8-25-2004

State of New York Public Employment Relations Board Decisions from August 25, 2004

New York State Public Employment Relations Board

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This interlocutory appeal comes to us on exceptions filed by the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (Council 82) to a ruling of an Administrative Law Judge (ALJ) determining that a representation petition filed by the Albany Police Supervisors Association (Association), seeking to represent certain sergeants and lieutenants in the City of Albany Police Department (City), was accompanied by a proper Declaration of Authenticity, as required by §201.4(d) of PERB’s Rules of Procedure (Rules), and that the petition was timely filed, pursuant to §201.3 of the Rules and §208.2(b) of the Public Employees’ Fair
Employment Act (Act). The Association cross-exceptions, arguing that the exceptions are untimely, but otherwise, supports the ALJ’s rulings. The City has not responded.

FACTS

On May 6, 2004, the Association filed a petition to represent sergeants and lieutenants employed by the City and currently represented by Council 82. The petition was accompanied by a showing of interest and a Declaration of Authenticity, signed by the president of the Association, Dennis Dolan, in which he stated that “I am currently President of the Petitioner, the Albany Police Supervisors Association (APSA), with authority to execute this Declaration of Authenticity on the Association’s behalf.”

On January 6, 2003, the collective bargaining agreement for the term January 1, 2002 to December 31, 2005, between the City and Council 82 was executed.

At a conference in this matter held on June 17, 2004, all parties executed a consent agreement, consenting to the scheduling of an election in the petitioned-for unit. On June 22, 2004, the ALJ wrote to the parties, confirming the details of the election and addressing certain matters discussed at the conference. In that letter, the ALJ confirmed that the petition was timely filed and that the Declaration of Authenticity complied with the Rules. It is to the rulings contained in that letter that Council 82 excepts.

DISCUSSION

We first address the Association’s claim that the exceptions are untimely filed. Section 204.10 of the Rules requires that exceptions to an ALJ’s decision be filed within fifteen working days after the party’s receipt of the decision. Council 82 received the ALJ’s ruling on June 23, 2004, and filed the exceptions on July 15, 2004. Fifteen
working days from June 24, 2004, excluding July 5, 2004, is July 15, 2004. The exceptions are, therefore, timely filed.

Addressing the exceptions themselves, as we have previously held, permission to appeal rulings made in conjunction with the processing of a representation petition will not be granted absent extraordinary circumstances. We here decline to grant review of the exceptions raised in Council 82’s motion. The issues raised are not novel and will only serve to delay the processing of the petition and the holding of the election that has already been scheduled.

Accordingly, the motion is denied.

SO ORDERED.

DATED: August 25, 2004
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

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1 General Construction Law §20 provides that the day from which any specified period of time is reckoned shall be excluded in making the reckoning. General Construction Law §24 provides that July 4 is a public holiday and, if it falls on a Sunday, the next day thereafter is the public holiday.


3 Indeed, Council 82 executed a consent agreement, agreeing to the scheduling of an election. The exceptions raise issues that, if considered to be valid concerns by Council 82, should have precluded it from signing the consent agreement.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of
CORTLAND ONONDAGA MADISON BOCES
ORGANIZATION, NYSUT, AFT LOCAL 3829,
Charging Party,

- and -

ONONDAGA CORTLAND MADISON BOARD OF
COORDERATIVE EDUCATIONAL SERVICES,
Respondent.

HELEN BEALE, for Charging Party

FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C. (MARC H.
REITZ and CRAIG M. ATLAS of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Onondaga Cortland Madison
Board of Cooperative Educational Services (BOCES) to a decision of an Administrative
Law Judge (ALJ) that found BOCES violated §209-a.1(d) of the Public Employees' Fair
Employment Act (Act) when it unilaterally changed the work year of employees in the
title of System Consultant (Computer Assisted Instruction) (CAI) who are represented
by the Cortland Onondaga Madison BOCES Organization, NYSUT, AFT Local 3829
(COMBO).

EXCEPTIONS

BOCES excepted to the ALJ's decision on both the law and the facts. COMBO
filed a response in support of the ALJ's decision.
Based upon our review of the record and consideration of the parties' arguments, we reverse the decision of the ALJ.

FACTS

Our decision herein is based upon the parties' stipulated record and relies upon the additional documents from the stipulation relevant to the exceptions.

In April of each year, the BOCES' component districts submit final requests for services. In April 2003, the Center for Learning Technology (CLT) received fewer requests for services than in the 2002-03 school year. The reduction in requests equated to 571 fewer work days available to System Consultants (CAI) employed by BOCES. This amounted to a reduction in funding of $261,500.

It is undisputed that the parties' collective bargaining agreement had no provision for the length of the work year. Exhibit A, annexed to BOCES' answer, is a letter dated June 12, 2003 from Dennis Jones, Deputy Superintendent, to Deb Shumway, COMBO president. Jones explained to Shumway that a reduction in funding for the CLT would necessitate a reduction in the number of System Consultants (CAI) on staff. Jones proposed two objectives to achieve the necessary cost reductions and to meet the needs of the BOCES' component districts:

Objective 1: Retain all CLT Systems Consultants

Objective 2: Align the CLT consultants' work year with the districts' requests

In order to achieve these objectives, Jones informed Shumway that BOCES "decided to reduce the work year for all employees in the System Consultant (CAI) position title from 12 months to 10 months effective July 1, 2003," adding that "[a]dditional per diem work may be available during this summer based on district requests." He indicated
that BOCES had notified the employees of the decision and that he was available to
discuss the matter.

Exhibit B, annexed to BOCES answer, is a memo dated June 16, 2003, from
Shumway to Jones. Shumway expressed her desire to meet with Jones concerning this
situation. She acknowledged BOCES’ “right to do so,” although she took exception to
the manner in which it was done. Shumway pointed out to Jones that “[a] change in
work year is a mandatory subject of bargaining. The BOCES did not negotiate with
COMBO concerning this issue . . . . Unless the BOCES rescinds this unilateral
change, COMBO will pursue the matter with PERB.”

The parties met to discuss the issue on June 18, June 23, and June 25, 2003.
On June 19, 2003, the BOCES’ Board of Education reduced the work year for the
Systems Consultants (CAI) from 12 months to 10 months.

DISCUSSION

COMBO alleged, inter alia, in its improper practice charge that the “change in the
work year was not negotiated with COMBO and was, in fact, implemented over its
objections.” BOCES contends, in its first and second exceptions to the ALJ’s decision,
that the ALJ erred when she concluded that there was no change in the nature or level
of services and that, therefore, BOCES’ reduction in the work year for the Systems
Consultants (CAI) was a violation of the Act.

The ALJ cited to the Board’s decision in Lackawanna City School District. \(^1\) In
Lackawanna, we held that it is a management prerogative to decide the time span
during which work is to be performed, and the distribution of work during that time span,
whether equally or otherwise, is a mandatory subject of negotiation. It is undisputed

\(^1\) 13 PERB ¶3085 (1980).
that for the 2003-04 school year BOCES received fewer requests for services than it had for the previous school year, as evidenced in paragraph 4 of BOCES' verified answer. Under circumstances where there is a reduction in the demand for the employer's service, we have held that:

a public employer may, for good business reasons, reduce the services that it provides to the public. Such a good faith reduction in services may justify the public employer in reducing its employees' workload with a commensurate reduction in salaries.\(^2\)

The ALJ recognized these principles, but, nevertheless, concluded that BOCES' privilege to reduce the work year was lost when the level of services was found to have not changed because, as the parties stipulated, BOCES employed Systems Consultants (CAI) during July and August. The ALJ, however, failed to support this conclusion with evidence from the stipulated record. COMBO stipulated that BOCES received fewer requests for services that translated into a reduction of 571 fewer work days for the Systems Consultants (CAI). This reduction amounted to a loss of $261,500 in funding for the service. The improper practice charge alleged that BOCES hired some of the Systems Consultants (CAI) on a per diem basis during July and August. This fact was repeated in the parties' stipulation. BOCES advised COMBO in its memo of June 12, 2003, that "[a]dditional per diem work may be available during this summer based on districts' [sic] requests." COMBO, however, failed to demonstrate that BOCES utilized the Systems Consultants (CAI) during July and August to the same extent as the past, thereby evidencing no change in the level of services. The mere fact that BOCES employed Systems Consultants (CAI) during those two months is no proof of the level of services provided. The ALJ's reliance on State of New York-Unified Court

\(^2\) Vestal Cent. Sch. Dist., 15 PERB ¶3005 (1982).
System, 28 PERB ¶3014 (1995); County of Nassau, 26 PERB ¶3082 (1993); and County of Broome, 22 PERB ¶3019 (1989), is misplaced. In State of New York and County of Broome, the employer abolished full-time positions and created part-time positions to complete the same work. In County of Nassau, the employer unilaterally increased the hours of work of nurses who regularly worked a reduced schedule.

Thus, COMBO having the burden of proof on its improper practice charge, failed to produce evidence of the nature and level of service provided by Systems Consultants (CAI) to the BOCES districts during July and August. We cannot speculate that there was no change in the level of service provided nor can we accept the ALJ's conclusion without any factual basis.

Based on the foregoing, we grant BOCES' first and second exceptions and reverse the decision of the ALJ. By our decision, we need not reach BOCES' other exceptions.

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

DATED: August 25, 2004
Albany, New York

[Signatures]
Michael R. Cuevas, Chairman
John T. Mitchell, Member
STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SARATOGA COUNTY DEPUTY SHERIFFS
BENEVOLENT ASSOCIATION,

Charging Party,

- and -

COUNTY OF SARATOGA and SARATOGA
COUNTY SHERIFF,

Respondent.

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Saratoga (County) and the Saratoga County Sheriff (Sheriff) (hereinafter referred to as employer)\(^1\) to a decision of an Administrative Law Judge (ALJ) that found the employer violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally issued a policy on July 8, 2002, that changed the time and place where a unit member of the Saratoga County Deputy Sheriffs Benevolent Association (Association) may make a personal phone call in the Saratoga County Correctional Facility (Facility).

\(^1\) *County of Putnam*, 33 PERB ¶3001 (2000) (elected Sheriff deemed joint employer with County).
EXCEPTIONS

The employer’s exceptions contend that the ALJ erred on the facts and the law. The Association cross-excepts on the ground that the ALJ erred by limiting the decision to outgoing calls when the charge addressed both incoming and outgoing personal calls. Both parties filed briefs in support of their respective exceptions.

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

FACTS

We adopt the ALJ’s findings of fact together with additional facts relevant to the exceptions filed by the parties.²

The Association filed its charge, as amended, on November 2, 2002, alleging that the employer violated §209-a.1(d) of the Act when it issued a new policy on July 8, 2002 that read, in pertinent part:

If A Staff Member Does Need To Make A Personal Telephone Call, The Call Shall Be Made During The Staff Members [sic] Break. Personal Calls Shall Be Made From One Of The Phones Located In The Booking Area. Staff Shall Be Prohibited From Making Long Distance Personal Phone Calls, Except In Emergency Situations.

The employer filed an amended answer denying, inter alia, the existence of any prior policy with regard to the personal use of the employer’s telephones. The answer denied that the employer unilaterally implemented a change without negotiation because there was no pre-existing policy so that the July 8, 2002 “new” policy merely

² 37 PERB ¶4525 (2004).

³ The Association withdrew an allegation that the employer unilaterally limited the unit members’ ability to accumulate compensatory time and, at the outset of the hearing, the Association also withdrew an allegation regarding the rescission of an overtime exemption in August 2002.
codified the employer's "longstanding understanding of the use of [Facility] telephones for personal communications."

The amended answer also contained certain affirmative defenses that alleged that the employer had no duty to negotiate with the Association because it did not change any terms and/or conditions of employment; PERB lacked jurisdiction because the Association had filed contract grievances over the subject matter of the charge, and Article XIV of the parties' collective bargaining agreement constituted a waiver.

Prior to the hearing, the employer urged the conference ALJ to dismiss the charge because PERB lacked jurisdiction or, in the alternative, defer the jurisdictional determination until the conclusion of the grievance procedure. By letter dated March 20, 2003, the conference ALJ ruled that deferral was inappropriate on both jurisdictional grounds and upon the merits, because the parties' grievance procedure does not provide for binding arbitration. This ruling was confirmed by the hearing ALJ.

Article XIV of the parties' collective bargaining agreement, entitled "Past Practice Clause," continues all terms and conditions of employment previously granted to the employees unless specifically excluded by the agreement. The clause provides that a Department Head may determine that a change in terms and conditions may occur if the workload or efficiency of the operation is impaired.

The collective bargaining agreement does not contain a definitions article. Appendix B, entitled "Grievance Procedure," contains general definitions used in conjunction with the procedure. Under this procedure, a "Department Head" is a person so designated by Charter, Local Law, Administrative Code, Rule or Resolution of the Board of Supervisors as the head of a department.
At the hearing held on August 21, 2003, the Association’s only witness, Donald Stack, testified that, for approximately 16 years prior to July 8, 2002, unit members did make and receive personal telephone calls during their work hours, from the telephones located in the towers and multi-purpose rooms in the Facility. On July 8, 2002, the employer promulgated the policy in dispute regarding the personal use of Facility telephones by unit members.

On cross-examination, Stack conceded that safety and security of the inmates is the primary concern of the department. He stated that, if the three telephones in the tower were used for personal calls, it would be distracting to the officer in the tower. He also stated that, even one person using the telephone in the tower engaged in a loud or long conversation, would be distracting to the tower officer. The main function of the tower officer is to observe the inmate housing unit below. He agreed that anything that would impede the effectiveness of the tower officer would impair the safety and security of the Facility.

Richard Emery, the Corrections Administrator for the Facility, was called to testify by the employer. He testified that, prior to July 8, 2002, a practice existed whereby a unit member could make a personal call at any time. It was not limited to a unit member’s coffee break or meal break. This was equally true for unit members receiving incoming personal calls.

Emery explained the reason for the change in policy. In March 2002, an inmate died in the Facility after a fight with another inmate inside the housing unit. The New York State Commission of Correction investigated the incident and made certain recommendations about the physical conditions in the Facility as well as the level of

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4 Transcript, p. 25.
supervision. The Commission found supervision lacking at the time of the inmate's death.

In response to the Commission's findings, Emery stated that the employer looked into the reasons supervision was lacking. One of the areas that the employer looked at was telephone usage by unit members. Telephone records revealed calls from thirty seconds to an hour in duration. Shortly thereafter, Emery issued the new policy, notwithstanding that the Commission's investigation had made no mention of telephone usage by unit members.

**DISCUSSION**

The employer contends in its first exception that the ALJ erred in finding that it was undisputed that, prior to July 8, 2002, unit employees could, and did, with the knowledge of the employer, make personal telephone calls during work hours from the telephones located in the towers and multi-purpose rooms in the housing units.

While the employer may have denied the allegation in its amended answer, Emery testified on cross-examination that before July 8, 2002, under the employer's "old system," unit employees were allowed to use Facility telephones in the tower and multi-purpose rooms for both outgoing and incoming personal telephone calls. The clear inference to be drawn from Emery's testimony and the issuance of new policy is that the employer was aware of the prior practice and had consented, condoned or acquiesced thereto. On this point, we deny the employer's first exception.

In order to establish a binding past practice, the charging party must first establish that the subject matter involves a mandatory subject of negotiations. The

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5 Transcript, pp. 71-71, 92-93.

employer here contends in the third exception that the unit employees' use of the employer's telephones to make personal telephone calls is not a term and condition of employment. We disagree. While we have not previously dealt with the specific subject of employees' use of the employer's telephones, we have determined that an economic benefit can be derived from an employer freely providing something of value to an employee, such as the use of an employer's building as a lounge during work breaks, bottled spring water, permitting casual office attire, and air conditioning. By providing these benefits, an employer affects the comfort and convenience of the employees' workplace, thereby adding to the employees' terms and conditions of employment, a mandatory subject of bargaining. This was the situation in the Facility. The employer established a practice of permitting unit employees to use the Facility telephones in the towers and multipurpose rooms for personal telephone calls. Employees value the ability to use the telephone for personal communications during the workday. Further, it has been common in our workplaces for employers to allow their employees to use their work-provided telephones for some degree of personal business. In so doing here, the employer added a benefit to the employees' terms and conditions of employment. Therefore, we deny the employer's third exception.

The employer contends in the fourth exception that no past practice existed. The ALJ erred by merely assuming the employer's obligation to negotiate without first

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7 Great Neck Water Pollution Control Dist., 36 PERB ¶3013, confirmed, 36 PERB ¶7015 (Sup. Ct. Nassau County 2003).

8 County of Nassau, 32 PERB ¶3034 (1999).

9 State of New York (Dep't of Taxation and Finance), 30 PERB ¶3028 (1997).

10 Scarsdale PBA, Inc., 8 PERB ¶3075 (1975).
employing the appropriate analysis to determine whether a past practice existed. Once
the mandatory nature of the subject matter is established, we must test whether the
practice alleged was unequivocal, existed substantially unchanged for a significant
period of time prior to the alleged unilateral change and was reasonably expected by
bargaining unit members to continue unchanged.\textsuperscript{11} The description of the practice by
the Association's witnesses\textsuperscript{12} is corroborated by the employer's witness\textsuperscript{13} sufficiently to
establish the practice as unequivocal. The Association's unchallenged evidence on its
direct case that the practice existed from the time the "new" jail opened some 16 years
ago, to the present, establishes the practice as long-standing. Emery's
acknowledgement of the practice, without disputing the Association's evidence that the
Sheriff was aware of the practice, is sufficient for us to conclude that the employer had
either condoned, consented to or acquiesced in the practice. Thus, we deny the
employer's fourth exception.

The employer's fifth exception challenges the ALJ's determination that Article XIV
does not constitute a waiver. We must determine whether the past practices clause of
the parties' collective bargaining agreement conditions the grant of the practice such as
to make its withdrawal permissible.\textsuperscript{14} Article XIV of the parties' collective bargaining
agreement leaves to the Department Head the ability to change terms and conditions

\textsuperscript{11} \textit{County of Nassau}, 24 PERB ¶3029 (1991).

\textsuperscript{12} Transcript, pp. 22-23.

\textsuperscript{13} Transcript, pp. 71-72, 92-93.

previously granted to employees. The employer raised Article XIV as an affirmative
defense and, as such, it was the employer's burden to prove in the hearing.\textsuperscript{15}

At the hearing, Emery testified on direct examination that he is the corrections
administrator for the Facility. On cross-examination, however, he could not answer
whether he had been designated a department head by the Saratoga County Charter or
any other local law, which is the definition of "Department Head" in the parties'
agreement. On redirect examination, Emery testified that it was his understanding that
the Saratoga County Legislature appointed him as Jail Administrator. It is undisputed
that, as Jail Administrator, Emery was responsible for the day-to-day operations of the
Facility and worked closely with the Sheriff in developing policy that affected the terms
and conditions of the Facility's employees, as evidenced by the policy in question here.
\textsuperscript{16} In that capacity, he was of sufficient policy-making authority to have condoned or
acquiesced in the subject practice that existed in the Facility prior to July 8, 2002.\textsuperscript{17}

The employer's contention that Emery is a department head for purposes of the
collective bargaining agreement is unsupported. What is clear from the testimony is
that Emery is the Jail Administrator, but what is unclear are his duties and whether he is
a department head within the context of the parties' collective bargaining agreement.
While we may not assume that Emery had the authority to represent the collective

\textsuperscript{15} Middle Country Cent. Sch. Dist., 23 PERB ¶3045 (1990).

\textsuperscript{16} Transcript, pp. 78, 96.

\textsuperscript{17} County of Nassau, 37 PERB ¶3014 (2004) (petition for review pending); Sherburne-
bargaining interests of the employer,\textsuperscript{18} under the Act and our decisions,\textsuperscript{19} the Sheriff with the County is the joint public employer and the Sheriff is the department head of the Sheriff's Department. Emery testified that the decision to issue the policy and procedures manual was made in concert with and with the approval of Sheriff Bowen.\textsuperscript{20} In fact, the policy and procedure indicates that it was issued under the authority of Sheriff Bowen.\textsuperscript{21} Inasmuch as the Sheriff effectively issued the policy and procedure, the remaining question turns on whether the procedure constitutes a sufficiently clear waiver.

We have held that even a broad management rights clause can constitute an explicit and unambiguous waiver of the right to bargain.\textsuperscript{22} The past practice clause in question here, while similarly broad, is also unambiguous and sufficiently clear to constitute a valid reservation of rights to the employer to change a past practice without negotiations where "it is determined by the Department Head that the workload or the efficiency of the operation is impaired thereby."

However, in the final analysis, the employer's claim fails because the proof does not show that a determination was made by either Emery or the Sheriff that the workload or the efficiency of the operation was impaired by permitting unit employees use of tower and multipurpose room telephones for personal telephone calls in the

\textsuperscript{18} County of Nassau, supra, note 16.
\textsuperscript{19} Supra, note 1.
\textsuperscript{20} Transcript, pp. 78, 96.
\textsuperscript{21} Joint Exhibit No. 1.
\textsuperscript{22} Deer Park Union Free Sch. Dist., 28 PERB \textsuperscript{¶}3038 (1995), Garden City Union Free Sch. Dist., 27 PERB \textsuperscript{¶}3029 (1994), County of Livingston, 26 PERB \textsuperscript{¶}3074 (1993), Town of Greece, 26 PERB \textsuperscript{¶}3032 (1993), Sachem Cent. Sch. Dist., 21 PERB \textsuperscript{¶}3021 (1988).
manner described notwithstanding Emery’s conclusory and self-serving statement.\textsuperscript{23} Therefore, we deny the employer’s fifth exception.

The employer argues in its sixth, and last, exception that the ALJ erred by failing to find that the policy of July 8, 2002, was in furtherance of its mission. The employer contends that the ALJ erred in not properly analyzing and balancing the employer’s concerns for safety and security and the convenience of the employees. The ALJ, in effect, focused only on the impact of the policy on the unit members. We disagree.

Here, the ALJ found no record evidence that telephone use by unit members was related to the inmate’s death or the Commission’s staffing determination. We agree. This was the pretext for the July 8, 2002 policy. However, we find no factual support for the employer’s complaint that, as the result of the inmate’s death and Commission’s report, the safety and security of the Facility had been compromised by unit members’ personal use of Facility telephones when Emery admitted the existence of an established practice. Furthermore, the record evidence failed to produce any finding of the Commission that supervision was lacking because of unit members’ use of Facility telephones. The new policy added a further component which made its implementation a mandatory subject of negotiation. The new policy of July 8, 2002, prohibited unit members “from making long distance personal phone calls, except in emergency situations.” The violation of such a rule would be grounds for discipline.\textsuperscript{24} Under the circumstances, the new policy has more than a minimal impact upon the rights of the

\textsuperscript{23} Transcript, pp. 71-72.

\textsuperscript{24} See Appendix B of Joint Exhibit 2 where a grievance is defined as any claimed violation, misinterpretation or inequitable application of the employment contract, existing laws, rules, procedures, regulations, administrative orders or work rules of the County of Saratoga or a Department Head thereof.
unit members and their terms and conditions of employment. Therefore, we deny the sixth exception.

The Association cross-excepts to the ALJ’s finding that the charge was limited to outgoing calls. The Association contends that the charge and the record address both incoming and outgoing personal telephone calls. The Association’s cross-exceptions with regard to incoming telephone calls is in the nature of a motion to conform the pleadings to the proof. However, our prior decisions hold that the Board may not consider allegations that are not raised in the charge or in timely amendments thereto. We, therefore, dismiss the Association’s cross-exceptions.

In light of our decision, we need not reach the employer’s second exception that the policy promulgated July 8, 2002, was the result of the Commission’s recommendation. Since we have found that the Sheriff was not privileged to unilaterally change a mandatory term and condition without negotiations with the Association, the origin of the policy is immaterial.

Based upon the foregoing, we deny the employer’s exceptions, except the second exception which we do not reach, deny the Association’s cross-exceptions, and affirm the ALJ’s determination that the employer violated §209-a.1(d) of the Act.

25 City of Buffalo (Police Dep’t), 23 PERB ¶3050 (1990); County of Montgomery, 18 PERB ¶3077 (1985).

26 See McCarthy v. Troberg, 275 App. Div. 139 (1949) [Where a cause of action is imperfectly stated, or on trial, a variance is disclosed between the pleadings and the proof, not affecting the essential nature of the claim asserted, the court has the power to grant relief without turning a party out of court].

27 County of Nassau, 29 PERB ¶3016 (1996); Arlington Cent. Sch. Dist., 25 PERB ¶3001 (1992); City of Buffalo, 15 PERB ¶3027 (1982); City of Mt. Vernon, 14 PERB ¶3037 (1981).
IT IS, THEREFORE, ORDERED that the County of Saratoga and the Saratoga County Sheriff rescind and cease enforcement and implementation of the July 8, 2002 provision of the policy and procedures manual of the County of Saratoga and the Saratoga County Sheriff regarding the making of personal telephone calls by unit employees, reinstate the prior practice regarding the making of personal telephone calls by unit employees, and sign and post notice in the form attached.

DATED: August 25, 2004
Albany, New York

Michael R. Cuevas, Chairman

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 Saratoga and Saratoga County Sheriff in the unit represented by the Saratoga County Deputy Sheriffs Benevolent Association that the County of Saratoga and Saratoga County Sheriff will rescind and will not enforce or implement the July 8, 2002 provision of the policy and procedures manual of the County of Saratoga and the Saratoga County Sheriff regarding the making of personal telephone calls by unit employees, and will reinstate the prior practice regarding the making of personal telephone calls by unit employees.

Dated ............

By

(Representative) (Title)

County of Saratoga and Saratoga County Sheriff

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.
This case comes to us on exceptions filed by the State of New York (Department of Correctional Services-Albion Correctional Facility) (State) to a decision of an Administrative Law Judge (ALJ), finding that the State violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally promulgated a change in the policy and procedure for the use of pre-approved sick leave by requiring two employees in the unit represented by the New York State Correction Officers and Police Benevolent Association (NYSCOPBA), which filed the instant improper practice charge, to provide medical documentation in support of their requests for four hours or less of sick leave.
The ALJ determined that the State had violated the Act by conditioning the receipt of such leave on the provision of medical documentation, an alteration without negotiations with NYSCOPBA, of a mandatory subject of negotiations.

**EXCEPTIONS**

The State excepts to the ALJ's decision, arguing that the ALJ erred on the facts and the law. NYSCOPBA 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 fully set forth in the ALJ's decision and are repeated here only as necessary for disposition of the issues raised on appeal.

Section III.C of Directive 2204 of the Department of Correctional Services (DOCS), dated December 20, 2001, permits unit employees to utilize accumulated sick leave for medical or dental appointments. Such use must be requested in advance of the scheduled appointment and, if the appointment is for greater than four hours duration, documentation must be provided. Section III.E of Directive 2204, entitled Medical Certification, provides that:

Medical certification is not usually required until the fourth continuous day....When medical certification is not submitted to substantiate charges to sick leave, the absence will be considered to be unauthorized and appropriate counseling is to take place. In exceptional cases, a supervisor may exercise the right to request certification for any absence charged to sick leave or family sick leave regardless of duration.

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1 37 PERB ¶4552 (2004).
On August 5, 1993, DOCS issued to all department employees the Revised Time and Attendance Guidelines that provides: “Documentation will be required of all employees if they use more than four hours for a medical appointment.”

On Friday, August 23, 2002, Sergeant Oehlbeck approved the request of two unit employees for the use of sick leave from 11:00 a.m. to 3:00 p.m. on Saturday, August 24, 2002, on the condition that they provide medical documentation upon their return to work. Oehlbeck had consulted with Deputy Superintendent Durfee about the requests because the requests were for the weekend and a limited amount of time for extra vacation or personal leave requests was available for that weekend. The granting of the at-issue sick leave requests would make less time available for more senior employees to use for vacation or personal leave and the two employees in question were not senior enough to have a vacation or personal leave request granted. Durfee approved Oehlbeck’s decision to require the two employees to submit medical documentation. The two employees thereafter withdrew their requests for sick leave.

When questioned thereafter by a NYSCOPBA shop steward about her order, Durfee responded that any of the supervisors could ask for documentation and referred to Section III.E of Directive 2204. The instant charge was then filed by NYSCOPBA.

Durfee testified at the hearing that DOCS had never provided a definition of what constituted “exceptional cases” under Section III.E. Durfee also testified that she has previously required unit employees to submit medical documentation in support of a request for four hours of sick leave for a medical appointment. Evidence was
introduced about one employee who had been required to do so but no reasons were
given as to why the documentation was required in that case.

The two NYSCOPBA witnesses, Donald Premo, the associate grievance director,
and Barry Pawlowski, a shop steward at Albion, testified that they were not aware that any
such requirement had been previously imposed and that the statewide policy was that
medical documentation was not required for a medical or dental appointment of four hours
or less, unless the employee was on formal time and attendance control.

DISCUSSION

In State of New York (Department of Correctional Services-Downstate Correctional
Facility), 2 we decided a similar issue. There, the State instituted a policy that all requests
by unit employees at its Downstate Correctional Facility for time off to attend any
scheduled appointment with a health care provider had to be accompanied by the name
and office phone number of the health care provider and the time of the appointment or an
appointment card that included the same information. Prior to the implementation of that
directive, documentation was only required for medical or dental appointments in excess of
four hours. Finding that the State had violated §209-a.1(d) of the Act, we held that:

It is well settled that sick leave is a mandatory subject of
negotiation. It is likewise well established that the procedures
and policies for granting or terminating sick leave are
mandatory. The new requirements for documentation instituted
by the State affect both sick leave and sick leave procedures
and are, therefore, mandatory subjects of negotiation. 3

2 31 PERB ¶3065 (1998).

3 Id. at 3144 (footnotes omitted).
Here, the State argues that Durfee's action was permitted under the language of Section III.E of Directive 2204, which allows for medical certification in exceptional cases.\(^4\) However, the State has offered no definition of what constitutes “exceptional cases.” The State can point to only one instance at Albion where medical documentation was required for a unit employee to utilize sick leave for a medical appointment of less than four hours duration and offered no rationale as to why the documentation was required in that case. That one instance is insufficient to establish that the State acted according to established statewide practice. As it appears that the Directive and Attendance Guidelines state the established practice that documentation was not required under the circumstances involved here, it is incumbent upon the State to provide evidence in support of its argument that Durfee's action was permitted.\(^5\)

NYSCOPBA alleges that Durfee's statement that any supervisor could require documentation in support of a request for four hours or less of sick leave for a medical or dental appointment is a change in the established policy and procedure within DOCS, not that it is a change in past practice. The relevant directives and guidelines upon which NYSCOPBA relied are in evidence, as is testimony that Durfee's interpretation of Section III.E of Directive 2204 had not been communicated to NYSCOPBA before or implemented to NYSCOPBA's knowledge, either at Albion or on a statewide basis.

\(^4\) The State also argues that 4 NYCRR 21.3, which permits the appointing authority to "require such proof of illness as may be satisfactory to it," authorizes its decision to require documentation for the use of sick leave for a medical or dental appointment. We rejected this argument in State of New York, supra, note 2, finding that this provision does not privilege the State to act unilaterally with respect to a mandatory subject of negotiations.

\(^5\) The State attached two arbitration decisions to its brief in support of its exceptions. As they were not in evidence before the ALJ, we will not consider them.
For the reasons stated in the ALJ's decision, we find that Directive 2204, Section III.E, is inapplicable to the circumstances at issue here. We find, therefore, that Durfee's application of Directive 2204, Section III.E, was a change in the established policy and procedure for the use of sick leave for medical and dental appointments of four hours or less duration and was a unilateral change in a mandatory subject of negotiations in violation of §209-a.1(d) of the Act.

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

IT IS THEREFORE ORDERED that the State cease and desist from requiring unit employees to submit medical documentation as a condition to its approval of the use of sick leave for medical or dental appointments of four hours or less duration and that the State sign and post notice in the form attached at all locations normally used by it to post written communications to unit employees.

DATED: August 25, 2004
Albany, New York

Michael R. Cuevas, Chairman

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 State of New York (Department of Correctional Services) within the bargaining unit represented by the New York State Correctional Officers and Police Benevolent Association, Inc., that the State will not require unit employees to submit medical documentation as a condition to the use of sick leave for medical or dental appointments of four hours or less duration.

Dated .........

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

State of New York
(Department of Correctional Services)

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

TEAMSTERS LOCAL #264,

Petitioner,

-and-

VILLAGE OF LEWISTON,

Employer.

CASE NO. C-5395

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 Teamsters Local #264 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 regular full-time and regular part-time employees of the Department of Public Works.
Excluded: Superintendent of Public Works, Deputy Superintendent of Public Works, supervisory employees, temporary employees, seasonal employees, clerical employees, and all other employees employed by the Village of Lewiston.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamster Local #264. 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: August 25, 2004
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member