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1-23-2008

## State of New York Public Employment Relations Board Decisions from January 23, 2008

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from January 23, 2008

### 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

**LAKE MOHEGAN PROFESSIONAL FIREFIGHTERS  
ASSOCIATION, LOCAL 2956, IAFF, AFL-CIO,**

Charging Party,

**CASE NO. U-26743**

- and -

**LAKE MOHEGAN FIRE DISTRICT,**

Respondent.

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**MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (RICHARD CORENTHAL of  
counsel), for Charging Party**

**LAMB & BARNOSKY, LLP (RICHARD K. ZUCKERMAN and  
ALYSON MATHEWS, of counsel)**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Lake Mohegan Professional Firefighters Association, Local 2956, IAFF, AFL-CIO (Association) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging, as amended, that the Lake Mohegan Fire District (District) violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when the District unilaterally modified its policy with respect to the dispatch of a District vehicle in response to certain calls.

The District filed an answer that denied that it violated the Act and raised various affirmative defenses.

A hearing was held before the ALJ on February 8, 2007. At the conclusion of the

Association's case, the District moved to dismiss the charge on the following grounds: waiver or duty satisfaction based on Article XI of the parties' contract and the alleged failure of the Association to present sufficient evidence to demonstrate a *prima facie* case.

On June 27, 2007, the ALJ issued a decision granting the District's motion and dismissing the charge. In the decision, the ALJ concluded that, after accepting all of the Association's evidence as being true and granting all reasonable inferences to that evidence, the Association failed to demonstrate a *prima facie* case that the District violated §§209-a1(a) and (d) of the Act when it changed its policy regarding the dispatch of the vehicle known as Utility 40 (U-40).

### **EXCEPTIONS**

The Association filed twenty-two exceptions challenging the ALJ's dismissal of the Association's claim that the District had violated §209-a.1(d) of the Act.<sup>1</sup> In its exceptions, the Association asserts that the ALJ failed to assume the truth of the Association's evidence, disregarded the purpose underlying the District's policy, failed to cite various facts in the record and misapplied the applicable legal precedent. The District supports the ALJ's decision.

Based upon our review of the record, consideration of the parties' arguments and application of relevant precedent, we affirm the ALJ's dismissal of the Association's charge for failure to establish a *prima facie* case.

### **FACTS**

The Board's recitation of the following facts is premised on our assumption that

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<sup>1</sup> The Association did not file an exception challenging the dismissal of its claim alleging a violation of §209-a.1(a) of the Act. Therefore, it is waived. Rules, §213.2(b); *Town of Orangetown*, 40 PERB ¶3008 (2007).

all of the Association's evidence is true and after granting all reasonable inferences from those assumed facts.<sup>2</sup>

The District covers approximately 42 square miles in the Town of Cortlandt and the Town of Yorktown which are located in Westchester County. The Association represents a bargaining unit comprised of full-time professional fire fighters who are required by the District to be certified as emergency medical technicians (firefighter/EMT).

In June 1999, bargaining unit member Ken Polito (Polito) collapsed due to heat exhaustion at the site of a rubbish fire. At the time, the District had a procedure in place that sent one engine with one firefighter/EMT in response to certain calls.

A few weeks after the Polito incident, the Association held a meeting where bargaining unit members expressed concerns about their safety when they were left alone for extended periods of time at fire and EMT calls. Following the meeting, the Association's president Ron Delullo (Delullo) sent a letter requesting a meeting with the Board of Fire Commissioners (Commissioners):

Due to recent incidents within the Lake Mohegan Fire District, concerning members of the Lake Mohegan Fire Fighters I.A.F.F. Local 2956, in which members felt concern and well being [sic] of their safety as president of this local I am requesting a meeting to address this concern.

As you are aware the number of calls within the District are rising, causing a strain on the volunteers and professional Fire Fighters in the District. Response time for Ambulances has risen as well as number of calls going mutual aid to other Ambulances, leaving Fire Fighters alone to do to much for extended periods of time. Response times to outlying parts of the District has also risen leaving Fire Fighters stranded alone. These are some concerns affecting the members of this District, as well as the public. Through this

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<sup>2</sup> See, *County of Nassau (Police Dept)*, 17 PERB ¶3013, at 3030 (1984); *Board of Educ of the City Sch Dist of the City of Buffalo*, 24 PERB ¶3033 (1991); *UFT (Fearon)*, 37 PERB ¶3029 (2004).

meeting we hope to address these concerns plus others, and strive at possible solutions.

In response to the letter, the District met with the Association in August 1999. During the meeting, the Association reiterated its safety concerns relating to firefighter/EMTs being left alone for extended periods of time at both fire and EMS scenes. At the meeting, there was a consensus between the Association and the District that the situation was caused by response delays by volunteer firefighters, the Lake Mohegan volunteer ambulance squads and paramedics from outside agencies. To remedy the problem, the Association suggested that the District purchase an additional vehicle to be dispatched as a means of providing back-up assistance for firefighter/EMTs. The Commissioners indicated at the meeting that they were receptive to the idea.

The following day, Captain Strauss telephoned Delullo to inform him that the District was going to purchase a vehicle that would be used to provide assistance and back up for firefighter/EMT's safety. At a January 2000 meeting, the Commissioners approved the purchase of a four-door Ford Explorer. At a March 2000 Commissioners' meeting, there was discussion regarding the use of the new vehicle. The Commissioners' meeting minutes state, in part:

Was told that it is part of the services that are offered to the public and it is not a separate budget item. Was concerned re: duplication of services within the town. The matter was discussed at length. Report will be bought [sic] back next month re: truck response. *The Squad car was discussed at length. The car is mainly a safety net for the career personnel.* The head count will go from 2 to 3 at headquarters. Career Deuilio stressed that there is no duplication of service. Irwin Goldman questioned whether the EMT from the squad car could ride the ambulance in case no EMT responds with the ambulance. The answer is no. It defeats the purpose of the squad car re: safety. Fremont Reif said that the engine is helpful when it

response. [*sic*] Career FF David Cercena spoke on the response. (emphasis added)

In April 2000, the District purchased the Ford Explorer and equipped it with both EMT and firefighter equipment including a defibrillator, a thermal imaging camera, an automatic pulse machine, bandages and ice packs. The vehicle, known as U-40, is designed expressly to provide safety assistance to firefighters/EMTs at fire and EMS scenes.

Following the purchase, U-40 was staffed by a firefighter/EMT in the bargaining unit. The vehicle was dispatched in response to all fire and EMS calls received by the District. If the first firefighter/EMT on the scene concluded that U-40 was unnecessary, the U-40 dispatch would be cancelled and it would be rerouted to a fire station.

In November 2000, after consultation with the Association, the District issued a document entitled "Response of Utility 40" setting forth the applicable protocol for U-40.

The document states, in part:

PURPOSE: TO ENSURE THAT AN ADDITIONAL FF/EMT RESPONDS TO PRIMARILY ONE ENGINE/TRUCK RESPONSES TO ASSIST WITH FIREFIGHTER SAFETY AT THE SCENE OF AN EMERGENCY RELATED TO FIRE IN STRUCTURE.

THIS VEHICLE WILL RESPOND FROM HEADQUARTERS IMMEDIATELY UPON RECEIPT OF AN EMS OR FIRE CALL, ALONG WITH AN ENGINE OR TRUCK FROM STATIONS 1, 2, 3, AND 4. (emphasis added).

Between 2001 and 2006, on a number of occasions the District modified the response procedures regarding U-40. In April 2003, the District issued another document entitled "Response of Utility 40" which states, in part:

PURPOSE: TO ENSURE THAT AN ADDITIONAL FF/EMT RESPONDS TO PRIMARILY ONE ENGINE/TRUCK

*RESPONSES TO ASSIST WITH FIREFIGHTER SAFETY  
AT THE SCENE OF AN EMERGENCY.*

THIS VEHICLE WILL RESPOND FROM HEADQUARTERS IMMEDIATELY UPON RECEIPT OF AN EMS OR FIRE CALL, ALONG WITH AN ENGINE OR TRUCK FROM STATIONS 1, 2, 3, AND 4. (emphasis added)

During the hearing, Association witnesses testified that the purpose of U-40 is aimed at protecting firefighter/EMT safety by ensuring that the first responding firefighter/EMT has assistance from a back-up firefighter/EMT when confronting potential physical dangers at a scene including volatile, if not violent and combative, situations. Association witnesses described how they feel safer and more secure when responding to calls and in the performance of their duties knowing that the dispatch of U-40 will ensure the presence of an "extra set of eyes."

In March 2006, Captain Strauss announced the District's unilateral new policy modifying the dispatch of U-40 with respect to EMS calls. Under the new policy, U-40 is not automatically dispatched to the scene when the District receives what is deemed a non-critical EMS call. Instead, in response to a non-critical EMS call, U-40 is sent to cover the fire station left vacant by the responding fire apparatus rather than being automatically dispatched to the scene. Association witnesses testified that as a result of the District's unilateral change when a firefighter/EMT responds to a non-critical EMS call there is no guarantee of timely assistance from another firefighter/EMT, the police, volunteer ambulance squads and paramedics at the scene in case of an unanticipated dangerous situation. However, the District continues to automatically dispatch U-40 in response to fire calls and critical EMS calls such as cardiac arrest or major trauma.

On April 6, 2006, Association president Thomas Eade sent a letter to the District

objecting to the District's unilateral policy change regarding the dispatch of U-40 in response to non-critical EMS calls. In his letter, Eade stated that safety constitutes a mandatory subject of bargaining and that the District is obligated to negotiate with the Association prior to making such a change to U-40 protocols. One month later, the District responded to Eade's letter.

### DISCUSSION

The Board will affirm an ALJ's decision to grant a motion to dismiss an improper practice charge at the close of the charging party's case where the evidence produced by the charging party, after granting all reasonable inferences, is plainly insufficient to warrant a finding that the charge should be sustained.<sup>3</sup>

In its exceptions, the Association asserts that the ALJ, in considering the District's motion, failed to assume the truth of the Association's evidence and grant all reasonable inferences in favor of the Association with respect to that evidence. We disagree.

Based on our review of the record, we conclude that the ALJ granted all reasonable inferences to the Association's evidence in concluding that the unilateral change in the U-40 dispatch policy relates predominately to staffing rather than safety and therefore constitutes a nonmandatory subject of bargaining.

In *City of New York*<sup>4</sup>, the Board recently reiterated that although safety is generally a mandatory subject of bargaining under the Act, our cases have equally recognized that determinations relating to staffing and deployment of personnel are nonmandatory subjects because they are managerial prerogatives tied to the public

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<sup>3</sup> *County of Nassau (Police Dept)*, *supra*, note 2.

<sup>4</sup> 40 PERB ¶13017 (2007).

employer's mission to provide public services.<sup>5</sup>

In determining whether a bargaining demand implicating both staffing and safety is a mandatory subject, we focus on the primary or predominate characteristic of the demand.<sup>6</sup> Our focus on the demand's predominate characteristic is necessitated by our recognition that many staffing and deployment decisions can have safety implications.

In *State of New York (Dept of Transportation)*,<sup>7</sup> the Board applied the same analysis in determining whether a unilateral change in a past practice that implicated both staffing and safety constituted a mandatory subject.

In the present case, granting all reasonable inferences to the Association's evidence as we must, we conclude that the subject matter of the changed practice is one of deployment and not safety. Just as the level of staffing assigned to an employer's vehicle is nonmandatory, even though it may implicate employee safety, the District's change in the deployment of U-40 and the assigned employee in response to

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<sup>5</sup> See also, *White Plains PBA*, 9 PERB ¶3007 (1976); *Orange County Comm Coll and County of Orange*, 9 PERB ¶3068 (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); *Police Assn of New Rochelle, Inc.*, 10 PERB ¶3042 (1977); *Uniformed Firefighters Assn, Inc., Local 273, IAFF*, 10 PERB ¶3078 (1977); *confirmed sub nom.*, *City of New Rochelle v Crowley*, 61 AD2d 1031, 11 PERB ¶7002 (2d Dept 1978); *Troy Uniformed Firefighters Assn, Local 2304, IAFF*, 10 PERB ¶3105 (1977); *City of Mount Vernon*, 11 PERB ¶3049 (1978); *New York State Court Employees Assn*, 12 PERB ¶3075 (1979), *revd in part sub nom.*, *Evans v Newman*, 71 AD2d 240, 12 PERB ¶7022 (3d Dept 1979), *affd*, 49 NY2d 904, 13 PERB ¶7004 (1980); *State of New York (Unified Court System)*, 25 PERB ¶3065 (1992); *State of New York (Dept of Transportation)*, 27 PERB ¶3056 (1994); *Town of Carmel*, 31 PERB ¶3006 (1998).

<sup>6</sup> *Supra*, note 5.

<sup>7</sup> *Supra*, note 5.

non-critical calls is nonmandatory.

During its direct case, the Association presented various documents and protocols issued by the District identifying firefighter/EMT safety as the primary purpose for the purchase and use of U-40. It also established that U-40 is equipped with safety equipment. In addition, it presented evidence regarding the safety role played by the U-40 firefighter/EMT at a scene as well as the subjective safety concerns of Association members.

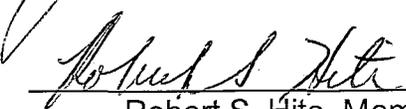
We conclude that the Association's evidence is insufficient to establish that the subject matter of the unilateral change in the present case is mandatory. The change is limited to U-40 being dispatched initially to a vacant fire station rather than it being dispatched automatically to the scene of a non-critical call. The expressed purpose in purchasing and utilizing U-40 has no relevancy in our determination regarding the subject matter of the District's minor change in protocol. The predominate nature of the change remains the deployment of staff rather than safety. Therefore, it constitutes a nonmandatory subject of bargaining.

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

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

DATED: January 23, 2008  
Albany, New York

  
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Jerome Lefkowitz, Chairman

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

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

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In the Matter of

**NIAGARA CHARTER SCHOOL**

**CASE NO. DR-120**

Upon a Petition for Declaratory Ruling

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**PROSKAUER ROSE LLP (NEIL H. ABRAMSON of counsel), for Niagara Charter School**

**MICHAEL DEELY, for Niagara Charter School Instructional Staff Association, Niagara Wheatfield Teachers Association, NYSUT**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Niagara Charter School (NCS) to a recommended declaratory ruling and decision<sup>1</sup> by an Administrative Law Judge (ALJ) dismissing a petition for a declaratory ruling (petition) filed by NCS.

On April 25, 2007, NCS filed a petition, pursuant to §210.1 of the Rules of Procedure (Rules), seeking a declaratory ruling as to whether the recognition and/or certification provisions of the Public Employees' Fair Employment Act (Act) and PERB's Rules are applicable to NCS instructional employees. The Niagara Charter School Instructional Staff Association, Niagara Wheatfield Teachers Association, NYSUT (Association) asserts it represents the at-issue employees pursuant to the New York Charter Schools Act of 1998, Education Law §2850, *et seq* (Charter Schools Act).

On May 18, 2007, the Association filed a response to the petition asserting that as a matter of law it is the bargaining representative for the NCS instructional employees under Education Law §2854(3)(b-1)(i).

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<sup>1</sup> 40 PERB ¶6603 (2007).

In lieu of a hearing, the parties stipulated to the record, which contains the petition and response along with a stipulation of facts and law.

On October 11, 2007, the ALJ dismissed the petition for a declaratory ruling on the ground that it did not raise a justiciable dispute under §210.1(a) of the Rules.

### **EXCEPTIONS**

In its exceptions, NCS contends that the ALJ erred in dismissing the petition because the petition seeks a ruling as to the applicability of the recognition and certification procedures in the Act and Rules to the employees that the Association asserts it represents. In addition, NCS argues that the ALJ erred in failing to determine whether a declaratory ruling is in the public interest pursuant to §210.2(a) of the Rules.

The Association has not filed a response to the exceptions.

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

### **FACTS**

The relevant facts are the subject of a stipulation between the parties and are thereby undisputed: a) NCS is not a conversion from an existing public school and is the only charter school in Niagara County; b) on August 21, 2006, NCS began operations with a student enrollment of 264; c) NCS takes the position that NCS instructional employees are currently not represented by an employee organization for purposes of collective bargaining; d) on March 26, 2007, the Association requested that NCS commence negotiations with the Association as the exclusive bargaining representative for NCS instructional staff; e) on April 24, 2007, NCS responded with a letter articulating legal concerns that a grant of the Association's request to bargain without a showing of interest would violate the Act as well as the United States

Constitution; f) the Association has not filed with PERB a representation petition pursuant to §201 of the Rules, has not presented a showing of interest and does not claim to have majority status among NCS instructional employees.

### DISCUSSION

Section 210.1(a) of the Rules permits any person, employee organization or employer to file a petition for a declaratory ruling "with respect to the applicability of the act to it or any other person, employee organization or employer or with respect to the scope of negotiations under the act." Thus, the subject matter that can be resolved in the context of a petition for declaratory ruling is limited to whether an individual or entity is subject to the Act or whether a particular negotiation subject is mandatory, nonmandatory or prohibited.

The limited purposes of the declaratory ruling process were recently reiterated in *Patrolmen's Benevolent Association of the City of New York, Inc.*<sup>2</sup> In that case, we affirmed the dismissal of a petition for a declaratory ruling by an employee organization that sought an interpretation of a provision in a collectively negotiated agreement between the public employer and another employee organization. The dismissal was affirmed because the subject matter of the petition was beyond the stated purposes for the declaratory ruling process under the Rules. Similarly, in *City of Plattsburgh*,<sup>3</sup> we underscored the limited nature of the issues that can be resolved in the context of a declaratory ruling.

In the present case, we conclude that the subject matter of NCS's petition is beyond the stated purpose for the declaratory ruling process under §210.1(a) of the Rules.

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<sup>2</sup> 40 PERB ¶3019 (2007).

<sup>3</sup> 32 PERB ¶3014 (1999).

Before the ALJ, the parties stipulated that under the Charter Schools Act, NCS is a public employer under the Act and that the NCS instructional employees are public employees under the Act. In its exceptions, NCS does not dispute those legal conclusions, which are based on the express provisions contained in Education Law §2854(3)(a), nor does it dispute that the Association is an employee organization under the Act. Similarly, NCS does not claim that the petition seeks a ruling as to whether a particular negotiation demand is a mandatory, nonmandatory or prohibited subject of negotiations.

Instead, what NCS seeks, in essence, is an administrative legal adjudication, equivalent to a declaratory judgment under CPLR §3001, analyzing the interplay between the representation procedures under the Act and Rules and the provisions of the Charter Schools Act, Education Law §§2854(1)(a)<sup>4</sup> and 2854(3)(b-1)(i).<sup>5</sup>

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<sup>4</sup> Education Law §2854(1)(a) states: "Notwithstanding any provision of law to the contrary, to the extent that any provision of this article is inconsistent with any other state or local law, rule or regulation, the provisions of this article shall govern and be controlling."

<sup>5</sup> Education Law §2854(3)(b-1)(i) states:

The employees of a charter school that is not a conversion from an existing public school shall not be deemed members of any existing collective bargaining unit representing employees of the school district in which the charter school is located, and the charter school and its employees shall not be subject to any existing collective bargaining agreement between the school district and its employees. Provided, however, that (i) if the student enrollment of the charter school on the first day on which the charter school commences student instruction exceeds two hundred fifty or if the average daily student enrollment of such school exceeds two hundred fifty students at any point during the first two years after the charter school commences student instruction, all employees of the school who are eligible for representation under article fourteen of the civil service law shall be deemed to be represented in a separate negotiating unit at the charter school by the same employee organization, if any, that represents like employees in the school district in which such charter school is located.

The purpose of the declaratory ruling process is to provide a less adversarial means than an improper practice charge for resolving justiciable issues regarding the subject matters set forth in §210.1(a) of the Rules.<sup>6</sup> It was never intended to be a substitute for a declaratory judgment action nor as a means of obtaining determinations as to whether an employer has a statutory duty to negotiate with an employee organization under the Act.<sup>7</sup> In addition, as the ALJ correctly concluded, the process is not intended for determinations relating to the applicability of the Rules.

NCS's reliance on *Village of Elmira Heights*<sup>8</sup> is misplaced. First, the Board is not bound by an earlier unreviewed decision of a Director or an ALJ.<sup>9</sup> Moreover, as the ALJ correctly recognized, the petition in that case sought a declaration on the applicability of the Act to the parties, while NCS's petition requires both an interpretation of the applicability of the Rules and the provisions of the Charter School Act.

Finally, we disagree with NCS's argument premised on §210.2(a) of the Rules. Section 210.2(a) of the Rules grants the Director of Public Employment Practices and Representation (Director) the authority to dismiss a petition when the Director concludes that a determination would not be in the public interest. This grant of authority to the Director to dismiss a petition on public interest grounds does not constitute an additional "public interest" basis for the granting of a declaratory ruling beyond the subject matters identified in §210.1(a) of the Rules. Moreover, issuance of a declaratory ruling on a

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<sup>6</sup> *State of New York (Division of State Police)*, 38 PERB ¶¶3007 (2006). The Board takes administrative notice that there is a pending improper practice charge, Case No. U-27727, related to the subject matter of NCS's petition.

<sup>7</sup> *County of Orange*, 28 PERB ¶¶6601 (1995).

<sup>8</sup> 26 PERB ¶¶6602 (1993).

<sup>9</sup> *Westchester County Dept of Correction Superior Officers' Assn*, 26 PERB ¶¶3077 (1993).

legal issue beyond the purpose of the declaratory ruling procedure would not be in the public interest pursuant to §210.2(a) of the Rules.<sup>10</sup>

Based on the foregoing, we affirm the ALJ's dismissal of the petition.

DATED: January 23, 2008  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

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<sup>10</sup> *PBA of the City of New York, Inc., supra*, note 2.

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

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In the Matter of

**CITY OF BINGHAMTON,**

Employer,

- and -

**CASE NO. G2007-003**

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS  
LOCAL UNION NO. 693,**

Grievant.

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**KENNETH J. FRANK, CORPORATION COUNSEL, for City of Binghamton**

**HICKEY, SHEEHAN & GATES, P.C. (DENNIS F. SHEEHAN of counsel) for  
International Brotherhood of Teamsters Local Union No. 693**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the City of Binghamton (City) to an arbitration decision and award sustaining a grievance filed by the International Brotherhood of Teamsters Local Union No. 693 (IBT). The grievance alleges that the City violated the collective bargaining agreement (agreement) between the City and the IBT when it filled a Parking Meter Maintainer vacancy.

On October 30, 2007, an arbitration was conducted by PERB's Assistant Director of Conciliation (Assistant Director) in his role as the arbitrator duly appointed to hear the grievance pursuant to PERB's staff grievance mediation/arbitration procedure (mediation/arbitration procedure).

In the arbitration decision and award, dated November 20, 2007, the Assistant Director found that the City violated §37 of the agreement when it appointed Thomas Ryder to the position of Parking Meter Maintainer over grievant Daniel Rose.

### EXCEPTIONS

In its exceptions, the City contends the arbitrator misinterpreted the agreement and allegedly ignored a 2002 arbitration decision and award issued by another arbitrator determining an earlier IBT grievance that alleged the City had violated §37 of the agreement in filling a vacancy. Furthermore, the City challenges the arbitration decision and award on the ground that the arbitrator allegedly acted in "bad faith."

The IBT objects to the City's exceptions, contending that an arbitration award issued pursuant to the staff grievance mediation/arbitration procedure is not subject to exceptions to the Board. In the alternative, the IBT supports the arbitration decision and award.

In response to the IBT's procedural objections, the City contends that the 2002 arbitration decision and award and the November 20, 2007 arbitration decision and award constitute inconsistent "PERB decisions." Furthermore, the City asserts that by filing exceptions to the Board it is exhausting its administrative remedies.

### FACTS

The IBT filed a grievance on behalf of bargaining unit member Daniel Rose alleging that the City violated the agreement when it selected a less senior employee, Thomas Ryder, to fill a Parking Meter Maintainer vacancy. The grievance was processed under the agreement to and including arbitration.

In a July 30, 2007 letter, the parties jointly requested the appointment of the Assistant Director to provide mediation and arbitration services aimed at reaching a final resolution of the grievance pursuant to the mediation/arbitration procedure. The PERB form for requesting the mediation/arbitration procedure states that an arbitration decision and award issued is final and binding on the parties and may not be the subject

of exceptions to the Board. In addition, the form states: "Judicial review of any award issued by the PERB med-arbitrator may be sought only under CPLR Article 75."

On August 20, 2007, the Director appointed the Assistant Director to provide the requested mediation and arbitration services to the parties. Following an unsuccessful mediation, the Assistant Director conducted the arbitration on October 30, 2007. On November 20, 2007, the Assistant Director issued an arbitration decision and award sustaining the grievance and imposing a remedy.

### **DISCUSSION**

In response to the City's exceptions, the IBT argues that the City's exceptions should be denied because exceptions pursuant to §213.2 of the Rules of Procedure (Rules) are prohibited under the mediation/arbitration procedures offered by the agency and agreed to by the parties. We agree.

Both the guidelines for the mediation/arbitration procedure, as well as the applicable agency form, state explicitly that an arbitration decision and award issued by a staff member may only be challenged through a proceeding commenced pursuant to CPLR §7511 and not through exceptions to the Board pursuant to §213.2 of the Rules. We take administrative notice that in over a dozen prior grievances, the City and IBT agreed to this condition when they utilized the mediation/arbitration procedure. By voluntarily requesting the mediation/arbitration process to resolve the grievance in the present case, both parties waived any claimed right to file exceptions to the Board from the arbitration decision and award pursuant to §213.2 of the Rules. Moreover, pursuant to §205.5(d) of the Act, PERB lacks jurisdiction to interpret collective bargaining

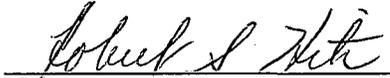
agreements except as necessary for the proper exercise of our improper practice jurisdiction.<sup>1</sup>

Contrary to the City's argument, an arbitration decision and award issued under the mediation/arbitration process or an arbitration decision and award issued under the voluntary grievance arbitration procedure pursuant to Part 207 of the Rules do not constitute a "PERB decision." Rather, they constitute awards that may be subject to the post-arbitration procedures contained in CPLR §§7509, 7510 and 7511.

Based on the foregoing, we deny the City's exceptions on jurisdictional grounds.

DATED: January 23, 2008  
Albany, New York

  
\_\_\_\_\_  
Jerome Leikowitz, Chairman

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

<sup>1</sup> *City of Troy*, 28 PERB ¶3057 (1995).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TEAMSTERS LOCAL UNION NO. 118,**

Petitioner,

-and-

CASE NO. C-5747

**TOWN OF SPRINGWATER,**

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 Teamsters Local Union No. 118 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.

Certification - C-5747

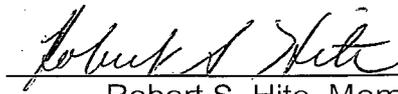
Included: Full-time and Part-time employees of the Highway Department.

Excluded: Supervisory, Temporary Seasonal Employees, Clericals and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local Union No. 118. 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: January 23, 2008  
Albany, New York

  
\_\_\_\_\_  
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

**COMMUNITY CHARTER SCHOOL  
INSTRUCTIONAL STAFF ASSOCIATION  
NYSUT/AFT, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-5753

**COMMUNITY CHARTER SCHOOL,**

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,

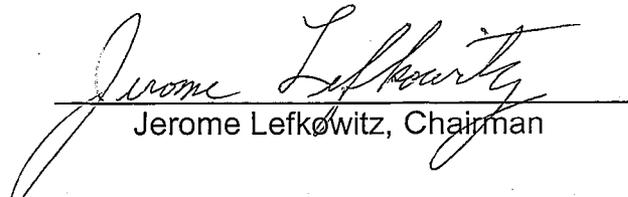
IT IS HEREBY CERTIFIED that the Community Charter School Instructional Staff Association NYSUT/AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative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

Included: All full and part-time Teachers, School Nurse, Social Worker, ten (10) month Building Substitute Teacher, and In-School Suspension Monitor.

Excluded: Teacher Aide, Chief Financial Officer, School Principal, School Director, Director of the Family Resource Center, Network Administrator, Substitute Teachers other than ten (10) month Substitute Teachers, Office Manager, Administrative Assistant, Food Service and Cafeteria Employees, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Community Charter School Instructional Staff Association 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: January 23, 2008  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member