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State of New York Public Employment Relations Board Decisions from November 8, 2006

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from November 8, 2006

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

In the Matter of

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

Charging Party,

CASE NO. U-23685

- and -

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

Respondent.

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

**WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N. VOLFORTE 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 its improper practice charge which alleged that the State of New York (Department of Correctional Services) (State) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the practice and procedure by which corrections officers were assigned to perform

vacation relief functions at Greene Correctional Facility.

EXCEPTIONS

NYSCOPBA excepts to the ALJ's decision, arguing that the ALJ erred by finding that the subject-matter of NYSCOPBA's charge is a nonmandatory subject of negotiations and by noting that the matter might appropriately be dismissed or deferred because of lack of jurisdiction. The State supports the ALJ's decision and argues that the charge should be dismissed for lack of jurisdiction.

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

FACTS

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

Greene Correctional Facility (Greene) is a medium/maximum security facility operated by the Department of Correctional Services (DOCS). Of the 430 correction officers assigned to Greene, 113 officers make up the "resource pool". Officers assigned to the resource pool fall into three categories: vacation relief officers, training relief officers and various/various resource officers. Correction officers in the resource pool are responsible for filling-in for correction officers who are absent due to vacations, sick or military leave, or other short or long-term absences.

Vacations are taken in two-week blocks of time. Vacation bids are made in

¹ 39 PERB ¶4571 (2006).

October of each year. Once the vacation bids are scheduled, the staffing lieutenant posts the vacation vacancies every two weeks during the year. Vacation relief officers are given the first opportunity to bid on filling vacation slots. If there are not enough vacation relief officers to fill all of the upcoming vacations in a two-week period, the various/various resource officers are assigned to any unfilled vacation slots.

NYSCOPBA and the State are parties to a 1999-2003 collective bargaining agreement which provides, in relevant part, at section 25.4:

Any arrangement which is the subject of a memorandum of understanding, letter of understanding or joint meeting minutes shall not be altered or modified by either party without first meeting and discussing with the other party at the appropriate level in a good faith effort to reach a successor agreement. Any alterations or modifications to a written local labor/management agreement as described in this section may occur no sooner than five days after such meeting and discussion and subsequent written notification of the changes received by the other party. Implementation of such alterations or modifications shall not occur without adherence to the procedures herein described.

Pursuant to section 25.4, a labor/management agreement was entered into at Greene on October 9, 1987, setting the number of vacation relief bids at 42. That agreement was revised by a subsequent labor/management agreement on June 4, 1996, but the number of vacation relief bids remained at 42.

In the fall of 2001, the parties met to discuss issues related to vacation relief positions. At that time, NYSCOPBA was aware of DOCS' requirement that the resource pool at each correctional facility be comprised of 50% various/various resource officers,

25% bid shift and 25% bid shift and squad (vacation relief officers). The resource pool at Greene did not comply with the 50-25-25 requirement, as the vacation relief officers made up more than 25% of the resource pool. In August 2002, local management made a proposal to NYSCOPBA to bring Greene into compliance but the proposal was rejected by NYSCOPBA. Thereafter, management at Greene determined to reduce the number of vacation relief officer positions by attrition. As a result, in August 2002, five vacant vacation relief officer positions were not offered for bid, thereby reducing the number of vacation relief officer positions to 37. The instant charge was then filed.

DISCUSSION

The ALJ opined in a footnote that the June 1996 labor/management agreement might be characterized as “an agreement of any kind”, as defined in §205.5 (d) of the Act, which would divest PERB of jurisdiction or at least warrant a jurisdictional deferral, pursuant to *Herkimer County BOCES*.² She did not reach the jurisdictional issue because of her dismissal of the improper practice charge on the merits.

In *City of Albany*,³ we held that:

we are obliged to [reach the jurisdictional] issue because it concerns our power to entertain the remaining unilateral change allegation. Pursuant to §205.5(d) of the Act, the Legislature has made clear that it is not within our power to either entertain alleged contract violations or enforce a collective bargaining agreement.

² 20 PERB ¶¶3050 (1987).

³ 25 PERB ¶¶3006, at 3020 (1992).

We need to first address the jurisdictional defense raised by the State because it brings into question our power to hear the charge.⁴ Section 205.5(d) of the Act denies PERB jurisdiction over alleged violations of an agreement between an employer and an employee organization that do not otherwise constitute improper practices. This section of the Act is triggered if an agreement is a reasonably arguable source of right to a charging party with respect to the actions complained of in its improper practice charge.⁵

NYSCOPBA argues that there was a long-standing practice in effect before the 1996 labor-management agreement that required that there be an adequate number of vacation relief officers to cover all vacations taken by correction officers in the facility and that it is the State's change in that practice that is the basis of the charge, not alterations in the labor-management agreement. The State argues that the 1996 labor-management agreement and its 1987 predecessor are agreements within the meaning of §205.5 (d) of the Act and that PERB is thereby divested of jurisdiction to hear this charge. The ALJ also opined that the labor-management agreement was an "agreement of any kind" which we might not have jurisdiction to enforce.

The 1996 labor-management agreement and its predecessor, the 1987 labor-management agreement, set the number of vacation relief officers at 42. It is the State's

⁴ *State of New York (DOH)*, 25 PERB ¶¶3038 (1992). *Cf.*, *State of New York (DOCS-Elmira Corr Fac)*, 39 PERB ¶¶3004 (2006).

⁵ *State of New York--Unified Court System*, 25 PERB ¶¶3035 (1992); *County of Nassau*, 24 PERB ¶¶3029 (1991).

decision not to post five vacant vacation relief officer positions for bid that prompted the instant charge to be filed. It is not a change in a past practice, as NYSCOPBA attempts to characterize the State's action, but a change in an existing agreement that actually forms the basis of the improper practice charge. The parties' practice, whatever it was before 1987, was memorialized in an agreement in 1987 that was continued, in relevant part, in the 1996 labor-management agreement.⁶

A determination of whether the State breached that agreement is not within our jurisdiction given the limitations set forth in §205.5(d) of the Act. NYSCOPBA argues that the agreement is no longer in effect as the State repudiated the agreement by failing to post the five vacant vacation relief officer positions. A meritorious repudiation claim arises only in "extraordinary circumstances" in which a party to the contract denies the existence of an agreement or acts in total disregard of the contract's terms without any colorable claim of right.⁷ The State has not denied the existence of an agreement; indeed, it asserts that there is an agreement and that it has acted according to the terms of the agreement

We, therefore, determine that NYSCOPBA's improper practice charge raises a question of enforcement of the labor-management agreement over which PERB has no

⁶ Transcript, pp. 37-38.

⁷ *State of New York (SUNY College at Potsdam)*, 22 PERB ¶3045 (1989); *Monticello Cent School Dist*, 22 PERB ¶3002 (1989); *Connetquot Cent School Dist*, 21 PERB ¶3049 (1988); *City of Buffalo*, 19 PERB ¶3023 (1986); *Copiague Union Free School Dist*, 13 PERB 3081 (1980).

jurisdiction. However, the parties have, by their 1999-2003 collective bargaining agreement, created a procedure for resolving disputes arising from the alterations or modifications of agreements reached by labor-management committees. We find that it is appropriate, therefore, under our decisions in *Herkimer County BOCES, supra*, and *Town of Carmel*⁸ to defer to the parties' collective bargaining agreement the dispute that has arisen from the allegation that the State "altered" the number of vacation relief officers set forth in the parties' 1987 and 1996 labor management agreements.⁹

Were we to reach the merits of the charge, which has been the subject of other improper practice charges,¹⁰ we would affirm the ALJ's decision. Relying on the Board's decision in *Town of Blooming Grove* (hereafter, *Blooming Grove*)¹¹, the ALJ found that the State was privileged to determine that there would be fewer employees at Greene designated as vacation relief officers. In *Blooming Grove*, we held that it is an employer's prerogative to determine the number of employees that it needs, in each job category, but that the means that the employer then utilizes to determine which employees are assigned to meet staffing needs in each category must be bargained. The ALJ, therefore, held that the State's action was not negotiable as it had not altered the procedure used for the assignment of vacation relief bids, but had simply decided

⁸ 29 PERB ¶13073 (1996).

⁹ See, *State of New York (DOCS)*, 30 PERB ¶14601 (1997). *But see, State of New York (DOCS-Franklin Corr Fac)*, 38 PERB ¶14519 (2005).

¹⁰ See, *State of New York (DOCS-Elmira Corr Fac)*, *supra* note 4;

¹¹ 21 PERB ¶13032 (1988).

that there would be fewer vacation relief officers in the resource pool from which those vacancies were filled.

NYSCOPBA argues that vacation relief is not a job category but rather a means of assigning employees and that *Blooming Grove* is inapposite. It characterizes the charge as dealing with the method by which employees are selected to perform work, a mandatory subject of negotiations.¹² We do not agree.

The fact that only those correction officers in the job category of vacation relief officer or various/various resource officer are eligible for assignment to vacation relief vacancies demonstrates that vacation relief officer is a job category and that vacation relief vacancies are the assignments. The ALJ correctly noted that while the State had changed the number of vacation relief officers, the order of assignment and the assignment procedures applicable to the remaining vacation relief officers and others in the resource pool had remained unchanged. As there has been no change in method or means of making vacation relief assignments or in the job categories eligible for such assignments, there is no violation of §209-a.1(d) of the Act.

Based on the foregoing, we deny NYSCOPBA's exceptions and, as modified, affirm the decision of the ALJ.

For the reasons set forth above, the charge is conditionally dismissed subject to

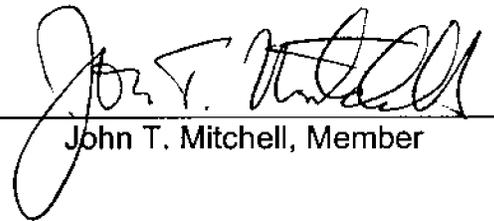
¹² See *City of White Plains*, 5 PERB ¶3008 (1972).

a motion to reopen in accordance with our decision herein.¹³ SO ORDERED.

DATED: November 8, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

¹³*New York City Transit Auth (Bordansky)*, 4 PERB ¶3031 (1971).

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

In the Matter of

JONES BEACH LIFEGUARD CORPS,
Petitioner,

-and-

CASE NO. C-5339

STATE OF NEW YORK,
Employer,

-and-

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

-and-

**NEW YORK STATE LAW ENFORCEMENT OFFICERS
UNION, DISTRICT COUNCIL 82, AFSCME, AFL-CIO,**
Intervenor.

In the Matter of

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

-and-

CASE NO. C-5443

STATE OF NEW YORK,
Employer,

-and-

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

Incumbent/Intervenor.

JAMES R. SANDNER, GENERAL COUNSEL (MARILYN S. SYMOND of counsel) for Petitioner

WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N. VOLFORTE and JAMES WALSH of counsel) for Employer

SHEEHAN GREENE CARRAWAY GOLDBERMAN & JACQUES, LLP (NANCY J. BURRITT of counsel) for Intervenor New York State Correctional Officers and Police Benevolent Association, Inc.

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Petitioner Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO

ENNIO J. CORSI, ESQ., for Intervenor New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO

BOARD DECISION AND ORDER

This case comes to us on exceptions of the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) to the decision of the Administrative Law Judge (ALJ) granting, in part, the petition for certification and decertification of the Jones Beach Lifeguards Corps (Lifeguard Corps) in Case No. C-5339, which sought to remove all lifeguard titles from the Security Services Unit (SSU) of the State of New York (State) and to be certified as the exclusive bargaining agent for those titles.¹ NYSCOPBA also excepts to the ALJ's decision with regard to Case No. C-5443, the petition for certification and decertification of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) which sought to remove certain security officer,

¹ New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO intervened as a party in Case No. C-5339.

safety officer, and other titles² from the SSU and to add these titles to the Operational Services Unit (OSU), which CSEA represents. The ALJ issued one decision and determined only that the titles sought to be removed in each petition should be fragmented from the SSU and did not determine the unit in which they should be placed.

EXCEPTIONS

NYSCOPBA excepts to the ALJ's decision regarding the disposition of each case, alleging a mis-interpretation of the law, particularly the ALJ's conclusion that the difference in impasse resolution procedures available to the titles sought to be fragmented and the remainder of the unit members alone is a sufficient basis for fragmentation and to the ALJ's failure to distinguish the Board's decisions on fragmentation from those involving unit placement/unit clarification or initial uniting. CSEA responds that NYSCOPBA's exceptions are without merit and that the exceptions are procedurally defective. Neither the State nor Council 82 filed a response to the exceptions.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ.³

² Those titles are as follows: Campus Public Safety Officer¹, Capital Police Communications Specialist, Capital Police Communications Specialist Trainee, Park Ranger, Parks and Recreation Forest Ranger, Safety and Security Officer 1, Safety and Security Officer 1 Spanish Language, Safety and Security Officer Trainee Spanish Language, Security Hospital Senior Treatment Assistant, Security Hospital Senior Treatment Assistant Spanish Language, Security Hospital Treatment Assistant, Security Hospital Treatment Assistant Spanish Language, Security Officer, Security Officer Spanish Language, Security Services Assistant 1, Security Services Assistant 2, Senior Security Officer, Ski Patrolman 1, Ski Patrolman 2, Ski Patrolman 3, Special Game Protector, Warrant and Transfer Officer.

³ 39 PERB ¶4014 (2006).

FACTS

On September 23, 2003, the Lifeguard Corps filed a petition for certification and decertification in Case No. C-5339, seeking to remove the titles of Assistant Chief Lifeguard, Chief Lifeguard, Lifeguard, Lifeguard 2, Supervising Lifeguard (LISPRC), Field Lieutenant of LISPRC Lifeguards, Field Captain of LISPRC Lifeguards, and Area Captain of LISPRC Lifeguards from the SSU represented by NYSCOPBA and to be certified as exclusive bargaining agent for a unit consisting of those titles.

On August 20, 2004, CSEA filed a petition for certification and decertification in Case No. C-5443, seeking to remove certain titles (see footnote 1) from the SSU and add them to the OSU.

In a letter to the parties dated December 17, 2004, the ALJ confirmed, among other issues not here relevant, that with respect to Case No. C-5443: “The petitioner’s only basis for the requested fragmentation is conflict of interest based solely on the petitioned-for titles’ ineligibility for interest arbitration.” With respect to Case No. C-5339, the ALJ advised that “...the following issues will now be addressed: the effect of the fact that the titles petitioned for are not eligible for interest arbitration while others in the present bargaining unit are”

The ALJ then established that the record for the purpose of deciding these issues should consist of the pleadings in each of the cases, the 1999-2003 collective bargaining agreement covering the SSU, and the ALJ’s February 23 and December 17 2004 letters.

In a letter dated March 7, 2004, the ALJ established a revised briefing schedule.⁴ The parties filed briefs with the ALJ and the matter was then decided on the record as established by the ALJ.

DISCUSSION

As a matter of procedure, CSEA's response to NYSCOPBA's exceptions that the "Interim Decision" of the ALJ is not an order from which exceptions may be taken must be addressed first as it raises the issue of whether the exceptions are properly before the Board. Section 212.4(h) of PERB's Rules of Procedure (Rules) states: "All motions and rulings made at the hearing shall be part of the record of the proceeding and, unless expressly authorized by the board, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision." Section 213.2 of the Rules states: "Within 15 working days after receipt of a decision, report, order, ruling or other appealable findings or conclusions, a party may file with the board an original and three copies of a statement in writing setting forth exceptions thereto or to any other part of the record or proceedings."

In support of its position that the exceptions should be denied as not expressly authorized by the Board, CSEA cites to *State of New York (Division of Military and Naval Affairs)*⁵. Although in that case CSEA's motion for permission to appeal a similar "interim decision" was granted, the Board did not address the necessity of the motion since it was unopposed.

⁴ The proceedings were delayed due to court proceedings regarding internal NYSCOPBA matters.

⁵ 18 PERB ¶3084 (1985).

The purpose of §212.4(h) of the Rules is to prohibit appeals from motions and rulings made at the hearing. It does not bar appeals from a decision on an ultimate issue of the type that is currently before us. None of the parties disagreed with the ALJ determination to first issue a written decision on the question of fragmentation. An opportunity to appeal to the Board from the ALJ's fragmentation decision might obviate the need for a time-consuming hearing on the placement issue. The policies of the Act are best served by our entertaining these exceptions, and we find the ALJ's decision to be one from which an appeal may be taken under §213.2 of the Rules. We further note that CSEA did not make this objection by way of a cross-exception to the ALJ's decision, which would have provided NYSCOPBA with an opportunity to respond.⁶

On the issue of fragmentation, we have previously stated that the availability of distinct impasse resolution procedures is a significant and important factor in determining whether a conflict of interest exists among a unit of employees when making an initial uniting determination.⁷ However, we did not make the availability of different impasse resolution procedures within a bargaining unit a "bright line" test requiring fragmentation,⁸ and we do not do so now.

⁶ Rules, §213.3.

⁷ *City of Lockport*, 30 PERB ¶¶3049 (1997).

⁸ *Village of Potsdam*, 16 PERB ¶¶3032 (1983).

The perception that a “bright line” test was established seems to derive from a decision of the Director of Public Employment Practices and Representation (Director) in *City of Auburn*⁹ where the Director stated:

...[A]ccording to the Board’s recently issued decision in *City of Lockport*, 30 PERB ¶¶3049 (October 9, 1997), a unit cannot include both titles that are not entitled to compulsory interest arbitration in the resolution of an impasse in collective negotiations pursuant to §209.4 of PERB’s Rules of Procedure and titles that are eligible for interest arbitration.

However, the Board did not make such a finding. In fact, the Board said,

The Director included the fire chief and the police chief in the at-issue unit. We have long had a practice of establishing separate units of police officers and fire fighters. “ Apart from historical reasons, this practice derives from a recognition that policemen and firefighters are not only fundamentally different from everyone else but also that they are different from each other in ways that affect the essence of their labor relations.” (Citation omitted) In addition, the police chief, as a member of an eligible police department, and the fire chief, as a member of a fire department, are entitled to compulsory interest arbitration in the resolution of an impasse in collective negotiations, pursuant to §209.4 of our Rules of Procedure. The other employees in the unit found appropriate by the Director are not eligible for such dispute resolution procedures. We have previously decided that “the difference in applicable impasse resolution procedures is a significant and important reason for defining a separate unit for police officers [citing to *Village of Skaneateles*, 16 PERB ¶¶3070 at 3113 (1983)] and firefighters. We find, therefore, that the police chief and fire chief are not appropriately placed in the same unit sought by the petitioner, and the petition is dismissed as to them.”¹⁰

⁹ 30 PERB ¶¶4036, at 4088 (1997).

¹⁰ 30 PERB ¶¶3049, at 3113-14 (1997).

Rather than establishing a new “bright line” test, the Board reiterated its prior precedent concerning uniting of police and fire titles, noting that differences in the types of dispute resolution procedures available to different categories of employees are significant and important. However, the Board did not state that these differences alone were dispositive in uniting determinations.

While ALJs have failed to approve the creation of a new unit consisting of various titles that do not have the same impasse resolution procedures or place a newly created title into a unit with impasse resolution procedures different from those available to the new title,¹¹ the standard for fragmentation of an existing unit differs from that for an initial uniting determination. Historically, we have declined to fragment a long-standing unit, even where we would not have placed the positions sought to be removed in the unit in the first instance.¹² Instead, we have interpreted the Act as requiring as few units as possible so long as each unit is compatible with the joint responsibilities of the public employer and public employees to serve the public.¹³

In an earlier case involving this unit, we reiterated our long-standing policies in deciding uniting questions: “to find appropriate the largest unit

¹¹ *County of Sullivan and Sullivan County Sheriff*, 38 PERB ¶4014 (2005), *County of Rockland*, 34 PERB ¶4021 (2001).

¹² See *County of Erie and Erie County Sheriff*, 22 PERB ¶3055 (1989), *County of Warren*, 21 PERB ¶3037 (1988), *Village of Potsdam*, 16 PERB ¶3032 (1983).

¹³ Act, §207.1 (c); see *State of New York*, 5 PERB ¶3022 at 3043 (1972).

permitting effective negotiations” and to refuse to fragment existing bargaining units “in the absence of compelling evidence of the need to do so”.¹⁴

In *Village of Skaneateles*,¹⁵ we specifically held, “While not alone mandating the fragmentation sought by the petitioner, the difference in applicable impasse resolution procedures is a significant and important reason for defining a separate unit for police officers”. The Board’s decision there demonstrates a more complete understanding of the fragmentation process. The fragmentation process is, in effect, a two-step process. The first is essentially the undoing of the initial uniting determination and the second is the placement of the titles fragmented into a new “most appropriate” unit. Our long-held position that we will fragment only for compelling reasons recognizes that an initial determination of unit appropriateness was made and that thereafter the members of that unit chose an exclusive representative for the purposes of collective negotiations, and are actions that should not be casually set aside. Generally, then, if there has been a history of “meaningful and effective negotiations”,¹⁶ we will not grant fragmentation, especially over the objection of the employer.¹⁷

To fragment a unit, otherwise bound by a shared community of interest, on the basis of a difference in dispute resolution procedures available to some, but not other members of the unit, calls for us to presuppose that “meaningful and effective” negotiations on behalf of one group of unit members or the other is

¹⁴ *State of New York (Long Island Park, Recreation and Historical Preservation Commission)*, 22 PERB ¶¶3043 at 3098 (1989).

¹⁵ 16 PERB ¶¶3070 (1983).

¹⁶ *Town of Smithtown*, 8 PERB ¶¶3015 (1975).

¹⁷ *County of Sullivan*, 7 PERB ¶¶3069 (1974).

impossible. This is not a factual determination that we can either make on the record before us, or on our historical experience with units so mixed, as this case appears to be the first since *Village of Potsdam*, over twenty years ago, to come to the Board on this issue.

The instant case involves a unit that we created in 1968 on the basis of the community of interest of the various titles that comprise the unit. The Legislature only recently granted interest arbitration as the final step in the impasse resolution process to peace officers employed by the Department of Corrections in 2001. At that time, the unit had a collective bargaining agreement that did not expire until March 31, 2003. The petition in Case No.C-5339 was filed within seven months of the expiration of the agreement so we cannot reach any conclusion about the impact of the interest arbitration legislation on the ability to conduct “meaningful and effective” negotiations merely from the passage of time from the expiration of the agreement to the filing of the petition which effectively barred further negotiations for the unit members sought to be fragmented.

The cases cited in support of the ALJ decision are either initial uniting decisions or otherwise distinguishable. Our holding in *State of New York*,¹⁸ rests solely on the differences in law enforcement duties of the titles at issue, as all titles involved had the same impasse resolution procedures. In that case, once we made the fragmentation decision, we were free to consider available impasse resolution procedures in determining the most appropriate unit. *County of*

¹⁸ 34 PERB ¶13038 (2001).

*Rockland*¹⁹ is inapposite in that it involved the unit placement of a newly created title and did not involve the fragmentation of an existing unit. Contrary to the ALJ's statement that in *County of Rockland* the Board agreed with the ALJ that "...a difference in applicable impasse resolution procedures was a fundamental dissimilarity warranting unit fragmentation..."²⁰ the Board in *County of Rockland* only agreed that it was a "significant and important" factor in unit fragmentation. Accordingly, as in *City of Lockport*, we do not find the difference in available impasse resolution procedures alone to compel the conclusion reached by the ALJ.

Based on the foregoing, we grant NYSCOPBA's exceptions and reverse the decision of the ALJ. CSEA's petition, based solely on the argument that a comprised of titles that have disparate impasse resolution processes must be fragmented is dismissed, and the Lifeguard Corps petition is remanded to the ALJ for further processing not inconsistent with this decision.

SO ORDERED.

DATED: November 8, 2006
Albany, New York



Michael R. Cuevas, Chairman



John T. Mitchell, Member

¹⁹ 35 PERB ¶¶3004 (2002) *aff'g* 34 PERB ¶¶4021 (2001).

²⁰ 39 PERB ¶ 4014, at 4050-51 (2006).