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State of New York Public Employment Relations Board Decisions from June 8, 2005

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from June 8, 2005

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

In the Matter of

JAMES EDWARD BOYKIN,

Charging Party,

- and -

CASE NO. U-25397

**NEW YORK CITY TRANSIT AUTHORITY and
TRANSPORT WORKERS UNION OF AMERICA,
LOCAL 100, AFL-CIO,**

Respondents.

JAMES EDWARD BOYKIN, *pro se*

**MARTIN B. SCHNABEL, GENERAL COUNSEL (DANIEL TOPPER of
Counsel), for New York City Transit Authority**

**KENNEDY, SCHWARTZ & CURE, P.C. (STUART LICHTEN of counsel),
for Transport Workers Union of America, Local 100, AFL-CIO**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by James Edward Boykin to a decision of an Administrative Law Judge (ALJ) that dismissed Boykin's improper practice charge against the New York City Transit Authority (NYCTA) and the Transport Workers Union of America, Local 100, AFL-CIO (TWU) alleging, as amended, that NYCTA violated §§209-a.1(a) and (b) of the Public Employees' Fair Employment Act (Act) by discriminating against him in his employment and that TWU violated §209-a.2(a) of the Act by denying him his right to participate in his employee organization.

NYCTA and TWU filed answers denying the allegations and, thereafter, moved to dismiss Boykin's improper practice charge prior to hearing on the grounds that Boykin's charge failed to state a claim upon which relief may be granted. The ALJ granted the motion to dismiss and Boykin filed exceptions to the ALJ decision.

EXCEPTIONS

Boykin excepts to the ALJ's findings of fact and conclusions of law.

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

FACTS

While Boykin disputes the ALJ's findings of fact, the record supports the ALJ's findings¹ and we here adopt them.

Boykin alleges in his improper practice charge that, on June 1, 2004, he was appointed to the position of bus driver for the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA). Thereafter, he underwent training from June 17, 2004 to July 8, 2004.

On June 22, 2004, while driving a MABSTOA bus, he collided with a cement barrier. On an unspecified date, between June 24, 2004 and June 28, 2004, Boykin was cited by one of the instructors for failing to yield to pedestrians. Although Boykin passed the road test given to him on June 29, 2004, he was sent back to the training facility.

On July 8, 2004, Boykin was assigned to drive a bus with a training instructor, Randy Spolton, accompanying him. Boykin alleges that Spolton's remarks about his

¹ 38 PERB ¶4524 (2005).

driving were pompous and arrogant. Spolton told Boykin that he had problems with his driving. Boykin was assigned a different instructor to complete the assigned route. Upon Boykin's return to the bus facility, he met with a Mr. Clark, the General Superintendent for NYCTA and a TWU representative to discuss the problem with Spolton. Clark directed Boykin to appear at the training facility on July 9, 2004 to meet with a Mr. Mulano. On July 9, 2004, Boykin alleges that his employment was terminated without a TWU representative present.

Boykin alleges that MABSTOA put Spolton on the training route with him in order "to provoke him in some form or fashion." He then alleges that MABSTOA terminated his employment as an effort to stifle his "freedom of expression and self person or to have me terminated from the job." In his letter of January 20, 2005, following a conference on the instant improper practice charge, Boykin states that his "charge against the New York City Transit Authority (NYCTA) is racism and discrimination."

Boykin further alleges in this letter that the:

charge against the Transport Workers Union Local 100 (TWU) is that TWU did not protect my rights as guaranteed in section two hundred two, §209-a.2(a); in that TWU did not protect my right to keep my jobs; and TWU and NYCTA are cohort in my termination from work and TWU did not protect my civil freedom of expression and speech.

DISCUSSION

Boykin's assertions in the record before the ALJ and in his exceptions focus on his theory that the NYCTA and TWU discriminated against him on the basis of race and not because of any protected activity under the Act. Boykin's recitation of the facts fails to supply any basis upon which we could exercise jurisdiction over what is essentially a claim alleging racial discrimination in employment rather than interference with

protected rights under §202 of the Act. We do not have jurisdiction over allegations that an employee has been discriminated against because of race.²

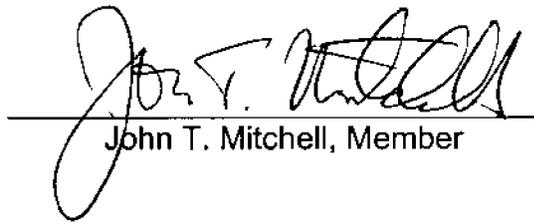
Based upon the foregoing, the exceptions are denied and the ALJ's decision is affirmed.

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

DATED: August 8, 2005
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

² See *State of New York (Rockland Psychiatric Center) and Civil Service Employees Ass'n*, 25 PERB ¶3012 (1992).

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

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, SUNY PURCHASE
LOCAL 637,**

Charging Party,

- and -

CASE NO. U-24432

**STATE OF NEW YORK (STATE UNIVERSITY OF
NEW YORK),**

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK
of counsel), for Charging Party**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (JAMES WALSH
of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (State University of New York) (State) to a decision of an Administrative Law Judge (ALJ) that found a violation of §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, SUNY Purchase Local 637 (CSEA), alleging that the State conducted a motor vehicle license search on CSEA's local president, Frank Williams in retaliation for his union activities. The State raised in its answer, *inter alia*, the affirmative defense of timeliness and that CSEA had failed to set forth facts upon

which a violation may be found. The State excepts to the ALJ's determination that the State's search of Williams' driver's license was improperly motivated.

CSEA filed cross-exceptions to that part of the ALJ's decision that dismissed the charge's allegations that, effective July 3, 2003, the State reassigned Williams, a cleaner, from the night shift to the day shift for improper reasons, finding that the record did not establish improper motivation for William's reassignment .

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

FACTS

The facts as set forth in the ALJ's decision¹ are disputed by the parties. The facts, as we find them to be established in the record, are set forth below.

Williams has been employed by the State since December 1998 at the State University of New York at Purchase (SUNY) as a Grade 5 cleaner. At the time of the hearing on the improper practice charge, Williams held the elected position of CSEA Local 637 president. During his five years as president, Williams has filed numerous grievances, the most recent of which dealt with allegations that Grade 11 supervisors were working overtime as cleaners. In August 2002, John Byrnes, Head Cleaner, filed a criminal harassment complaint against Williams with the campus police based in part on Williams' behavior towards Byrnes when Williams was told that he would not receive a promotion. Williams was also charged with improper behavior towards another supervisor on December 12, 2002 and the two charges were the subject of an improper practice charge brought by CSEA alleging that the charges were issued in retaliation for

¹ 38 PERB ¶4508 (2005).

Williams' complaints about the overtime system. By a stipulation of settlement, executed June 17, 2003, the improper practice charge was withdrawn, the Notices of Discipline against Williams were rescinded and Williams was issued a counseling memorandum regarding his behavior.

For the past fifteen years, at the end of each school year, cleaners' shifts are changed to provide the largest number of staff working days to prepare the College for the fall semester. SUNY changed Williams' shift in the Summer of 2002 but, based upon the intercession of Dan Sedgwick, Manager of the Performing Arts Center, Williams was allowed to continue with his regular night shift assignment in 2002. In April 2003, Williams received notice of a shift change for the summer from his immediate supervisor, Anna May Harting, Supervising Janitor. Williams complained to the Joseph Olenik, Chief of Campus Police and Chief Operating Officer of SUNY Purchase and Maritime College, about the shift change, noting that he operated a painting business in addition to his State employment and that it would be a hardship for him to work the day shift during the summer months. Williams opined that, in light of his situation, any shift change must be viewed as a retaliatory action because of his activities as CSEA Local 637 President. Olenik wrote to Williams and assured him that his shift change had nothing to do with either his union activities or his private business. Olenik, as a past PBA president, applauded Williams for his efforts on behalf of CSEA unit members. During the summer of 2003, Williams worked the day shift.

On April 22, 2003, Williams, as CSEA local president, wrote to Thomas Schwartz, President of SUNY Purchase. In that letter, Williams complained that a Grade 5 cleaner had been passed over for promotion. The letter was copied to Olenik;

John Byrnes, Head Janitor; Barbara Gianoplus, Personnel Director; and Carl Rasmussen, CSEA Labor Relations Specialist.

Williams testified that in April or May 2003, he learned that a search had been conducted into whether he had a valid New York State driver's license through the NYSPIN (New York Statewide Police Information Network) system. An article later appeared in the student newspaper in which Olenik identified an anonymous telephone call as the basis for the inquiry into the status of Williams' license and that the phone number was identified as one in the office assigned to Byrnes.

When asked whether he had a New York State driver's license in April or May 2003, Williams testified that he did not, but that he possessed a Rhode Island driver's license. He explained that as a cleaner he does not have access to a State vehicle nor is it a condition of his employment to be able to drive one, that he owns a motor vehicle that he drives to work on the SUNY campus and that he did not suffer any adverse consequences as the result of the NYSPIN search of his driver's license.

Byrnes testified on behalf of the State that Olenik was not involved in changing Williams' shift in 2003 because all of Byrnes' discussions regarding Williams' shift change were with Byrnes' supervisor, Vito Liberatore. Olenik became involved later only because Williams complained to him. Byrnes also denied that he called the campus police to complain that Williams did not have a New York State driver's license. All the supervising janitors, the recycling manager, and some of the janitors had access to the telephone in Byrnes' office.

Olenik has been Chief of Campus Police and Chief Operating Officer since June 2003 and reports directly to Schwartz, SUNY Purchase's president. Olenik testified that

he received an anonymous complaint that Williams did not have a driver's license and that he was driving on State roads. Thereafter, Olenik ordered the NYSPIN search on the basis of that call. NYSPIN searches have been frequently conducted by the Campus Police and, at least once previously, have been initiated by an anonymous call.

During cross-examination, Olenik acknowledged that he was aware of Williams' position as local CSEA president and of the fact that Williams had filed grievances and an improper practice charge. Olenik took no part in the decision to change Williams' shift in the summer of 2003. When questioned about the NYSPIN search, Olenik explained that he wrote a memorandum about the anonymous call and gave it to Assistant Chief Pete Macaluso, who conducted the investigation into Williams' driver's license.² Olenik assigned the investigation to Macaluso to avoid any conflicts between himself and CSEA because of his supervisory position.³

In the memorandum to Macaluso, Olenik referenced the fact that Williams drives a vehicle to and from work and that, although Olenik had no knowledge of Williams driving a State vehicle, Williams does have access to them. Olenik also stated that he had another occasion where an anonymous call prompted him to order a NYSPIN search. While the anonymous call came from a phone assigned to an office used by Byrnes, Olenik testified that he had not recognized the caller's voice as Byrnes. Olenik acknowledged that he spoke with Schwartz about the NYSPIN search prior to the president sending a memorandum dated February 27, 2004 to faculty and staff.⁴

² Charging Party's Exhibit 11.

³ Transcript, p. 299.

⁴ Charging Party's Exhibit 9.

Schwartz had wanted clarification from Olenik about the NYSPIN search because Williams had led him to believe that a criminal record search had been conducted.

DISCUSSION

The State argues that the ALJ erred in concluding that the record supports a finding of improper motivation in conducting the NYSPIN search of Williams. We agree.

To establish discrimination or retaliation under §§209-a.1(a) and (c) of the Act, a charging party must prove that (a) he/she had engaged in protected activities, (b) the respondent had knowledge of those activities, and (c) the respondent acted because of those activities.⁵ If the charging party proves a *prima facie* case of discrimination, the burden of going forward shifts to the respondent to establish that its actions were motivated by legitimate business reasons.⁶ A charging party can establish the existence of anti-union animus by statements or by circumstantial evidence, which may be rebutted by evidence of legitimate business reasons for the actions taken, unless those reasons are found to be pretextual.⁷

CSEA alleged that the State, through Olenik, directed that a NYSPIN search be made as to Williams' driver's license in retaliation for Williams' exercise of protected activity. The charge must be dismissed because there is no evidence of improper motivation on the part of Olenik, who initiated the NYSPIN search. While Williams was involved in protected activities in his role as CSEA President and Olenik was aware of

⁵ *City of Salamanca*, 18 PERB ¶¶3012 (1985); *Town of North Hempstead*, 32 PERB ¶¶3006 (1999).

⁶ *State of New York (SUNY Oswego)*, 34 PERB ¶¶3017 (2001); *State of New York (State University of New York at Buffalo)*, 33 PERB ¶¶3020 (2000).

⁷ *Town of Independence*, 23 PERB ¶¶3020 (1993).

some of Williams' actions, there is no independent evidence that Olenik harbored any anti-union animus toward Williams. Indeed, Olenik complimented Williams on his advocacy on behalf the CSEA bargaining unit members. CSEA cannot rely on the presumed animosity between Byrnes and Williams from their past dealings as evidence of improper motivation on the part of Olenik. The record does not establish that Byrnes made the anonymous telephone call, or, if he did, that Olenik was aware that the call came from Byrnes. Olenik's initiation of the NYSPIN search cannot, therefore, be found to be improper as tainted by Byrnes' animus towards Williams.⁸ To the extent that the ALJ's finding that Olenik was improperly motivated is based upon circumstantial evidence, what the ALJ describes as incredulous testimony or the inferences he drew from the testimony, we decline to adopt his findings.⁹ The ALJ concluded that "Williams was targeted in an unfounded and unsuccessful effort to get him into trouble and to prevent him from driving to and from work" and that he could "...not accept Olenik's representation that the threshold warranting such an invasion of privacy is so low as to justify the search of Williams' records solely on the idle speculation of an unidentified caller." The ALJ's conclusions are unsupported by any record evidence and appear to be his personal opinions, unsupported by fact or law. While the ALJ might conclude that Williams was targeted, the allegation that he did not have a New York State driver's license was not "unfounded"; it proved to be true. There is no record evidence that anyone was trying to get Williams "into trouble" and certainly, no evidence that anyone

⁸ *Croton-Harmon Union Free Sch. Dist.*, 31 PERB ¶¶3086 (1998).

⁹ *Benson v. Cuevas*, 293 AD2d 927, 35 PERB ¶¶7008 (3d Dep't), *motion for leave to appeal denied*, 98 NY2d 611, 35 PERB ¶¶7017 (2002).

sought “to prevent him from driving to and from work”. That Olenik, as the Chief of the Campus Police and a former police officer would investigate a tip that someone was driving without a license on his campus is not surprising or suspicious. The fact that this incident was only the second in which the tip came from an anonymous telephone call is not relevant given the myriad of reasons that could trigger a NYSPIN search. There are any number of non-discriminatory, non-retaliatory reasons why Olenik might have acted on the tip, but neither party chose to explore them on the record. Timing alone is insufficient to establish improper motivation¹⁰ and that the timing of the NYSPIN search is suspect is all that can be reasonably inferred from this record.

The record is clear that Williams, as local CSEA President, had filed grievances on behalf of unit members and was, therefore, engaged in protected activity and that Olenik, Chief of Campus Police and Chief Operating Officer, was aware of Williams’ protected activities. However, the record lacks evidence that the State, through Olenik, would not have acted but for Williams’ protected activity. An employer’s conduct must be deliberate in order for us to find a violation of §§209-a.1(a) and (c) of the Act.¹¹

CSEA, in its cross-exceptions, contends that the ALJ erred in dismissing so much of the charge that alleged that Williams’ shift was changed in retaliation for Williams’ protected activity. We disagree.

It is undisputed that, in prior years, SUNY has changed work schedules in the summer months to prepare the campus for the students’ return in the fall. As the ALJ

¹⁰ *Roswell Park Cancer Institute*, 34 PERB ¶¶3040 (2001); see also, *County of Monroe and Monroe County Sheriff*, 33 PERB ¶¶3044 (2000); *Town of North Hempstead*, 32 PERB ¶¶3006 (1999); *Bd. of Educ. of the City Sch. Dist. of the City of New York*, 14 PERB ¶¶3005 (1981).

¹¹ See *Greenburgh #11 Union Free Sch. Dist.*, 33 PERB ¶¶3018 (2000).

noted, the evidence shows that, but for Sedgwick's intervention, Williams' work shift would have changed in 2002, notwithstanding his private painting business. SUNY was continuing that practice when it changed Williams' schedule for the Summer of 2003. It was because Sedgwick did not press the college to excuse Williams from the shift change that he was required to comply with the shift changes, not his exercise of protected rights. CSEA's cross-exceptions are, therefore, denied.

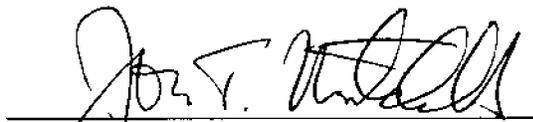
Based upon our review of the record, we grant the State's exceptions and reverse the ALJ's finding that the State violated the Act when a NYSPIN search was conducted on Williams' driver's license. We deny CSEA's cross-exceptions and affirm the decision of the ALJ, dismissing the charge as to Williams' Summer 2003 shift reassignment.

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

DATED: August 8, 2005
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

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

In the Matter of

UNITED FEDERATION OF POLICE OFFICERS, INC.,

Petitioner,

- and -

CASE NO. C-5412

POUGHKEEPSIES' JOINT WATER PROJECT BOARD,

Employer,

- and -

CITY OF POUGHKEEPSIE,

Employer,

- and -

TOWN OF POUGHKEEPSIE,

Employer,

- and -

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

Incumbent/Intervenor.

THOMAS HALLEY, ESQ., for Petitioner

**GELLERT & KLEIN, P.C. (DAVID R. WISE of counsel), for Poughkeepsies'
Joint Water Supply Project**

STEPHEN J. WING, CORPORATION COUNSEL, for City of Poughkeepsie

**NANCY E. HOFFMAN, GENERAL COUNSEL (DAREN J. RYLEWICZ of
counsel), for Incumbent/Intervenor**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Poughkeepsie (City), the Poughkeepsies' Joint Water Project Board (Project Board) and the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) finding that the City and the Project Board, as well as the Town of Poughkeepsie (Town), are joint employers of the employees who work at the Poughkeepsies' Joint Water Project (Joint Project). The United Federation of Police Officers, Inc. (Federation) had filed the instant petition seeking to fragment those employees from a City-wide unit of employees represented by CSEA and represent them in a separate bargaining unit.¹

After a hearing at which the City, CSEA and the Federation were present, the ALJ issued a decision finding that the Project Board, the City and the Town constituted a joint employer and that the employees of the Joint Employer were no longer appropriately included in the City-wide unit represented by CSEA.²

EXCEPTIONS

The City excepts to the ALJ's decision, arguing that it is the sole employer of the employees who work at the Joint Project. The Project Board joins in the City's exceptions. CSEA also excepts to the finding that the City is not the sole employer. The Federation concurs with the ALJ's decision.

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

¹ The ALJ made no other determinations as to unit appropriateness.

² The Project Board did not appear but, in its letter brief, concurred with the City's position. Although put on notice by the ALJ, the Town has not appeared in this matter.

FACTS

The facts are set forth in the ALJ's decision and are repeated here only as necessary to address the exceptions.³

The City, until 1995, operated a water treatment plant, staffed by City employees who were included in the City-wide unit represented by CSEA. In 1995, the City and the Town entered into an inter-municipal agreement whereby the Town became a co-owner of the water treatment facility. The agreement created the Joint Project. The Joint Project is funded by fees collected from water users in the City and the Town under a metering formula.

The Joint Project is administered by the six-member Project Board, with the City and the Town each appointing three members. The Project Board establishes and maintains the capital fund and the operating fund. The revenue to fund the operating budget is derived from meter fees and the budget is administered by the City, for a fee. The Joint Project fund is maintained as a discrete account, separate from any City funds, and is utilized only to fund the budget of the Joint Project.

The Project Board hires the Water Plant Administrator, subject to the approval of the City and the Town. The Administrator is charged with preparing an annual budget for approval by the Project Board, before its submission to the City and the Town for consideration and adoption. The Administrator is also responsible for the day-to-day operations of the Joint Project, including the supervision of all employees working for the Joint Project.

³ 38 PERB ¶4008 (2005).

After the pre-hearing conference in this matter, the Town and the City deleted the language from their inter-municipal agreement that had made the Administrator responsible for the hiring, firing, transfer and discipline of Joint Project employees. The City is now designated in the inter-municipal agreement as the appointing authority and employer of those employees. The employees are paid through the City payroll account and receive the same benefits as City employees, as governed by City personnel practices and the City-CSEA collective bargaining agreement.

DISCUSSION

A joint employer relationship rests on a finding of shared or divided control over the employees' terms and conditions of employment.⁴ We have analyzed this relationship between governmental entities sharing control in cases involving public libraries⁵, community colleges⁶, highway departments⁷, and county sheriffs⁸. But it is our decision in *Town of North Castle*⁹ which is the most instructive in reaching a decision as to the relationship between the Project Board, the City and the Town. *North Castle* involved a town and its various sewer and water districts. The Board, in weighing the uniting criteria set forth in §207 of the Act, determined that the various water and sewer

⁴ See *County of Orange and Sheriff of County of Orange*, 14 PERB ¶¶3012 (1981).

⁵ See *New York Public Library v PERB*, 45 AD2d 271, 7 PERB 7013 (1st Dep't 1974), *aff'd*, 37 NY2d 752, 8 PERB ¶¶7013 (1975).

⁶ See *County of Jefferson and Jefferson County Community College*, 26 PERB ¶¶3010 (1993), *confirmed sub nom. Jefferson County v PERB*, 204 AD2d 1001, 27 PERB ¶¶7010 (4th Dep't 1994), *leave to appeal denied*, 84 NY2d 804, 27 PERB ¶¶7014 (1994).

⁷ See *Town of Ramapo*, 8 PERB ¶¶3057 (1975).

⁸ See *County of Putnam*, 33 PERB ¶¶3001 (2000).

⁹ 19 PERB ¶¶3025 (1986).

districts, created by the Town for the provision of specific services, were little more than departments of the Town and could not be considered to be public employers, either in their own right or as joint employers with the Town. Those districts were not the appointing authorities of their employees, the Town was. Those districts likewise had no control over terms and conditions of employment and did not control their budgets.

Here, the Town and the City control the budget of the Joint Project by each retaining the power to review and approve or disapprove the budget submitted to them by the Project Board. Given this financial control, the City and the Town are joint employers of the employees of the Joint Project.¹⁰ A joint employer relationship exists when the control over the employment relationship is divided between two public employers to the point where there cannot be meaningful negotiations without a joint employer designation.¹¹ As the Project Board has budget preparation authority and the authority to establish and maintain the capital fund and the operating fund of the Joint Project, it, too, holds one of the purse strings to the money to be utilized to fund any contractual wages and benefits negotiated for the employees of the Joint Project.¹² While the City is the appointing authority, the Joint Board appoints the Plant Administrator who is charged with overseeing the day-to-day operation of the Joint Project and formulating the Joint Project's annual budget.

¹⁰ See *Jefferson County Community Coll.*, *supra*, note 5, and cases cited therein.

¹¹ *County of Nassau and Nassau County Sheriff*, 25 PERB ¶3026 (1997).

¹² See *Genesee Community College*, 24 PERB ¶3017 (1991), *aff'g* 23 PERB ¶4068 (1993), where College employees were paid by the County from County and College funds, but the President of the college was the appointing authority and exercised day-to-day control over the employees; the County and the College were found to be joint employers.

Irrespective of the fact that the City and Town have identified the City as the employer of the employees of the Joint Project, as it is PERB's statutory duty to define who is a joint public employer, we are not bound by their agreement.¹³

Based on the foregoing, we find that the City, the Town and the Project Board constitute a joint public employer within the meaning of §201.6(b) of the Act.

The exceptions of the City, CSEA and the Joint Board are, therefore, denied, and the decision of the ALJ is affirmed.

The matter is hereby remanded to the Director of Public Employment Practices and Representation for further processing consistent with this decision.

SO ORDERED.

DATED: August 8, 2005
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

¹³ Act, §201.6(b).

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

In the Matter of

**NEW YORK STATE CORRECTIONAL OFFICERS
AND POLICE BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

- and -

CASE NO. U-24120

**STATE OF NEW YORK (DEPARTMENT OF
CORRECTIONAL SERVICES),**

Respondent.

HINMAN STRAUB P.C. (NANCY L. BURRITT of counsel), for Charging Party

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MAUREEN SEIDEL of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the State of New York (Department of Correctional Services) (DOCS) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally terminated a practice of granting employees' requests for pre-approved sick leave of four hours or less to attend scheduled medical appointments.

EXCEPTIONS

NYSCOPBA, in its exceptions, contends that the ALJ erred on the law and the facts. Specifically, NYSCOPBA argues that the ALJ erred by failing to recognize a

change in facility procedures with respect to obtaining work coverage for four or fewer hours of pre-approved sick leave; equating pre-approved sick leave with vacation leave and, therefore, determining the subject to be a non-mandatory subject for negotiations; finding that NYSCOPBA was attempting to change the charge into one involving a unilateral denial of overtime for those who formerly worked full shifts of overtime to cover for pre-approved sick leave of four and fewer hours; finding that the direct participation of the Governor or the Governor's Office of Employee Relations (GOER) was required to establish a past practice, or a change thereof; and failing to find that DOCS' directives demonstrated a delegation of authority to the facility to establish or change practices in these regards.

DOCS filed cross-exceptions to the ALJ's decision, arguing that the ALJ erred by failing to find the issue to be one of agency-wide concern and by considering the practice on the facility level. DOCS further alleges that the ALJ erred on the law by failing to decide DOCS' motion to amend its answer to include a timeliness defense.

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

FACTS

The facts, as relied upon by the ALJ,¹ are disputed by the parties in their exceptions. The facts as we find them to be established in the record, are set forth below.

On March 14, 2003, NYSCOPBA filed an improper practice charge alleging, in substance, that, in July 2002, Assistant Watch Commanders at the Downstate

¹ 37 PERB ¶4566 (2004).

Correctional Facility (Downstate) unilaterally began to deny pre-approved sick leave requests for four hours or less which was contrary to the past practice of approving such requests and using additional employees, who were assigned eight hours of overtime, to cover for the absent employees.

On April 7, 2003, DOCS filed its answer alleging, *inter alia*, that the facility's actions were consistent with a DOCS' statewide directive which established a sick leave procedure for medical appointments. The answer did not plead the affirmative defense of timeliness. The directive, dated December 20, 2001, is entitled "Sick Leave at Full Pay".² Under Section III. Sick Leave Accruals Utilization, subpart C, Medical or Dental Appointments and Family Sick Leave it provides:

Employees who wish to apply sick leave accruals for absences for medical or dental appointments must request time off in advance in the same manner used for annual or personal leave. When granting such leave, consideration should be given to the time of the appointment and the location of the medical facility. Medical appointments, in most instances, do not require full-day absences. To be considered pre-approved, a time-off slip must be filled out and approved no later than the previous day

NYSCOPBA witness Donald Premo, a corrections sergeant at Hudson Correctional Facility and NYSCOPBA's Associate Grievance Director, testified that correctional facility managers review every request for leave because there is no automatic leave and they are required to follow directives from the DOCS central office.

Diane Davis, a corrections sergeant, is NYSCOPBA's recording secretary. She previously worked at Downstate as Assistant Watch Commander and prepared corrections officers' work charts for each day. In that capacity, she testified that she

² ALJ's Exhibit 3.

received requests for doctors' appointments 24 hours in advance of the appointments and that these requests were routinely approved.

Corrections sergeant Homer Chin was assigned to Downstate where he functioned as an Assistant Watch Commander. In that position, Chin completed the work charts. He stated that a sick leave request for four hours or less had to be submitted a day in advance. Prior to November 2002, he never denied anyone's request, if timely submitted, but he had the discretion to deny a timely request for sick leave if he did not have the manpower to relieve the officer making the request. Chin testified that he received an order sometime in 2003 prohibiting him from filling an officer's absence of four hours or less with an officer who would be receiving eight hours of overtime pay.³

Walter Clark, NYSCOPBA's Chief Steward for Downstate, testified that he first became aware of the denial of pre-approved sick leave requests in July 2002. Upon learning of the denial, he called NYSCOPBA's regional office for assistance. On August 9, 2002, Clark discussed the subject of the denial of pre-approved sick leave requests for four hours or less with Frank Tracy, Downstate's Superintendent, in a labor/management meeting, but without reaching a resolution of the dispute. Other denials of pre-approved sick leave occurred in November 2002.

At the conclusion of NYSCOPBA's direct case, counsel for DOCS moved to amend DOCS' answer to include the affirmative defense of timeliness and to dismiss NYSCOPBA's charge for failing to establish a *prima facie* case. DOCS argued that the

³ Charging Party's Exhibit 1.

right to determine staffing levels is nonmandatory and, in the alternative, the charge was untimely.

The ALJ reserved on the motion, closed the record to consider the motions, and requested briefs from parties. The ALJ, upon consideration of the parties' arguments, thereafter dismissed the charge because DOCS' determination of staffing levels, which was the basis of the alleged change, was not a mandatory subject of negotiation.

DISCUSSION

We have held that in order to establish a unilateral change in a past practice, the charging party has the burden to show that:

[T]he alleged past practice affected a mandatory subject of bargaining, that the practice was unequivocal and existed for a significant period of time such that the employees in the unit could reasonably expect the practice to continue.⁴

In other words, NYSCOPBA has the burden of proof to establish by a preponderance of the reliable evidence that pre-approved sick leave is a mandatory subject of negotiation, that a practice with respect to its use had, in fact, existed,⁵ and that DOCS' action in denying the use of pre-approved sick leave is a change in that practice. If NYSCOPBA fails to prove an essential element of the charge, the charge must be dismissed.⁶

⁴ *Hewlett-Woodmere Union Free Sch. Dist.*, 38 PERB ¶¶3006, at 3018 (2005); *County of Nassau*, 35 PERB ¶¶3036, at 3018 (2002).

⁵ *State of New York*, 33 PERB ¶¶3024 (2000), *confirmed sub nom. Benson v Cuevas*, 288 AD2d 542, 34 PERB ¶¶7034 (3d Dep't 2001).

⁶ *Id.*

NYSCOPBA may not rely upon cross-examination of the respondent's witnesses to establish a *prima facie* case.⁷

We have previously established a standard of proof by which to judge the merits of a motion to dismiss and concluded that, with respect to

. . . a motion made to [an ALJ] to dismiss a charge after the presentation of charging party's evidence . . . we would reverse [an ALJ's] decision to grant such a motion unless we could conclude that the evidence produced by the charging party, including all reasonable inferences therefrom, is plainly insufficient even in the absence of any rebuttal⁸

Here, while the ALJ characterized DOCS' action of pre-approving sick leave as a practice rather than a procedure, NYSCOPBA has failed to prove that the alleged past practice involved a mandatory subject of bargaining. The ALJ correctly concluded that our decision in *Town of Carmel*⁹ was dispositive of the instant matter. We agree. In *Carmel*, we held that the employer's action in changing the vacation pick system did not violate the Act because the change affected only the number of employees scheduled to be on duty at specific times without diminishing the amount of their vacation time.

NYSCOPBA argues that the ALJ erred by equating pre-approved sick leave with pre-approved vacation leave because sick leave is a mandatory subject of negotiation. We reject that argument because, while sick leave, like vacation leave, is a function of hours of work and thereby a mandatory subject of negotiation, the charge deals with DOCS' decision to pre-approve sick leave and the restrictions that DOCS placed on the

⁷ *Id.*

⁸ *County of Nassau (Police Dep't)*, 17 PERB ¶13013, at 3029-330 (1984).

⁹ 31 PERB ¶13006 (1998), *confirmed sub nom. Town of Carmel Police Benev. Ass'n, Inc. v PERB*, 267 AD2d 858, 32 PERB ¶17028 (3d Dep't 1999).

pre-approval.¹⁰ As was the case in *Carmel*, pre-approval necessarily constrains an employer's right to set staffing levels, a nonmandatory subject of negotiation.¹¹

We also reject NYSCOPBA's arguments that any cost savings realized by DOCS Downstate reducing the amount of overtime to fill the posts of absent officers cannot be recognized as part of its management prerogative to determine its staffing needs.

NYSCOPBA's argument is that DOCS' change in the manner in which pre-approval for sick leave of four hours or less is granted results in a lack of volunteers who are willing to work less than eight hours of overtime. The record is clear that pre-approval for sick leave of four hours or less has always been conditioned upon the staffing needs of the facility. There is no evidence in the record that DOCS has limited its discretion to determine its staffing needs and, in so doing, determining when to pre-approve sick leave of four hours or less.

For the reasons discussed above, NYSCOPBA's exceptions are denied, and the ALJ's decision is affirmed. Based on our affirmance, we need not reach NYSCOPBA's exception to that part of the ALJ's decision that finds an alternative basis to dismiss the charge -- that neither the Governor nor GOER was shown to have consented to, acquiesced in, or condoned the alleged practice or the change thereto -- and we also do not reach DOCS' cross-exceptions.

¹⁰ *City of Albany*, 7 PERB ¶3078 (1974), *rev'd on other grounds sub nom. City of Albany v Helsby*, 48 AD2d 998, 8 PERB ¶7012 (3d Dep't 1975), *aff'd* 38 NY2d 778, 9 PERB ¶7005 (1975).

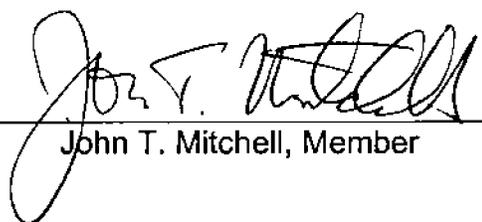
¹¹ *City of White Plains*, 5 PERB ¶3008 (1972).

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

DATED: August 8, 2005
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

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

In the Matter of

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

Petitioner,

- and -

CASE NO. C-5411

VILLAGE OF SUFFERN,

Employer.

**NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel),
for Petitioner**

TERRY RICE, VILLAGE ATTORNEY, for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Village of Suffern (Village) to a decision of an Administrative Law Judge (ALJ) on a petition filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). While CSEA had originally petitioned for a single overall unit of certain unrepresented Village employees, it was agreed by the parties that there would be two units of employees, one of rank-and-file employees and one of supervisory employees, should the ALJ find that certain employees are not managerial and/or confidential within the meaning of §201.7(a) of the Public Employees' Fair Employment Act (Act).

After a hearing, the ALJ issued his decision finding that the duties of certain employees alleged by the Village to be managerial and exempt from representation are supervisory rather than managerial. The ALJ also found that the duties and employment relationship of certain employees alleged by the Village to be confidential did not meet the standard for designation as a confidential employee. The ALJ then defined the most appropriate bargaining units as:

Unit I:

Included: Maintenance Mechanic I, Assistant Maintenance Mechanic, Chief Operator IIA-Water Treatment, Assistant Operator Grade 2-A Waste Water, Motor Equipment Operator I, Motor Equipment Operator II, Sewer and Water System Mechanic I, Auto Mechanic II, Sanitation Worker, Laborer, Clerk, Senior Clerk, Account Clerk/Deputy Treasurer, Senior Clerk Typist, Secretary/Deputy Clerk, Justice Court Clerk.

Excluded: All other employees.

Unit II:

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

Excluded: All other employees.

EXCEPTIONS

The Village excepts to the ALJ's determinations that the alleged managerial employees are, in fact, mid-level supervisors; that the employment duties of certain of the alleged confidential employees do not deprive them of representational rights under the Act; and that the Village Clerk is a managerial employee.

CSEA's response to the exceptions supports the ALJ's determination.

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

FACTS

The facts are set forth in the ALJ's decision¹ and are repeated here only as necessary for our discussion of the exceptions.

On May 21, 2004, CSEA filed a petition for certification of all full-time employees of the employer.² The Village objected to the inclusion of certain employees in the proposed bargaining unit that it considered to be either managerial or confidential.

James J. Giannettino, Village Mayor, testified on behalf of the Village that he oversees the operations of the entire Village. He described the structure of the Department of Public Works (DPW), where a number of the petitioned-for employees are assigned.³ DPW's Director is Joseph Hornik, and he oversees three separate units within the DPW: Street and Refuse, Water, and Waste Water Treatment. Individual employees "run each division or section and report to him."⁴

The Village contends the employees who run each division or section:-- John DeGraw, Motor Equipment Operator II/Supervisor; DeGraw's Assistant, Daniel Haglund,

¹ 38 PERB ¶4006 (2005).

² The petition excluded police officers and public safety dispatchers, who are currently represented.

³ Giannettino described the organizational chart of the Village as composed of the Office of the Mayor, Board of Trustees, Department of Public Works, Recreation, Building, Treasurer, Police, Village Clerk and Village Court.

⁴ Transcript, p. 21.

Motor Equipment Operator II/Assistant Supervisor; Nick Duvo, Sr., Assistant Operator Grade 3A/Supervisor; and Robert Conklin, Maintenance Supervisor I-- should be designated managerial and excluded from CSEA's proposed bargaining unit.

DeGraw is designated Supervisor of Street and Refuse and oversees the unit, has input into work rule changes, and is involved with the departmental budget. With respect to personnel policies, DeGraw can initiate policies that make his department run more efficiently, such as work rules, break times, and anything else that affects his department. DeGraw writes up any proposed discipline and submits it to Hornik. DeGraw has the authority to deduct pay from his employees for an unexcused absence.

Haglund would assume DeGraw's position in his absence. His regular duties include being

[o]n the road making sure that the crews are doing what they're supposed to do... [and] the power to recommend any kind of changes he needs to get his mission accomplished. [Supervisors are] there to manage their department and get optimal performance out of the people they supervise, and they have the latitude to make suggestions and recommendations and implement those once they are deemed a good situation.⁵

Duvo, Sr., is in charge of the waste water treatment plant. He shares the same responsibilities over his unit as DeGraw does in his unit. Conklin is in charge of the Water Department and functions "pretty much the same as the other people... described."⁶

⁵ Transcript, p. 27.

⁶ Transcript, p. 36.

Each of the three, Duvo, Sr., DeGraw and Conklin, make a budget recommendation to Hornik, who then considers the recommendations in preparing the DPW budget. Hornik has to approve any request from an employee for a permanent schedule change.

The procedure for promotion within DPW starts with the supervisor and assistant supervisor compiling a list of people they feel are qualified for promotion. Their recommendations are discussed with Hornik, and when they come to a decision, it is discussed with Giannettino.⁷

Giannettino acknowledged that none of the three, Duvo, Sr., DeGraw or Conklin, sits as a member of the Village work rule committee. The committee members include department heads, the Mayor, and any member of the Board of Trustees available for a meeting.⁸ Duvo, Sr., DeGraw and Conklin serve only as resource persons during negotiations because the actual negotiations are conducted by either the Village Attorney or Giannettino.

The Village also objected to the inclusion of certain support staff from the Village Clerk's office, the Treasurer's office and the Village Court in CSEA's proposed unit on the grounds that they are confidential employees as defined by the Act. They are Christine Anderson, Village Court Clerk; Kathleen Van Sickle, Deputy Village Clerk; Joann Cioffi, Senior Clerk; Barbara Cottiers, Account Clerk/Deputy Treasurer; and Lynne Bryant, Clerk Typist

⁷ Transcript, pp. 63-64.

⁸ Transcript. pp. 68-69.

Anderson is responsible for the administrative work of the Village Court and oversees two employees. At budget time, she prepares a proposed budget and meets with the village budget committee. The Court functions independent of Village supervisory control.

Virginia Menschner, Village Clerk, handles the administrative functions of the Village. The Village has no administrator, nor does it have a human resource officer. The Village Clerk sits at the Board meetings, including executive session when policy matters are discussed. When questioned, Menschner provides her opinion to both the Board of Trustees and to Giannettino. She assigns work to her staff and authorizes leaves from work.⁹

Within the Village Clerk's office, VanSickle serves as secretary to the Mayor and the Village Attorney. She types all their correspondence including letters and notes regarding the status of negotiations. Cioffi reports directly to the Village Clerk. Cioffi is responsible for, and has unrestricted access to, all the personnel records, including health insurance information. She does occasional secretarial work for the Village Attorney as well as the Mayor when Van Sickle is unavailable. Bryant does general typing, answers inquiries from the public at the counter, handles some billing and payroll matters, in addition to other clerical tasks. While performing payroll duties, she has access to time records and personnel records of the Village employees.

⁹ The Village alleges that the ALJ disallowed further testimony about Menscher's managerial duties. The ALJ indicated that he was satisfied with the evidence of Menscher's role as a policy-maker and inquired whether there was any evidence that she had other managerial duties, such as involvement in contract or personnel administration. There was no evidence introduced in support of either of those areas of responsibility. Transcript, pp.89-93.

With regard to the employees in the Village Treasurer's office, Cottiers works directly for the Treasurer in the capacity as the Deputy Treasurer. She assists in calculating pay increases, health insurance rates for budget purposes, and longevity increases. She has access to all the personnel records and has knowledge of the calculations used during negotiations.

Cottiers testified as a rebuttal witness for CSEA. She stated that her civil service title is Account Clerk and that Deputy Treasurer is her "in-house" title. She described her duties as overseeing payroll, preparing water and sewer bills, making general entries relating to accounting and transferring funds.¹⁰ Cottiers was not involved in the calculations for the police bargaining unit negotiations. She does not sit at the negotiating table and is not privy to any collective bargaining issues during negotiations.

Cottiers acknowledged that she does the employees' pay increases for the budget submitted to the Board of Trustees. She prepares different salary comparisons during the negotiations with the dispatchers and she has unrestricted access to the file cabinets in her office. However, she stated that, as far as collective bargaining negotiations, she has no knowledge of whether the Treasurer hides additional money or where it might be hidden in the budget.

DISCUSSION

Any doubt as to the managerial status of an employee must be decided in favor of coverage by the Act.¹¹ The statutory criteria have been applied conservatively in

¹⁰ Transcript, p. 5.

¹¹ Act, §201.7(a). See also *Owego-Apalachin Cent. Sch. Dist.*, 33 PERB ¶13005 (2000).

order to prevent an employee from being denied collective bargaining rights based upon speculation.¹² The Act is quite specific regarding the criteria for managerial designation: the employee must (1) formulate policy, or (2) reasonably be required to assist directly in the preparation for and conduct of collective negotiations, or (3) have a major role in the administration of collective agreements or personnel administration. It is not necessary to satisfy all standards in order to consider an employee managerial.¹³

On this record, the Village failed to establish facts sufficient to designate Duvo, Sr., Conklin, DeGraw and Haglund employees as managerial. At best, Gianettino's testimony established the structure of an administrative team within the DPW. The department head, Hornik, recommends and implements Village policy regarding DPW matters established by the Mayor and Board of Trustees. Any department policy recommendations made by Duvo, Sr., Conklin, DeGraw or Haglund that may impact the Village budget are first submitted to Hornik for his consideration before they are submitted to Gianettino and the Board of Trustees for their review. Without more evidence of these employees' participation in the policy-making decisional process, it cannot be concluded that they are engaged in the formulation of policies that will have a substantial impact upon the affairs and the constituents of the Village government such as would warrant their exclusion from the proposed unit.¹⁴

¹² *Id.*, at 3014.

¹³ *Id.*

¹⁴ *City of Lockport*, 30 PERB ¶3049 (1997); *Village of Kenmore*, 22 PERB ¶3044 (1989); *County of Putnam*, 20 PERB ¶3059 (1987).

As to their role in negotiations, Duvo, Sr., Conklin, DeGraw and Haglund may serve as resource personnel to Gianettino and the Village Attorney who conduct the actual negotiations. However, they function merely to offer technical advice to the real decision-makers.¹⁵ They clearly have no major role in personnel administration. They have a limited role in employee discipline. Their supervision and direction of employees in their individual sections of the DPW and their responsibility to implement the policy determinations of the Mayor and the Village Board clearly establish that they are supervisory employees. However, they do not come within the managerial exclusion by reason of such status.¹⁶

The ALJ determined that neither Cioffi nor Bryant are confidential employees because they do not serve in a confidential capacity to a managerial employee directly involved in contract negotiations or contract and personnel administration. While they work in the office of the Village Clerk, who is managerial by virtue of her policy-making responsibilities, there is no evidence in the record that the Menschner plays any role in contract negotiations or administration or personnel administration. The Village asserts that the ALJ improperly cut-off its introduction of additional evidence as to these duties; however, the record clearly demonstrates that the ALJ simply indicated that there was sufficient evidence in the record of Menschner's policy formulation role and inquired if there was any evidence of other responsibilities that would support a finding that the

¹⁵ *Supra*, note 12.

¹⁶ *See County of Cayuga*, 20 PERB ¶13024 (1987).

employees working in that office were confidential. The only testimony after that point was that Menschcer supervised all the activities of her office, including scheduling and the assignment of tasks.

As Menschner's managerial responsibilities do not include negotiations or contract or personnel administration, Cioffi and Bryant cannot be excluded from the proposed unit because they act in a confidential capacity to the Village Clerk. An employee is confidential for purposes of the Act only when, in the course of assisting a managerial employee who exercises labor relations responsibilities, that employee has access on is privy to information related to collective bargaining, contract administration, or other aspects or labor-management relations on a regular basis which is not appropriate for the eyes and ears of rank and file personnel or their negotiating representative.¹⁷ Cioffi's and Bryant's access to personnel records does not warrant a contrary result, nor does the occasional secretarial work performed for the Mayor and Village Attorney, because there is no record evidence that either acts in a confidential capacity to the Mayor or the Village Attorney.¹⁸

Barbara Cottiers, Deputy Treasurer

An employee assisting a managerial employee in the performance of duties confidential in nature is not necessarily performing those duties in a confidential relationship to the managerial employee.¹⁹ Here, Cottiers unrebutted testimony

¹⁷ *Penfield Cent. Sch. Dist.*, 14 PERB ¶4044, *aff'd*, 14 PERB ¶3082 (1981).

¹⁸ *Town of Ulster*, 36 PERB ¶3001 (2003); *Town of DeWitt*, 32 PERB ¶3001 (1999).

¹⁹ See *Town of DeWitt*, *supra*, note 18.

disputed the scope of duties described by Giannetino. Colliers' civil service title is Account Clerk. She does not do the health insurance calculations nor did she perform any calculations for the police bargaining unit. She does not sit at the bargaining table nor is she privy to issues connected with collective negotiations. There is no evidence that Cottiers' actual duties elevated her assistance to the Village Treasurer to a confidential level.

Christine Anderson, Village Court Clerk

There is no dispute that the Village Justice has no responsibility with regard to formulating Village policy, nor does the Justice have any role in contract negotiations or personnel administration for the Village. We concur with the ALJ that there is no basis to deny Anderson, as the clerk to the Justice, representational rights under the Act.²⁰ Anderson's administrative duties and her supervisory role *vis-a-vis* the other court employees do not disqualify her from coverage.

Based upon the foregoing, the exceptions are denied and the decision of the ALJ is affirmed.

For the reasons set forth above, we find the following units to be most appropriate:

Unit I:

Included: Maintenance Mechanic I, Assistant Maintenance Mechanic, Chief Operator IIA-Water Treatment, Assistant Operator Grade 2A-Waste Water, Motor Equipment

²⁰ *Newburgh Enlarged City Sch. Dist.*, 21 PERB ¶13047 (1989). See also *Village of Sleepy Hollow*, 31 PERB ¶4036 (1998).

Operator I, Motor Equipment Operator II, Sewer and Water System Mechanic I, Auto Mechanic II, Sanitation Worker, Laborer, Clerk, Senior Clerk, Account Clerk/Deputy Treasurer, Senior Clerk Typist, Secretary/Deputy Clerk, Justice Court Clerk.

Excluded: All other employees.

Unit II:

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

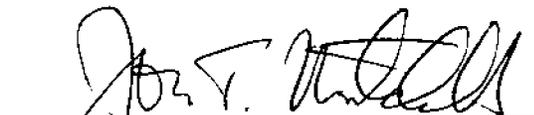
Excluded: All other employees.

IT IS, THEREFORE, ORDERED that the case be remanded to the Director of Public Employment Practices and Representation for further processing consistent with this decision.

DATED: August 8, 2005
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

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

In the Matter of

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

Petitioner,

- and -

CASE NO. U-25061

VILLAGE OF SUFFERN,

Employer.

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

TERRY RICE, ESQ., VILLAGE ATTORNEY, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Village of Suffern (Village) to a decision of an Administrative Law Judge (ALJ) that found a violation of §209-a.1(a) of the Public Employees' Fair Employment Act (Act), on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). The charge alleged that the Village violated the Act when it unilaterally imposed new work rules affecting employees of a proposed bargaining unit that CSEA sought to represent.

The Village filed an answer that, as amended, denied the material allegations of the charge and alleged, as defenses to the charge, that the revised work rules were not

adopted in response to any action taken by CSEA and that CSEA withdrew its initial petition for certification on May 21, 2004, thereby rendering the instant charge moot.

EXCEPTIONS

The Village, in its exceptions, argues that the ALJ erred on the facts and the law. The Village contends that, once CSEA withdrew its petition for certification, the petition was rendered a nullity. CSEA supports the ALJ's decision.

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

FACTS

The undisputed facts are as set forth in the ALJ's decision¹ and are repeated here only as necessary to decide the exceptions.

CSEA notified the Mayor, James J. Giannettino, by letter dated March 4, 2004, that it represented a majority of the Village's full-time employees and requested recognition. In that letter, CSEA also informed Giannettino that "all current terms and conditions of employment for all employees in the previously mentioned titles above must, according to the Taylor Law, remain unchanged until this issue is resolved."²

Giannettino's uncontradicted testimony was that, upon receipt of CSEA's March 4, 2004 letter requesting recognition, he consulted with the Village's legal counsel for an opinion. Giannettino testified that his legal counsel received an opinion from PERB's Director of Public Employment Practices and Representation that the Village could continue with its work in progress on the work rules.

¹ 38 PERB ¶14522 (2005).

² Joint Exhibit 1.

Having received no response to its request for recognition, CSEA, on April 5, 2004, filed with PERB a petition for certification³ seeking to represent all full-time and part-time employees of the employer. On April 22, 2004, the Village's Board of Trustees adopted the revised work rules, entitled Standards and Benefits.⁴ On April 26, 2004, the Village filed its response to CSEA's petition for certification in Case No. C-5394.

On May 14, 2004, CSEA filed this improper practice charge alleging that the Village violated §§209-a.1(a) and (c) when it adopted new work rules, thereby failing to maintain the *status quo* once a question concerning representation arose. The improper practice charge alleged nine separate changes in the work rules.

On May 17, 2004, a conference was conducted by a PERB ALJ in Case No. C-5394. Thereafter, on May 21, 2004, CSEA withdrew its petition in Case No. C-5394 and simultaneously filed a petition for certification as the collective bargaining representative of all full-time employees of the employer.⁵

Following a conference conducted on July 15, 2004, by a PERB ALJ in the instant charge, the Village filed an amended answer to the improper practice charge. That answer generally denied the material allegations and asserted two affirmative defenses: the first alleged that the Village had been preparing the revisions to its work rules since December 2003, and the second argued that because CSEA withdrew its

³ PERB Case No. C-5394.

⁴ Joint Exhibit 3.

⁵ PERB Case No. C-5411. *Village of Suffern*, 38 PERB ¶14006, *aff'd* 38 PERB ¶13016 (August 8, 2005).

petition for certification in Case No. C-5394, the improper practice charge was now moot.

CSEA called Scott Brown as its sole witness. Brown, employed by the Village as a Mechanical Equipment Operator II, testified that he first saw the revised work rules on his supervisor's desk, together with a receipt form. He was given a copy and asked to sign the receipt acknowledging that he received the new rules. He testified that he knew the revised work rules had been implemented because the work week of Village employees had been changed. At the conclusion of Brown's testimony, CSEA rested.

The Village called Giannettino as its sole witness. He testified that, immediately upon taking office, he began an evaluation of the Village's work rules. This process involved members of the Board of Trustees and various department heads, employees, and Village officers. This process commenced about December 5, 2003, and continued to March 15, 2004. The Village Board of Trustees adopted the revised work rules at a special meeting held on April 22, 2004. Giannettino stated that, at the April 22, 2004 Board meeting, the question of CSEA representation was mentioned and discussed.

DISCUSSION

An employer's obligation to maintain the *status quo* starts on the date it is presented with a *bona fide* representation question and continues to the date a wage and benefit package is fixed by collective negotiations with the newly recognized or certified employee organization.⁶ Changes in the *status quo* during the pendency of a representation proceeding violate §§209-a.1(a) and (c) of the Act, even without a

⁶ *Onondaga-Cortland-Madison BOCES*, 25 PERB ¶¶3044 (1992), *rev'd on other grounds*, 198 AD2d 824, 26 PERB ¶¶7015 (4th Dep't), *motion for leave to appeal denied*, 81 NY2d 706 (1993).

specific finding of animus, because such conduct interferes with fundamental statutory rights to representation afforded to public employees by the Act.⁷ “Such changes in employment conditions inherently chill employees in their protected right to seek representation through an employee organization of their own choosing, influence the employees' choice of bargaining agent, and distort any collective negotiations resulting from the certification of a bargaining agent.”⁸

Here, CSEA filed its petition for certification in Case No. C-5394 on April 5, 2004. That petition was withdrawn on May 21, 2004, subsequent to the Village adopting the new work rules on April 22, 2004. The Village argues that the effect of the withdrawal of CSEA's petition on May 21, 2004 was to render the petition a nullity and vitiate any claim that an improper practice occurred prior to the simultaneous filing of CSEA's petition in Case No. C-5411 on May 21, 2004. The Village's argument misapprehends the nature of the violation found by the ALJ, which we here modify and affirm.

While the ALJ held that a *bona fide* question of representation existed from the time that CSEA requested recognition on March 4, 2004, we find that, at the very least, a *bona fide* question of representation existed as of April 5, 2004, the date the petition in Case No. C-5394 was filed. Once that question was presented, the Village had a statutory obligation to maintain the terms and conditions of employment as they existed when the petition was filed until the representation question was resolved.⁹ That the

⁷ *Genesee-Livingston-Steuben-Wyoming BOCES*, 29 PERB ¶¶3065 (1996), *confirmed*, 30 PERB ¶¶7009 (Sup. Ct. Livingston County 1997).

⁸ *Id.*, at 3151.

⁹ *Genesee-Livingston-Steuben-Wyoming BOCES*, *supra*, note 6; *County of Rockland*, 10 PERB ¶¶3098 (1977).

Village had been discussing the changes in work rules prior to the filing of the representation petition that it later implemented after the petition was filed does not change the *status quo* at the time the petition was filed. Neither do such discussions permit the Village to proceed with the implementation of changes that were only in the discussion stage when the representation question was presented.

The withdrawal of the original petition and the simultaneous filing of the current petition subsequent to the Village's implementation of the new work rules, do not, as argued by the Village, moot the charge or render the petition filed a nullity. The May 21 petition differs from the April 5, 2004 petition in that it no longer included part-time employees in the proposed bargaining unit. CSEA therefore renounced its representation interests in those employees as of May 21, 2004.

In *Genesee-Livingston-Steuben-Wyoming BOCES, supra*, at 3151, the Board stated:

To give any employer the legal right to make changes in the employment conditions of its employees during the pendency of a representation question and prior to the certification of a bargaining agent would afford that employer an unfair advantage in any negotiations subsequently required. Were we to extend to [the employer] the privilege it seeks, the [bargaining agent], and all other unions presented with unilateral changes in employment conditions after seeking certification, would be forced to bargain for a restoration of employment conditions which were once possessed by the employees who are seeking representation. There is nothing in any of our case law or in any policy of the Act which would warrant such a result.

The unit appropriateness issue raised by CSEA's petition in Case No. C-5411 is decided by us today and has been remanded to the Director of Public Employment

Practices and Representation for further processing consistent with our decision.¹⁰ The representation question that arose when CSEA filed its original petition in Case No. C-5394, subsequently re-filed as Case No. C-5411, thus remains pending.

Accordingly, we find that the Village violated §§209-a.1(a) and (c) of the Act by implementing changes in employees' terms and conditions of employment while a *bona fide* representation petition was pending concerning those employees.

To the extent that the Village's April 22, 2004 Standards and Benefits apply to employees holding positions in the bargaining unit for which CSEA petitioned on April 5, 2004, and until such time as CSEA abandons, or has abandoned, its interests in representing said employees,¹¹ the Village is hereby ordered to, forthwith:

1. Rescind the Standards and Benefits for Village employees that were adopted by the Village Trustees on April 22, 2004, to the extent that said Standards and Benefits are new or inconsistent with those in effect on April 5, 2004.
2. Restore the Standards and Benefits that were in effect on April 5, 2004.
3. Make the aforementioned employees whole for any wages or benefits they lost as a result of the Village's implementation of the April 22, 2004 Standards and Benefits, with interest at the

¹⁰ *Supra*, Note 5.

¹¹ As CSEA withdrew the representation petition that included part-time employees on May 21, 2004, our order as to those employees is for the time period of April 5, 2004 to May 21, 2004, the time during which a *bone fide* representation question existed as to part-time employees of the Village.

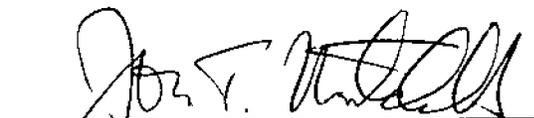
maximum legal rate from April 22, 2004, until such payments are fully satisfied.

4. Purge the aforementioned employees' personnel files of any reference to adverse employment actions taken by the Village as a result of said employees' failure to comply with any directives concerning new Standards and Benefits or any inconsistent with those applicable to said employees on April 5, 2004, and make employees whole for any such adverse employment actions, plus interest at the maximum legal rate.
5. As to part-time employees of the Village, implement paragraphs 1 through 4 of this order for the period from April 5, 2004 to May 21, 2004.
6. Sign and post the attached notice at all locations customarily used to post notices to employees in the unit for which CSEA sought to be recognized as bargaining agent.

DATED: August 8, 2005
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 Village of Suffern (Village) in the unit petitioned for by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the Village will forthwith:

1. Rescind the Standards and Benefits for Village employees that were adopted by the Village Trustees on April 22, 2004, to the extent that said Standards and Benefits are new or inconsistent with those in effect on April 5, 2004.
2. Restore the Standards and Benefits that were in effect on April 5, 2004.
3. Make the aforementioned employees whole for any wages or benefits they lost as a result of the Village's implementation of the April 22, 2004 Standards and Benefits, with interest at the maximum legal rate from April 22, 2004 until such payments are fully satisfied.
4. Purge the aforementioned employees' personnel files of any reference to adverse employment actions taken by the Village as a result of said employees' failure to comply with any new directives or inconsistent with those applicable to said employees on April 5, 2004, and make employees whole for any such adverse employment actions, plus interest at the maximum legal rate.
5. As to part-time employees of the Village, implement paragraphs 1 through 4 of this order only for the period from April 5, 2004 to May 21, 2004.

Dated

By
(Representative) (Title)

Village of Suffern
.....

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 791, INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,**

Petitioner,

-and-

CASE NO. C-5494

TOWN OF BRIGHTON,

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 Teamsters Local 791, International Brotherhood of Teamsters 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: Foreman (Roads), Foreman (Sewer).

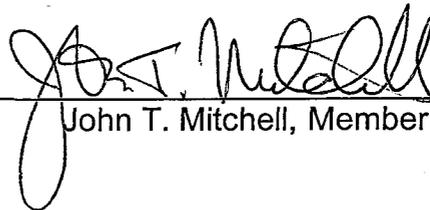
Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 791, International Brotherhood of Teamsters. 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: June 8, 2005
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**VILLAGE OF LAKEWOOD POLICE UNIT,
CHAUTAUQUA COUNTY LOCAL 807, CIVIL
SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-5506

VILLAGE OF LAKEWOOD,

Employer,

-and-

**LAKWOOD POLICE BENEVOLENT
ASSOCIATION, INC.,**

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Village of Lakewood Police Unit,

¹ The Lakewood Police Benevolent Association, Inc. (PBA), petitioned the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to become an affiliate of CSEA. The Village refused to recognize CSEA as the successor to the PBA. The instant petition was then filed.

Chautauqua County Local 807, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

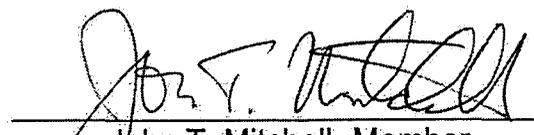
Included: All full-time Police Officers of the Village of Lakewood.

Excluded: All others including the Chief of Police.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Village of Lakewood Police Unit, Chautauqua County Local 807, Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 8, 2005
Albany, New York


Michael R. Cuevas, Chairman


John T. Mitchell, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 463,**

Petitioner,

-and-

CASE NO. C-5515

TOWN OF WHEATFIELD,

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 International Union of Operating Engineers, Local 463 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time employees in the Departments of Highway, Water and Sewer.

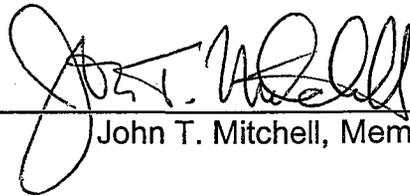
Excluded: Clerical, part-time and seasonal employees, Highway Superintendent, Deputy Highway Superintendent, Superintendent of Water and Sewer, Deputy Superintendent of Water and Sewer (Crew Leader).

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Union of Operating Engineers, Local 463. 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: June 8, 2005
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member