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State of New York Public Employment Relations Board Decisions from February 9, 2005

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from February 9, 2005

Keywords

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1049,

Petitioner,

-and-

CASE NO. C-5351

NEW YORK POWER AUTHORITY,

Employer.

HOLM & O'HARA LLP (VINCENT O'HARA of counsel), for Petitioner

DAVID E. BLABEY, EXECUTIVE VICE PRESIDENT, GENERAL COUNSEL & SECRETARY (GERARD V. LOUGHRAN of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York Power Authority (Authority) to a decision of an Administrative Law Judge (ALJ) finding most appropriate a unit of certain employees of the Authority employed at the Richard M. Flynn Power Plant (Flynn Plant) and the Brentwood Power Station (Brentwood Station), on a petition filed by the International Brotherhood of Electrical Workers, Local 1049 (IBEW). After a hearing, the ALJ determined that the most appropriate unit included the titles of Gas Turbine Operator (GTO) I and II, Gas Turbine Mechanic I and II, Gas Turbine Technician (GTT) I and II, General Plant Assistant I and II, Purchasing Warehouse Assistant[1] and Secretary.

[1]At the hearing, the parties stipulated that the title of the Purchasing Warehouse Assistant was appropriately placed in the bargaining unit.

EXCEPTIONS

The Authority excepts to the ALJ's decision, arguing that the ALJ erred by including the Secretary position in the bargaining unit because that is a confidential title. The Authority also argues that the ALJ erred by excluding certain supervisory titles[2] from the bargaining unit because they are first-level supervisors who perform the same or similar duties as the employees included in the bargaining unit. IBEW supports the ALJ's decision.

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 are fully set forth in the ALJ's decision[3] and are repeated here only as necessary to decide the exceptions.

The Authority, a public benefit corporation, operates 21 generating plants throughout the State of New York. The Authority's administrative offices are located in Albany, White Plains and New York City.[4] At issue in this proceeding are two facilities located on Long Island: the Flynn Plant and the Brentwood Station. The Brentwood Station is staffed by employees from the Flynn plant.

Both facilities are under the direct supervision of Michael Medvec, Director of Operations, who is responsible for overseeing all operations and maintenance. Reporting directly to him are the Maintenance Superintendent, the Planning

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[2] The Shift Supervisors and the Technical Services Supervisor are the titles the Authority seeks to include in the bargaining unit.

[3] 37 PERB ¶4019 (2004).

[4] The Human Resources Department at the White Plains location services the Flynn Plant and the Brentwood Station.

Superintendent, the Shift Supervisors, the Technical Services Supervisor and the Secretary.

The parties agreed that the supervisory responsibilities of the Technical Services Supervisor with respect to the GTT titles mirror the supervisory responsibilities of the Shift Supervisors with respect to the GTO titles. The Shift Supervisors and the Technical Shift Supervisor are referred to jointly as "Shift Supervisors" throughout this decision.

Shift Supervisors work directly with one or two GTOs and have many overlapping duties. Either a Shift Supervisor or a GTO attends the daily morning meetings with Medvec, during which the day's work is discussed. The Planning Superintendent prepares the work schedule for each shift and each position.[5] Shift Supervisors assign the work to be performed during a shift, but GTOs may be allowed by the Shift Supervisor to choose which work to perform during the shift. A Shift Supervisor may fill in for an absent GTO, but a GTO may not fill in for an absent Shift Supervisor.[6] Shift Supervisors initially approve sick and vacation leave requests from GTOs, Medvec gives final approval.[7] Either Shift Supervisors or GTOs are responsible for arranging replacements for absent employees. But it is Medvec who has final approval of all "swaps" between employees and he may disallow a "swap" even after it has been approved by a Shift Supervisor. Shift Supervisors do not approve overtime to be worked

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[5] Transcript, p. 111.

[6] A GTO may perform as a Shift Supervisor as part of a planned training program.

[7] Transcript, p. 180.

by the GTOs but merely confirm that the GTO worked the amount of overtime claimed.[8] Shift Supervisors are ultimately responsible for work done on their shifts, even if performed by outside contractors; only a Shift Supervisor can sign a work clearance order.

Shift Supervisors and the Technical Services Supervisor evaluate their subordinate employees by writing and filling in a Performance Plus Plan (PPP) for each employee. Medvec provides them with energy output and target information for each GTO and GTT to be inserted in each employee's PPP. The Shift Supervisors and the Technical Services Supervisor meet with Medvec for their own performance reviews and a discussion of how they have met the performance goals for the Fleet Plant. They also propose a performance rating number for each of the employees whom they supervise. While the Shift Supervisors may advocate for a certain rating for the employees they supervise, it is Medvec who determines the number rating to be given to each employee.[9] The number rating translates to a range of possible wage increase percentages. Medvec assigns the percentage increase for each employee at the Flynn Plant, except himself.[10] There are two interim reviews, which are not signed by the supervisor, and one annual review, which is signed by both the supervisor and Medvec.

When a vacancy occurs in a position, Shift Superviors have no role in the filling of that position, whether it is filled from within the Flynn Plant, from another Power

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[8] Transcript, p. 300.

[9] Transcript, p. 74.

[10] Transcript, p. 79.

Authority facility or from an outside job search. Medvec and the Human Resources staff from the White Plains office are responsible for filling vacancies.[11]

Shift Supervisors are also responsible for informal discipline and may inform a GTO that discipline is imminent. Disciplinary issues that cannot be resolved informally are brought to Medvec by the Shift Supervisor. Medvec might instruct the Shift Supervisor to do a fact-finding report on the incident or complaint. If the matter cannot be resolved informally, Medvec meets with Human Resources to come to a decision on discipline. The Shift Supervisor does not make a recommendation as to what the disciplinary action should be.[12] Shift Supervisors would be responsible for enforcing disciplinary decisions made by Medvec. Shift Supervisors are responsible for handling initial complaints from a GTO. If the complaint cannot be resolved on an informal basis, the complaint is presented to Medvec by the Shift Supervisor.

Eleanor Bladen holds the Secretary title at the Flynn Plant. She reports directly to Medvec. Her job description provides that she is responsible for maintaining correspondence, filing documents, shipping logs to storage, compiling information and entering data into the computer. She runs a computerized program that randomly selects an employee number for monthly drug testing - a process that requires confidentiality of the identity of the employee selected and the results of the test. She provides Medvec with the name of the employee to be tested.[13]

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[11]Transcript, p. 59.

[12]Transcript, p. 192.

[13]Transcript, p. 316.

Bladen has access to the filing cabinet that contains the PPP for each employee. Other employees are given access to the filing cabinet, as necessary, by Bladen. She is also the receptionist, receives and distributes mail throughout the Flynn Plant and may do work as requested by the Shift Supervisors, or the Planning and Maintenance Superintendents. Bladen testified that she types very few letters each year and that she does not access Medvec's files or his computer. She does not open any correspondence marked "confidential" and directs his telephone messages to his "voicemail". Bladen has never attended a disciplinary hearing conducted by Medvec.

Should employees at the Flynn Plant and the Brentwood Station become organized, Medvec would be a part of the Authority's negotiating team. Medvec testified that he would then have negotiations materials in his files, to which Bladen would have access, and that he would call upon her to perform work related to negotiations, such as taking notes at meetings.

DISCUSSION

In an initial uniting situation, PERB will not include a supervisor in a unit with rank-and-file employees over the objection of a party in interest if the degree and nature of the supervisory responsibilities indicate a conflict of interest.[14] Here, the Shift Supervisors and the Technical Services Supervisor, while "working supervisors", also have certain supervisory duties that IBEW argues may create a conflict of interest with the titles they supervise. IBEW opposes the inclusion of these two supervisory titles in the proposed bargaining unit. The Authority argues that the titles should be included in the proposed bargaining unit because of the similarity in job duties, the modest nature

[14] *See State of New York (Div. of State Police)*, 1 PERB ¶399.32 (1968).

and degree of their supervisory role and PERB's preference for establishing the largest unit permitting effective negotiations.[15]

In cases where similar job responsibilities were performed by unrepresented supervisory personnel, and one party objected to the inclusion of the supervisory title in the bargaining unit, we have declined to include supervisors in a unit of rank-and-file employees.[16] However, as we noted in *County of Genesee:*[17]

> There is no prohibition against mixed units of supervisors and rank-and-file employees. Such units are not and never have been *per se* inappropriate under the Act. It is the nature and level of supervisory functions which have always determined whether a mixed unit of supervisors and subordinates is most appropriate or a unit of supervisors separate from the rank-and-file is most appropriate. As summarized in *Uniondale Union Free School District*,[2] it is the community/conflict of interest and the employer's administrative convenience standards set forth in §201.7(a) and (c) of the Act which determine the appropriate uniting of previously unrepresented supervisors.
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> [2]21 PERB ¶3060 (1988).

Here, the Shift Supervisors are working supervisors. While they exercise some supervisory responsibilities, their supervisory decisions are reviewed by Medvec and may be reversed or changed by him, as he is the final decision-maker in many instances. We do not find that the record supports the ALJ's conclusion that the Shift Supervisors have a significant role in employee evaluations and discipline. The record

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[15] It has long been our policy to find that the most appropriate unit is the largest one which will permit for effective and meaningful negotiations. *See*, *Town of Dryden*, 32 PERB ¶3021 (1999); *State of New York*, 1 PERB ¶399.85 (1968).

[16] *See City of Rye*, 33 PERB ¶3035 (2000). *See also Clinton Comm. Coll.*, 31 PERB ¶3070 (1998); *East Ramapo Cent. Sch. Dist.*, 11 PERB ¶3075 (1978); *City Sch. Dist. of the City of Binghamton*, 10 PERB ¶3062 (1977); *New York State Div. of State Police*, 1 PERB ¶399.32 (1968).

[17] 29 PERB ¶3068 (1996).

shows that Medvec gives the Shift Supervisors performance data for inclusion in the evaluation of each GTO and GTT and Medvec discusses the Shift Supervisor's recommended evaluation rating before he assigns the rating and the concomitant salary increase. The Shift Supervisors are involved in discipline at only the most initial and informal level. It is Medvec and the Human Resources staff who make the actual determinations as to discipline; Shift Supervisors do not impose discipline. As a result, we do not find that the Shift Supervisors perform any significant supervisory duties or exercise any significant supervisory responsibilities which would preclude their placement in the proposed bargaining unit and we reverse the ALJ in this regard.[18]

The Secretary should, likewise, be placed in the proposed bargaining unit. We will also assume, as did the ALJ, for purposes of this decision that Medvec is a managerial employee within the meaning of §201.7 (a)(ii) of the Act. As we held in *Town of Dewitt*:[19]

> The test for designation as a confidential employee is two-pronged. The person to be designated must assist a §201.7(a)(ii) manager in the delivery of the duties described in that subdivision. Assistance alone, however, is not enough to support a designation. In addition, the person assisting the §201.7(a)(ii) manager must be one acting in a confidential capacity to that manager. The first part of the test is duty oriented, while the second is relationship oriented.

Here, the incumbent in the Secretary title, Bladen, meets neither of the criteria for exclusion from the proposed bargaining unit due to her confidential status. The record

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[18] Given our finding placing the Shift Supervisors in the proposed bargaining unit, we need not reach the Authority's exception regarding the inclusion of the current incumbent in the Purchasing Warehouse Assistant position, whose title is Shift Supervisor, in the bargaining unit.

[19] 32 PERB ¶3001, at 3002 (1999).

makes clear that Bladen performs no confidential duties for Medvec. Her access to the filing cabinet that contains the employees' PPPs is insufficient as she testified that others access the same filing cabinet. Neither is her involvement in accessing the information about which employee is to be randomly drug tested sufficient to warrant the conclusion that she performs confidential duties within the meaning of the Act because that information is not of the type which has a direct relationship to and impact upon collective negotiations and the administration of collective bargaining agreements.[20] While her job description provides that she transcribes and types correspondence and reports and maintains files, Bladen testified that she has typed and filed very few documents over the years. That Medvec may be called upon to perform a role in collective negotiations and personnel and contract administration, should the at-issue employees become organized, and may utilize Bladen to type or file correspondence or memoranda related to those responsibilities is simply too speculative a basis for the exclusion of the Secretary title from the proposed bargaining unit.

Bladen also does not meet the second prong of the test. Bladen does not handle confidential mail or filing for Medvec and she does not have access to his files, computer or telephone messages. There is no evidence that Bladen has been consulted by, or confided in, by Medvec regarding any personnel matters. She does not have a confidential relationship with Medvec or serve in a capacity of trust and confidence to him.

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[20] *See*, *Board of Educ. of the City Sch. Dist. of the City of New York*, 18 PERB ¶3025 (1985); *Board of Educ. of the City Sch. Dist. of the City of New York*, 6 PERB ¶3046 (1973).

Based on the foregoing, we reverse, in part, and affirm, in part, the decision of the ALJ.

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

Included: All employees at the Flynn Plant in the titles of Gas Turbine Operator I and II, Gas Turbine Mechanic I and II, Gas Turbine Technician I and II, General Plant Assistant I and II, Purchasing Warehouse Assistant, Shift Supervisor, Technical Shift Supervisor and Secretary.

Excluded: Director of Operations, Planning Superintendent, and Maintenance Superintendent.

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

SO ORDERED.

DATED: February 9, 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 830, AFSCME, AFL-CIO,

Charging Party,

-and-

CASE NO. U-24202

COUNTY OF NASSAU,

Respondent.

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

LORNA B. GOODMAN, COUNTY ATTORNEY (JOADY BENJAMIN FEINER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 830, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the County of Nassau (County) violated §209-a.1(d) of the Public Employees Fair Employment Act (Act) when it unilaterally discontinued the practice of assigning County vehicles to certain unit members working in the County's Department of Parks, Recreation, and Museums (Department).

The ALJ dismissed the charge as to all the affected employees. As to one of the employees, the ALJ found that a past practice had not been established. As to the

others, the ALJ found that, while a long-standing practice of those employees using County vehicles both for their employment and to travel to and from work had been established, CSEA had failed to present sufficient evidence of the authority of the supervisors who assigned or approved the assignment of County vehicles to those employees for travel to and from work to sustain the charge.

EXCEPTIONS

CSEA excepts to the ALJ's decision arguing that the ALJ misinterpreted legal precedent and misapplied record evidence in determining that the alleged practice was not unequivocal. The County filed a response 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 fully set forth in the ALJ's decision[1] and are repeated here only as necessary to address the exceptions filed by CSEA.

CSEA represents William J. Kirkham, III; Michael Florio; Neal Fairchild; Joseph Ginobbi; John Messina; and George Nosworthy, each of whom had previously been assigned a County vehicle.[2] In addition to using the vehicle to carry out their respective

[1] 37 PERB ¶4570 (2004).

[2] CSEA does not except to the ALJ's determination as to Nosworthy; we, therefore, do not deal with the allegations in the charge as they relate to him. At the hearing, the ALJ also dismissed the charge as it related to Russ Furchak, because of his transfer out of the Department. Neither does CSEA except to that determination.

work duties, they were allowed to use the vehicles to commute between home and work.

The charge, as amended, alleges that between January 15 and March 25, 2003, the County, through Doreen Banks, Commissioner of Parks, Recreation and Museums, issued a memorandum to each of the six employees, revoking their take-home vehicle privilege. Each memorandum stated that the County had determined that the employee's duties no longer required the assignment of a vehicle and that the vehicle must be returned to the County within thirty days. None of the memoranda stated any other reason for removal of the County-owned vehicles, such as the Commissioner's lack of knowledge of the existence of the practice. The employees were also informed that they could submit a rebuttal to Banks, outlining their need for the continued use of a take-home vehicle.

In 1974, Kirkham was assigned a take-home vehicle by William Keanna, then Superintendent of Pools and Rinks, because he was on twenty-four hour call to respond to repair calls. The vehicle was not to be used for personal business, although Kirkham could use it for travel to and from work. Even with his title change from Maintenance Mechanic I to Shop Maintenance Supervisor I, Kirkham's work duties have remained unchanged since that time.

In 1997, Florio was promoted to Supervisor of Grounds at the County's Mineola Complex[3] and assigned a vehicle by the Department's Deputy Commissioner, Vincent

[3] The complex houses all the Mineola court buildings, the police headquarters and County executive buildings.

Neglia. Florio was instructed that he was to limit his use of the vehicle to work and travel between home and work. His duties did not change between the time of his promotion and the issuance of Banks' memorandum in January 2003.

Fairchild, in 1998, was assigned to work as Shop Supervisor of the Department's Woodworking and Antiques Restoration Shop. Upon taking that assignment, he spoke with Nick Delsanti, who was either the Commissioner or Deputy Commissioner of the Department and requested a County vehicle. He, too, was allowed the use of a take-home vehicle, as had been the case with prior Shop Supervisors. He continues to perform all of the duties of Shop Supervisor in his title as Historic Museum Crafter Supervisor, with some additional duties.

In October 2000, Ginobbi was promoted to Head Shop Supervisor of the Locksmith and Carpentry Shop and a vehicle was assigned to him. Neglia made the vehicle assignment to Ginobbi for use at work and daily commuting.

Messina was promoted to Lawn Mower Shop Supervisor in 2001. In 2002, Messina became the head of the Eisenhower Park Lawn Mower Shop. At the time of his promotion, Messina asked James Caracciollo, Deputy Commissioner of the Department, to assign him a County vehicle. Caracciollo then assigned a vehicle to Messina for work and commuting.

At the close of CSEA's direct case, the County rested, having called no witnesses.

DISCUSSION

An employee's use of an employer-owned vehicle for transportation to and from work is an economic benefit inuring to the employee and may not be unilaterally withdrawn by the employer.[4] To establish a past practice that may not be altered unilaterally by the employer, it must be proven that the practice was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged.[5] In order to establish that an alleged past practice was unequivocal, a charging party must prove the employer's knowledge of the practice either through direct negotiations or by evidence that the employer condoned, ratified or acquiesced in the practice and that it was not conditional. [6]

CSEA, in its exceptions, contends that the ALJ erred when she concluded that, although CSEA proved certain elements of a past practice, it failed to demonstrate that the practice was unequivocal because the authority of the County's agents who made the vehicle assignments was not sufficiently established.

The record evidence establishes that the five individuals addressed in CSEA's exceptions have used a County vehicle for transportation to and from work and throughout the work day for a sufficient period of time to establish the time element of the aforementioned test. The County does not dispute this finding by the ALJ or her

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[4] *County of Nassau*, 35 PERB ¶3036 (2002); *County of Monroe*, 33 PERB ¶3044 (2000); *County of Nassau*, 26 PERB ¶3040, *conf'd sub nom County of Nassau v PERB*, 215 AD2d 381, 28 PERB ¶7011 (2d Dep't 1995).

[5] *County of Nassau*, 37 PERB ¶3014 (2004) (petition for review pending).

[6] *Id.* at 3042.

determination that the practice did not have to be unit-wide to be considered to be a valid past practice. Neither does the County dispute the duties that each of the five performed at the time they were assigned a County vehicle or the duties currently being performed by these employees. The ALJ found that their duties have not changed significantly since the time the cars were assigned to them.[7]

The sole issue raised in this appeal is whether CSEA produced sufficient evidence to prove that the County had agreed to the alleged past practice or knew of the practice and, by its actions, condoned, ratified or acquiesced in the practice. The ALJ found that CSEA had failed to prove that the Commissioner and Deputy Commissioner of the Department and the Superintendent of Pools and Rinks had sufficient authority to assign the cars in question so as to bind the County. In reaching this conclusion, the ALJ relied upon our previous decisions in *Sherburne-Earlville Central School District*[8] (hereafter, *Sherburne-Earlville*) and *County of Nassau*[9] (hereafter, *County of Nassau*).

In *Sherburne-Earlville*, we reiterated that, in a case alleging a change in a past practice, we must first determine whether the alleged past practice involves a mandatory subject of negotiations. Once we have determined that the subject-matter is

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[7]The County argued in its brief to the ALJ that the duties of the affected employees either did not warrant the assignment of a take-home County vehicle in the first instance or that the duties that might have justified the initial assignment had changed. The County has not excepted to the ALJ's decision on this point.

[8] 36 PERB ¶3011 (2003).

[9] *Supra*, note 5.

a term and condition of employment, we begin our analysis of whether the alleged practice is unequivocal, has existed substantially unchanged for a significant period of time prior to the change, and could, therefore, reasonably be expected by the affected unit members to continue unchanged. Judged against those criteria, we found that the alleged past practice in *Sherburne-Earlville* was not unequivocal. There, a Superintendent of Buildings and Grounds had allowed certain members of the bargaining unit who worked for him in the maintenance and custodial division to use District equipment and tools. Not everyone in the unit was allowed the privilege; the decision to allow the use of tools and equipment was a subjective one made by the Superintendent of Buildings and Grounds based upon his relationship with certain senior employees, the tool or equipment requested, and his assessment of the trustworthiness and capabilities of the employee making the request. As the practice was indefinite and not widely known even within the unit, we found that no unequivocal practice had been established.

We went on to note that the evidence did not show that the District had acquiesced in the practice nor did it show that the District had authorized, ratified or condoned the practice and that the charge would fail for that reason also. We determined that, despite the title, the Superintendent of Buildings and Grounds was a first-level supervisor. He had neither negotiating nor policy-making authority in the District hierarchy. We would not assume, without more, that he had the apparent authority to bind the District. Nor could we assume that he had actual authority to bind the District based solely on his title. Finding that the charging party had failed to prove

that the Superintendent of Buildings and Grounds, by lending District tools and equipment to some unit employees, had established a past practice binding on the District, we dismissed the charge.

In *County of Nassau*, sergeants in the County Police Department Applicant Investigation Unit (AIU) had been assigned County vehicles for commuting to and from work and for their job assignments. The vehicles were assigned to the sergeants by the lieutenant who supervised the sergeants in the AIU. There was also evidence that an inspector had knowledge of the vehicle assignments to the sergeants. The inspector, lieutenant and sergeants were in the same bargaining unit. No evidence was introduced as to the command structure of the Police Department. There was no evidence as to who possessed either express or implicit policy-making authority sufficient to bind the County. Neither was there any evidence to establish knowledge by the County that the sergeants had been assigned take-home vehicles. In finding that there was insufficient evidence in the record before us to establish that the alleged practice was unequivocal, we relied upon our decision in *Sherburne-Earlville*, stating that "we should not assume an employee's authority merely from his/her status as a supervisor. We should require a more definite delegation of authority to the employee."[10] We rejected the ALJ's reliance on *City of Schenectady,*[11] reiterating that while it is "within the totality of the circumstances" that inquiry into an employee's authority is made, the "ultimate focus

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[10] *Supra,* note 5, at 3042.

[11] 26 PERB ¶3038 (1993).

must always be on the agency relationship, not supervisory status itself."[12] Applying that analysis, we concluded that the record was devoid of any evidence that a lieutenant, in the same bargaining unit as the sergeants who had been assigned the cars, had any authority, real or implied, to bind the County to the alleged practice. We stated that "[i]nherent in the finding that a practice is unequivocal is the concept of the employer's knowledge of the practice either through direct negotiations or indirectly through condoning, ratifying or acquiescing in the practice."[13] There was no evidence to establish that the County knew of the alleged practice or had ratified, condoned or acquiesced in the alleged practice. The only evidence in the record was that the lieutenant was the AIU's ranking officer. The holding of a supervisory title, without more, is insufficient to establish the authority of an employee to bind an employer to an alleged past practice.

In this case, as to Fairchild, Florio, Ginobbi and Messina, the record establishes that take-home vehicles were assigned to them by either the Commissioner or Deputy Commissioner of Parks, Recreation and Museums. Even without more, we find that employees in the title of Commissioner or Deputy Commissioner of a County-wide department have at least implied, if not actual, authority to bind the County to a past practice.[14] It was sufficient that CSEA introduced evidence that the vehicle assignments

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[12] *Supra,* note 5, at 3042.

[13] *Id.*

[14] *See County of Nassau*, 34 PERB ¶8001 (2001), wherein the structure of the Department is set forth and the Commissioner and Deputy Commissioners are delineated as policy-makers.

were made or approved by individuals in those titles, as they are not mere supervisory titles, but titles that carry with them the authority to operate the Department. The burden of proof then shifted to the County to establish that the County had never agreed to the practice or that the Commissioner and Deputy Commissioner did not have actual or implied authority to act on behalf of the County.[15] Instead, the County rested.

With respect to Kirkham, CSEA has, however, failed in its proof. There is no evidence that the Superintendent of Pools and Rinks has actual or implied authority to shift the burden to the County to explain his authority, or lack thereof, to make a vehicle assignment. Unlike the clearly managerial titles of Commissioner and Deputy Commissioner, the title itself does not require or incline us to assume actual or implied authority as it appears to be a supervisory title and no other evidence of the Superintendent's authority was introduced by CSEA.

Therefore, we find that CSEA has established that County employees with actual or implied authority assigned take-home vehicles to Fairchild, Florio, Ginobbi and Messina and that this practice existed for a significant time such that the affected employees in the unit could reasonably expect such practice to continue without change and that the practice was unequivocal.[16] The County, therefore, violated §209-a.1(d) of

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[15] We note that the current Commissioner is the individual who issued the memoranda that removed the use of take-home vehicles to these employees. The County has not argued that the County should not be held liable for this action of the Commissioner or that the Commissioner did not have the authority to so act.

[16] *County of Nassau*, 35 PERB ¶3036 (2002).

the Act when it unilaterally discontinued the practice of assigning these four employees a take-home vehicle. As to Kirkham, no such violation has been established.

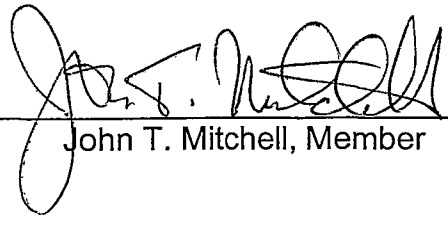
Based upon the foregoing, we hereby grant CSEA's exceptions and reverse, in part, the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the County forthwith:

1. Restore the use of take-home County motor vehicles to Neil Fairchild, Historic Museum Crafter Supervisor (Woodworking and Antiques Restoration Shop); Michael Florio, Supervisor of Grounds (Mineola Complex); Joe Ginobbi, Head Shop Supervisor (Locksmith and Carpentry Shop); and John Messina, Lawn Mower Shop Supervisor (Eisenhower Park Lawn Mower Shop);
2. Cease and desist from unilaterally removing County vehicles to drive to and from work from employees in CSEA's unit in these titles; and
3. Sign and post the attached notice at all locations normally used to communicate with CSEA members.

DATED: February 9, 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 County of Nassau in the unit represented by the Civil Service Employees Association, Inc., Local 830, AFSCME, AFL-CIO, (CSEA) that the County will forthwith:

1. Restore the use of take-home County motor vehicles to Neil Fairchild, Historic Museum Crafter Supervisor (Woodworking and Antiques Restoration Shop); Michael Florio, Supervisor of Grounds (Mineola Complex); Joe Ginobbi, Head Shop Supervisor (Locksmith and Carpentry Shop); and John Messina, Lawn Mower Shop Supervisor (Eisenhower Park Lawn Mower Shop);

2. Not unilaterally remove County vehicles to drive to and from work from employees in CSEA's unit in these titles.

Dated . . . . . **By** . . . . . .
(Representative) (Title)

COUNTY OF NASSAU

. . . . . .

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

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

- and -

CASE NO. U-24054

COUNTY OF NASSAU,

Respondent.

NANCY E. HOFFMAN, GENERAL COUNSEL (JEROME LEFKOWITZ of counsel), for Charging Party

LORNA B. GOODMAN, COUNTY ATTORNEY (NICOLE S. BOUTIS of Counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Nassau (County) to a decision of an Administrative Law Judge (ALJ) 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 Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) alleging that the County changed a past practice of assigning a County vehicle to the Supervisor of Fleet Services with the privilege to drive the vehicle to and from work (a take-home vehicle).

EXCEPTIONS

The County, in its exceptions, argues that the ALJ erred when she found an unequivocal past practice and also when she failed to consider the impact of the April 3,

2003 reorganization of Fleet Services upon the remedy. CSEA supports the ALJ's decision.

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

FACTS

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

The County Sheriff's Department maintains its vehicles at its garage referred to as "Fleet Services." Until April 2003, the supervision of Fleet Services was within the jurisdiction of the Transportation Unit of the Sheriff's Department. William Lanier, a corrections officer, held the Department's in-house title of Officer-in-Charge of Fleet Services. As a corrections officer, Lanier had been represented by CSEA until 1999, when corrections officers were fragmented from the CSEA unit and, thereafter, represented by a different bargaining representative.[2]

In 1995, Lanier was assigned a take-home vehicle. In March 2000, Lanier submitted a memorandum to Sheriff Edward Reilly justifying the assignment of a County vehicle to him. Lanier noted that, as Supervisor of the Department of Fleet Services, he could be called out at different hours to respond to different situations that may arise, "break-downs, auto accidents, etc." He also noted that he was part of the Emergency

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[1] 37 PERB ¶4571 (2004).

[2] *See Nassau County Sheriff's Dep't*, 32 PERB ¶8001 (1999).

Management Program and that the vehicle was equipped with red lights, siren, jail, radio with the Sheriff's Department and Emergency Management Program frequencies.[3]

Subsequently, in August 2000, Reilly issued a new policy and procedure addressing the use of departmental vehicles.[4] The policy restricted to the Sheriff the authority to assign County vehicles within the Sheriff's Department. The Sheriff included the title of Officer-in-Charge of Fleet Services on the list of positions from the Sheriff's Department that were authorized to use a County vehicle 24 hours a day, 7 day a week.

Lanier retired on August 27, 2002. In its charge filed February 13, 2003, CSEA alleged that Thomas Pugliese was thereafter assigned the duties of Officer-in-Charge of Fleet Services. Pugliese, a civilian employed by the County in the title of Automotive Mechanic II at Fleet Services, is in the unit represented by CSEA. Pugliese worked under Lanier's supervision until his retirement in 2002. Although Lanier, upon his retirement, turned over his pager to Pugliese, Reilly never designated Pugliese to be on-call 24 hours a day, 7 days a week nor was he designated as Officer-in-Charge of Fleet Services. Following Lanier's retirement, Pugliese, on one occasion, drove Lanier's formerly assigned vehicle home without authorization.[5] Pugliese testified that he drove it home because he had a problem with his car. Deputy Under-Sheriff Sidney Head testified that, on July 10, 2002, he was driving to work when he observed Pugliese driving the County vehicle previously assigned to Lanier. That same day, Head sent

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[3] Joint Exhibit #2.

[4] Respondent Exhibit #2.

[5] Transcript, pp. 22-23.

Pugliese a memorandum informing him that he was not authorized to use County-owned vehicles during off-duty hours or to travel to and from the workplace.

DISCUSSION

In a decision issued today, we reiterated the standard for establishing a unilateral change in a past practice. In *County of Nassau,*[6] we held that

> An employee's use of an employer-owned vehicle for transportation to and from work is an economic benefit inuring to the employee and may not be unilaterally withdrawn by the employer. To establish a past practice which may not be altered unilaterally by the employer, it must be proven that practice was unequivocal and existed for such a period of time that unit employees could reasonably expect the practice to continue unchanged. In order to establish that an alleged past practice was unequivocal, a charging party must prove the employer's knowledge of the practice either through direct negotiations or by evidence that the employer condoned, ratified or acquiesced in the practice. (footnotes omitted)

The County, contends that the ALJ erred by finding an unequivocal past practice that would entitle Pugliese to the use of the County-owned vehicle previously assigned to Lanier. CSEA argues that the practice of assigning a County-owned vehicle to the Officer-in-Charge of Fleet Services is unequivocal and that Pugliese, as the *de facto* Officer-in-Charge, is entitled to the use of the vehicle historically assigned to that position. We find that the record does not support the ALJ's conclusion that an unequivocal practice has been established such that Pugliese could expect a take-home vehicle to be assigned to him.

We find that the record establishes that the County assigned a County-owned vehicle to be used both on the job and as a take-home vehicle to Lanier in his capacity

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[6] 38 PERB ¶3003, at ____ (2005).

as Officer-in-Charge of Fleet Services. The assignment continued unchanged and with the County's knowledge and approval for several years, covering both the time Lanier's title was in the CSEA unit and thereafter, when the corrections officers were fragmented from CSEA's unit and no longer represented by CSEA. It is, therefore, clear that the first two prongs of the assessment of the existence of a past practice have been established: the assignment of the County-owned vehicle was unequivocal and has been in existence for a significant period of time. However, the charge fails because the third prong of the test has not been established: that unit employees could reasonably expect the practice to continue unchanged.[7]

In *Town of Shawangunk*,[8] we held that a practice that had been established with respect to unrepresented titles prior to their inclusion in a bargaining unit, could not be found to inure to the benefit of members of the bargaining unit. Here, a practice of assigning a County-owned vehicle to the Officer-in-Charge of Fleet Services has been established, but that title is no longer in the CSEA bargaining unit, nor has it been for several years. Therefore, there can be no reasonable expectation on the part of CSEA unit employees that the practice would continue unchanged to the benefit of the CSEA unit. As in *Town of Shawangunk*, *supra*, it is simply not a practice that inures to the benefit of members of CSEA's bargaining unit.

The ALJ erred in concluding that, because Pugliese had assumed some of the duties previously performed by Lanier, he was *de facto* Officer-in-Charge and, in that capacity, he was entitled to the practice established with respect to the Officer-in-

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[7] *Id.*

[8] 33 PERB ¶3054 (2000).

Charge. The collective bargaining relationship between the County and CSEA with respect to terms and conditions of employment for corrections officers ended in 1999. Therefore, the fact that Lanier, as a corrections officer, and Pugliese, as a civilian, were represented by different employee organizations with different bargaining agreements with the County, is not a distinction without a difference, as found by the ALJ. To the extent that we find a past practice is established by this record, it would inure only to the benefit of members of the corrections officers' unit of which Lanier was a member and in which the in-house title of Officer-in-Charge of Fleet Services resided for all times applicable hereto. CSEA does not represent corrections officers; members of CSEA's bargaining unit, including Pugliese, therefore, could not have had any reasonable expectation that the benefit of a take-home car granted to Lanier would pass to Pugliese upon Lanier's retirement.

Based upon the foregoing, we hereby grant the County's exceptions as to the factual and legal basis of the ALJ's decision and reverse the decision of the ALJ.

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

DATED: February 9, 2005
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member