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3-10-2006

## State of New York Public Employment Relations Board Decisions from March 10, 2006

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from March 10, 2006

### Keywords

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

### Comments

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

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In the Matter of

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

Charging Party,

**CASE NO. U-23550**

- and -

**STATE OF NEW YORK (DEPARTMENT OF  
CORRECTIONAL SERVICES - ELMIRA  
CORRECTIONAL FACILITY),**

Respondent.

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**SHEEHAN GREENE CARRAWAY GOLDBERMAN & JACQUES LLP (WILLIAM  
F. SHEEHAN of counsel), for Charging Party**

**WALTER J. PELLEGRINI, GENERAL COUNSEL (AMY M. PETRAGNANI of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the State of New York (Department of Correctional Services-Elmira Correctional Facility) (State) to a decision of an Administrative Law Judge (ALJ) that found a violation of §209-a.1(d) of the Public Employees' Fair Employment Act (Act) on an improper practice charge filed by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) alleging that the State unilaterally changed the manner in which unit employees working vacation relief are scheduled at the Elmira Correctional Facility.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5553**

**UNIONDALE UNION FREE SCHOOL DISTRICT,**

Employer,

-and-

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

Incumbent/Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Cleaner, Attendants, Stock Assistant, Custodians, Bus Drivers, Groundskeepers, Maintenance Helpers, Pool Operators, Recreation Aide, Head Custodians-Elementary Schools, Head Custodian-Middle School, Assistant Head Custodian-Sr. High School, Maintenance Personnel, Senior Maintainer, Supervisory Groundskeeper, Head Custodian-Sr. High School.

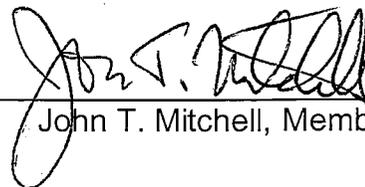
Excluded: All other employees.

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

DATED: March 10, 2006  
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5555**

**BAYPORT-BLUE POINT UNION FREE SCHOOL DISTRICT,**

Employer,

-and-

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

Incumbent/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,

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

IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, 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 Food Service Workers.

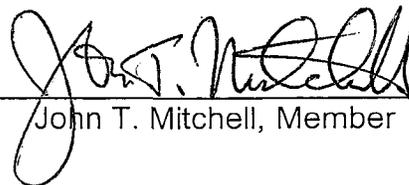
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, 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: March 10, 2006  
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

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

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In the Matter of

**LOCAL 687, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,**

Petitioner,

-and-

**CASE NO. C-5557**

**TOWN OF BOYLSTON,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure 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 Local 687, 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: All full-time Highway Department employees.

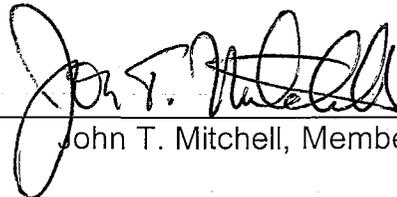
Excluded: Highway Superintendent and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 687, 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: March 10, 2006  
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5558**

**HEWLETT-WOODMERE UNION FREE SCHOOL  
DISTRICT,**

Employer,

-and-

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

Incumbent/Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Teacher Aides, Teacher Assistants, School Monitors, Security Aides.

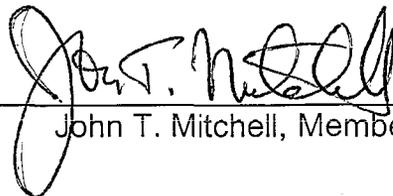
Excluded: All other employees.

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

DATED: March 10, 2006  
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5560**

**GLEN COVE CENTRAL SCHOOL DISTRICT,**

Employer,

-and-

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

Incumbent/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,

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Operational and Maintenance employees set forth in the Collective Bargaining Agreement including Cleaners, Custodian/Groundsman, Head Custodians and Maintenance employees.

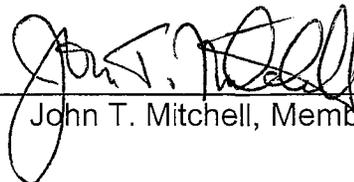
Excluded: All other employees.

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

DATED: March 10, 2006  
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5546**

**TOWN OF CATSKILL,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

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

Included: All full-time and part-time Emergency Medical Technicians and Drivers.

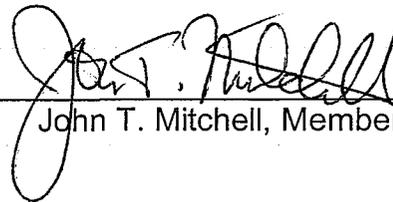
Excluded: Ambulance Administrator, Ambulance Supervisor, per diems and all other Town employees.

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

DATED: March 10, 2006  
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

### EXCEPTIONS

In its exceptions, the State alleges that the ALJ erred in finding that it violated §209-a.1(d) of the Act and, in the alternative, that the collective bargaining agreement provided grounds for deferral.

NYSCOPBA filed a response to the exceptions in support of the ALJ's decision.

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

### FACTS

The facts are set forth in the ALJ's decision<sup>1</sup> and are repeated here only as necessary to decide the exceptions.

On July 16, 2002, NYSCOPBA filed an improper practice charge alleging, *inter alia*, that the position of Vacation Relief Officer (VRO) is a permanent job assignment and, as such, vacancies in the position are awarded to the most senior corrections officers who bid for the position. VROs do not have a permanent schedule; instead they periodically bid for assignments of differing durations. The charge alleges that, by long-standing past practice, a VRO who bids a "partial relief" or a vacation relief of less than two weeks was able to keep his regular days off (RDO) for the entire two-week period; the importance of the practice is that it provides a measure of certainty to a VRO's schedule thereby making it possible to make family plans or to schedule personal matters. The charge further alleges that the practice affects terms and conditions of employment and constitutes a mandatory subject of bargaining.

The parties discussed this practice during the labor-management meeting on November 16, 1993. Prior to June 17, 2002, the date on which it is alleged that the

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<sup>1</sup> 38 PERB ¶4582 (2005).

State unilaterally changed the practice, the parties met to discuss the change. NYSCOPBA alleged that the meetings were not negotiations. Instead, NYSCOPBA claims that the State used these meetings merely to inform NYSCOPBA of the proposed changes.

The State answered, as amended, alleging, *inter alia*, that its actions were consistent with its management of the facility; that, as such, there has been no unilateral change in terms and conditions of employment and; relying upon Articles 6, 24 and 25 of the parties' collective bargaining agreement, the State had satisfied its duty under the Act to negotiate the subject matter.

NYSCOPBA's witnesses testified about the alleged practice. Jack Morrow, a 23-year employee at Elmira Correctional Facility, stated that the VROs' schedules are determined through a bid process based upon seniority. Jack Smith, a Corrections Officer, with 17½ years of service at Elmira, is currently assigned as a VRO. He stated that, during the second week of vacation relief, the VRO retained the same days off as in the first week of the schedule. Thomas Wisneski, a Corrections Officer and NYSCOPBA steward, testified about the meetings that took place in 2002 over the change to the alleged practice. NYSCOPBA's Western Regional Business Agent was the last witness in its direct case. Frederick Kintzel testified about the differences in assigning the VRO position among the 21 facilities in the western part of New York State. Kintzel concluded that the only constant criterion within the facilities is that the VRO is selected by seniority.

At the close of NYSCOPBA's direct case, the State made a motion to dismiss on the grounds of timeliness and lack of proof of a unit-wide practice. The ALJ denied the

motion on the grounds that there was sufficient evidence in the record to survive the motion.

The State called Phillip Hubbard as its sole witness. Hubbard is currently employed at Elmira Correctional Facility in the rank of lieutenant. He has worked at Elmira for the past five and one-half years. At the time of the petition, Hubbard's job duties exclusively involved planning and staffing. In that capacity, he maintained the charting system and assigned officers to jobs.

Hubbard explained the method used to fill job positions. Corrections Officers may bid for certain positions and the successful bid is awarded to the most senior officer.<sup>2</sup> The position available for bid would also determine whether it is on a fixed shift.<sup>3</sup>

Hubbard stated that the position of Resource Officer is used to fill-in for Corrections Officers who do not have a fixed job assignment. He also described the subgroup of Resource Officers, known as "various/various", as those officers who work on various shifts or in various squads. Hubbard stated that the VRO is a bid position awarded by seniority. Conversely, the various/various positions are assigned without bid and usually filled with new or less senior officers. The pool of VROs at Elmira has been reduced from about 48 or 49 officers to 29, while the pool of various/various officers is increasing.

This change in the composition of the resource pool of VROs and various/various was at the request of Deputy Commissioner Lucien J. Leclaire. Leclaire had sent a memorandum, dated December 17, 2001, to all Superintendents requesting that all

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<sup>2</sup> Transcript, p. 96.

<sup>3</sup> Transcript, p. 97.

facilities be in compliance with the department's manpower needs of "at least 50 percent being various/various; 25 percent long-term relief or tour various; and another maximum of 25 percent for bid shift and squad."<sup>4</sup>

Hubbard explained the procedure outlined in Leclaire's memorandum<sup>5</sup> in order to reach the department's manpower needs. He stated that the facility was to attempt to reach an agreement with the union and, in the event such discussions were unsuccessful, the facility was to eliminate the VRO portion of the vacation relief pool by attrition.

During his direct examination, Hubbard stated that, as the result of an arbitration award, once VROs are fully utilized to fill vacant slots due to vacations, the position for the remaining days would be posted for bid and filled by long-term relief officers or various/various.

During his cross-examination, Hubbard testified that the number of VROs had been shrinking even prior to 2002:

Q. Right. But you testified, I take it, that in 2002 you came up with this proposal to make some changes in the vacation relief procedures because there were some holes that were created by the lack of vacation relief officers?

A. Right. What the problem was, the number of vacation relief officers had begun to dramatically shrink.

Q. Right.

A. Which is still shrinking. We're steadied off here for the last six months. But as the numbers moved down--and during that time of the year also we have less vacation during the winter months. As they're heading into the summer vacation schedule, we need to have maximum use of our vacation relief officers, which means we cannot

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<sup>4</sup> Transcript, p. 105.

<sup>5</sup> Respondent's Exhibit 4.

have vacation relief officers bidding a one week vacation and being resource the next week when we have vacations still waiting to be covered.

- Q. Right. But that was because the number of vacation relief officers had drastically been reduced, right?
- A. Well, that made the effect more so. But it was even in effect prior to that. It's just we were stealing officers from the various/various pool to cover vacations prior to 2002.<sup>6</sup>

Hubbard testified that, as a result of Leclaire's memorandum, meetings took place with NYSCOPBA to discuss the situation.

Edward Lattin testified for NYSCOPBA on redirect examination. Lattin, a Corrections Officer for approximately 22 years, with the last 12 years spent at Elmira, is the chief sector steward for NYSCOPBA and identified for the record (Charging Party's Exhibit 9) a grievance response, dated November 30, 1993, filed by Officer Woodcock. The exhibit was entered into the record as further evidence of the long-standing nature of the practice in dispute.

### DISCUSSION

NYSCOPBA alleges that the State unilaterally changed a practice that was originally discussed in a labor/management meeting in November 1993. The State contends that NYSCOPBA has failed to prove a practice or, in the alternative, the collective bargaining agreement provides a remedy to resolve the dispute.

The ALJ concluded that the State instituted a procedure for VROs that reduced their opportunities for the same days off during two-week assignments. The ALJ determined that the State had, therefore, interfered with the VROs time off which is a mandatory subject of negotiation. In support of this determination, the ALJ cited *City of*

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<sup>6</sup> Transcript, pp. 135-6.

*Albany*,<sup>7</sup> as authority and distinguished *Town of Carmel*<sup>8</sup> (hereafter, *Carmel*) on which the State relied.

In *City of Albany, supra*, the Board held a demand seeking paid leave for absences occasioned by bereavement, personal concerns, jury duty, military service and other recited reasons is a demand for time off and, as such, a term and condition of employment. *Carmel* involved a vacation pick system and whether the Town's unilateral change violated the Act. In *Carmel*, the Board affirmed the ALJ's dismissal of the charge because the issue involved the Town's managerial prerogative regarding staffing. The Board decided that the Town could change its prior practice regarding approval of vacation leave to restrict overlapping vacations so that it could increase the number of employees scheduled to be on duty at any given time. Simply put, the Board concluded that the issue involved when a vacation may be taken and not the amount of time an employee in the unit is entitled to take.

In *Amherst Police Club, Inc.*<sup>9</sup> (hereafter, *Amherst*), the Board reviewed whether the Police Club's demand to permit officers to select shift assignments which they would hold for a year constituted a condition of employment because it facilitated the employees making plans for the use of nonworking time. The Board determined such a demand to be nonmandatory because it interfered with the Town's right to change

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<sup>7</sup> 7 PERB ¶¶3078 (1974), *annulled*, 89 LRRM 2914 (Sup Ct Albany County), *rev'd*, *City of Albany v. Helsby*, 48 AD2d 998 (3d Dept 1975), 8 PERB ¶¶7012, *aff'd*, 38 NY2d 778 (1975), 9 PERB ¶¶7005 (1976).

<sup>8</sup> 31 PERB ¶¶3006 (1998), *conf'd*, 267 AD2d 858 (3d Dept 1999), 32 PERB ¶¶7028 (1999).

<sup>9</sup> 12 PERB ¶¶3071 (1979).

schedules at any time during the year or to replace absent policemen in order to maintain desired deployment.

We find the rationale in the *Carmel* and *Amherst* applicable here. We find the alleged practice involves a nonmandatory subject of bargaining. The determination whether a particular work rule constitutes a mandatory or nonmandatory subject of bargaining involves identifying the subject matter and then balancing the competing interests of the employer and employees.<sup>10</sup> In this case, the subject matter is the ability of VROs to maintain their RDO when they bid a partial relief of less than two weeks. The interest of the VROs in maintaining a fixed RDO must then be balanced against the manpower concerns of the facility in order to fill shift assignments due to vacations. The ALJ determined that the issue simply involved the VROs' time off. The ALJ's analysis and reliance on *City of Albany, supra*, for support of this proposition is misplaced. The issue here is not whether the unit employees may take paid time off but rather whether they can fix in time the RDOs without consideration of the facilities' manpower needs. As we determined in *Carmel* and *Amherst*, it is for the State to determine the manpower needs of its facilities in order to maintain desired deployment.

NYSCOPBA's insistence on the VROs maintaining their fixed RDO is inconsistent with our decisions in *Carmel* and especially *Amherst*. Here, NYSCOPBA seeks to secure a fixed RDO for the VROs who elect not to bid for a full two-week job opportunity in the face of a continuously shrinking pool of VROs and an increasing number of vacation slots to fill. The ostensible purpose set forth in paragraph 9 of the improper practice charge:

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<sup>10</sup> *State of New York (Dept of Transportation)*, 27 PERB ¶3056 (1994).

[i]s to provide a measure of certainty to one's schedule; if their days off can change with a two-week period it becomes impossible for corrections officers to make family plans or to otherwise anticipate and schedule their affairs.

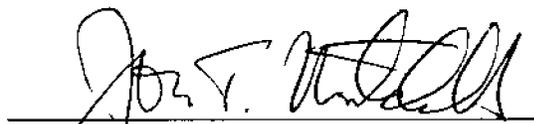
We note from the parties' collective bargaining agreement the various leave provisions which provide unit members with the opportunity to make plans and schedule affairs. Thus, when the interests of the VROs in maintaining a fixed RDO is balanced with the interests of the State to provide corrections service by filling the vacant job openings through vacation leave and any other vacancies, we find that the interests of the State predominate.

For the reasons discussed above, the State's exceptions are granted and we reverse the decision of the ALJ.

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

DATED: March 10, 2006  
Albany, New York

  
\_\_\_\_\_  
Michael R. Cuevas, Chairman

  
\_\_\_\_\_  
John T. Mitchell, Member

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

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In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,  
LOCAL 1000, AFSCME, AFL-CIO, ERIE COUNTY  
WHITE COLLAR UNIT,**

Charging Party,

- and -

**CASE NO. U-24659**

**COUNTY OF ERIE and ERIE COMMUNITY COLLEGE,**

Respondent,

- and -

**ADMINISTRATORS ASSOCIATION OF ERIE  
COMMUNITY COLLEGE, LOCAL 3300 UNITED  
AUTO WORKERS,**

Intervenor.

---

**NANCY E. HOFFMAN, GENERAL COUNSEL (PAUL BAMBERGER of  
counsel), for Charging Party**

**SAELI & TOLLNER, PC (SARAH E. TOLLNER of counsel), for Respondent  
Erie Community College**

**GEORGE M. LONCAR (ERNEST J. GAWINSKI of counsel), for Respondent  
County of Erie**

**SAMUEL WILLIAMS, for Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Erie Community College (College) to a decision of an Administrative Law Judge (ALJ), on a charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Erie County White Collar Unit (CSEA), finding that the College and the County of Erie (County)

(together, joint employer), violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when work performed by CSEA unit employees was unilaterally transferred to College employees in another bargaining unit.<sup>1</sup>

### EXCEPTIONS

The College excepts to the ALJ's decision, on the law and the facts, arguing that the ALJ erred in defining the unit work in issue in the improper practice charge and in applying an incorrect legal standard.<sup>2</sup> CSEA filed a response to the exceptions which supports the ALJ's decision. The County and the Intervenor have not responded.

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

### FACTS

The facts are set forth in the ALJ's decision<sup>3</sup> and are repeated here only as necessary to decide the exceptions.

CSEA represents employees in a County-wide unit, including certain employees at the College, as well as the buyer title in the County's Division of Purchase. CSEA's collective bargaining agreement is with the County. The Intervenor represents only employees of the joint employer at the College, including the Business Manager and Assistant Business Manager titles.

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<sup>1</sup> The work was transferred to the College Business Manager and Assistant Business Manager, titles in the unit represented by the Administrators Association of Erie Community College, Local 3300, United Auto Workers (Intervenor).

<sup>2</sup> In response to a motion to dismiss by CSEA, we found that the College, as a public employer within the meaning of the Act, had standing to file exceptions to the ALJ's decision. *County of Erie and Erie Community College*, 38 PERB ¶13035 (2005).

<sup>3</sup> 38 PERB ¶14555 (2005).

Since at least 1987, the buyers in the Division of Purchase exclusively handled requisitions of the College for purchases over \$250, in the same manner as other County purchases, according to guidelines set by the County Charter and the County's Director of Purchase.<sup>4</sup> Prior to September 2003, the College's Business Manager reviewed and processed only purchase requests from College departments in amounts of \$250 or less.

On March 5, 2003, the County and the College entered into a transition agreement to provide the College with greater autonomy in purchasing, personnel and payroll functions. The stated intent of the agreement was to streamline the handling of the College's business affairs, reduce costs and improve the quality of its services, so as to facilitate the unconditional reaccreditation of the College by the Middle States Association. The transition agreement provided for the transfer of the County contribution to the College's operating budget to be paid to the College in one lump sum on an annual basis. It also gave the College the authority to perform its own purchasing, personnel and payroll functions, subject to applicable state law and regulations and enactment of a draft local law by the Erie County Legislature.

On March 6, 2003, the County Legislature enacted County of Erie Local Law No. 3-2003. This local law codified the transition agreement and provided the authority, as here relevant, to the College Board of Trustees:<sup>5</sup>

A. 1. . . . to make all purchases and contracts, including leases of personal property, for all furniture, appliances, fixtures, equipment, materials and supplies necessary for the efficient operation of the college to the extent that appropriations have been provided therefor in the college budget. The Board . . . shall

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<sup>4</sup> Bidding on major construction projects at the College, and other County departments, is handled by the County's Department of Public Works.

<sup>5</sup>Local Law No. 3-2003, Section 2 (amending §1613 of the Erie County Charter).

designate an individual to be its purchasing agent who shall supervise and manage the personnel responsible for purchasing duties and perform the responsibilities hereunder in conformity with the provisions of this section, generally accepted principles of management and procurement, and policies established from time to time by the Board. Except as otherwise provided by law, authority to enter into contracts for capital improvements and real property leases of college property shall continue to be vested in the county.

2. The procedures for purchasing, including public advertising and competitive bidding, shall be the same as those set forth in section three hundred six of the charter and section 3.06 and 3.07 of the administrative code as these sections now exist or hereafter may be amended, except that where those sections specify that actions may be taken by the county legislature, the action of the Board shall be substituted as sufficient, and where those sections specify that action may be taken by the county executive, the division of purchase and/or the purchasing director, the action of the purchasing agent of the college shall be substituted as sufficient.

3. The Board shall have the authority to approve all contracts for professional, technical and other consultant services to be rendered to or for the college, which are not required to be competitively bid . . . provided that such services to be rendered to or for the college shall not exceed \$50,000. . . .

4. No services provided by employees of the college shall be contracted out without complying with appropriate existing collective bargaining agreements and following the procedures required by section two hundred nine of the civil service law of the state of New York, if applicable.

B. 1. Subject to the civil service law and rules and to all provisions of applicable collective bargaining agreements, the Board shall have the power, through its existing budgetary process, to create and abolish full-time and part-time permanent or temporary positions of employment. The Board . . . will designate a personnel agent who shall act in place of the Erie County commissioner of personnel and have the same powers and duties of the commissioner of personnel . . . with regard to employment and personnel matters within the college.

3. Notwithstanding any provision contained in this subsection B, the county and the college shall negotiate on behalf of the college, and the county attorney shall approve as to form, all collective

bargaining agreements and other contracts with civil service unions to which the county is a signatory.

The local law further provided that:

Nothing contained in this local law shall prohibit the county, at the request of the college, from contracting with the college to perform one or more functions, or portions thereof, on behalf of the college.

Pursuant to the Transition Agreement, in September 2003, the College's Business Manager, Paul Danieu, began processing all of the College's purchasing. Since the hiring of Jo-Ann Barris as an Assistant Business Manager, all purchasing has been performed by her, under the general direction of the Business Manager. Barris must utilize the same procedure as that used by the County buyers in performing purchasing for the College; that is, the procedure as set by the County Charter and County Director of Purchase.

#### DISCUSSION

With respect to the unilateral transfer of unit work, the initial essential questions are whether the work had been performed by unit employees exclusively (footnote omitted) and whether the reassigned tasks are substantially similar to those previously performed by unit employees. If both these questions are answered in the affirmative, there has been a violation of §209-a.1(d), unless the qualifications of the job have changed significantly. Absent such a change, the loss of unit work to the group is sufficient detriment for the finding of a violation.<sup>6</sup>

Here, the work in issue is the purchasing of all goods and services for the College, valued at over \$250, which must be done pursuant to informal or formal bidding procedures set forth in the applicable charter sections and local laws, *supra*. That the buyers perform additional tasks that have not been reassigned to the Business Manager and Assistant Business Manager does not, as argued by the College, change

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<sup>6</sup> *Niagara Frontier Transportation Auth*, 18 PERB ¶13083, at 3182 (1985).

the definition of the work that must be analyzed.<sup>7</sup> There is no dispute that prior to September 2003, all purchases or contracts for good or services valued at over \$250 for the College were done by the buyers in CSEA's bargaining unit. This work is definable by a discernible boundary which establishes the CSEA unit's exclusivity over it.<sup>8</sup> The purchase of goods and services under \$250 by the College Business Manager and the bidding on construction projects by the Department of Public Works are not sufficient to destroy CSEA's exclusivity.<sup>9</sup>

Since September 2003, the in-issue work has been performed by non-unit employees, specifically the College's Business Manager and Assistant Business Manager. There is, likewise, no dispute that it is the same work as previously performed by the buyers in the County's Division of Purchase. Therefore, based upon *Niagara Frontier*, there is a violation of §209-a.1(d) of the Act unless there has been a change in the qualifications for the job. We find that there has been no change.

As pointed out by the College in its exceptions, the Assistant Business Manager and the Business Manager have higher educational requirements for their positions and perform other duties not performed by the buyers. This does not mean that the qualifications for the job have changed. When we speak of a change in qualifications, we mean that the employer has decided, in determining how and by whom its work is to

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<sup>7</sup> *City of Rome*, 32 PERB ¶¶3058 (1999), *revd on other grounds*, 33 PERB ¶¶7002 (Sup Ct Albany County 2000), *affd* 283 AD2d 817, 34 PERB ¶¶7001 (3d Dept 2001), *lv denied*, 96 NY2d 936, and 97 NY2d 607, 34 PERB ¶¶7039 (2001).

<sup>8</sup> We first recognized the concept of discernible boundary to define unit work in *Town of West Seneca*, 19 PERB ¶¶3028 (1986). Recognition of a discernible boundary around unit work allows a union to maintain its exclusivity within that boundary even if there is no exclusivity over the job function beyond that boundary. *Union-Endicott Cent Sch Dist*, 26 PERB ¶¶3075 (1993).

<sup>9</sup> See *County of Westchester*, 31 PERB ¶¶3035 (1998).

be performed, that employees with different qualifications will perform the work better or that the nature of the work is changed and must, necessarily, be performed by employees with different qualifications.<sup>10</sup> That tasks which are substantially similar to unit work are reassigned to employees with different job qualifications does not mean that the qualifications for performing the work have changed.<sup>11</sup> It is also irrelevant that the employees to whom the work has been reassigned perform additional or different tasks than the employees from whom the work was taken.

The College erroneously focuses on the local law and the transition agreement entered into between the County and the College as authority for the transfer of the in-issue work. The County and the College were under no obligation to make the transfer. The transition agreement was entered into before the local law was enacted; indeed, the local law appears to have been enacted to effectuate the terms of the transition agreement. In any event, both the agreement and the local law provide that the College may continue to utilize the County to perform services and that the agreement and the local law are subject to the provisions of the Civil Service Law and the relevant collective bargaining agreements. The County and the College could have agreed to give more financial autonomy to the College and still utilized the buyers in the County Division of Purchase or could have assigned a buyer to the College. Neither the transition agreement nor the local law relieves the joint employer from its obligation to negotiate a transfer of bargaining unit work with CSEA.

Lastly, the College focuses on the ALJ's failure to call witnesses. The College, as part of the joint employer, called no witnesses itself. It is incumbent upon the party

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<sup>10</sup> See *West Hempstead Union Free Sch Dist*, 14 PERB ¶13096 (1981).

<sup>11</sup> *State of New York (Div of Corr Serv)*, 27 PERB ¶13055 (1994), *affd* 220 AD2d 19, 29 PERB ¶17008 (3d Dept 1996).

raising an argument to produce evidence in support of that argument; the burden does not rest upon the hearing ALJ.

We, therefore, find that the College violated §209-a.1(d) of the Act when it unilaterally transferred CSEA bargaining unit work to the College's Business Manager and Assistant Business Manager.

Based on the forgoing, we deny the College's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the joint employer:

1. Immediately restore to employees in the bargaining unit represented by CSEA, all purchasing work for Erie Community College which was previously performed by the buyers in the County's Division of Purchase;
2. Make CSEA unit employees whole for the loss of wages, benefits and conditions of employment, if any, with interest at the maximum legal rate, caused by the County's reassignment of buyer work from CSEA unit employees to the College's Business Manager and/or Assistant Business Manager; and
3. Sign and post the attached notice at all locations normally used to communicate information to employees in the CSEA unit.

DATED: March 10, 2006  
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 Erie and Erie Community College represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Erie County White Collar Unit that the County of Erie and Erie Community College will:

1. Immediately restore to employees in the bargaining unit represented by CSEA, all purchasing work for Erie Community College which was previously performed by the buyers in the Division of Purchase; and
2. Make CSEA unit employees whole for the loss of wages, benefits and conditions of employment, if any, with interest at the maximum legal rate, caused by the County's reassignment of buyer work from CSEA unit employees to the College's Business Manager and/or Assistant Business Manager.

Dated . . . . .

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

County of Erie and Erie Community College

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*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.*