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8-29-2007

## State of New York Public Employment Relations Board Decisions from August 29, 2007

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from August 29, 2007

### 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 THRUWAY EMPLOYEES,  
TEAMSTERS LOCAL 72,**

Charging Party,

- and -

**NEW YORK STATE THRUWAY AUTHORITY,**

**CASE NO. U-27510**

Respondent.

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**KEVIN C. CLOR, GENERAL COUNSEL, for Charging Party**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the New York State Thruway Employees, Teamsters Local 72 (Local 72) to a decision of the Director of Public Employment Practices and Representation (Director) on an improper practice charge filed by Local 72. As amended, Local 72 alleges in the charge that the New York State Thruway Authority (Authority) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred bargaining unit work in the fall of 2006.

Following the Director's initial review of the charge, as mandated by §204.2 of PERB's Rules of Procedure (Rules), the Director informed Local 72 that its April 12, 2007 charge was deficient by failing to identify the date(s) of the occurrence of the improper practice and because parties cannot agree to toll the four-month period for the filing of a charge.<sup>1</sup> Thereafter, Local 72 filed an amended charge. Following a review of

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<sup>1</sup> Rules, §204.1(a)(1).

the amended charge, the Director issued a decision dismissing the charge, as amended, on the grounds that it was untimely pursuant to §204.1(a)(1) of the Rules.<sup>2</sup>

### **EXCEPTIONS**

Local 72 filed two exceptions to the Director's dismissal of the charge.

In its first exception, Local 72 acknowledges that it learned that private contractors had been assigned to fill potholes, work previously performed by unit members, in "October or November 2006." However, it asserts that it was unable to confirm that the type of work being performed by the contractors was exclusive bargaining unit work until March 10, 2007.

In its second exception, Local 72 asserts that the four-month filing period had been tolled by an agreement between the Local 72 and the Authority during settlement discussions that commenced in November 2006. Under this agreement, the parties had purportedly agreed to extend the filing date of any improper practice charge until four months after settlement discussions had ended.

The Authority has not filed a response to the exceptions.

Based on our review of the record and our consideration of Local 72's exceptions, we affirm the decision of the Director dismissing the charge as untimely under §204.1(a) (1) of the Rules.

### **DISCUSSION**

Local 72 admits to having knowledge of the private contractors performing pothole filling over four months prior to filing the charge. It contends, however, that the time for the filing of a charge regarding the unilateral transfer of unit work commences

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<sup>2</sup> 40 PERB ¶4533 (2007).

only after an employee organization has completed an investigation to determine whether the work that was contracted out was exclusive bargaining unit work.

We disagree.

In determining the commencement of the four-month filing period for an improper practice charge alleging a §209.1-a (d) violation, we consider when the employee organization had actual or constructive knowledge of the act or acts that form the basis for the charge.<sup>3</sup> In the present case, Local 72, by its own admission, had such knowledge over four months prior to filing the charge. As the Director correctly noted, there is no claim that the pothole filling was performed by the contractors in secret.

Even if the Authority delayed in providing copies of the contracts during the settlement discussions, as alleged by Local 72 in its exceptions, such a delay did not preclude Local 72 from ascertaining on its own whether the work being performed by the contractors constituted exclusive bargaining unit work.

In its second exception, Local 72 contends that the Board should honor the parties' purported agreement to toll the commencement of the filing period under §204.1(a)(1) of the Rules. It is well-established that the time in which to file an improper practice charge is not tolled through negotiations between the parties or by the pendency of a related grievance.<sup>4</sup> Neither the Act nor the Rules grants parties the right to modify the filing period. Adoption of a procedure permitting the tolling of the filing period would eviscerate the uniformity created by a fixed limitation period.

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<sup>3</sup> *Otsellic Valley Cent Sch Dist*, 29 PERB ¶13005 (1996); *Cold Spring Cent Sch Dist*, 36 PERB ¶13016 (2003), *confirmed sub nom.*, *Cold Spring Harbor Teachers Assn v New York State Pub Empl Rel Bd*, 12 AD 3d 443, 37 PERB ¶17009 (2d Dept 2004); *Board of Educ of the City Sch Dist of the City of New York*, 39 PERB ¶13014 (2006).

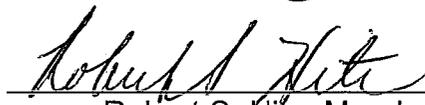
<sup>4</sup> *NYCTA*, 10 PERB ¶13077 (1977). *See also*, *County of Suffolk (Dept of Labor Relations)*, 19 PERB ¶13003 (1986).

Based on the foregoing, we deny Local 72's exceptions and affirm the Director's decision to dismiss the charge.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: August 29, 2007  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairman

  
\_\_\_\_\_  
Robert S. Hite, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**RAMAPO POLICE SUPERIOR OFFICER'S  
ASSOCIATION,**

Petitioner,

- and -

**CASE NO. C-5604**

**TOWN OF RAMAPO,**

Employer,

-and-

**RAMAPO POLICE BENEVOLENT ASSOCIATION,**

Incumbent/Intervenor.

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**JOHN M. CROTTY, ESQ., for Petitioner**

**MICHAEL KLEIN, ESQ., TOWN ATTORNEY (JACK SCHLOSS, ESQ.,  
of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board following the grant of leave to the Ramapo Police Superior Officer's Association (Association) to file exceptions pursuant to §212.4(g) of PERB's Rules of Practice (Rules) for the review of an interim ruling by the Director of Public Employment Practices and Representation (Director), dated December 21, 2006. The Director's ruling denied a motion by the Association for certification without an election pursuant to §201.9(g)(1) of the Rules.

**FACTS**

The Association filed a representation petition on May 22, 2006 seeking to fragment from a current unit represented by the Ramapo Police Benevolent Association (PBA), a unit composed of seven (7) employees in the Lieutenant title employed by the Town. The PBA did not file a response to the petition and informed the Administrative Law Judge (ALJ), through counsel, that it consented to the proposed fragmentation.

Thereafter, the Town consented to the proposed fragmentation of the Lieutenant title but contested whether three individuals holding the title should be included in the bargaining unit on the grounds that they are managerial or confidential and, therefore, are not public employees pursuant to §201.7(a) of the Public Employees' Fair Employment Act (Act).

Following the Town's objection to the composition of the unit, the Director commenced an investigation pursuant to §201.9(a) of the Rules. On October 10, 2006, a hearing was commenced before the ALJ on the issue, raised by the Town, of whether the three Lieutenants should be included in the fragmented unit because they are managerial or confidential.

On October 23, 2006, the Association filed a letter motion with the Director requesting certification without an election pursuant to §201.9(g)(1) of the Rules prior to a determination being reached on the issue of whether the three at-issue Lieutenants should be included in the bargaining unit. The Town opposed the Association's request.

On December 21, 2006, the Director issued an interim ruling denying the Association's motion for a certification without an election prior to a determination concerning the three Lieutenants' alleged managerial or confidential status. In his interim decision, the Director concluded that the agency's historical administrative practice of determining managerial and/or confidential status under the uniting criteria set forth in §207.1 of the Act is fully consistent with both the Act and Rules.

In its exceptions, the Association argues that that the Director erred in failing to certify the Association pursuant to §201.9(g)(1) of the Rules while the managerial and/or confidential issue was pending before the ALJ. It contends that despite Board precedent and historical practices to the contrary, certification prior to a determination regarding resolution of a managerial and/or confidential issue is warranted under the Act and Rules. The Town supports the Director's interim ruling.

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

### **DISCUSSION**

In denying the Association's request for certification, the Director held that a determination on an employer's claim regarding an employee's purported managerial and/or confidential status under §201.7(a) is both necessary and proper in rendering a uniting determination under the criteria set forth in §207.1 of the Act. We agree.

Contrary to the Association's argument, certification pursuant to §207.3 of the Act and §201.9(g)(1) of the Rules can take place only after the Director has

completed the investigation required by §201.9(a) of the Rules regarding the appropriate composition of the proposed unit.

Prior to the 1971 amendment to the Act,<sup>1</sup> which explicitly excluded managerial and confidential employees from the definition of "public employee" under the Act,<sup>2</sup> the Board had already held, under the uniting standard set forth in §207.1(a) of the Act, that managerial and confidential employees cannot be included in a bargaining unit containing other employees because of the existence of an inherent conflict of interest.<sup>3</sup>

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<sup>1</sup> L. 1971, ch 503, 504.

<sup>2</sup> §201.7 states: The term "public employee" means any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, judges and justices of the unified court system, persons holding positions by appointment or employment in the organized militia of the state and persons who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board in accordance with procedures established pursuant to section two hundred five or two hundred twelve of this article, which procedures shall provide that any such designations made during a period of unchallenged representation pursuant to subdivision two of section two hundred eight of this chapter shall only become effective upon the termination of such period of unchallenged representation. Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii).

<sup>3</sup> See, *New York State Police*, 1 PERB ¶399.21 (1968); *State of New York*, 5 PERB §3001 (1972).

There is nothing in the Act or the legislative history of the 1971 amendment to demonstrate a legislative intent aimed at negatively impacting PERB's role in determining managerial and confidential issues prior to certifying a bargaining unit. To the contrary, the 1971 amendment constituted an expansion of PERB's jurisdiction in this area by granting the Board the authority to remove managerial and confidential employees from a bargaining unit based on an employer application and a subsequent investigation by the Director.

Following the 1971 amendment, PERB has continued to render determinations regarding managerial and/or confidential issues as part of uniting determinations prior to certification.<sup>4</sup> The statutory basis for PERB's continued practice is self-evident: §207.1 of the Act requires PERB when defining the appropriate negotiation unit to take into account, *inter alia*:

- (a) the definition of the unit shall correspond to a community of interest among the *employees* to be included in the unit. (emphasis added)

Pursuant to §201.7(a) of the Act, employees who are determined to be managerial or confidential are not public employees entitled, as a matter of law, to be included in a bargaining unit prior to certification under §201.7(c). Nor are such employees entitled to representation under §203 of the Act.

By examining whether a particular employee is managerial or confidential during the investigation of a representation petition, the Director is fulfilling the

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<sup>4</sup> See, *McGraw Cent Sch Dist*, 21 PERB ¶¶3001 (1988); *City of Jamestown*, 25 PERB ¶¶3015 (1992); *Chautauqua County and Chautauqua County Sheriff*, 26 PERB ¶¶3070 (1993); *Town of Greece*, 27 PERB ¶¶3024 (1994); *City of Lockport*, 30 PERB ¶¶3049 (1997); *Owego-Apalachin Cent Sch Dist*, 33 PERB ¶¶3005 (2000); *State of New York*, 36 PERB ¶¶3029 (2003); *State of New York (Office of Parks, Recreation and Historic Preservation)*, 39 PERB ¶¶3007 (2006).

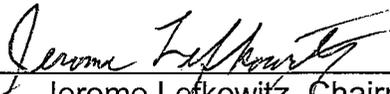
statutory obligation of determining which employees should be included in the bargaining unit and thereby entitled to representation under the Act.

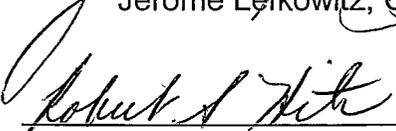
As conceded by the Association in its brief, the first determination that must be made prior to certification is the appropriateness of the proposed bargaining unit. Here, the Town raised the question as to whether three of the seven lieutenants sought to be represented by the Association in the proposed unit should be excluded by reason of having managerial or confidential responsibilities. Until the appropriate dimensions of the unit are determined, the Association cannot be certified.

Therefore, we reject the Association's contention that the Board's precedent and historical practice is inconsistent with the policy underlying the Act and the Rules. In fact, a grant of certification to the Association prior to the completion of the Director's determination regarding unit composition would be premature.

Based on the foregoing, we deny the Association's exceptions and affirm the interim decision of the Director.

DATED: August 29, 2007  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairman

  
\_\_\_\_\_  
Robert S. Hite, Member

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

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In the Matter of

**KINGSTON POLICE BENEVOLENT ASSOCIATION,  
INC.,**

Charging Party,

**CASE NO. U-26553**

- and -

**CITY OF KINGSTON,**

Respondent.

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**JOHN M. CROTTY, ESQ., for Charging Party**

**ROEMER WALLENS & MINEAUX LLP (DIONNE A. WHEATLEY of counsel),  
for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the City of Kingston (City) to a decision of an Administrative Law Judge (ALJ) finding that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued a past practice of defraying the costs of police officers for veterinary services and food for specially trained police canines in their care after the canines have been taken out of service.

The improper practice charge was filed by the Kingston Police Benevolent Association, Inc. (PBA), the exclusive bargaining representative of the City's police officers. The City alleged that the charge, filed on February 10, 2006, is untimely. It also

contended that there was no established past practice and that the subject matter of the charge is not a mandatory subject of negotiations.

The ALJ found the charge timely and concluded that the PBA had established a past practice of the City's paying for routine veterinary care and food provided to the out-of-service canines cared for by the police officers and that these payments were an economic benefit for the police officers.

### **EXCEPTIONS**

In its exceptions, the City argues that the ALJ erred by finding that the charge was timely, that there was a cognizable past practice, and that the payment for the food and routine veterinary care is a mandatory subject of bargaining. The PBA supports the ALJ's decision.

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

### **FACTS**

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

The City and the PBA are parties to a collective bargaining agreement with a term of January 1, 2005 through December 31, 2007. The collective bargaining agreement is silent on the issues presented by this improper practice charge.

The City has utilized canines in the police department since at least 1981. To be part of the K-9 unit, a police officer, along with an assigned canine, receive special training and certification to perform a variety of duties including: crowd control, search

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<sup>1</sup> 40 PERB ¶4520 (2007).

and rescue, apprehending fleeing suspects, and self-defense. The specially trained canine is assigned solely to the police officer who was trained to handle that canine. The canine is trained to respond only to the commands of that police officer handler.

Following the training, the police officer handler and his/her assigned canine work together. When the canine is removed from service because of age or injury, or because the police officer is no longer assigned to the K-9 unit, it remains in the care and custody of the officer until it dies. The City has opted not to euthanize the out-of-service police dogs immediately but to have them cared for by their former police officer handlers.

Police Officer Roger Boughton testified that a practice of defraying the costs for the veterinary care and food for out-of-service canines in the care of their former police handlers was authorized by former Chief of Police Riggins in the mid-1990's following an oral request by Boughton and other K-9 unit officers. Boughton's unrefuted testimony was that Riggins told him that the City's Board of Police Commissioners, headed by the City's Mayor, had given approval to Chief Riggins for the City to pay for veterinary care and food for five years after the canines were taken out of service. At that time, there were five K-9 officers, but no out-of-service dogs.

From approximately 1995 through 2005, in each of at least three<sup>2</sup> situations when a canine was removed from service, the City defrayed the assigned police officer's costs for food and routine veterinary care by paying the bills for those services

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<sup>2</sup> The record establishes that the City paid for the care of a fourth out-of-service canine, in the custody of police officer Appa in the K-9 unit, before it died. However, the precise time frame of such payments is unclear from the record.

for a maximum of five years. None of the canines have lived more than five years after being placed out of service.

The routine veterinary care paid for by the City that constituted the past practice included periodic examinations, vaccinations and medications.<sup>3</sup> Documents in the record establish that the bills were paid by the City, whether or not an officer signed for the services or purchases.<sup>4</sup>

In the late 1990's, Boughton's assigned canine was taken out of service and for the next few years the City paid for the dog food and routine veterinary care including the dog's cremation. A second dog assigned to Boughton was taken out of service in May 2005, when Boughton was reassigned out of the K-9 unit. Boughton brought the dog to the veterinarian from May 2005 until it died in August 2006 and he was not billed. It was not until October 2006 that he received a bill from the veterinarian indicating that the City had not paid for the services rendered. Also, in April 2006, Boughton was told at the feed store that the City stopped paying the food bills for his out-of-service dog.

In 1997, a dog assigned to former K-9 Police Officer John Van Etten was taken out-of-service. For over two years after being taken out of service, the City paid for the canine's routine veterinary care and food.

Van Etten was assigned a second canine on the day that his first was taken out of service. In April 2005, at the time Van Etten went on GML §207-c disability leave, his

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<sup>3</sup> The record establishes that the practice of payment for routine veterinary care included euthanasia and cremation of out-of-service dogs in the custody of police officer handlers. During the decade long practice, the City paid for the euthanasia of one out-of-service dog and the cremation for at least two out-of-service dogs. There is nothing in the record indicating the City's unwillingness to pay for these veterinary services regarding any other out-of-service dog.

<sup>4</sup> Joint Exhibits 1, 2, 3, 4.

second assigned canine was taken out of service and the City was billed for the routine veterinary care and food. However, the City did not pay those bills. Van Etten testified that in September 2005 he had heard a rumor that the City might discontinue paying for the food and routine veterinary care for out-of-service dogs. He called Anthony Solfaro of the New York State Union of Police Associations, with whom the PBA is affiliated, and related that information. In October 2005, Van Etten received a telephone message from Deputy Chief Wallace, stating the City was not going to pay for the care and feeding of out-of-service dogs. Van Etten returned the call and Wallace confirmed that message. Thereafter, Van Etten left a telephone message for PBA President Wayne Maisch about the situation. Van Etten met with Maisch and gave him information and documentation regarding former Chief Riggins' authorization of the practice.

Maisch testified that after meeting with Van Etten, he contacted Chief of Police Gerald Keller. Keller indicated to Maisch that he had no records regarding the City's payment for veterinary care and dog food bills. Nevertheless, Keller agreed to look into it. In early 2006, Keller told Maisch that because the City had no record of such payments, he would not pay for veterinary care and food bills for Van Etten's out-of-service canine.

Chief Keller testified that he first learned that there was an issue involving the City relating to the payment for food and veterinary care for out-of-service dogs in late August or early September 2005 when he received a telephone call from the City's labor counsel, James Roemer. Keller testified that Roemer told him that Solfaro had told Roemer that Solfaro had received a telephone call from Van Etten concerning this issue. After that phone call, Keller went to Maisch and told him that Van Etten had made

the call to Solfaro. In addition, Keller told Maisch that it was not his policy to pay for the food and care for dogs taken out of service. Thereafter, Keller checked with Lieutenant Tinti, who handles the K-9 unit's bills, and he advised Keller that to his knowledge the City had not made payments for any "retired" dog. Keller testified that he reiterated his policy to Maisch in late October or early November 2005, based on his conversations with Tinti.

### **DISCUSSION**

The City's exception regarding the timeliness of the charge is the threshold issue that must be considered.

We conclude that Solfaro was acting as an agent for the PBA, in August or September 2005, when he spoke with Roemer and discussed the City's past practice regarding its payment for food and routine veterinary care. However, that conversation was just an inquiry by Solfaro on behalf of Van Etten as to whether there was any substance to a rumor that the practice was changing. During the conversation, Solfaro was not given a definitive answer.

The ALJ credited Maisch's testimony that while the PBA and the City had discussions sometime in October or November 2005 about whether a practice existed, it was not until early 2006 that Keller unequivocally told Maisch that the City would not pay for the veterinary care and food for out-of-service dogs. Furthermore, Keller testified that he told Maisch in late October or early November 2005, that the City would not make the at-issue payments, still making the charge timely.

As the charge was filed on February 10, 2006, it was timely as long as the PBA first learned of the change after October 10, 2005, and we conclude that it did.<sup>5</sup>

The next inquiry is whether the payment by the City for veterinary care and food for the out-of-service dogs living with the police officer handler is a mandatory subject of negotiations. We find that it is.

~~The provision by the City of the veterinary care and food for out-of-service dogs~~ is an economic benefit and thus a form of compensation for unit employees, which makes it a mandatory subject of negotiation, whether or not it has a direct relationship to any aspect of job performance.<sup>6</sup> As Van Etten testified, he now pays for the dog's veterinary care and food out of his own pocket, as did Boughton.

Next, we consider whether a past practice has been established with respect to the City paying for the veterinary care and food for out-of-service canines. As the Board recently decided in *Chenango Forks Central School District*,<sup>7</sup> a past practice is established where the "practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."<sup>8</sup> In *Chenango Forks, supra*, we explained that "the clear meaning of our decision...is that the expectation of the

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<sup>5</sup> PERB's Rules of Procedure, §204.1(a).

<sup>6</sup> *Town of Haverstraw v Newman*, 75 AD2d 874, 13 PERB ¶7007 (2d Dept 1980).

<sup>7</sup> 40 PERB ¶3012 (2007).

<sup>8</sup> Citing to *County of Nassau*, 24 PERB ¶3029, at 3058 (1991).

continuation of the practice is something that may be presumed from its duration with consideration of the specific circumstances under which the practice has existed.”<sup>9</sup>

In the present case, the testimony and documents establish that, for approximately ten years, the City paid for the veterinary care and the food for canines removed from service in the K-9 unit consistent with the policy authorized by former Chief of Police Riggins. The police officers were aware of the decade-long practice. That is sufficient to render the past practice binding on the City, although it involved the cost for at minimum three out-of-service canines and two police officer handlers.

The practice was authorized by then Chief Riggins and continued for seven years under Chief Keller from 1998 through 2005. The City paid for the dog food and routine veterinary care during Chief Keller’s tenure, despite his testimony denying the existence of such a practice. Indeed, as the Board noted in *Chenango Forks, supra*, even when an employer’s managerial or supervisory staff have changed over time, the employer will be bound by a practice established under a prior administration or manager when:

the extended period of the practice alone, under normal circumstances, would have constituted circumstantial evidence sufficient to establish a *prima facie* proof of the employer’s knowledge, thereby imposing upon the [employer] the burden of proof of demonstrating that under the totality of the circumstances it did not have actual or constructive knowledge of the past practice.<sup>10</sup>

The record establishes that the bills from the veterinarian along with bills from the feed store were regularly paid by the City for out-of-service canines in at least three

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<sup>9</sup> 40 PERB ¶3012 at \_\_ (2007).

<sup>10</sup> 40 PERB ¶3012 at \_\_ (2007).

situations for over a decade. In each situation, the City made the payments for a few years before the out-of-service dog died.

Nevertheless, the City argues that the Board of Police Commissioners and the Mayor did not have knowledge of or agree to the practice. The ALJ found that to be immaterial given Boughton's testimony that former Chief Riggins had told him that he had brought the proposal to the Board of Police Commissioners and returned with their approval.

The City contends that Boughton's testimony is not enough to establish that the Mayor or the City's Common Council had approved, or was even aware, of the practice.

However, *Chenango Forks, supra*, makes clear that the length of time of the practice, under appropriate circumstances, is sufficient to bind the City. In that case, we expressly rejected the notion that additional proof of mutuality of agreement, knowledge or acquiescence by a managerial or high level supervisory employee is necessary to establish such a past practice. In any event, in the present case the highest ranking member of the police department, former Chief Riggins, stated the policy and acquiesced to the practice of paying for the routine care and food for the out-of-service police dogs. Moreover, as we recognized in *Chenango Forks*, the fact that the practice included making payments from the employer's budget constitutes appropriate circumstances sufficient to establish that the City had actual or constructive knowledge of the practice.<sup>11</sup>

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<sup>11</sup> During the hearing, the City did not present any evidence regarding the police department's budget or the respective roles played by the Chief or the Board of Police Commissioners in reviewing and preparing the annual departmental budget.

We find, therefore, that the City violated §209-a.1(d) of the Act when it unilaterally discontinued its practice of paying for routine veterinary care and food bills for out-of-service dogs in the care of the City's police officers.<sup>12</sup>

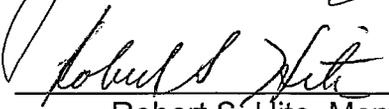
Based on the foregoing, we deny the City's exceptions and affirm the decision and order of the ALJ.

IT IS, THEREFORE, ORDERED that the City forthwith:

1. Restore the practice of paying for routine veterinary care and food for dogs that have been taken out of service from the City's K-9 unit and given to their police officer handlers;
2. Pay any outstanding food and veterinary bills incurred by employees in accordance with its practice;
3. Make employees whole for any payments they have made as a direct result of the City's termination of the practice, plus interest at the maximum legal rate; and
4. Post the attached notice at all locations normally used to communicate with employees in the unit represented by the PBA.

DATED: August 29, 2007  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairman

  
\_\_\_\_\_  
Robert S. Hite, Member

<sup>12</sup> The City has not filed an exception to the ALJ's proposed remedial order. Therefore, it is waived pursuant to §213.2(b)(4) of the Rules of Procedure. See, *State of New York (OMH)*, 31 PERB ¶3051 (1998); *NYCTA*, 35 PERB ¶3028 (2002); *Town of Orangetown*, 40 PERB ¶3008 (2007).

# 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 City of Kingston in the unit represented by the Kingston Police Benevolent Association, Inc. that the City will forthwith:**

1. Restore the practice of paying for routine veterinary care and food for dogs that have been taken out of service from the City's K-9 unit and given to their police officer handlers;
2. Pay any outstanding food and veterinary bills incurred by employees in accordance with its practice; and
3. Make employees whole for any payments they have made as a direct result of the City's termination of the practice, plus interest at the maximum legal rate.

Dated .....

By .....

(Representative)

(Title)

.....  
*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**

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In the Matter of

**THE CITY OF NEW YORK,**

**CASE NO. DR-119**

Upon a Petition for Declaratory Ruling

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**PROSKAUER ROSE LLP (M. DAVID ZURNDORFER, NEIL H. ABRAMSON and DANIEL ALTCHECK, of counsel), for the City of New York**

**GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for Patrolmen's Benevolent Association of the City of New York, Inc.**

**O'DONNELL, SCHWARTZ, GLANSTEIN & LILLY, LLP. (JOEL C. GLANSTEIN, of counsel) for Lieutenants Benevolent Association, *Amicus Curiae***

**JOHN M. CROTTY, ESQ., for New York State Union of Police Associations, *Amicus Curiae***

**GREENBERG BURZICHELLI GREENBERG P.C. (HARRY GREENBERG, of counsel), for Captains Endowment Association, Inc., *Amicus Curiae***

**DAVIS & HERSH, LLP (DAVID A. DAVIS, of counsel), for the Suffolk County Police Conference, *Amicus Curiae***

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) and the City of New York (City), pursuant to PERB's Rules of Procedure (Rules) §201.12 to various conclusions reached by an Administrative Law Judge (ALJ) in a Recommended Declaratory Ruling and Decision (Decision) regarding the negotiability of seven PBA proposals included in its interest arbitration petition.<sup>1</sup>

The City filed a declaratory ruling petition for a determination whether the following proposals were mandatory or nonmandatory subjects of negotiations:

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<sup>1</sup> 40 PERB ¶6601 (2007).

attainment of safe staffing levels; work schedule; bullet-resistant vests; chronic sick program; contract maintenance; and premium pay for lack of a negotiable disciplinary procedure.

In response to the City's petition, the PBA contended that each proposal is a mandatory subject or should be treated as a mandatory subject under the conversion theory of negotiability originally adopted by the Board in *City of Cohoes (Cohoes)*.<sup>2</sup>

In the Decision, the ALJ concluded that the PBA's demands relating to safe staffing levels, bullet-resistant vests, chronic sick program and contract maintenance were nonmandatory subjects of bargaining and, therefore, were not properly submitted to interest arbitration. Further, the ALJ rejected the PBA's arguments that those four demands had been converted under *Cohoes* into mandatory subjects based on the provisions of the expired agreement.

With respect to the PBA's work schedule proposal, the ALJ concluded that it constituted a prohibited subject of bargaining based on Unconsol. § 971(d).

Additionally, the ALJ concluded that the demands for safety and health maintenance and premium pay for the lack of a negotiable disciplinary procedure were mandatory subjects of bargaining and, therefore, properly submitted to interest arbitration by the PBA.

### **EXCEPTIONS**

The PBA filed five exceptions challenging the ALJ's conclusions that the safe staffing levels, bullet-resistant vests, chronic sick program and contract maintenance demands were nonmandatory subjects and that the work schedule demand was a

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<sup>2</sup> 31 PERB ¶3020 (1998), *confirmed sub nom.*, 32 PERB ¶7026 (Sup Ct Albany County), *affd*, *Uniform Firefighters of Cohoes, Local 2562 v Cuevas*, 276 AD2d 184, 33 PERB ¶7019 (3d Dept 2000), *lv denied* 96 NY2d 711, 34 PERB ¶7018 (2001).

prohibited subject.

The City filed two exceptions challenging the ALJ's conclusions that the demand for premium pay for the lack of a negotiable disciplinary procedure was a mandatory subject of bargaining and the ALJ's conclusion that the demand regarding work schedules constituted a prohibited subject of bargaining rather than a nonmandatory subject. With respect to the premium pay demand, the City asserts that it is nonmandatory because it seeks compensation unrelated to the performance of work or a prohibited subject under the holding in *Patrolmen's Benevolent Association v New York State Public Employment Relations Board*.<sup>3</sup>

The City did not file an exception to the ALJ's conclusion that the safety and health maintenance proposal was a mandatory subject of bargaining and it supports the ALJ's other findings.

Following the filing of the exceptions, the Board issued an interim decision granting leave to four employee organizations to appear as *amici curiae*: Lieutenants Benevolent Association (LBA), New York State Union of Police Associations (NYSUPA), Captains Endowment Association, Inc. (CEA), and the Suffolk County Police Conference (Police Conference).<sup>4</sup> The separate briefs from the four *amici* challenge the ALJ's conclusion that the work schedules demand was a prohibited subject of bargaining and contend that it was a mandatory subject of bargaining. *Amici* CEA, NYSUPA and the Police Conference argue in the alternative that if the subject matter of the demand was nonmandatory it was converted to mandatory under *Cohoes*. Finally, *amicus* NYSUPA's brief challenges, in general, the ALJ's analysis and application of *Cohoes* and subsequent cases regarding the conversion theory of negotiations.

<sup>3</sup> 6 NY3d 563, 39 PERB ¶7006 (2006).

<sup>4</sup> 40 PERB ¶3005 (2007).

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

### **FACTS**

The case was decided by the ALJ on a stipulated record submitted by the parties. The specific language for each of the PBA's six demands at issue in the exceptions is set forth below in the discussion regarding the negotiability of each demand.

### **DISCUSSION**

We begin our discussion with an examination of the ALJ's findings that the PBA's two health and safety proposals were nonmandatory. The first safety proposal regarding staffing states:

#### **Attainment of Safe Staffing Levels**

In order to safeguard and ensure the health and safety of police officers performing patrol functions, a Joint-Labor Management Committee consisting of two representatives appointed by the Union and the City shall be convened to establish expeditiously the minimum manning in each patrol precinct and patrol command within the City of New York.

The NYPD will be required to staff each patrol command at the levels established by the Labor Management Committee. To the extent that the agreed to minimum manning levels cannot be met with the officers scheduled for duty, the NYPD shall be required to call in additional officers on overtime.

In the event of a failure to reach an agreement between the Union and the Employer as to the appropriate manning levels, the issue shall be submitted to binding arbitration pursuant to the grievance procedures in the collective bargaining agreement.

The Board has long recognized that the general topic of safety of employees beyond the normal hazards inherent in their work is a mandatory subject of bargaining. In determining whether a proposal regarding safety is a mandatory subject, we focus on

the demand's primary or predominate characteristic.<sup>5</sup> However, the application of the term "safety" is not a label capable of automatically transforming a nonmandatory subject, such as minimum staffing, into a mandatory subject of bargaining.<sup>6</sup>

Although a demand relating to safety may constitute a mandatory subject, our cases have equally recognized that determinations relating to staffing and deployment of personnel are nonmandatory because they are managerial prerogatives tied to the public employer's mission to provide public services.<sup>7</sup>

Recognizing the thin line that can separate mandatory from nonmandatory proposals relating to safety and staffing, the Board has found that a bargaining proposal seeking the creation of a health and safety labor-management committee working under general guidelines to examine specific factual situations and subject to the grievance arbitration procedure, can constitute a mandatory subject of bargaining.<sup>8</sup> For example, in *Uniformed Firefighters Association, Local 273, IAFF*<sup>9</sup> and *White Plains Professional Firefighters Association*<sup>10</sup>, the Board held that a proposal for the creation of a general

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<sup>5</sup> *Police Assn of New Rochelle, Inc.*, 10 PERB ¶3042 (1977); *Troy Uniformed Firefighters Assn, Local 2304, IAFF*, 10 PERB ¶3105 (1977); *City of Mount Vernon*, 11 PERB ¶3049 (1978).

<sup>6</sup> *City of New Rochelle v Crowley*, 61 AD2d 1031, 11 PERB ¶7002 (2d Dept 1978).

<sup>7</sup> *White Plains PBA*, 9 PERB ¶3007 (1976); *Intl Assn of Firefighters of the City of Newburgh, Local 589*, 10 PERB ¶3001 (1977), *confirmed sub nom*; *Intl Assn of Firefighters v Helsby*, 59 AD2d 342, 10 PERB ¶7019 (3d Dept 1977) *lv denied*, 43 NY2d 649 (1978); *Uniformed Firefighters Assn, Inc., Local 273, IAFF*, 10 PERB ¶3078 (1977), *confirmed sub nom.*, *City of New Rochelle v Crowley*, *supra*; *State of New York (Dept of Transportation)*, 27 PERB ¶3056 (1994); *Town of Carmel*, 31 PERB 3006 (1998).

<sup>8</sup> *White Plains PBA*, *supra*; *Intl Assn of Firefighters of the City of Newburgh, Local 589*, *supra*; *Uniformed Firefighters Assn, Local 273, IAFF* *supra*; *White Plains Professional Firefighters Assn, Local 274, IAFF*, 11 PERB ¶3089 (1978).

<sup>9</sup> *Supra*, note 7.

<sup>10</sup> *Supra*, note 8.

health and safety committee, subject to grievance arbitration, with jurisdiction over "all matters of safety and health to the members of the Fire Department including but not limited to, the total number of employees reporting to a fire and the minimum number of employees to be assigned to each piece of firefighting apparatus"<sup>11</sup> constituted a mandatory subject of bargaining.

In the present case, the ALJ concluded that the PBA's demand seeking the creation of a labor-management committee for the attainment of safe staffing levels, with unresolved disputes subject to binding arbitration, was a nonmandatory subject of bargaining. We agree.

Contrary to the PBA's argument, the primary characteristic of its demand is not safety. Rather, it is an effort to establish an enforceable procedural means to usurp the City's fundamental prerogative to determine the appropriate level of police staffing. As such, the proposal constitutes a nonmandatory subject of bargaining.

Nor can the proposal be reasonably construed, as claimed by the PBA, as a safety and health maintenance clause and, therefore, mandatorily negotiable.<sup>12</sup> As noted, the PBA proposed a separate safety and health maintenance clause that the ALJ correctly concluded was a mandatory subject of bargaining.

In the alternative, the PBA challenges the ALJ's rejection of its argument that the staffing proposal constitutes a mandatory subject of bargaining under *Cohoes*<sup>13</sup> and its progeny. For the reasons set forth below, we affirm the ALJ's reasoning for rejecting the PBA's argument under *Cohoes*.

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<sup>11</sup> 10 PERB at 3132.

<sup>12</sup> *Town of Niagara*, 14 PERB ¶13049 (1981).

<sup>13</sup> *Supra*, note 2.

In *Cohoes*, the Board established a supplemental theory of negotiability that converts nonmandatory subjects contained in collective bargaining agreements into mandatory subjects of negotiations between the parties to that agreement. The central rationale underlying the conversion theory was the Board's view that there was a fundamental structural imbalance in negotiations where an employer is obligated to continue all terms and conditions of employment in a contract, including provisions that are nonmandatory in nature, pursuant to §209-a.1(e) of the Act but that the nonmandatory subjects in the agreement did not have to be negotiated.

As the Board stated in *Cohoes*:

This unilateral veto power over the scope of collective negotiations, whether wielded by employers or unions, is itself contrary to the policies of the Act. The result is as ironic as it is unfair for it has elevated nonmandatory subjects of negotiation to a legal status above that of mandatory subjects.<sup>14</sup>

In the present case, the PBA contends that the ALJ erred in failing to find that the nonmandatory staffing proposal was converted into a mandatory subject based on the negotiated article contained in the expired 2002-2004 agreement between the parties regarding a general health and safety labor-management committee.<sup>15</sup>

The PBA does not question the merit of the ALJ's conclusion that the negotiated labor-management committee article constituted a mandatory subject of bargaining

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<sup>14</sup> 31 PERB at 3040.

<sup>15</sup> Stipulated Record, Exhibit E, Response to Petition for A Declaratory Ruling, Exhibit B, pp. 26-27. Article XXVII, §2 provides that: "The labor-management committee shall consider and may recommend to the Police Commissioner changes in working conditions of employees, including, but not limited, to the following subjects: the adequate levels of Police coverage to ensure the safety of employees on duty; an excusal policy for employees appearing in court after the midnight tour. Matters subject to the grievance procedure shall not be appropriate items for consideration by the labor-management committee."

under Board precedent. Instead, the PBA, along with *amicus* NYSUPA, contend that under *Cohoes*, the presence of a mandatory subject in a collectively negotiated agreement transforms a nonmandatory proposal seeking to impose restrictions on a managerial prerogative into a mandatory subject because it is arguably related to the mandatory provision in the expired agreement.

We are not persuaded that there is any rationale under the Act for the expansion of the *Cohoes* conversion theory that would transform nonmandatory subjects not already contained in an agreement into mandatory subjects. Unlike the negotiating disparity that the Board sought to remedy in *Cohoes*, no structural imbalance exists between the parties with respect to the negotiability of nonmandatory subjects outside of an agreement. Neither an employer nor an employee organization is obligated to negotiate such a subject and they are mutually impacted when a nonmandatory subject is incorporated into an agreement: it is converted, as a matter of law, into a mandatory subject in subsequent negotiations.

Furthermore, adoption of the PBA's argument has the potential for undermining the stability of negotiations by inappropriately and unnecessarily blurring the distinction under a traditional scope analysis between mandatory and nonmandatory subjects.

Contrary to the arguments made by the PBA and *amici* NYSUPA and the Police Conference, Board precedent subsequent to *Cohoes* does not demonstrate an explicit or implicit adoption of the proposed appurtenance to the *Cohoes* theory of conversion. The PBA and *amicus* NYSUPA cite to four cases subsequent to *Cohoes* to support an expansion of the conversion theory of negotiability: *Greenburgh No. 11 Union Free School District (Greenburgh)*,<sup>16</sup> *Town of Yorktown Police Benevolent Association, Inc.*

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<sup>16</sup> 32 PERB ¶3024(1999).

(Yorktown),<sup>17</sup> Village of Saugerties Police Benevolent Association (Saugerties)<sup>18</sup> and Town of Fishkill Police Fraternity, Inc.(Fishkill).<sup>19</sup>

In *Fishkill*, the Board reiterated the central rationale for the *Cohoes* conversion theory: "*Cohoes* was intended to give parties an avenue to discuss and change nonmandatory contract terms."<sup>20</sup>

The *dicta* from *Greenburgh*, cited by *amici* NYSUPA and the Police Conference regarding "any legal term" in a contract being subject to negotiation regarding deletion, modification or continuation was utilized in the context of explaining the *Cohoes* rationale for the conversion of nonmandatory subjects already contained in a contract.<sup>21</sup>

In *Yorktown*, the Board made clear that the *Cohoes* conversion theory is applicable only to efforts at deleting or modifying nonmandatory subjects already included in an agreement:

*Cohoes* was intended to give parties an avenue to address contractual provisions which deal with nonmandatory subjects of negotiations. Not only does it provide parties with the means to argue at interest arbitration that a contract provision dealing with a nonmandatory subject should be removed, it is also a tool to modify nonmandatory contract provisions, as long as the proposed modification is reasonably related to specific language of the nonmandatory contract provision.<sup>22</sup>

Similarly, *Saugerties* can not be reasonably interpreted to constitute an adoption of an expanded view of the supplemental theory of negotiations under *Cohoes*, as

<sup>17</sup> 35 PERB ¶3017 (2002).

<sup>18</sup> 38 PERB ¶3034 (2005).

<sup>19</sup> 39 PERB ¶3035 (2006).

<sup>20</sup> *Id.* at 3119.

<sup>21</sup> *Supra*, note 16 at 3047-3048.

<sup>22</sup> 35 PERB at 3041. See also, *City of New York*, 35 PERB ¶3034 (2002).

*amicus* NYSUPA contends. In *Saugerties*, the Board affirmed the ALJ's conclusions that the subject matters of the four proposals were mandatorily negotiable and, in the alternative, they were negotiable under *Cohoes*. To the extent that *Saugerties* might be interpreted as permitting the conversion of a nonmandatory proposal on the basis that it relates to a contract provision involving a mandatory subject, we hereby reject such interpretation of *Saugerties*.

Based on the foregoing, we affirm the ALJ's conclusion that the PBA's nonmandatory proposal was not converted under *Cohoes* into a mandatory proposal.<sup>23</sup>

The second PBA health and safety proposal relates to bullet-resistant vests. The proposal states:

**Vests**

The Employer shall issue new bullet-resistant vests to every police officer reflecting the current state of technology no less than once every five years from the date that Police Officer's current vest was issued but no later than the expiration day of the warranty for the vest.

The ALJ found that the proposal to mandate the purchase and issuance of new bullet-resistant vests on a periodic basis was nonmandatory. The ALJ reached that conclusion by analogizing to Board precedent holding that the selection and deployment of weapons for law enforcement as well as the amount of ammunition were nonmandatory subjects.<sup>24</sup> In those earlier decisions, the Board concluded that such

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<sup>23</sup> Based on our rejection of the PBA's argument under *Cohoes*, we need not reach the issue of whether the PBA's proposal constituted the creation of a new contractual obligation rather than a mere modification of a pre-existing nonmandatory provision under *Cohoes* by seeking to make staffing decisions subject to binding arbitration.

<sup>24</sup> *City of Albany PBA*, 7 PERB ¶3078 (1974); *Local 294, Intl Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 10 PERB ¶3007 (1977).

equipment related directly to the manner and means that police services are provided, thereby constituting a managerial prerogative.<sup>25</sup>

Despite the common use of bullet-resistant vests for the safety of members of law enforcement, the Board has never been called upon to determine whether a demand relating to such vests constitutes a mandatory subject of bargaining.

A review of the proposal reveals that its paramount purpose is to ensure that police officers will not be utilizing unsafe and outdated safety equipment by requiring the purchase and distribution of new vests on a periodic basis.<sup>26</sup> Unlike weapons and ammunition, bullet-proof vests are safety-sensitive and defensive in nature. Their use is solely aimed at protecting the life and well-being of police officers.

Significantly, the PBA's proposal does not seek to negotiate when such vests are to be utilized by bargaining unit members or seek to limit managerial discretion regarding deployment of personnel. Such a proposal might be nonmandatory because it could impact the manner and means that police services are provided.

But a balancing between the interests of the PBA and the City regarding this proposal demonstrates that it is a mandatory subject of bargaining.<sup>27</sup> The PBA's interest in protecting the safety and well-being of its members by ensuring that safety equipment is safe and modernized outweighs the City's interest with respect to the cost associated

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<sup>25</sup> *Id.*

<sup>26</sup> See, *Scarsdale PBA*, 8 PERB ¶¶3075 (1975); *PBA of the City of White Plains*, 12 PERB ¶¶3046 (1979).

<sup>27</sup> In reaching our conclusion, we have reviewed the ALJ decision in *Police Assn of the City of New Rochelle*, 13 PERB ¶¶4540, *affd on other grounds*, 13 PERB ¶¶3082 (1980), cited by the parties. The Board is not bound by earlier unreviewed ALJ decisions. *Westchester County Department of Correction Superior Officers' Assn*, 26 PERB ¶¶3077 (1993). We find the ALJ's conclusion in *Police Assn of the City of New Rochelle* regarding the negotiability of bullet-resistant vests to be conclusory in nature and, thereby, unpersuasive.

with the demand. The balancing of respective interests of the City and PBA with regard to the subject matter at issue is fully consistent with our methodology in determining whether specific subjects are mandatorily negotiable.<sup>28</sup> In reaching the conclusion that the demand is a mandatory subject, we are not deciding the merits of the demand, only its negotiability.

Based on our conclusion that the PBA's demand regarding bullet-resistant vests is a mandatory subject of bargaining, we do not need to reach whether it is a mandatory subject under the conversion theory of negotiations.

### **Work Schedule**

We next turn to the exceptions filed by both the PBA and the City challenging the ALJ's conclusion that the PBA's work schedule proposal constituted a prohibited subject of bargaining. The PBA's original proposal states:

NYPD will adopt a modern chart for police officers, implementing duty schedules that replicate or are similar to those in other jurisdictions that will require either 10 hour or 12 hour tours, plus or minus increments of less than an hour (*i.e.*, a 12 hour, 15 minute tour, a 10 hour, 30 minute tour), and fewer appearances.

By stipulation, the proposal was clarified in response to the City's contention that it was vague and ambiguous. The stipulated clarification states:

The PBA's "Work Schedule" proposal is seeking either ten hour tours or twelve hour tours (or a combination of the two) with the requisite number of appearances so that officers work 2088 hours per year.<sup>29</sup>

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<sup>28</sup> See, *State of New York (Dept of Transp)*, 27 PERB ¶3056 (1994). In applying the balancing test, we are not suggesting that the City is indifferent to the safety of its police officers by asserting that it is a nonmandatory subject.

<sup>29</sup> Based on the clarification, the City withdrew its vagueness challenge to the proposal.

As clarified by the stipulation, the PBA's proposal is aimed at establishing tours beyond eight hours. It does not seek to restrict the City's authority to decide staffing needs or the discretion of the City to establish platoons or charts.

The ALJ concluded that the proposal was a prohibited subject based on the text of Unconsol. § 971(d).<sup>30</sup> In addition, he relied upon New York Court of Appeals precedent concluding that other statutes prohibited the negotiation of certain subjects.<sup>31</sup> Relying on the Unconsol. § 971(d) provision that states no member "shall be assigned to perform a tour of duty in excess of eight hours," except in specifically identified circumstances, the ALJ found the PBA proposal seeking tours of duty in excess of eight hours to be a prohibited subject of bargaining.

Although the PBA and the City have both filed exceptions to that conclusion, they differ regarding whether the work schedule proposal is a mandatory or nonmandatory subject of bargaining.

The PBA contends that the proposal is a mandatory subject based on Board

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<sup>30</sup> Unconsol. § 971(d) provides: In the city of New York, the police commissioner, and in the city of Syracuse, the chief of police, shall promulgate duty charts for members of the police force which distribute the available police force according to the relative need for its services. This need shall be measured by the incidence of police hazard and criminal activity or other similar factor or factors. No member of the force shall be assigned to perform a tour of duty in excess of eight consecutive hours excepting only that in the event of strikes, riots, conflagrations or occasions when large crowds shall assemble, or other emergency, or on a day on which an election authorized by law shall be held, or for the purpose of changing tours of duty so many members may be continued on duty for such hours as may be necessary. No member shall be assigned to an average of more than forty hours of duty during any seven consecutive day period except in an emergency or as permitted in this subdivision or for the purpose of changing tours of duty or as otherwise provided for by law.

<sup>31</sup> See, *Schenectady PBA v New York State Pub Empl Rel Bd*, 85 NY2d 480, 28 PERB ¶7005 (1995); *Webster Cent Sch Dist v New York State Pub Empl Rel Bd*, 75 NY 2d 619, 23 PERB ¶7013 (1990). See also, *Patrolmen's Benevolent Assn v New York State Pub Empl Rel Bd*, *supra*, note 3.

precedent holding that a proposed change to tours of duty which does not interfere with an employer's right to determine staffing requirements is a mandatory subject of bargaining. In particular, the PBA cites to the Board's 2004 decision in *Patrolmen's Benevolent Association* holding that a virtually identical proposal was a mandatory subject of bargaining.<sup>32</sup> In the alternative, the PBA argues that if the subject matter of the proposal is nonmandatory, it is converted into a mandatory subject under *Cohoes*.

The City, in support of its argument that the work schedule proposal is nonmandatory, relies on judicial decisions and informal opinions of the New York State Attorney General analyzing the negotiability of proposals that conflict with a similar statutory provision, Unconsol. §971(a), regarding tours of duty for police working for other local public employers.

*Amici* LBA, NYSUPA, CEA and the Police Conference have all filed briefs supporting the challenge to the ALJ's conclusion that the proposal was a prohibited subject of bargaining and argue that the proposal constitutes a mandatory subject.

The first question we must examine is whether the broad mandate under the Act for negotiations about terms and conditions of employment is negated or circumscribed by the clear legislative intent derived from Unconsol. § 971(d).

In *Schenectady Police Benevolent Association v New York State Public Employment Relations Board*<sup>33</sup> and *Patrolmen's Benevolent Association v New York State Public Employment Relations Board*<sup>34</sup>, the Court of Appeals concluded that

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<sup>32</sup> 37 PERB ¶¶3033 at 3098, 3100 (2004).

<sup>33</sup> 85 NY2d at 485-486, 28 PERB at 7012 (1995).

<sup>34</sup> 6 NY3d at 572-573, 39 PERB at 7008 (2006).

legislation that pre-dated the Act demonstrated a legislative intent to preclude negotiations regarding certain powers and authority granted public employers.<sup>35</sup>

Based upon our review of the legal arguments raised by the PBA, City and *amici*, we disagree with the ALJ's conclusion that the work schedule proposal constituted a prohibited subject of bargaining.

In *MacNish v Waldo*,<sup>36</sup> the Court of Appeals concluded that the primary legislative purpose for the eight hour statutory limitation on police tours of duty, contained in the precursor statute, the so-called "Three Platoon" law, was the promotion of the health and efficiency of police officers. When the statute was amended in 1969 to eliminate the mandatory three platoon system for New York City and the City of Syracuse, the Legislature chose to retain the eight hour limitation on police tours.<sup>37</sup>

It is well settled that other statutory protections and benefits for employees in New York can be waived under the terms of a collective bargaining agreement.<sup>38</sup> In *City of Schenectady*,<sup>39</sup> the Board concluded that the eight hour limitation on police tours in other local governments, contained in another subsection of Unconsol. §971, constituted a waivable statutory overtime restriction. Both the Appellate Division,

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<sup>35</sup> At the same time, courts have upheld the Board's conclusion in *Cohoes* that an employer proposal seeking an employee organization's waiver of statutory rights of bargaining unit members is a mandatory subject of bargaining as long as the waiver is consistent with public policy and not contrary to legislative intent. *Uniform Firefighters of Cohoes, Local 2562, IAFF v Cuevas*, 276 AD2d 184, 33 PERB ¶7019 (3d Dept 2000), *lv denied* 96 NY2d 711, 34 PERB ¶7018 (2001).

<sup>36</sup> 212 NY 348, 350 (1914), *mot for rehearing den*, 212 NY 610 (1914).

<sup>37</sup> L. 1969, c. 177 (McKinneys).

<sup>38</sup> See, *Board of Education of the City of Rochester v Nyquist*, 48 NY2d 97, 104-105 (1979); *American Broadcasting Companies, Inc. v Roberts*, 61 NY2d 244, 249-250 (1984).

<sup>39</sup> 18 PERB ¶3035 (1985).

Second Department and the New York Attorney General have found that the same provision does not bar negotiations.<sup>40</sup>

In 1975, in *PBA of the City of New York*<sup>41</sup>, the New York City Board of Collective Bargaining (BCB) ruled that Unconsol. § 971(d) did not prohibit the negotiability of the length of police tours noting the established practice of police exceeding eight hours. The following year, a similar finding was reached by a PERB ALJ in the context of a related improper practice charge.<sup>42</sup>

Therefore, after consideration of the history, text and prior interpretations of Unconsol. §971, we reverse the ALJ's conclusion that the statutory eight hour limitation renders the PBA's proposal a prohibited subject of bargaining.

The second question we need to resolve is whether the PBA's proposal is a mandatory subject of bargaining.

We conclude that the proposal is a mandatory subject based on our decision three years ago in *Patrolmen's Benevolent Association* with respect to a similar prior PBA proposal, along with the well-established precedent finding that proposals relating to tours of duty and work schedule are mandatory subjects as long as they do not interfere with an employer's determination regarding staffing and other managerial

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<sup>40</sup> *Spring Valley PBA v Village of Spring Valley*, 80 AD2d 910, 911, 14 PERB ¶7515; at 7522 (2d Dept 1981); 1978 Op Atty Gen (Inf) 297; 1992 Op Atty Gen (Inf) 21. See also, *Follett v Sejan*, 123 Misc2d 263, 17 PERB ¶7513 (Sup Ct Broome Co. 1984). Contrary to the City's argument, neither the court decision nor the advisory opinions support the conclusion that subject matter is a nonmandatory subject of bargaining.

<sup>41</sup> B-24-75 (1975), *confirmed sub nom.*, 9 PERB ¶7501 (Sup Ct New York County 1976); See also, B-5-75 (1975).

<sup>42</sup> *City of New York*, 9 PERB ¶4502 (1976).

prerogatives.<sup>43</sup> Furthermore, as the Board reiterated in *Cohoes*, a demand by an employee organization for the wavier of an employee's statutory right or privilege is a mandatory subject unless it would violate public policy.

We next consider the PBA's exception to the ALJ's conclusion that the chronic sick program proposal was nonmandatory. The PBA proposal states:

**Chronic Sick Program**

All sick leave taken as a result of Line of Duty injuries shall be exempt from consideration in the NYPD's chronic sick leave program. By making this demand, the PBA expressly does not acknowledge or concede the legality of the chronic sick leave program.

The ALJ concluded that the proposal was nonmandatory because it seeks to limit the criteria the City may utilize in determining whether a police officer is abusing sick leave. We agree.

The PBA argues that its proposal is mandatory subject based on cases finding that sick leave, generally, as well as procedures relating to the grant or denial of sick leave are mandatory subjects. Alternatively, it contends that the proposal is mandatory under *Cohoes*. The City supports the ALJ's conclusion contending that the proposal would interfere with a managerial prerogative regarding sick leave abuse.

An employer has the inherent managerial right to establish the standards to determine sick leave abuse and to monitor an employee's use of sick leave under those standards.<sup>44</sup> Therefore, as the ALJ correctly found, the PBA's proposal is nonmandatory

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<sup>43</sup> *Patrolmen's Benevolent Assn*, supra, note 34; *City of New York*, 35 PERB ¶3034 at 3098 (2002); *Starpoint Cent Sch Dist*, 23 PERB ¶3012 (1990); *Town of Yorktown*, 35 PERB at 3040-3041; *Village of Mamaroneck PBA*, 22 PERB ¶3029 (1989); *Town of Blooming Grove*, 21 PERB ¶3032 (1988); *City of White Plains*, 5 PERB ¶3008 (1972).

<sup>44</sup> *Poughkeepsie City Sch Dist*, 19 PERB ¶3046 (1986); *Town of Carmel*, 31 PERB ¶3023 (1998).

because it seeks to place limitations on the standards that the City may apply in determining sick leave abuse.<sup>45</sup> In addition, we concur with the ALJ that the PBA's nonmandatory proposal is not converted under *Cohoes* because it does not seek to modify or alter a nonmandatory subject in the expired agreement.

Our discussion now turns to the ALJ's finding that the contract maintenance proposal was a unitary demand containing both nonmandatory and mandatory issues rendering the entire proposal nonmandatory. The proposal states:

#### **Contract Maintenance**

The Employer shall provide written notification to the PBA in advance of any change in the Patrol Guide, Administrative Guide or any other change in the terms and conditions of employment.

The Board has long held that when a proposal contains two or more inseparable elements at least one of which is nonmandatory, the entire proposal is deemed nonmandatory.<sup>46</sup>

The ALJ concluded that the PBA's proposal was nonmandatory because it seeks, *inter alia*, notice of procedural changes in the Administrative Guide regarding the terms and conditions of nonunit members and because the proposed notice requirement does not include an exception for emergency situations. The ALJ also rejected the PBA's contention that the proposal was converted under *Cohoes* based on

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<sup>45</sup> The PBA's reliance on *Croton Police Assn*, 16 PERB ¶3007 (1983) is misplaced because the proposal in that case was unrelated to establishing the criteria for sick leave abuse.

<sup>46</sup> *Pearl River Union Free Sch Dist*, 11 PERB ¶3085 (1978); *City of Rochester*, 12 PERB ¶3010 (1979); *CSEA, Inc., Niagara Chapter*, 14 PERB ¶3049 (1981); *City of Oneida*, 15 PERB 3096 (1982); *Schenectady PBA*, 21 PERB ¶3022 (1988); *PBA of the City of White Plains, Inc.*, 35 PERB ¶3051 (2000); *Poughkeepsie Prof Fire Fighters' Assn, Local 596, IAFF*, 33 PERB ¶3029 (2000).

the information exchange provision contained in the expired agreement.<sup>47</sup>

We agree with the ALJ that the proposal is nonmandatory for the reasons cited by the ALJ. Furthermore, we find, as the ALJ did, that the proposal is not a mandatory subject under *Cohoes*. The proposal imposes new obligations on the City to provide advance notification to the PBA regarding policies and procedures contained in the Administrative Guide. Therefore, it is not reasonably related to the specific language in the expired agreement regarding information exchange between the parties.<sup>48</sup>

Finally, we address the City's exceptions to the ALJ finding that the PBA's premium pay proposal is a mandatory subject of bargaining. The PBA's proposal states:

**Premium for Lack of Negotiable Disciplinary Procedural Protections**

The City will be obligated to pay annually a premium equal to 10% of salary at basic maximum to each officer in recognition of the fact that PBA members are employed in a jurisdiction in which the Courts have found that the power to limit fundamental disciplinary procedural protections rests entirely with the Police Commissioner. The premium shall be considered wage compensation and as a part of base salary for purposes of the calculation of both overtime and night shift differential, and shall increase on in the same percentage as all future wage increases.

The ALJ determined that the demand was a mandatory subject of bargaining because the essential nature of the demand is for increased compensation. Relying on

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<sup>47</sup> Article XVI (5) of the expired agreement provides:

The Department will provide the Union with a copy of all Orders, Department Bulletins, "Open Door" issues, and press releases. The details of the delivery shall be worked out between the parties.

<sup>48</sup> *Town of Yorktown PBA, Inc., supra*, note 43 at 3041.

the Board's decision in *Fulton Fire Fighters Association, Local 3063, IAFF*,<sup>49</sup> the ALJ concluded that the proposal was mandatory. We agree.

Contrary to the City's exceptions, the proposal does not seek increased compensation as a penalty for when work is not performed.<sup>50</sup> Rather, it would provide compensation that is directly related to the working conditions of the PBA membership.<sup>51</sup>

Finally, we reject the City's assertion that the proposal is a prohibited subject of bargaining based on the holding in *Patrolmen's Benevolent Association v New York State Public Employment Relations Board*.<sup>52</sup> In that case, the Court of Appeals ruled that the City's police disciplinary procedure was a prohibited subject. The Court's decision can not be reasonably interpreted to prohibit negotiations regarding a proposal for an increase in the level of compensation for PBA members in consideration for the impact of the City's unilateral right to set disciplinary procedures.<sup>53</sup>

Based on the foregoing, we conclude that the following three proposals were properly submitted to interest arbitration by the PBA: bullet-resistant vests, work

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<sup>49</sup> 30 PERB ¶3012 (1997).

<sup>50</sup> *Lynbrook PBA*, 10 PERB ¶3067 (1977).

<sup>51</sup> *Town of Haverstraw*, 12 PERB ¶3064 (1978), *confirmed sub nom, Town of Haverstraw v PERB*, 12 PERB ¶7007 (Rockland County Sup Ct 1979), *aff'd*, 75 AD2d 874, 13 PERB 7006 (2d Dept 1980); *Fulton Fire Fighters Assn, supra*, note 49 at 3025; *Village of Spring Valley* 14 PERB ¶3010 at 3017 (1981).

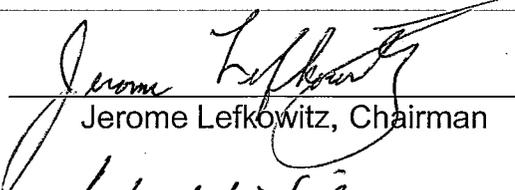
<sup>52</sup> *Supra*.

<sup>53</sup> The narrowness of the decision was exemplified by the Court's reaffirmation that police discipline can be a mandatory subject when police officers are subject to Civil Service Law §§75 and 76. *Supra*, note 3 at 573. *See also, Auburn Police Local 195, Council 82 v Helsby*, 91 Misc2d 909, 10 PERB ¶7016 (1977), *aff'd*, 62 AD2d 12, 11 PERB ¶7003 (3d Dept 1978), *aff'd*, 46 NY2d 1034, 12 PERB ¶7006 (1979).

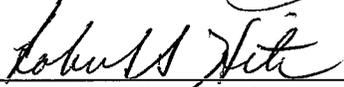
schedule, safety and health maintenance and premium pay for the lack of negotiable disciplinary procedures. The PBA's other demands, attainment of safe staffing levels, chronic sick program and contract maintenance are not mandatory subjects of negotiation and were not properly submitted to interest arbitration.

DATED: August 29, 2007  
Albany, New York

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Jerome Lefkowitz, Chairman

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Robert S. Hite, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**YONKERS FEDERATION OF TEACHERS, NYSUT,  
AFT, AFL-CIO,**

Petitioner,

-and-

**CASE NO. C-5712**

**THE CHARTER SCHOOL OF EDUCATIONAL  
EXCELLENCE,**

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,

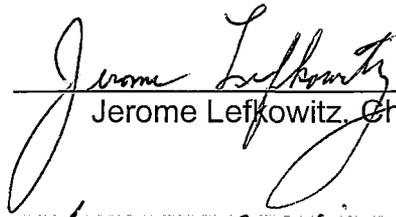
IT IS HEREBY CERTIFIED that the Yonkers Federation of Teachers, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time Teachers, Teaching Assistants and those long term Substitute Teachers who are employed more than 95 consecutive working days except that approved personal illness and/or approved absences of not more than 8 days will not be considered a break in consecutive workdays.

Excluded: Principals, Assistant Principals, Cafeteria Workers, Custodial Workers, Teacher Aides, Clerical Personnel and Security Personnel and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Yonkers Federation of Teachers, NYSUT, AFT, 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: August 29, 2007  
Albany, New York

  
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Jerome Lefkowitz, Chairman

  
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Robert S. Hite, Member