitrary, discriminatory or in bad faith.

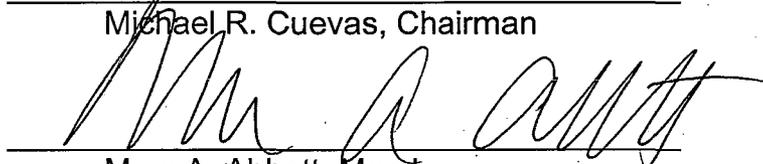
Based upon the foregoing, we deny Sobie's exceptions and affirm the decision of the ALJ.

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

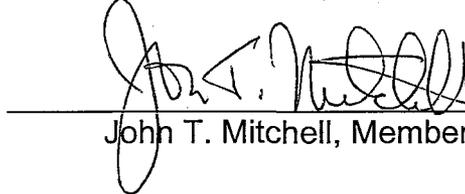
DATED: November 4, 2002
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

⁷Civil Service Employees Ass'n, Inc., Local 1000, AFSCME, AFL-CIO, State University College at Buffalo, Local 640, 27 PERB ¶3004 (1994).

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

In the Matters of

**PATROLMEN'S BENEVOLENT ASSOCIATION OF
THE CITY OF NEW YORK, INC.**

**CASE NOS. DR-072
DR-101**

Upon a Petition for Declaratory Ruling

In the Matter of

THE CITY OF NEW YORK

CASE NO. DR-100

Upon a Petition for Declaratory Ruling

**GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for
Patrolmen's Benevolent Association of the City of New York, Inc.**

**PROSKAUER ROSE LLP (M. DAVID ZURNDORFER of counsel), for the City
of New York**

BOARD DECISION AND ORDER

The City of New York (City) and the Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) except to a declaratory ruling issued by an Administrative Law Judge (ALJ) in the above-referenced matters, dismissing DR-072 and DR-101,¹ and finding that certain proposals before him in DR-100 were properly submitted to arbitration. Both parties have filed cross-exceptions and responses to the other party's exceptions. In addition, this Board heard oral argument in these cases and accepted supplemental briefs on the issue of mootness.

¹ No exceptions have been taken to the ALJ's dismissal of these two cases; we, therefore, do not consider them in this decision.

EXCEPTIONS

The PBA excepts to the ALJ's decision, arguing that the ALJ erred in finding the demand related to the Variable Supplement Fund (VSF) Fixed Schedule to be nonmandatory and finding the following four demands to be prohibited subjects of negotiations: Disciplinary Records and Disciplinary Procedure, Pilot Program-Oath, Bill of Rights, and Modifications in Patrol Guide. The City excepts to the ALJ's decision, arguing that the conversion theory of negotiations articulated in *City of Cohoes* (hereafter, *Cohoes*)² is not applicable to these parties and that, therefore, the following at-issue provisions of the expired collective bargaining agreement between the City and the PBA are nonmandatory: Hours and Overtime, Vacations, Fixed Post Duty, Meal Scheduling, and Funding Application; the PBA's proposal related to adopting the Sergeant's Chart is vague and ambiguous and is nonmandatory; and that the PBA demand related to Sick Leave - Home Confinement of Police Officers is nonmandatory.

At oral argument, the City, for the first time, raised the issue of mootness, arguing that because the decision of the arbitration panel was issued on September 9, 2002, and the parties had agreed to withdraw from the panel's consideration all of the demands in dispute before the ALJ, the arbitration award fully and finally resolved the case and there was no live controversy before this Board for decision. The PBA opposed the City's argument. The parties were invited to file supplemental briefs on the

² 31 PERB ¶3020 (1998), *confirmed* 32 PERB ¶7026 (Sup. Ct. Albany County), *aff'd*, 276 AD2d 184, 33 PERB ¶7019 (3d Dep't 2000), *leave denied*, 96 NY2d 711, 34 PERB ¶7018 (2001).

issue; both have done so.³

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

FACTS

The specific language of the at-issue demands and contract provisions are fully set forth in the ALJ's decision. We adopt the ALJ's factual findings. The facts are repeated here only as necessary for this decision.

Chapter 641 of the Laws of 1998 amended the Public Employees' Fair Employment Act (Act) to extend to the Public Employment Relations Board (PERB) impasse resolution jurisdiction over bargaining disputes between local governments and their police and fire unions that had formerly been within the jurisdiction of local boards. Those local boards, commonly referred to as "mini-PERBs," were created pursuant to Civil Service Law, §212. The New York City Board of Collective Bargaining (BCB) is one such mini-PERB.

The parties' 1995-2000 collective bargaining agreement expired on July 31, 2000. On November 3, 2000, the City filed a scope of bargaining petition with BCB. The

³ Counsel for PBA, who was also a member of the arbitration panel, submitted an affidavit with the PBA's post-argument brief, setting forth his understanding of certain agreements reached at arbitration with respect to PERB's jurisdiction and the withdrawal of the at-issue demands and contract clauses from consideration by the panel. We will not accept the affidavit and have not considered any of the statements contained therein in reaching our decision herein. This Board will consider only the evidence accepted and made a part of the record before the ALJ, unless one of the exceptions before us is an alleged erroneous refusal by the ALJ to accept proffered material into evidence or unless some other extraordinary circumstance, such as newly discovered evidence, exists. *Greenburgh #11 Union Free Sch. Dist.*, 33 PERB ¶3018 (2000).

PBA responded that it was PERB and not the BCB that had jurisdiction over scope of bargaining issues.

On December 15, 2000, the PBA filed a declaration of impasse with PERB, seeking the appointment of a mediator. The PBA also filed a petition for a declaratory ruling (DR-072), seeking a finding that all the provisions in the expired contract were mandatory subjects of negotiation and that all of the PBA's demands were mandatory subjects of negotiation.

Also, on December 15, 2000, both parties filed declaratory judgment actions in State Supreme Court; the PBA seeking judgment declaring that, pursuant to Chapter 641 of the Laws of 1998, PERB had exclusive jurisdiction to determine whether an impasse exists between the PBA and the City and to resolve scope of bargaining disputes between them. The City sought a determination that Chapter 641 violated home rule requirements of the State Constitution⁴ and that, even if Chapter 641 were constitutional, BCB had exclusive jurisdiction over collective bargaining impasses and scope of bargaining disputes between the parties, whether the scope of bargaining dispute arose before or after impasse. The actions were consolidated in Supreme Court, Albany County, which granted summary judgment to the PBA.⁵ The Appellate Division affirmed.⁶

⁴ NY Const., Art. IX, §2.

⁵ 188 Misc2d 146, 34 PERB ¶7017 (Sup. Ct. Albany County 2001).

⁶ 285 AD2d 52, 34 PERB ¶7026 (3d Dep't 2001).

On December 20, 2001, the Court of Appeals modified⁷ the decision of the Appellate Division, stating that:

We conclude that under the present statutory scheme, once a police or fire union pursues impasse resolution assistance from PERB and PERB declares an impasse, it has jurisdiction over scope of bargaining issues between PBA and the City, to the extent necessary for PERB to exercise its exclusive jurisdiction to resolve impasses. Until such time, BCB retains jurisdiction to determine scope of bargaining outside of the impasse context. We decline to adopt the Appellate Division's proposition that "PERB has exclusive jurisdiction over scope of bargaining disputes between PBA and the City." [citation omitted]

The Court further stated (at 7068) that:

Thus, because we find that chapter 641 authorizes PERB to determine scope of bargaining in the context of impasse proceedings (without divesting BCB of its jurisdiction until PERB has declared an impasse), we conclude that the Legislature has accorded both agencies jurisdiction over scope of bargaining in negotiations between the PBA and the City. To the extent that this construction may result in venue shopping and concomitant delays, such consequences can only be rectified by the Legislature.

...PERB has jurisdiction over scope of bargaining issues necessary to impasse determination when a New York City police or fire union opts to utilize PERB's impasse resolution procedures, and [Chapter 641] does not otherwise divest the Board of Collective Bargaining of the City of New York of scope of bargaining jurisdiction....

⁷*Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. City of New York*, 97 NY2d 378, at 389, 34 PERB ¶7040, at 7067 (2001).

A mediator was appointed in response to the PBA's declaration of impasse with PERB. We confirmed the mediator's appointment by decision dated October 11, 2001.⁸

On November 2, 2001, the PBA's petition for interest arbitration was received by PERB. The City filed a declaratory ruling petition (DR-100) on November 20, 2001, arguing that *Cohoes* was not applicable and that a number of the PBA's demands and a number of provisions in the collective bargaining agreement were nonmandatory and were, therefore, precluded from submission to arbitration.

On December 6, 2001, the PBA filed a second declaratory ruling petition (DR-101), seeking a ruling that certain of the City's proposals were not properly included in its submission to the interest arbitration panel because they had been formally withdrawn by the City during negotiations.

The parties participated in hearings before the interest arbitration panel on the PBA's petition for interest arbitration and in hearings before the ALJ on the declaratory ruling petitions. The ALJ issued his decision on April 30, 2002.⁹ The ALJ found that five demands or clauses addressed prohibited subjects of negotiations and five demands or clauses addressed mandatory subjects of negotiations.

On May 7, 2002, during the final hearing day before the arbitration panel, the parties agreed to the following suggestion of the panel:

...the withdrawal from our jurisdiction of the other matters which we are urging you to do, such withdrawal of those matters from our jurisdiction will unencumber us and allow us to reach a decision.

⁸ *City of New York*, 34 PERB ¶13033 (2001).

⁹ *Patrolmen's Benevolent Ass'n of the City of New York, Inc. and City of New York*, 35 PERB ¶6603 (2002).

Of the other matters of Exhibit 10 [the ALJ's decision here] is without prejudice to your respective rights to pursue to finality those remaining issues in Board Exhibit 10.

However, we urge that this be done with the understanding that the final judgment, whatever it may be, by whomever it may be, in case numbers DR-072, DR-100 and DR-101 – will have no force, effect or impact on the finality of this Panel's award....

The arbitration award was transmitted to the parties for release on September 11, 2002, by a September 9, 2002 letter, from the Chair of the panel, Dana E. Eischen, Esq., which also advised the parties: "I will retain jurisdiction for sixty (60) days, i.e., until November 11, 2002, to permit you to file any response and for the Parties to advise me whether they deem necessary a longer, more fully developed Opinion of the Chair."

DISCUSSION

We first address the issue of mootness raised by the City at oral argument. The City argues that the case is now moot because the bargaining demands have been withdrawn from the interest arbitration panel's jurisdiction, the arbitration panel has issued its award and the rights of the parties will no longer be directly affected by a decision on this appeal. The PBA argues that the case continues to present a live controversy where the rights of the parties will be directly affected by the determination and where the decision has immediate consequences; that the facts of the case establish an exception justifying a decision despite the alleged mootness; and that the parties' agreement to continue these matters to finality constitutes a special circumstance warranting our exercise of jurisdiction over this appeal.

We apply traditional concepts of mootness in our improper practice proceedings and here adopt them in deciding declaratory ruling petitions as well.¹⁰ Unless all three elements of the exception to the mootness doctrine apply, a court will not entertain questions of law made merely academic by a settlement agreement. The three elements are, as set forth in *Hearst Corporation v. Clyne*:¹¹

(1) a likelihood of repetition, either between the parties or among other members of the public; (2) a phenomenon typically evading review; and (3) a showing of significant or important questions not previously passed on, i.e., substantial and novel issues.

The City argues that this appeal does not fall within the exception articulated in *Hearst, supra*. We do not agree.

This appeal seeks a determination as to the mandatory nature of ten proposals or clauses. They deal with significant non-monetary terms and conditions. There is a likelihood that these issues will be presented in subsequent negotiations between these parties.¹²

The City and the PBA are no strangers to interest arbitration, even though this is the first time that they have appeared before PERB. It is not unlikely that subsequent negotiations will end in compulsory interest arbitration, nor is it unlikely that the time frame for such an arbitration would be similar to the timeframe that was present in this

¹⁰ *City of Peekskill*, 26 PERB ¶3062 (1993).

¹¹ 50 NY2d 707, 714-715 (1980).

¹² The arbitration award covers the period of August 1, 2000 through July 30, 2002. It is, by its terms, already retroactive and the parties are faced with negotiating a successor agreement at this time.

arbitration proceeding. A review of the negotiability of these demands in each subsequent round of negotiations could be evaded simply by the normal passage of time in the processing of a declaration of impasse and a petition for interest arbitration.

Additionally, the issues in this case are substantial and novel as to these parties. After years of legislation and litigation,¹³ the parties are now before this Board for a determination on the negotiability of several demands and contract clauses. As noted above, there are important legal issues to be here decided that have not been decided before and which have an impact not only on these parties, but other parties who now come under PERB's jurisdiction pursuant to Chapter 641.

We also note that the parties agreed that these matters would proceed for final determination by PERB. We do not need to interpret the specific intent of the parties in agreeing to the arbitration panel's suggestion that the matters before us now be withdrawn from the panel's consideration.¹⁴ We find that language of the panel's proposal is sufficient for us to invoke the rationale we articulated in *Solvay Teachers Association*.¹⁵

In circumstances in which the parties specifically agree to the preservation of a scope of negotiation question and, thereby, rely upon our assessment of negotiability to determine a term of their agreement, there are presented the "special circumstances" we spoke of in [*Buffalo Police*

¹³ See Chapter 13 of the Laws of 1996; *City of New York v. Patrolmen's Benevolent Ass'n of the City of New York, Inc.*, 89 NY2d 380, 29 PERB ¶7015 (1996).

¹⁴ See *Seneca Falls Teachers Ass'n*, 23 PERB ¶3032 (1990).

¹⁵ 28 PERB ¶3024, at 3057 (1995).

Benevolent Association, Inc., 23 PERB ¶3036 (1990)] which warrant our exercise of jurisdiction. Whether the case is never mooted in that circumstance or there has been a waiver of a mootness defense is largely immaterial. Application of a mootness concept under the circumstances presented here would not be "consistent with the policies of the Act" for only by reaching the negotiability question do we resolve the parties' collective bargaining impasse.

We also note that, by the very language of the transmittal letter of the arbitration panel chair, the arbitration award is not "final" until November 11, 2002. The arbitration is still "technically" open for the parties to file a response to the panel's September 11, 2002 award and seek a longer and more fully developed opinion of the chair.

The applicability of our decision in *Cohoes* to these parties is a central issue in this case.

The Court of Appeals in *Patrolmen's Benevolent Association of the City of New York, Inc. v. City of New York*¹⁶ recognized that:

[t]he duty to bargain exists only as to mandatory subjects, which are defined by law, and in the absence of an agreement, only mandatory subjects can be submitted to an impasse panel. It is true that an express statement of BCB's jurisdiction to determine scope of bargaining issues is provided in New York City Collective Bargaining Law, which states that "the board of collective bargaining . . . shall have the power and duty . . . to make a final determination as to whether a matter is within the scope of collective bargaining" (12-309a[2]). This provision dates back to the original enactment of the law in 1967 (NYCCBL §1173-5.0a[2], now recodified as §12-309a[2]) and was in effect when chapter 641 was enacted. Despite that language, section 2 of chapter 641, codified as the new subdivision 3 of the Civil Service Law §212, provides in relevant part that notwithstanding other provisions of law to the contrary, the resolution of disputes in the course of collective bargaining

¹⁶97 NY2d 378, 390, 34 PERB ¶7040, at 7067 (2001).

negotiations as provided by Civil Service Law §209 shall apply to any organized fire or police department. Subdivision 4 of Civil Service Law §209 further provides that PERB shall render assistance when it "determines that an impasse exists in collective negotiations between [an] employee organization and a public employer . . . as to the conditions of employment." Thus, in order to determine whether an impasse exists as to "conditions of employment," PERB must be authorized to determine what qualifies as a proper condition of employment because if the impasse does not relate to a condition of employment, PERB has no authority to render assistance. The lower courts concluded that the term "conditions of employment," loosely defined to include "salaries, wages, [and] hours" (Civil Service Law §201[4]), is the equivalent of the phrase "scope of bargaining" as it is used in the administrative code, and that chapter 641 therefore grants to PERB exclusive scope of bargaining jurisdiction.

The Court recognized that its decision might result in conflicting rulings by BCB and PERB on negotiability issues but left the resolution of such conflicts to the Legislature. We conclude that we must determine the negotiability of the issues before us within the context of the Act and our decisions on negotiability. We must, therefore, apply our definition of terms and conditions of employment, utilizing the case law that we have developed to make those determinations. That includes the application of the *Cohoes* conversion theory to the issues in this case.

As the agency vested with the jurisdiction to decide scope of bargaining issues that arise between these parties in the context of our impasse procedures, we find that the ALJ's application of the *Cohoes* conversion doctrine in this matter was correct.

The City argues that our decision in *Cohoes* was our attempt to address the perceived inequities that had arisen in negotiations as a result of the adoption of §209-a.1(e) of the Act, better known as the Triborough Amendment (hereafter, Triborough).

The City further posits that since all agree that Triborough is not applicable to the City, neither should *Cohoes*, the remedy to the Triborough Amendment, be made applicable to the City. However, the PBA does not agree with the City's analysis, and the ALJ never reached the issue. Neither are we in agreement that Triborough is inapplicable to the City.

While §212 of the Act provides that certain provisions of the Act shall be inapplicable to any local government that has enacted a mini-PERB, it expressly excepts §209-a from the provisions of the Act that are made inapplicable to mini-PERBs. Section 212 further requires that all such mini-PERBs have provisions and procedures that are substantially equivalent to the provisions and procedures that are set forth in the Act and are made applicable to the State.

That the City has not, at this time, accepted that all provisions of §209-a are applicable to it, including §209-a.1(e), does not require us to reach an identical conclusion. The Act states that the provisions of §209-a apply to all governments or governmental entities covered by the Act, including the City of New York.

We have not had occasion before to review the City's determinations concerning the applicability of §209-a.1(e) of the Act and our decisions in the cases arising thereunder. A review of BCB's provisions and procedures comes to us only on a petition by an aggrieved party to an improper practice proceeding.¹⁷ Furthermore, unlike other mini-PERBs, we cannot, pursuant to the provisions of §212.2 of the Act, require BCB to submit its procedures and provisions adopted by local law to us for periodic

¹⁷Act, 205.5(d).

review to ensure that they are substantially equivalent to the provisions and procedures set forth in the Act.^{18,19} As we now have the opportunity to review BCB's procedures and provisions, we here decide that §209-a.1(e) of the Act is applicable to the City as part of §209-a, in the context of BCB's resolution of both scope of bargaining disputes and improper practice charges. Section 209-a.1(e) is not a vehicle for determining scope of bargaining disputes, it is a separate and distinct improper practice under the Act. That scope of bargaining determinations may be made in the context of deciding whether there is a violation of §209-a.1(e) of the Act does not make that section solely a scope of bargaining provision which BCB is otherwise excused from adopting in order to satisfy the "substantially equivalent" requirement of §212.2.

We now turn to a determination of the negotiability of the at-issue demands and contract provisions.

The PBA proposed the continuation in the collective bargaining agreement of certain provisions related to discipline and disciplinary procedures. They are Disciplinary Records and Disciplinary Procedures, article XVI, sections 8 and 9; Pilot Program – OATH, Appendix; Bill of Rights, article XIX; and Modification of Patrol Guide, Appendix. The ALJ, relied upon the decision of the Appellate Division, First

¹⁸ Compare CSL §212.1.

¹⁹ We have declined to exercise jurisdiction over scope of bargaining appeals brought to us from determinations of BCB, but none have involved issues arising from Triborough. See *Uniformed Firefighters Ass'n of Greater New York*, 22 PERB ¶3025 (1989); *aff'd* 163 AD2d 251, 24 PERB ¶7523 (1st Dep't 1990).

Department, in *City of New York v. McDonald*,²⁰ which determined that §434 of the New York City Charter vested the City's Police Commissioner with the exclusive right and responsibility to discipline police officers. As we held in *Board of Education of the City School District of the City of New York*,²¹ prohibited subjects of bargaining "are those forbidden, by statute or otherwise, from being embodied in a collective bargaining agreement." While disciplinary procedures and aspects of discipline are not always prohibited subjects of bargaining, where there is a special or local law relating to police discipline, demands or contract provisions relating to police discipline or disciplinary procedures will be held to be prohibited subjects of bargaining.²²

The ALJ correctly found that the New York City Code and Charter are special laws that leave the discipline of police officers to the discretion of the Police Commissioner. The ALJ's analysis of the PBA's demands related to Disciplinary Records and Disciplinary Procedures, Pilot Program – OATH; Bill of Rights, and Modification of Patrol Guide properly found that each of the provisions deals with the discipline of police officers and impinges upon the Commissioner's discretion in this area. The demands are, thus, prohibited subjects of negotiation. That, in cases in which there was no local or special law related to discipline of police officers, demands related

²⁰ 201 AD2d 258, 27 PERB ¶7503 (1st Dep't 1994).

²¹ 32 PERB ¶3051, at 3139 (2000).

²² *Rockland City PBA, Inc. v. Town of Clarkstown*, 149 AD2d 516, 22 PERB ¶7516 (2d Dep't 1989); *Town of Greenburgh v. Police Ass'n of the Town of Greenburgh, Inc.*, 94 AD2d 771, 16 PERB ¶7510 (2d Dep't 1983).

to disciplinary procedure,²³ bills of rights,²⁴ procedures for witnesses to incidents,²⁵ or alternatives to discipline procedures,²⁶ have been found to be mandatory, does not, as the PBA argues, compel a contrary conclusion. Here, there is just such a special law that removes these provisions from a traditional analysis of their negotiability.

The PBA's reliance on *City of Watertown v. State of New York Public*

*Employment Relations Board*²⁷ is misplaced. The Court of Appeals in that case stressed the strong and sweeping public policy of this State in favor of collective bargaining, which may be overcome only where there is "clear evidence" that the Legislature intended otherwise".²⁸ Finding that the statute²⁹ in question did not preclude bargaining about procedures, the Court noted that, "the presumption is that all terms and conditions of employment are subject to mandatory bargaining."³⁰ Here, however, the applicable local law clearly places discipline of police officers in the hands of the

²³ *City of Utica*, 31 PERB ¶¶3045 (1998).

²⁴ *City of Schenectady*, 22 PERB ¶¶3018 (1989).

²⁵ *Patchogue-Medford Union Free Sch. Dist.*, 30 PERB ¶¶3041 (1997); *Cortland Paid Fire Fighters Ass'n, Local 2737, IAFF, AFL-CIO*, 29 PERB ¶¶3037 (1996).

²⁶ *Auburn Police Local 195, Council 82, AFSCME v. Helsby*, 62 AD2d 12, 11 PERB ¶¶7003 (3d Dep't 1978), *aff'd on opinion below*, 46 NY2d 1034, 12 PERB ¶¶7006 (1979).

²⁷ 95 NY2d 73, 33 PERB ¶¶7007 (2000).

²⁸ *Id.* at 7015

²⁹ General Municipal Law, §207-c.

³⁰ *Supra*, note 27.

Police Commissioner. Where police officer discipline procedures are contained in a local or special law, alternatives or modifications to those disciplinary procedures are prohibited subjects of negotiation.³¹

The PBA also excepts to the ALJ's finding that the PBA's VSF Fixed Schedule demand for an increase in the schedule is a nonmandatory subject of negotiation. The schedule, set forth in the City's Administrative Code, is fixed by State legislation through 2007. As the ALJ correctly noted, even though the fund was initially created through collective bargaining, the in-issue demand seeks to require the City to change existing legislation and, as such, is nonmandatory.³²

The ALJ found that the PBA's demands relating to Hours and Overtime, Article III, §1(b); Vacations, Article XI, §3; Fixed Post Duty, Article XVI, §10; Meal Scheduling, Article XVI, §11; and Funding Applications, Article XVI, §16, were properly submitted to the arbitration panel because they are provisions in the parties' collective bargaining agreement and, under *Cohoes*, they become, as to these parties, mandatory subjects of negotiation. The City excepts to the ALJ's rulings, arguing that each of the demands is nonmandatory and, because *Cohoes* is not applicable to the City, the demands need not be included in a successor agreement.

³¹ See, *City of Mt. Vernon v. Cuevas*, 34 PERB ¶7038 (2001), citing to *City of New York v. MacDonald*, 201 AD2d 258, leave denied, 83 NY2d 759 (1994); *Rockland County Patrolmen's Benevolent Assn. v. Town of Clarkstown*, 149 AD2d 516, 22 PERB ¶7516 (1st Dep't 1994); *Town of Greenburgh v. Police Assn. of Town of Greenburgh*, 94 AD2d 771, 16 PERB ¶7510 (2d Dep't 1983), leave denied, 60 NY2d 551 (1983).

³² See *Rochester Fire Fighters, Local 1071, IAFF*, 12 PERB ¶3047 (1979).

Under the *Cohoes* conversion theory of negotiability, all of the legal terms contained in a collective bargaining agreement, no matter what their inherent nature, are "terms and conditions of employment" for purposes of the collective negotiations between the parties to that contract and may properly be submitted to interest arbitration. Having found *Cohoes* applies to this analysis, the at-issue demands were correctly found by the ALJ to be mandatory as between these parties.

The City also excepts to the ALJ's finding that the PBA's proposal regarding the Sergeant's Chart is mandatory. The City argues that the demand is vague and ambiguous and interferes with the City's organizational discretion. The PBA argues, and the ALJ so found, that the PBA had sufficiently identified the chart it was proposing, both at negotiations and during the hearing on these petitions, and that the demand relates to the scheduling of shifts, a mandatory subject of negotiation.³³ As described by the PBA, the demand is a work schedule, setting hours of work, and does not set manpower limits or limit the City's ability to determine manpower needs. As such, it is a mandatory subject of negotiation.³⁴

The ALJ determined that the PBA's Sick Leave demand is a mandatory subject of negotiation. The demand seeks to make clear that an employee utilizing sick leave is confined to his or her home only during his or her regular shift. The City argues that the

³³ *County of Rockland and Rockland County Sheriff*, 27 PERB ¶13019 (1994); *Starpoint Cent. Sch. Dist.*, 23 PERB ¶13012 (1990).

³⁴ *Village of Mamaroneck*, 22 PERB ¶13029 (1989).

demand would impinge upon its right to control sick leave abuse. In *City of Rochester*,³⁵ we found nonmandatory a proposal that would permit police officers on sick leave to leave their homes without any restriction whatsoever on their movements, explaining that "although the subject of sick leave is a mandatory subject of negotiation, a demand that the employer relinquish to unit employees alone all control over abuses in the taking of sick leave is not."³⁶ *City of Rochester* is distinguished from the case at bar in that the demand there sought total employee control, which we were unwilling to countenance as eliminating all managerial control regarding sick leave abuse. That is not the case here. As such, the demand is mandatorily negotiable.³⁷

Based upon the foregoing, we affirm the decision of the ALJ.

We, therefore, find that the following demands are not properly submitted to the interest arbitration panel:

1. Disciplinary records and disciplinary procedures, Article XVI, §§8 and 9;
2. Pilot Program – Oath, Appendix;
3. Bill of Rights, Article XIX;
4. Modification of Patrol Guide, Appendix;
5. Variable Supplement Fund.

³⁵ 12 PERB ¶3010 (1979).

³⁶ *Id.* at 3018.

³⁷ See *County of Nassau*, 18 PERB ¶3034 (1985).

We further find that the following demands are properly submitted to interest arbitration:

1. Hours and Overtime, Article III, §1(b);
2. Vacations, Article XI, §3;
3. Fixed Post Duty, Article XVI, §10;
4. Meal Scheduling, Article XVI, §11;
5. Funding Application, Article XVI, §16;
6. Sergeant's Chart;
7. Sick leave.

SO ORDERED.

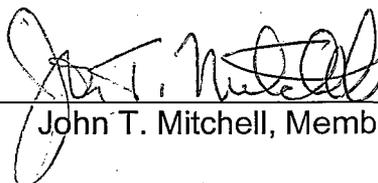
DATED: November 4, 2002
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**COMMUNICATIONS WORKERS OF AMERICA,
LOCAL 1180,**

Petitioner,

-and-

CASE NO. C-5225

**NEW YORK CONVENTION CENTER
OPERATING CORPORATION,**

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Communications Workers of America, Local 1180, 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 Public Safety Supervisors and Command Center Supervisors.

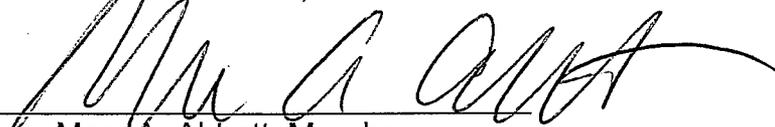
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Communications Workers of America, Local 1180. 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.

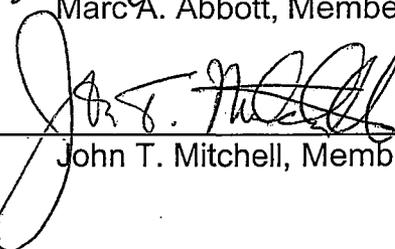
DATED: November 4, 2002
Albany, New York



Michael R. Cuevas, Chairman



Marc A. Abbott, Member



John T. Mitchell, Member