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Board (PERB)

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2-8-2010

## State of New York Public Employment Relations Board Decisions from February 8, 2010

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from February 8, 2010

### 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

**INTERNATIONAL UNION OF OPERATING  
ENGINEERS LOCAL 832-S,**

Petitioner,

-and-

**CASE NO. C-5911**

**TOWN OF SOUTH BRISTOL,**

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,

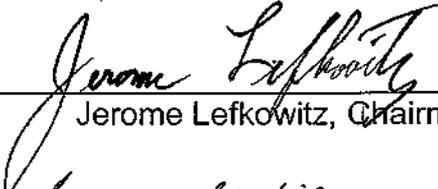
IT IS HEREBY CERTIFIED that the International Union of Operating Engineers Local 832-S has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

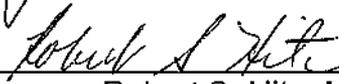
Included: All Department of Public Works employees.

Excluded: Highway Superintendent and clerical staff.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Union of Operating Engineers Local 832-S. 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: February 8, 2010  
Albany, New York

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

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

  
\_\_\_\_\_  
Sheila S. Cole, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**NIAGARA FALLS BRIDGE COMMISSION  
EMPLOYEES UNIT,**

Petitioner,

-and-

**CASE NO. C-5914**

**NIAGARA FALLS BRIDGE COMMISSION,**

Employer.

---

**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 Niagara Falls Bridge Commission Employees Unit 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.<sup>1</sup>

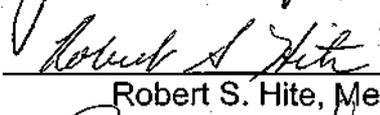
Included: Toll Collectors, Truck Compound Attendants, Toll Captains, Part-time employees, Maintenance Men, Building Maintenance Foreman and Janitors.

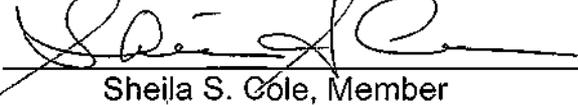
Excluded: Seasonal temporary employees, Maintenance Foreman and all other employees of the employer.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Niagara Falls Bridge Commission Employees Unit. 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: February 8, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

<sup>1</sup> Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, the employee organization representing the petitioned-for unit, disavowed any and all interest in representing employees of the Commission's Toll Collectors, Truck Compound Attendants, Toll Captains, part-time employees, Maintenance Men, Building Maintenance Foreman and Janitors.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5924**

**MAHOPAC CENTRAL SCHOOL DISTRICT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

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

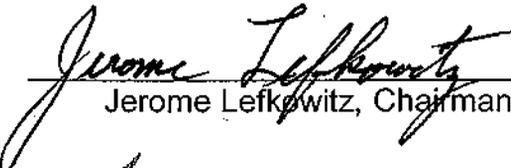
grievances.<sup>1</sup>

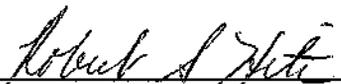
Included: Head Bus Driver; Mechanic Foreman; High School Head Custodian; Middle School Head Custodian; Middle School Crew Chief; High School Crew Chiefs; Elementary Head Custodian; Elementary Crew Chiefs; Head Groundskeeper and Head Custodian/Crew Chief.

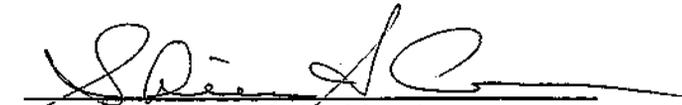
Excluded: All other employees.

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

DATED: February 8, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

<sup>1</sup> Local 456, International Brotherhood of Teamsters, the employee organization representing the petitioned-for unit, disavowed any and all interest in representing the employees in the Supervisory Association of Mahopac unit.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**COUNCIL OF SCHOOL SUPERVISORS AND  
ADMINISTRATORS, LOCAL 1, AFSA,**

**CASE NO. C-5672**

Petitioner,

-and-

**BROOKLYN EXCELSIOR CHARTER SCHOOL,**

Employer.

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In the Matter of

**BROOKLYN EXCELSIOR CHARTER SCHOOL  
AND NATIONAL HERITAGE ACADEMIES, INC.,**

**CASE NO. E-2429**

Upon the Application for Designation of  
Persons as Managerial or Confidential.

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**BRUCE K. BRYANT, GENERAL COUNSEL, for COUNCIL OF SCHOOL  
SUPERVISORS AND ADMINISTRATORS, LOCAL 1, AFSA**

**HISCOCK & BARCLAY, LLP (LAURENCE B. OPPENHEIMER of counsel), for  
BROOKLYN EXCELSIOR CHARTER SCHOOL AND NATIONAL HERITAGE  
ACADEMIES, INC.**

**JAMES R. SANDNER (FREDERICK K. REICH of counsel), for NEW YORK  
STATE UNITED TEACHERS**

**ADAM S. ROSS, SPECIAL COUNSEL, for UNITED FEDERATION OF  
TEACHERS, LOCAL 2, AFT, AFL-CIO**

**INTERIM BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed jointly by the Brooklyn Excelsior Charter School (BECS) and the National Heritage Academies, Inc. (NHA) and exceptions by the Council of School Supervisors and Administrators, Local 1, AFSA (Association) to a decision by an Administrative Law Judge (ALJ),<sup>1</sup> dated June 1, 2009. In their exceptions,

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<sup>1</sup> 42 PERB ¶4010 (2009).

BECS and NHA assert *inter alia* that the ALJ erred when she rejected their preemption argument that is based upon the alleged applicability of the National Labor Relations Act<sup>2</sup> (NLRA) to the employees subject to the parties' respective representation petitions.

According to their argument, the National Labor Relations Board (NLRB) has exclusive jurisdiction over the representation petitions because NHA is a private entity and it, along with BECS, constitute a joint employer.

The New York State United Teachers (NYSUT) and the United Federation of Teachers, Local 2, AFT, AFL-CIO (UFT) have jointly moved for leave to file an *amicus curiae* brief responsive to the preemption argument raised by BECS and NHA. BECS and NHA oppose the motion on the following grounds: a) timeliness; b) the issue was fully briefed by the parties, as well as NYSUT and UFT, before the ALJ. The Association does not object to the Board granting the motion by NYSUT and UFT.

#### DISCUSSION

Although our Rules of Procedure (Rules) do not include explicit procedures or a timeframe for the filing of a motion for leave to file an *amicus curiae* brief, the Board has historically granted such motions<sup>3</sup> and in some cases we have invited *amicus* briefs relating to particular pending legal issues.<sup>4</sup>

An *amicus* brief can enhance our deliberations especially with respect to legal issues of state-wide importance. The federal preemption argument asserted by BECS

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<sup>2</sup> 29 USC §151, et seq.

<sup>3</sup> See, *City of New York*, 40 PERB ¶3005 (2007); *Greenburgh No 11 Union Free Sch Dist*, 32 PERB ¶3024 (1999); *Patchogue-Medford Union Free Sch Dist*, 30 PERB ¶3041 (1997); *Johnstown Police Benevolent Assn*, 25 PERB ¶3085 (1992); *Arlington Cent Sch Dist*, 25 PERB ¶3001 (1992).

<sup>4</sup> *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), *confirmed and mod, in part*, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009), *on remittur*, 42 PERB ¶3016 (2009); *Highland Falls PBA*, 42 PERB ¶3030 (2009).

and NHA in the present case constitutes such an issue under both the Public Employees' Fair Employment Act (Act) and the New York Charter Schools Act of 1998.<sup>5</sup>

In their joint motion, NYSUT and UFT state that their proposed *amicus* brief will be limited to the issue of federal preemption. Contrary to the argument by BECS and NHA, the motion is not untimely. Furthermore, the mere fact that the legal issue was fully briefed before the ALJ is not a legitimate basis for denying leave to file an *amicus* brief with the Board.

Based upon the foregoing, the motion by NYSUT and UFT for leave to file a joint *amicus* brief is hereby granted on the condition that it is limited to the issue of federal preemption raised by BECS and NHA in their exceptions.

IT IS, THEREFORE, ORDERED that NYSUT and UFT may file an original and four copies of a joint *amicus* brief with the Board on or before March 1, 2010 with proof of service upon BECS, NHA and the Association. BECS, NHA and the Association may file supplemental briefs with the Board on or before March 22, 2010 responsive to the arguments presented in the joint *amicus* brief with proof of service upon NYSUT and UFT.

DATED: February 8, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

<sup>5</sup> L.1998, c. 4; Education Law §2850, *et seq.*

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

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In the Matter of

**NEW YORK STATE NURSES ASSOCIATION,**

Charging Party,

**CASE NO. U-27819**

- and -

**COUNTY OF ERIE and ERIE COUNTY MEDICAL  
CENTER CORPORATION,**

Respondents.

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**SPIVAK LIPTON LLP (NICOLE CUDA PÉREZ of counsel), for Charging Party**

**COLUCCI & GALLAHER, P.C. (GILLIAN BROWN of counsel), for  
Respondent Erie County Medical Center Corporation**

**CHRISTOPHER M. PUTRINO, ESQ., COMMISSIONER OF LABOR  
RELATIONS, for Respondent County of Erie**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Erie County Medical Center Corporation (ECMC), to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by the New York State Nurses Association (NYSNA) alleging that the County of Erie (County) and ECMC violated §§209-a.1(a), (d) and (e) of the Public Employees' Fair Employment Act (Act). In her decision, the ALJ concluded that the County and ECMC violated §§209-a.1(a), (d) and (e) of the Act when the wage rate for NYSNA represented per diem registered nurses was unilaterally increased.<sup>1</sup>

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<sup>1</sup> 42 PERB ¶4511 (2009).

### EXCEPTIONS

In its exceptions, ECMC contends that the ALJ erred when she concluded that the County and ECMC did not have a compelling reason to unilaterally increase the wage rate for per diem registered nurses. In addition, it asserts that the ALJ erred when she rejected ECMC's argument that the unilateral wage increase was a reallocation or a reclassification of per diem nurses to a higher pay grade consistent with the parties' collectively negotiated agreement (agreement).<sup>2</sup> NYSNA supports the ALJ's decision.

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

### FACTS

The facts are fully set forth in the ALJ's decision. They are repeated here only as necessary to address the exceptions.

Since 2001, the per diem registered nurse title has been in the recognized collective bargaining unit represented by NYSNA. The parties' last agreement expired on December 31, 2004. Appendix S of the expired agreement states that:

Per diem registered nurses with less than four (4) years of verifiable experience will be paid twenty-five dollars (\$25.00) per hour for hour [sic] worked. Per diem registered nurses with more than four (4) years of verifiable experience will be paid twenty-eight dollars (\$28.00) per hour for each hour

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<sup>2</sup> The County has not filed any exceptions to the ALJ's decision. ECMC has not filed an exception to the ALJ's holding that the County and ECMC are joint employers pursuant to Public Authorities Law §3629, which states that for purposes of the Act, Erie County is the employer of ECMC employees. See also, *County of Erie and Erie County Medical Center Corp*, 39 PERB ¶¶3036 (2006), *confirmed sub nom. Erie County Medical Center Corp v New York State Pub Empl Rel Bd*, 48 AD3d 1094, 41 PERB ¶¶7002 (4<sup>th</sup> Dept 2008). The issue of their joint employer status is, therefore, waived. Rules of Procedure (Rules) §213.2(b)(4); *Town of Orangetown*, 40 PERB ¶¶3008 (2007), *confirmed, Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶¶7008 (Sup Ct Albany County 2007); *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶¶3006 (2008).

worked.<sup>3</sup>

Section 7 of the expired agreement includes negotiated provisions with respect to the reallocation and the reclassification of positions:

7.04 Reallocation

Upon the reallocation of a class of positions to a higher job group, the employee or employees serving in the reallocated positions shall receive a salary at the increment step in the higher job group that corresponds with the increment step in which they were serving in the lower group.

7.05 Reclassification

When an employee's class title is reclassified to a higher title and job group, it shall be considered as a new position and a promotion. The salary will then be determined in accordance with the salary rule on promotions.<sup>4</sup>

The parties commenced negotiations for a successor agreement in 2004. Following a declaration of impasse, they participated in mediation and fact-finding, and have continued direct negotiations. Throughout this period, NYSNA proposed percentage wage increases for the entire unit including the same percentage increases in the hourly rate for per diem registered nurses.<sup>5</sup>

During a July 26, 2007 negotiation session, the County and ECMC proposed percentage wage increases for registered nurses and a separate proposal to amend appendix S to provide that per diem registered nurses with one year of verifiable experience would be paid at a \$35 hourly rate. NYSNA representatives rejected the

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<sup>3</sup> Joint Exhibit 1, p. 78.

<sup>4</sup> The salary rule for promotions is set forth in §7.01 of the agreement. It states that following a promotion, an employee will receive a salary at an increment step within specific ranges for the higher position. Joint Exhibit 1, p. 19.

<sup>5</sup> Charging Party Exhibits 8, 10, 11, 12.

proposals and cancelled two subsequent negotiation sessions in order to consult with NYSNA's membership.

On August 3, 2007, the County and ECMC requested NYSNA to sign a memorandum of agreement amending appendix S to permit it to implement its proposed rate increase for the per diem registered nurses. After NYSNA refused to sign the memorandum, insisting that the issue be resolved in the context of collective negotiations over the salary proposals, the County and ECMC unilaterally implemented its proposed salary increase for per diem registered nurses on or about August 24, 2007.

During her testimony, ECMC Vice-President of Human Resources, Kathleen O'Hara (O'Hara,) stated that the vagueness of §7.04 of the agreement provides the respondents with the necessary contractual authority to unilaterally increase the hourly rate for the per diem registered nurses. In addition, she testified that the unilateral increase was necessitated by a shortage of nursing staff at ECMC, which she asserted was caused by the current hourly rate set forth in appendix S. On cross-examination, however, Ms. O'Hara acknowledged that a nursing shortage has existed for a number of years.

#### DISCUSSION

We begin our discussion with ECMC's exception challenging the ALJ's determination that respondents did not have a compelling need to unilaterally increase the hourly rate for the per diem registered nurses.

It is well-settled that an employer does not violate §209-a.1(d) of the Act when it acts unilaterally with respect to a mandatory subject of negotiation where: (a) there is a compelling reason for the employer to act unilaterally at the time when it does so; (b) it has negotiated the change in good faith to the point where negotiations are in deadlock;

and (c) it is willing to continue such negotiations.<sup>6</sup> However, compelling need is not a defense to an improper practice charge alleging that an employer violated §209-a.1(e) of the Act by failing to continue the terms of an expired agreement until a new agreement has been negotiated. This statutory provision constitutes an affirmative grant of jurisdiction to PERB to remedy an employer's breach of a term of an expired collectively negotiated agreement.<sup>7</sup>

In the present case, it is undisputed that following the expiration of the agreement, the County and ECMC failed to continue the negotiated hourly rate for per diem registered nurses set forth in appendix S of the agreement. Therefore, they violated §209-a.1(e) of the Act.

Based upon this finding, we conclude that it is unnecessary for us to reach the issue whether respondents met their burden of proof by demonstrating a compelling need defense to the alleged violation of §209-a.1(d) of the Act. In the present case, the remedy for a violation of §209-a.1(d) would have been substantially the same as the remedy for respondents' violation of §209-a.1(e).<sup>8</sup>

Next, we turn to ECMC's exception challenging the ALJ's rejection of its argument that the increase in the hourly rate is permissible based upon the negotiated reallocation or reclassification provisions of the agreement. In support of its argument, ECMC relies upon precedent holding that a reallocation to a salary grade constitutes a

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<sup>6</sup> *Wappingers Cent Sch Dist*, 5 PERB ¶3074 (1972); *Cohoes City School District*, 12 PERB ¶3113 (1979); *Wyandanch Union Free Sch Dist*, 15 PERB ¶3069 (1982); *County of Chautauqua*, 22 PERB ¶3016 (1989).

<sup>7</sup> *Sullivan County and Sullivan County Sheriff*, *supra* note 2.

<sup>8</sup> Similarly, it is unnecessary for us to reach the issue whether a compelling need constitutes a legitimate defense to an alleged violation of §209-a.1(a) of the Act that is derivative of a violation of §209-a.1(d) of the Act.

nonmandatory subject of negotiations.<sup>9</sup>

Following our review of the evidence, we conclude that the increase in the hourly rate for per diem registered nurses is not a reallocation or a reclassification of the title under §§7.04 and 7.05 of the agreement. Pursuant to the agreement, the per diem nurses are not in any assigned job group.<sup>10</sup> Moreover, the record does not include evidence that the hourly rate increase was imposed in conjunction with the reallocation of the title to an identified job group or a reclassification to a higher title and a job group. In fact, the proposed August 3, 2007 memorandum of agreement to amend appendix S does not reference a reallocation or reclassification of the title.

Therefore, we modify the ALJ's decision and conclude that respondents violated §209-a.1(e) of the Act by refusing to continue the negotiated hourly rate for per diem registered nurses under the parties' agreement.

To that extent, we deny ECMC's exceptions and affirm the decision of the ALJ,<sup>11</sup> and refrain from determining whether the unilateral increase in this case violates §209-a.1(a) and (d) of the Act.

IT IS, THEREFORE, ORDERED that the County and ECMC shall forthwith:

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<sup>9</sup> See, *Evans v Newman*, 71 AD2d 240, 12 PERB ¶7022 (3d Dept 1979), *affd*, 49 NY2d 904, 13 PERB ¶7004 (1980); *County of Tompkins*, 15 PERB ¶3092 (1982); *County of Monroe*, 29 PERB ¶3060 (1996).

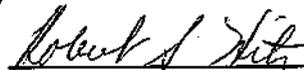
<sup>10</sup> Joint Exhibit 1, pp. 51-52, 78-79.

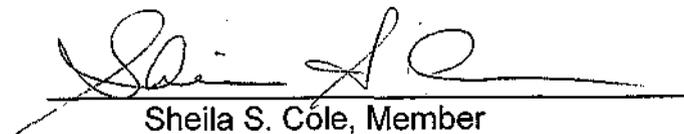
<sup>11</sup> ECMC has not excepted to the ALJ's proposed remedial order, which does not require recoupment of the increased wages paid to the per diem registered nurses. ECMC has, therefore, waived the issue. Nevertheless, we would affirm the ALJ's conclusion that the facts and circumstances of the present case do not present special circumstances warranting an order requiring such recoupment. See, *Brookhaven-Comsewogue Union Free Sch Dist*, 22 PERB ¶3037 (1989), *enforced*, *New York State Pub Empl Rel Bd v Brookhaven-Comsewogue Union Free Sch Dist*, 23 PERB ¶7009 (Sup Ct Albany County 1990).

1. Rescind the August 2007 increase in the hourly wage rate for the per diem registered nurses;
2. Cease and desist from unilaterally increasing the wages of unit members in excess of the terms of the parties' expired agreement until a new agreement has been negotiated; and
3. Sign and post the attached notice in the form attached at all locations normally used by it to post written communications for unit employees.

DATED: February 8, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Erie and the Erie County Medical Center Corporation represented by the New York State Nurses Association (NYSNA) that the County of Erie and Erie County Medical Center Corporation will rescind the August 2007 pay increase for the registered nurse per diem title.

Dated .....

By .....

(Representative)

(Title)

County of Erie and Erie County Medical Center Corporation

.....

*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

**NEW YORK STATE LAW ENFORCEMENT  
OFFICERS UNION, DISTRICT COUNCIL 82,  
AFSCME, AFL-CIO, LOCAL 2790,**

Charging Party,

**CASE NO. U-27414**

- and -

**VILLAGE OF CATSKILL,**

Respondent.

---

**ENNIO J. CORSI, GENERAL COUNSEL (CHRISTINE CAPUTO  
GRANICH of counsel), for Charging Party**

**ROEMER WALLENS & MINEAUX LLP (ELAYNE G. GOLD  
of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Village of Catskill (Village) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO, Local 2790 (Council 82) alleging that the Village violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented procedures and restrictions on dual employment for unit employees.

The ALJ concluded that the Village's implementation of the procedures and restrictions constituted a unilateral change to a past practice with respect to

a mandatory subject, dual employment, in violation of §209-a.1(d) of the Act.<sup>1</sup>

### EXCEPTIONS

In its exceptions, the Village contends that the ALJ erred in finding an enforceable past practice permitting unit members to hold dual law enforcement employment based upon an earlier Village written policy. In addition, the Village asserts that the subject matter of the charge is nonmandatory for two reasons: a) the procedures and restrictions placed on dual employment are a managerial prerogative; and b) the Village's concerns about liability resulting from dual employment outweigh the interests of Council 82's unit members. Finally, the Village urges the Board to overrule *Ulster County Sheriff*,<sup>2</sup> based upon alleged workplace and societal changes in the field of law enforcement.

Council 82 supports the ALJ's decision.

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

### FACTS

The applicable facts are set forth in the ALJ's decision. They are repeated here only as necessary to address the Village's exceptions.

Council 82 represents a unit of 14 employees holding Village law enforcement positions.

Prior to 1991, the Village promulgated Rule 200.85 (Outside Employment) and distributed it to unit members as part of the Police Department's policy manual. Rule 200.85 stated:

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<sup>1</sup> 42 PERB ¶4522 (2009).

<sup>2</sup> 27 PERB ¶3028 (1994).

The nature of the law enforcement task requires Department employees to have the ability to work irregular duty schedules which are subject to change in meeting deployment needs. Additionally it is necessary that an employee have adequate rest to be alert during his tour of duty. *For these reasons, and because certain occupations inherently conflict with an employee's primary responsibility to the Department, the Department may impose conditions on outside employment or may prohibit it altogether. Determination of the degree of limitation will be based upon the interest of the Department in furthering professionalization, protecting the reputation of the employee and the service in return for its expenditure of resources.*<sup>3</sup> (emphasis added).

Prior to 2007, the Village did not impose any procedures, restrictions or prohibitions on dual employment by unit employees. Between 1995 and 2007, at least four Council 82 unit members held dual employment positions with other law enforcement agencies to supplement their income. During this same period, Village Police Chief Roger Massey (Massey) held a second position as the Town of Athens (Athens) Police Chief. Massey's simultaneous tenure as the Athens Police Chief lasted approximately 10 years. In September 2005, David R. Darling (Darling) was appointed the new Village Police Chief.

In October 2006, unit member Christopher Sprague (Sprague), a Village patrolman, who was also employed as a patrolman by the Town of Cairo (Cairo), was promoted to be the Cairo Police Chief. Following a newspaper story about Sprague's promotion, Police Chief Darling ordered Sprague to a meeting. During that meeting, Darling expressed his displeasure with respect to Sprague's promotion.

In the months following the meeting with Sprague, the Village began a review of its dual employment policy, as part of a general revision to the police manual.

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<sup>3</sup> Joint Exhibit 1.

During that review, Lieutenant Gregory K. Sager (Sager) raised concerns about potential Village liability resulting from a lack of adequate police training offered by the secondary employer and potential fatigue-related safety problems resulting from dual employment.<sup>4</sup> During his testimony, Sager admitted that the Village did not have a compelling need to change its policy and that the Village's action was not precipitated by any actual problems or conflicts resulting from the dual employment of unit members.<sup>5</sup> Police Chief Darling also testified to concerns over future Village liability for the actions of unit members while employed by another law enforcement agency. According to Darling, the Village could be sued for providing inadequate training if one of its officers, while working for another police department, improperly discharged his or her firearm. His fear of potential litigation is exacerbated by concerns over the applicable qualifications for holding a position in other police departments, and the training, if any, provided by those departments.

Following a two-month review, the Village issued a Department Directive Number G07-001 (Directive) entitled "Secondary Employment of Full Time Employees" on February 9, 2007. The Directive imposes a series of procedures and restrictions on dual employment by unit members including:

- a) all requests for dual employment are subject to the Police Chief's approval;
- b) an employee must make a written request and receive written approval from the Police Chief prior to accepting or engaging in any form of dual employment;
- c) dual law enforcement employment is prohibited except for

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<sup>4</sup> Transcript, p. 44.

<sup>5</sup> Transcript, pp. 50-51.

employees who held such positions as of February 10, 2007;<sup>6</sup>

d) dual employment can not interfere or conflict with an employee's ability to efficiently perform his or her Village job duties;

e) employees cannot work more than 20 hours per week in a second job;

In May 2007, the Village, under the new policy, denied a unit member's request for permission to engage in non-law enforcement work at a concert for two days.

### DISCUSSION

We begin with the Village's exception challenging the ALJ's finding of an enforceable past practice with respect to dual employment.

In *Chenango Forks Central School District*,<sup>7</sup> we restated the applicable test for determining whether an enforceable past practice exists under the Act. Under the test, there must be a showing of an unequivocal and continuous practice for a sufficient period of time, under the circumstances, to create a reasonable expectation among the affected unit employees that the practice would continue. A reasonable expectation is something that will "be presumed from its duration with consideration of the specific circumstances under which the practice has existed."<sup>8</sup> Following a *prima facie* showing, an employer may present a defense seeking to demonstrate that it lacked either actual or constructive knowledge.<sup>9</sup>

In the present case, the Village does not dispute that it had actual

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<sup>6</sup> However, Village police supervisory personnel are prohibited from holding dual law enforcement employment in which they have a command rank or have other supervisory duties and responsibilities.

<sup>7</sup> 40 PERB ¶3012 (2007).

<sup>8</sup> 40 PERB ¶3012 at 3047.

<sup>9</sup> *FIT*, 41 PERB ¶3010 (2008), *confd.*, *FIT v New York State Pub Empl Rel Bd*, 68 AD3d 605, 42 PERB ¶7011 (1<sup>st</sup> Dept 2009).

knowledge of the practice of unit members holding secondary law enforcement jobs. Instead, it relies on its earlier written policy, Rule 200.85, which it contends constitutes a reservation of rights granting it a right to unilaterally prohibit, or impose conditions on, dual employment for unit employees. Alternatively, it asserts that the Directive is a mere clarification of the prior written policy. We disagree with both propositions.

In *Board of Education of the City School District of the City of New York*,<sup>10</sup> we concluded that

when a subsequently enforceable practice is inconsistent with an employer's written policy, the employer can no longer rely on that policy to unilaterally end or modify the practice without violating §209-a.1(d) of the Act. Where, however, there is evidence establishing that the contours of the practice include an employer's unfettered discretion to continue or to modify the practice consistent with a prior explicit reservation or evidence establishing an explicit waiver to negotiate by the employee organization, there would be no enforceable practice.<sup>11</sup> (footnotes omitted)

Furthermore, in *New York City Transit Authority*,<sup>12</sup> we emphasized that we will strictly construe policy-based reservation of rights because, unlike contract reversion, an employer's policy does not stem from an employer satisfying its duty to negotiate under the Act.

Following our review of the record, we affirm the ALJ's finding that Council 82 demonstrated an enforceable past practice under the Act with respect to dual

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<sup>10</sup> 42 PERB ¶3019 (2009).

<sup>11</sup> *Supra* note 10, 42 PERB ¶3019 at 3069.

<sup>12</sup> 42 PERB ¶3012 (2009).

employment. The evidence establishes that for a dozen years prior to the implementation of the Directive, there has been an unequivocal and continuous practice of unit members holding dual employment with other law enforcement agencies. Indeed, for much of the same period, Village Police Chief Massey held secondary employment as Athens Police Chief.

Furthermore, the record demonstrates that the Village did not apply Rule 200.85 to limit the contours of this practice in any manner. The evidence establishes that there were no restrictions on off-duty employment by unit members. The scope and length of the practice, including Massey's own dual employment for 10 years, demonstrate the Village's abandonment of the discretion described in its earlier written policy.

Contrary to the Village's contention, the Directive does not constitute a mere clarification of Rule 200.85. In fact, the Directive imposed new procedures, prohibitions and restrictions that go well beyond clarifying or "fine-tuning" the earlier policy. The Directive states expressly that it constitutes a replacement of Rule 200.85.<sup>13</sup>

Next, we turn to the Village's assertion that the subject of dual employment is nonmandatory under the Act. It is well-settled that, in general, limitations on an employee's use of non-working time to engage in dual employment are mandatory subjects under the Act.<sup>14</sup> Nevertheless, the Board will apply a balancing test to determine whether a unilateral promulgation or

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<sup>13</sup> Joint Exhibit 2.

<sup>14</sup> *Local 589, IAFF*, 16 PERB ¶3030 (1983); *Ulster County Sheriff*, *supra* note 2; *City of Buffalo (Police Dept)*, 23 PERB ¶3050 (1990); *Hewlett-Woodmere Union Free Sch Dist*, 38 PERB ¶3006 (2005); *City of Albany*, 42 PERB ¶3005 (2009); *NYCTA*, *supra* note 12.

alteration of a work rule violates the Act. As we stated in *City of Albany*:

In applying this balancing test, we examine the record to determine whether there is preponderance of credible evidence to demonstrate that the employer's need for a particular mission-related work rule outweighs the effect that the rule has on the employees' terms and conditions of employment. The mere fact that a work rule has a relationship to an employer's mission does not permit an employer to act unilaterally in any manner it deems appropriate. Rather, an employer can unilaterally impose a work rule only to the extent that the unilateral action does not significantly or unnecessarily intrude on the protected interests of bargaining unit employees under the Act. Therefore, under the balancing test the burden rests with the employer to demonstrate that the new work rule does not go beyond what is necessary to further its mission.<sup>15</sup> (footnotes omitted)

In the present case, we conclude that the Village has not satisfied its burden of demonstrating that the provisions of the Directive do not go beyond what is necessary to further that mission.

It is not disputed that the Directive places substantial limitations on the ability of unit members in their use of non-work time, including impairing their ability to supplement their income. Despite the lack of any demonstrated problems or conflicts resulting from secondary employment by unit members, the Directive prohibits such dual employment prospectively, and places other substantial restrictions and procedures on secondary employment.

We are not persuaded by the Village's argument that its concerns over potential civil liability outweigh the interests of Council 82's unit members. In *Ulster County Sheriff*,<sup>16</sup> we rejected a similar argument by a respondent that dual

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<sup>15</sup> *Supra* note 14, 42 PERB ¶3005 at 3007.

<sup>16</sup> *Supra* note 2.

law enforcement employment is nonmandatory based upon fear of future potential civil liability that may result from off-duty employee conduct while performing secondary law enforcement duties. We concluded in that case that potential liability is primarily an economic concern that can be resolved as part of the collective bargaining process.

Although the Village urges us to reverse our holding in *Ulster County Sheriff*, it has not presented any facts, studies or expert testimony to support its broad assertion that the field of law enforcement has substantially changed since we issued *Ulster County Sheriff* warranting reconsideration of our earlier holding. Similarly, it has not presented any proof supporting its related argument that secondary employment results in safety problems caused by fatigue among unit members.

Therefore, we find no basis for overruling our decision in *Ulster County Sheriff*. The issue of potential civil liability for the Village, resulting from dual employment by unit members, remains an economic issue that is subject to negotiations under the Act.<sup>17</sup>

Based on the foregoing, we deny the Villages exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the Village of Catskill forthwith:

1. Immediately rescind and cease enforcement or implementation of Directive Number G07-001 entitled "Secondary Employment of Full Time Employees" for employees in the Village of Catskill Police

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<sup>17</sup> The Village's reliance upon precedent upholding limitations placed upon dual employment in law enforcement is misplaced. See, *Flood v Kennedy*, 12 NY2d 345 (1963); *Dake v Bowen*, 134 AD2d 684 (3d Dept 1988); *Treifa v Vill of Centre Island*, 54 AD2d 985 (2d Dept 1976). Those decisions do not address the negotiability of the subject under the Act.

Department represented by Council 82;

2. Compensate and/or make whole unit employees for any loss of pay or benefits resulting from the enforcement or implementation of Directive Number G07-001, with interest at the maximum legal rate;
3. Sign and post the attached notice at all locations normally used to communicate written information to unit employees.

DATED: February 8, 2010  
Albany, New York

  
Jerome Leikowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Village of Catskill in the unit represented by the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO, Local 2790 that the Village of Catskill will:

1. immediately rescind and cease enforcement or implementation of Directive Number G07-001 entitled "Secondary Employment of Full Time Employees" for employees in the Village of Catskill Police Department represented by Council 82; and
2. compensate and/or make whole unit employees for any loss of pay or benefits resulting from the enforcement or implementation Directive G07-001, with interest at the maximum legal rate.

Dated .....

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

Village of Catskill  
.....

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

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

In the Matter of

**UNITED FEDERATION OF POLICE OFFICERS, INC.,**

Petitioner,

**CASE NOS. C-5723 & C-5724**

- and -

**TOWN OF ISLIP,**

Employer,

- and -

**LOCAL 237, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,**

Intervenor.

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**THOMAS P. HALLEY, ESQ. for Petitioner**

**BOND, SCHOENECK & KING, PLLC (ERNEST R. STOLZER of counsel), for  
Employer**

**MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (BARRY J. PEEK of counsel), for  
Intervenor**

**BOARD DECISION AND ORDER**

These cases come to the Board on exceptions filed by the United Federation of Police Officers, Inc. (Federation) to a decision by an Administrative Law Judge (ALJ) dismissing two certification/decertification petitions seeking the fragmentation of four positions from a blue collar unit of Town of Islip (Town) employees represented by Local 237, International Brotherhood of Teamsters (Teamsters): Airport Security Guard, Senior Airport Security Guard (Security Guards), Park Ranger I and Park Ranger II

(Park Rangers).<sup>1</sup> The Federation seeks fragmentation based solely upon the law enforcement duties performed by employees in the four positions.

The ALJ dismissed both petitions concluding that the employees in the positions at-issue do not perform job duties that are exclusively or primarily the prevention and detection of crime and the enforcement of the general criminal laws of New York.<sup>2</sup>

#### EXCEPTIONS

In its exceptions, the Federation asserts that the ALJ erred in concluding that Security Guards and Forest Rangers do not exclusively or primarily engage in general law enforcement duties. The Teamsters support the ALJ's decision.

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

#### FACTS

The relevant facts are set forth in the ALJ's decision. They are repeated here only as necessary to address the exceptions.

Since 1970, the Teamsters has been certified as the exclusive negotiating representative of a unit of Town blue collar employees.<sup>3</sup> For approximately 20 years, the unit has included the Security Guards and Park Rangers. Within the blue collar unit, which is comprised of approximately 498 employees, there are 36 employees in

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<sup>1</sup> Case No. C-5723 seeks fragmentation of the Airport Security Guard and Senior Airport Security Guard positions. Case No. C-5724 seeks fragmentation of the Park Ranger I and Park Ranger II positions.

<sup>2</sup> 42 PERB ¶4007 (2009).

<sup>3</sup> See, *Town of Islip*, 3 PERB ¶3085.6 (1970); *Town of Islip*, 15 PERB ¶3000.48 (1982).

the Security Guard and Park Ranger positions.

### Security Guards

In 2002, the Legislature amended the Criminal Procedure Law §2.10 to designate Security Guards as peace officers for the limited purpose of providing

security at Long Island MacArthur Airport when acting pursuant to their duties as such, and such authority being specifically limited to the grounds of said airport. However, nothing in this subdivision shall be deemed to authorize such officer to carry, possess, report or dispose of a firearm unless the appropriate license therefore has been issued pursuant to section 400.00 of the penal law.<sup>4</sup>

The primary responsibility of Security Guards is to provide security at Long Island MacArthur Airport (Airport). They are assigned to specific posts at the Airport and are required to patrol those areas. Their duties include securing the Airport's air operations area, screening access of employees and passengers to secure areas, responding to emergencies and disturbances, enforcing the Vehicle & Traffic Law, and acting in response to requests for assistance involving airport and passenger safety. While on duty, Security Guards are armed, and wear bulletproof vests.

At times, during the course of their duties, Security Guards detain, search and arrest individuals at the Airport for possession of drugs, weapons and large amounts of cash. However, most individuals detained by Security Guards are issued a summons and released. The decision to arrest, rather than issue a summons, is made by police officers with the Suffolk County Police Department, which maintains a 24-hour presence at the Airport.

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<sup>4</sup> L 2002, c 321; Crim Pro Law §2.10(75).

Security Guards receive training consistent with Criminal Procedure Law §2.30. In addition, they receive supplemental training from and interact with various federal law enforcement agencies.

### Park Rangers

Park Rangers are peace officers with the authority "to issue appearance tickets, simplified traffic informations, simplified parks informations and simplified environmental conservation informations."<sup>5</sup> Their primary responsibilities are to guard and patrol the Town's parks, marinas, and related facilities. In conjunction with those primary responsibilities, they enforce provisions of the Town Code by issuing appearance tickets. In addition, on an infrequent basis, they issue appearance tickets for violations of the Vehicle and Traffic Law, the Environmental Conservation Law and the Penal Law. They also respond to calls for assistance, administer first aid, and provide information to members of the public.

While on duty, Park Rangers wear uniforms with a Town insignia and bulletproof vests. In addition, they carry various equipment including a baton and handcuffs but they are not armed. Their patrols are conducted on foot and in specially marked vehicles. Park Rangers receive peace officer training.

### DISCUSSION

It is well-established under the Act that fragmentation is appropriate for public employees "that hold police officer titles or hold a title that has been granted police officer status by the Legislature and whose exclusive or predominant duties are the

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<sup>5</sup> Crim Pro Law §2.10(9).

enforcement of the State's general criminal laws."<sup>6</sup>

In the present case, Security Guards and Park Rangers are not police officers, and they have not been granted police officer powers by the Legislature. Rather, they are peace officers with explicitly narrow law enforcement authority.<sup>7</sup>

As we emphasized in *State of New York (Division of Parole)*, there is a fundamental difference between the law enforcement powers and authority of a police officer and a peace officer:

There are a multitude of titles assigned to perform important law enforcement related duties involving public safety. However, whether a position has been granted police officer status under the CPL §1.20(34) remains an initial factor to be considered in determining whether fragmentation is appropriate based on the performance of those duties. The Legislature, in drafting the Criminal Procedure Law, has established a clear dichotomy between the respective scope of law enforcement authority of police officers and peace officers confirming the unique authority and responsibilities of individuals with police officer status.<sup>8</sup>

By definition, a police officer is an employee with broad legal authority to enforce

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<sup>6</sup> *State of New York (Division of Parole)*, 40 PERB ¶¶3011 at 3042 (2007). See also, *City of Amsterdam*, 10 PERB ¶¶3031 (1977). *Vill of Skaneateles*, 16 PERB ¶¶3070 (1983).

<sup>7</sup> Crim Pro Law §§2.10(9), 2.10(75), 2.20.

<sup>8</sup> *Supra* note 6, 40 PERB at 3042. In that case we expressly declined to follow *County of Rockland*, 32 PERB ¶¶3074 (1999), *confirmed sub nom. County of Rockland v New York State Pub Empl Rel Bd*, 34 PERB ¶¶7013 (Sup Ct, Albany County 2001), *affd*, 295 AD2d 790, 35 PERB ¶¶7013 (3rd Dept 2002) and *State of New York*, 34 PERB ¶¶3038 (2001) to the extent those decisions suggest that law enforcement employees without police officer powers and authority should be fragmented into a separate unit.

the general criminal laws of New York.<sup>9</sup> In contrast, the law enforcement authority of a peace officer is much more limited.<sup>10</sup>

Even if Security Guards and Park Rangers had police officer powers, the record in the present case demonstrates that their duties are not exclusively or primarily the prevention and detection of crime, and the enforcement of the general criminal laws of New York.<sup>11</sup>

The security duties of Security Guards are limited to the Airport and those duties are not predominantly the enforcement of New York's criminal law. Although Security Guards carry weapons and have certain powers to detain, search and arrest individuals at the Airport, they primarily issue summons and release the individuals detained. Furthermore, the training they receive relates to their role as peace officers and their responsibilities at the Airport. Similarly, the primary duties of Park Rangers are to provide security for the Town's parks and marinas and to enforce the Town Code. The fact that they wear uniforms, conduct patrols in specially marked vehicles, and receive

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<sup>9</sup> Civ Serv Law §58(3) defines the term police officer as an employee "who is responsible for the prevention and detection of crime and the enforcement of the general criminal laws of the state...."

<sup>10</sup> In its exceptions, the Federation asserts that the ALJ erred in concluding that Security Guards and Park Rangers, as peace officers, do not have the authority to effectuate an arrest or search warrant. We do not need to determine this issue because whether peace officers have such authority does not change the fundamental differences between police officers and peace officers created by the Legislature in the Criminal Procedure Law.

<sup>11</sup> See, *County of Erie and Sheriff of Erie County*, 29 PERB ¶3031, at 3069 (1996), *confirmed sub nom. County of Erie v New York State Pub Empl Rel Bd*, 247 AD2d 671, 31 PERB ¶7004 (3d Dept 1998).

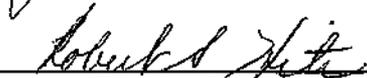
peace officer training does not constitute evidence warranting their fragmentation under our precedent.

Based upon the foregoing, we deny the Federation's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the Federation's petitions are dismissed.

DATED: February 8, 2010  
Albany, New York

  
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Jerome Lefkowitz, Chairman

  
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Robert S. Hite, Member

  
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Sheila S. Cole, Member

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

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In the Matter of

**NIAGARA FALLS POLICE CLUB, INC.,**

Charging Party,

**CASE NO. U-27834**

- and -

**CITY OF NIAGARA FALLS,**

Respondent.

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**WILLIAM E. GRANDE, ESQ., for Charging Party**

**CRAIG H. JOHNSON, CORPORATION COUNSEL (CHRISTOPHER M. MAZUR of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the City of Niagara Falls (City) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge, as amended, filed by the Niagara Falls Police Club, Inc. (Police Club) alleging that the City violated §209-a:1(d) of the Public Employees' Fair Employment Act (Act) when it refused to engage in negotiations for an appeal procedure from an initial City determination that a unit employee is not in compliance with the City's residency requirement.

On a stipulated record, the ALJ concluded that the subject matter of the charge constitutes a mandatory subject of negotiations under the Act, and that the City violated the Act by refusing the Police Club's request to negotiate the subject.<sup>1</sup>

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<sup>1</sup> 42 PERB ¶4532 (2009).

### EXCEPTIONS

The City excepts to the ALJ's conclusion that an appeal procedure from an initial determination over a unit member's non-compliance with the residency requirement is a mandatory subject of negotiations. In addition, it asserts that the ALJ erroneously ruled that the Police Club had made a request to the City to negotiate an appeal procedure. Finally, the City challenges the ALJ's rejection of its argument that the charge is untimely. The Police Club supports the ALJ's decision.

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

### FACTS

The relevant facts are fully set forth in the ALJ's decision. They are repeated here only as necessary to address the exceptions.

The Police Club represents a unit of Niagara Falls Police Department employees including uniformed police officers, detectives, communication technicians and police dispatchers. The City and the Police Club are parties to a collectively negotiated agreement (agreement) for the period January 1, 2004-December 31, 2007, which does not include a zipper clause. Pursuant to §12.08 of the agreement, either party may serve written notice upon the other if it desires to amend, modify or terminate the agreement.

In 1984, the Niagara Falls City Council enacted Local Law #7 (Local Law) requiring each newly hired employee to become a City resident within six months of initial employment. In June 1996, the Niagara Falls City Council enacted legislation amending the Local Law. The Local Law, as amended, sets forth a procedure to be followed after the City Administrator obtains information indicating that an employee is

in breach of the residency requirement. Under that statutory procedure, the employee is sent a written notice and is provided an opportunity to respond. If the employee fails to respond or the response is deemed inadequate by the City Administrator, the Local Law requires the scheduling of a hearing to determine whether the employee is a non-resident. Upon a determination by the City Administrator that the employee is a non-resident, the employee is deemed to have voluntarily resigned from his or her position. The City Administrator is obligated to file a report with the City Council setting forth the allegations against the employee and the disposition of those allegations. The Local Law does not include an appeal procedure to challenge a determination by the City Administrator that a unit member is not in compliance with the residency requirement.

Since 1984, the City has not invoked the notice and hearing procedures under the Local Law against unit employees. However, it has required unit members to provide notification of a change in address.

On May 11, 2007, the City issued a new directive to all City employees, including Police Club unit members, requiring them to sign and return a form certifying compliance with the residency requirement of the Local Law and certifying their current residence.

Following issuance of the new directive, counsel for the Police Club sent a letter, dated May 29, 2007, to the City's Human Resources Director. In his letter, the Police Club's counsel requested the City to rescind its new directive on the grounds that requiring unit members to prepare and return the new certification form constitutes a mandatory subject of negotiations under the Act. In addition, the May 29, 2007 letter stated that an appeal procedure with respect to an initial determination of non-compliance with the residency requirement constitutes a mandatory subject. In support

of its position, the Police Club attached to its letter a decision by an ALJ concluding that such a review procedure is mandatory.<sup>2</sup> The letter requested negotiations over the issues raised in the letter along with impact negotiations over the City's decision to begin enforcing the residency requirement. The City did not respond to the May 29, 2007 letter or counsel's June 2007 follow-up letter. After the City threatened to discipline unit members for failing to comply with the new residency certification requirement, the Police Club filed its charge.

#### PROCEDURAL HISTORY

In its charge, the Police Club alleges, *inter alia*, that the City violated §209-a.1(d) of the Act by unilaterally imposing the residency certification form on unit members, and by refusing to negotiate a review procedure from an initial determination that an employee is not in compliance with the residency requirement.<sup>3</sup> The City filed an answer setting forth five defenses; the answer does not, however, allege that the charge is untimely.

During the processing of the charge, the parties reached a partial settlement. Under that settlement, the City rescinded the directive requiring unit members to submit the residency certification form and the City agreed to take certain affirmative steps to remedy its prior efforts at enforcing the directive. In exchange, the Police Club withdrew that portion of the charge that relates to the residency certification form.

The parties' stipulation states that the ALJ should determine the "remaining issue" raised by the charge: "whether the City has violated the Act by failing to negotiate the procedure by which unit members may appeal an initial determination by the City as

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<sup>2</sup> See, *City of Schenectady*, 22 PERB ¶4527 (1989).

<sup>3</sup> The charge does not allege that the City violated §209-a.1(d) of the Act for refusing to negotiate the impact of the City's decision to begin enforcing the residency requirement.

to whether or not they are in compliance with the residency policy—based upon this Stipulated Record.”

### DISCUSSION

In its exceptions, the City contends that Public Officers Law §30.4(3) renders the subject matter of the charge nonmandatory under the Act. We disagree.

The Board has held that the imposition of a residency requirement for police officers subject to Public Officers Law §30.4(3) is nonmandatory because it constitutes the exercise of a managerial prerogative.<sup>4</sup> By its explicit terms, Public Officers Law §30.4(3) is applicable to a police force consisting of “less than two hundred full-time members.” In the present case, however, the stipulated record does not include an essential fact necessary to support the City’s argument that unit members are subject to that state law: the police force has fewer than 200 full-time members.<sup>5</sup> Therefore, the City has failed to demonstrate that the law is applicable to Police Club unit members.

Even if we found Public Officers Law §30.4(3) to be applicable, the statute does not render the subject matter of the charge nonmandatory. The plain and clear language of the statute grants certain localities the right to unilaterally impose a residency requirement on its police officers. It is silent with respect to an appeal procedure from an employer’s initial determination of non-compliance with the residency

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<sup>4</sup> *City of Mount Vernon*, 18 PERB ¶3020 (1985); *Salamanca Police Unit, CSEA*, 12 PERB ¶3079 (1979). Based upon our ruling today, it is unnecessary for us to reach the City’s argument that a residency requirement imposed upon police officers subject to Public Officers Law §30.4(3) constitutes a prohibited subject of negotiations. See, Respondent’s Brief in Support of Exceptions, pp. 11-12.

<sup>5</sup> As we recently reiterated in *Niagara Charter Sch.*, 42 PERB ¶3036 (2008), parties have the same level of responsibility to ensure a complete record whether through a stipulation of facts or through the presentation of evidence at a hearing.

requirement.<sup>6</sup> Consistent with precedent finding that a contractual alternative to judicial review under CPLR Article 78 is a mandatory subject of negotiations,<sup>7</sup> we conclude that an appeal procedure from an initial determination that an employee is not in compliance with a residency requirement is a mandatory subject. Simply put, such a determination adversely impacts an employee's terms and conditions of employment.<sup>8</sup>

Next, we turn to the City's argument that the Police Club failed to request negotiations over an appeal procedure. Based upon our review of the May 29, 2007 letter from the counsel for the Police Club, we affirm the ALJ's conclusion that the Police Club requested negotiations over the subject. Among the issues specifically addressed by the letter is the negotiability of a procedure to review the City's determination of non-compliance. In the letter's penultimate full paragraph, counsel expressly requests the scheduling of a meeting to negotiate the issues discussed in the letter. To the extent that the City claims that the letter is ambiguous, it had a reasonable opportunity to seek clarification prior to refusing to negotiate.

Finally, we reject the City's assertion that the charge is untimely because it was filed more than four months after the enactment of the Local Law. The City waived the

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<sup>6</sup> The statute also does not touch upon the procedures to be followed in rendering an initial determination with respect to compliance with the residency requirement. However, we do not reach the issue whether the subject of initial determination procedures is mandatory because the charge is limited to the negotiability of an appeal procedure. See, Respondent's Brief in Support of Exceptions, p. 9.

<sup>7</sup> See, *Watertown PBA*, 30 PERB ¶3072 (1997), *confirmed*, *City of Watertown v New York State Pub Empl Rel Bd*, 31 PERB ¶7013 (Sup Ct Albany County 1998), *revd*, 263 AD2d 797, 32 PERB ¶7016 (3d Dept 1999), *revd*, 95 NY2d 73, 33 PERB ¶7007 (2000); *City of Middletown*, 42 PERB ¶3022 (2009).

<sup>8</sup> *City of Schenectady*, *supra* note 2.

issue of timeliness by not pleading it as an affirmative defense.<sup>9</sup> Furthermore, the four-month time period began to run after the City refused Police Club's request to negotiate the subject and not when the Local Law was enacted. As the City concedes, the Local Law is silent with respect to an appeal procedure from an initial determination and it is undisputed that the City did not previously seek to enforce the Local Law.

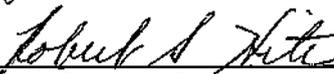
Based upon the foregoing, the City's exceptions are denied and the decision of the ALJ's finding that the City violated §209-a.1(d) of the Act by refusing the Police Club's request to negotiate an appeal procedure is affirmed.

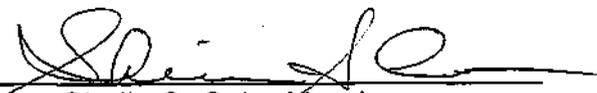
IT IS THEREFORE ORDERED that the City:

1. Cease and desist from refusing to engage in negotiations with the Police Club over a procedure to review an initial determination that an employee is not in compliance with the residency requirement; and
2. Sign and post the attached notice at all locations normally used to communicate with unit employees.

DATED: February 8, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

<sup>9</sup> Rules of Procedure, §§204.3(c)(2) and 212.4(l).

# 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 Niagara Falls (City) in the bargaining unit represented by the Niagara Falls Police Club, Inc. (Police Club) that the City will not refuse to engage in good faith negotiations with the Police Club over an appeal procedure to review an initial determination by the City that an employee is not in compliance with the residency requirement.

Dated .....

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

City of Niagara Falls  
.....

*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

**VILLAGE OF GARDEN CITY.**

**CASE NO. DR-125**

Upon a Petition for Declaratory Ruling

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

**CULLEN AND DYKMAN LLP (GERARD FISHBERG of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Professional Firefighters Association of Nassau County, Local 1588, IAFF, AFL-CIO (Association) 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 the Association.

On October 10, 2008, the Association filed a petition, pursuant to §210.1 of the Rules of Procedure (Rules), seeking a declaratory ruling that: a) the mandatory retirement age and the twenty-five (25) years length of service requirements in Article XI, §2(a) of the expired agreement (agreement) between the Association and the Village of Garden City (Village) are void as a matter of law and are prohibited subjects of negotiations under the Public Employees' Fair Employment Act (Act); and b) the Association is not obligated under the Act to engage in negotiations for the deletion of the prohibited subjects.

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<sup>1</sup> 42 PERB ¶6601 (2009).

On May 18, 2007, the Village filed a response seeking dismissal of the petition on the grounds that the petition does not raise a cognizable issue under the Rules and that it constitutes an attempt by the Association to circumvent its duty to negotiate under the Act.

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

On May 19, 2009, the ALJ issued a recommended declaratory ruling and decision (decision) dismissing the petition for a declaratory ruling on the ground that it did not raise a genuine dispute over the negotiability of a proposal under §210.1(a) of the Rules.

#### EXCEPTIONS

In its exceptions, the Association contends that the ALJ erred in dismissing the petition on the grounds that the petition raises a question with respect to the scope of negotiations under the Rules, and that the ALJ applied an erroneous legal standard in concluding that she is without authority to determine the issues raised in the petition. In addition, the Association asserts that the ALJ erred in her findings that the Village has not made a relevant proposal and that neither party has refused to negotiate a proposal. Finally, the Association contends that the objectionable provisions in Article XI, §2(a) of the agreement are void as a matter of law pursuant to §201.4 of the Act, Retirement and Social Security Law §470 and New York State Constitution, Article 5, §7.

The Village supports the ALJ's decision dismissing the petition. In the alternative, it contends that the provisions in Article XI, §2(a) are mandatorily negotiable.

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

### FACTS

The relevant stipulated facts are simple and straightforward.

Article XI, §2 of the parties' agreement states:

Village will provide the improved career retirement plan of Section 375-i of the Retirement & Social Security Law for employees who have twenty-five (25) years of service and have reached their 55<sup>th</sup> birthday. Employees agree by such election to retire at age sixty-two (62) and execute an appropriate form to this effect, if required. Any employee who makes this election and fails to retire by age sixty-two (62) shall be terminated and in the event the employee grieves and arbitrates this termination, the arbitrator shall sustain the discharge if he finds the employee made the election and has reached sixty-two (62) years of age.

The provision was originally added to the parties' collectively negotiated agreements pursuant to a memorandum of agreement, dated October 18, 1986.

On July 25, 2008, the Association's counsel sent a letter to the Village's counsel confirming the scheduling of the first negotiation session between the parties for a successor agreement. In that letter, the Association's counsel stated that Article XI, §2 of the expired agreement

violates the New York State Retirement and Social Security Law and should be stricken from the CBA. Since the age 62 mandatory requirement provision is illegal, we do not believe that its removal is subject to collective bargaining and any negotiations regarding this provision would be prohibited under the Taylor Law. Please advise us within ten days if the Village disagrees with our position and is taking the position that removal of the age 62 mandatory retirement provision from the CBA must be negotiated. Failing to hear from you within ten days, we will have no choice but to assume that the Village is insisting that Local 1588 is required to

negotiate the removal of the age 62 mandatory retirement provision from the CBA.

Five days later, the City's counsel sent a letter that confirmed the date for the commencement of negotiations and responded to the Association's counsel's letter with respect to the contested contractual provision:

The remainder of your letter is puzzling to me. As you know, we have a Nassau Supreme Court Decision upholding the mandatory age 62 retirement for members covered by the 375-i retirement plan. I am confused by your statement that the age 62 mandatory retirement provision is illegal and its removal from the CBA is not subject to negotiations. Please let me know what you base that on. It is our position that the Village is not requesting any change in the current provision and, therefore, there is no need for the Village to characterize this provision as mandatory, non-mandatory or illegal.

On August 29, 2008, the Association's counsel sent another letter to the Village's attorney clarifying the Association's position. In his letter, the Association's counsel contended that the contract provision is void because it sets a mandatory retirement age at variance with the applicable mandatory retirement age of 70 for a Retirement and Social Security Law §375-i retirement plan, which is set forth in Retirement and Social Security Law §370(b). In addition, he asserted that the agreement's eligibility requirement of 25 years of service is inconsistent with the 20 years service requirement set forth in Retirement and Social Security Law §375-i. In support of the Association's argument that the removal of the void provisions is a prohibited subject, counsel cited

§201.4 of the Act.<sup>2</sup>

During the exchange of proposals at the second bargaining session, on October 7, 2008, the Association's list of proposals included the following:

With respect to the age sixty-two mandatory retirement age requirement and twenty-five years of service requirement applicable to employees enrolled in Section 375-i of the Retirement & Social Security Law contained in Article XI, Section 2(a) of the collective bargaining [sic], Local 1588 makes no proposal inasmuch as these requirements are void as a matter of law and should be deleted from the agreement. The Village is requested to confirm that these requirements are deleted from the agreement.

In addition, during the bargaining session the Association reiterated that the mandatory retirement age and years of service set forth in Article XI, §2(a) of the agreement are illegal and void and requested that the Village confirm that those requirements will be deleted from the agreement. In response the Village stated that the issues were negotiable.

#### 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

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<sup>2</sup> Section 201.4 of the Act states:

The term "terms and conditions of employment" means salaries, wages, hours and other terms and conditions of employment provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.

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.<sup>3</sup>

In *Patrolmen's Benevolent Association of the City of New York, Inc.*,<sup>4</sup> we affirmed the dismissal of a petition for a declaratory ruling that sought an interpretation of a provision in a collectively negotiated agreement between the public employer and another employee organization because the subject matter of the petition was beyond the stated purposes for the declaratory ruling process under the Rules.

More recently, in *Niagara Charter School*,<sup>5</sup> we affirmed the dismissal of a petition for a declaratory ruling by an employer that sought an adjudication regarding the interplay between the representation procedures under the Act and Rules and the provisions of the New York Charter Schools Act of 1998.<sup>6</sup> In affirming the ALJ's dismissal of the petition in that case, we stated:

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. 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> (footnotes omitted)

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<sup>3</sup> *City of Plattsburgh*, 32 PERB ¶¶3014 (1999).

<sup>4</sup> 40 PERB ¶¶3019 (2007).

<sup>5</sup> 41 PERB ¶¶6501 (2008).

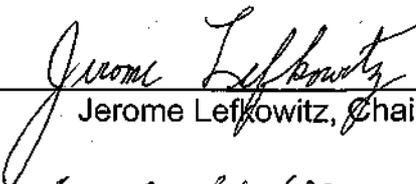
<sup>6</sup> Education Law §2850, *et seq.*

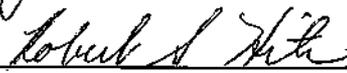
<sup>7</sup> *Supra* note 5, 41 PERB at 6503.

In the present case, we affirm the ALJ's conclusion that the Association's petition does not raise a justiciable issue under §210.1(a) of the Rules. Consistent with Board precedent, the ALJ correctly found that the Association's petition does not seek a declaratory ruling with respect to the applicability of the Act or with respect to the negotiability of a specific proposal. The primary purpose of the Association's petition is not a negotiability determination. Instead, it seeks an administrative legal determination as to the legality of Article XI, §2, which has been in the parties' collectively negotiated agreements since 1986. To render such a determination would require the Board to interpret various provisions of the Retirement and Social Security Law and the New York State Constitution. While this legal issue may be of importance to the parties, the declaratory ruling process was never intended to be a means for resolving this type of legal issue, which is external to the Act, without the pendency of a related negotiation proposal. Nothing in our decision, however, precludes the Association or Village from seeking a judicial declaration as to the respective rights of the parties pursuant to CPLR §3001.

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

DATED: February 8, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Colé, Member

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

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In the Matter of

**VICTOR C. BUCHALSKI,**

Charging Party,

**CASE NO. U-28360**

- and -

**UNITED STEELWORKERS, LOCAL 9434-00,**

Respondent,

- and -

**CITY OF NIAGARA FALLS,**

Employer.

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**SANDERS & SANDERS (HARVEY P. SANDERS of counsel), for  
Charging Party**

**CREIGHTON, PEARCE, JOHNSON & GIROUX (E. JOSEPH GIROUX, JR.  
of counsel), for Respondent**

**CRAIG H. JOHNSON, CORPORATION COUNSEL (CHRISTOPHER M.  
MAZUR of counsel), for Employer City of Niagara Falls**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by Victor C. Buchalski (Buchalski) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge, as amended, filed by Buchalski against the United Steelworkers, Local 9434-00 (Steelworkers) alleging that the Steelworkers violated §209-a.2(c) of the Public Employee's Fair Employment Act (Act) when it failed to take action to challenge the

termination of his contractual health insurance benefits in 2007 following his successful application for disability retirement with the New York State and Local Retirement System.

The Steelworkers filed an answer denying that it violated the Act and asserting timeliness as an affirmative defense.

Following a hearing, the ALJ issued a decision dismissing the charge concluding that Buchalski's allegations are untimely pursuant to §204.1(a)(1) of PERB's Rules of Procedure (Rules).<sup>1</sup> In the alternative, the ALJ determined that Buchalski failed to establish a breach of the duty of fair representation because the Steelworkers' conduct was not arbitrary, discriminatory or in bad faith.

#### EXCEPTIONS

In his exceptions, Buchalski contends that the ALJ made errors of law and fact in concluding that the charge is untimely under the Rules. In addition, he contends that the ALJ erred in finding that the Steelworkers acted reasonably when it concluded that Buchalski's proposed claim challenging the termination of his health insurance lacked merit. The Steelworkers support the ALJ's decision.

Based upon our review of the record, consideration of the parties' arguments and application of relevant precedent, we deny Buchalski's exceptions, and affirm the ALJ's dismissal of the charge.

#### FACTS

For approximately 20 years, Buchalski was an employee of the City of Niagara Falls (City). In May 2002, he suffered a compensable injury at work for which he

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<sup>1</sup> 42 PERB ¶4563 (2009).

received supplemental workers' compensation benefits under the parties' collectively negotiated agreement (agreement). After a one-year leave of absence, the City terminated him from employment, effective June 2003, pursuant to Civil Service Law §71, and it cancelled his contractual health insurance benefits under the City-Steelworkers' collectively negotiated agreement.

In 2003, counsel for the Steelworkers expressed an initial written reservation about the merits of a grievance challenging the cancellation of Buchalski's health insurance benefits under the agreement. However, three days later, the same counsel reversed her opinion, and recommended that a grievance be filed on behalf of Buchalski alleging a violation of §9.6.1(c) of the agreement. According to Buchalski's testimony, the change in legal position resulted from his direct conversation with the attorney for the Steelworkers.

It is undisputed that the Steelworkers filed and processed a grievance in 2003 on Buchalski's behalf alleging that the City violated the agreement by terminating his health insurance benefits.<sup>2</sup> The grievance was heard at an arbitration in February 2005. At the close of the arbitration, Buchalski was advised by Steelworkers' representative Thomas Vitello (Vitello) that if he successfully applied for New York State disability retirement, his contractual right for health insurance benefits would expire.<sup>3</sup>

Consistent with that advice, in its post-hearing brief, the Steelworkers argued to

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<sup>2</sup> Section 9.6.1(c) of the parties' agreement states:

The City will maintain these contractual benefits for the duration of the compensation period: medical, dental and prescription coverage, contribution to the Retirement System at the earning rate. Joint Exhibit 1, p. 19.

<sup>3</sup> Transcript, pp. 41-42.

the arbitrator that:

Regarding the continuation of health insurance, it is the Unions [sic.] contention that "the duration of compensation period" as stated in Subsection 9.61c is from the time the employee is injured and approved by Workers Compensation, continuing until the employee files for and is granted New York State disability retirement. (Consistent with CE #1), then Subsection 10.3.1 would apply.<sup>4</sup>

On March 22, 2005, the arbitrator issued a decision and award sustaining the grievance and ordering the City to restore Buchalski's health insurance coverage and to make him whole.<sup>5</sup>

In 2006, Buchalski applied for and was granted disability retirement by the New York State and Local Retirement System. After he was granted disability retirement benefits, Buchalski was notified by the Niagara Falls Water Board (Water Board),<sup>6</sup> in a letter dated July 19, 2006, that his contractual health insurance would terminate, effective October 1, 2007.<sup>7</sup> Shortly after receiving the Water Board's 2006 letter, Buchalski was advised by Vitello that the letter was consistent with the terms of the

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<sup>4</sup> Respondent Exhibit 2, p. 2. Section 10.3.1 states: "City will continue to pay for Health Benefits as provided in Section 10.1; one (1) month for each year of service for employees retiring under the New York State Disability Retirement Plan." Joint Exhibit 1, p. 24.

<sup>5</sup> Charging Party Exhibit 4.

<sup>6</sup> The City is named as a statutory party to the charge pursuant to §209-a.3 of the Act. Although the City was Buchalski's employer at the time of his termination and when he applied for disability retirement, it appears from the record that the Water Board may be the successor employer. However, no exceptions have been filed to the declination by the ALJ to determine whether the City or the Water Board is the appropriate statutory party. *Supra* note 1, 42 PERB at 4749, n.1. Therefore, the issue is waived. Rules, §213.2(b)(4); *Town of Orangetown*, 40 PERB ¶3008 (2007), *confirmed*, *Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶7008 (Sup Ct Albany County 2007).

<sup>7</sup> Charging Party Exhibit 6.

agreement.

In 2007, after his contractual benefits were terminated, Buchalski contacted a Steelworkers' representative, Joseph LaGamba (LaGamba), and requested that he ascertain whether the Steelworkers would take action to enforce the arbitrator's award. In December 2007, LaGamba informed Buchalski that the Steelworkers would not pursue his legal claim based upon a legal opinion, dated December 4, 2007, from its attorney. In his opinion, the Steelworkers' counsel concluded the termination of Buchalski's contractual health insurance benefits in 2007, following the grant of disability retirement, was consistent with the terms of the agreement and the arbitration award.<sup>8</sup> At Buchalski's request, he received a copy of the Steelworkers' counsel's opinion during a meeting with LaGamba in early January 2008. Thereafter, Buchalski retained private counsel who sent two letters to the Steelworkers' counsel requesting that he reconsider his merits-based determination. After not receiving responses to the requests for reconsideration, the improper practice charge was filed on May 15, 2008.

#### DISCUSSION

In his exceptions, Buchalski challenges the ALJ's conclusion that the charge is untimely and that his duty of fair representation claim is without merit.

##### 1. Timeliness

Pursuant to §204.1(a)(1) of the Rules, an improper practice charge must be filed within four-months from the date a charging party knew or should have known of the facts that constitute the alleged violation.<sup>9</sup> A request for reconsideration will not toll the

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<sup>8</sup> Charging Party Exhibit 7.

<sup>9</sup> *TWU (Abraham)*, 36 PERB ¶13008 (2003).

commencement of the filing period under §204.1(a)(1) of the Rules unless the charging party demonstrates a reasonable non-subjective belief that the decision was not final.<sup>10</sup>

In the present case, Buchalski knew or should have known that the Steelworkers would not be taking action to challenge the cancellation of his health insurance benefits based upon his conversation with LaGamba in December 2007. Therefore, the time period for Buchalski to file a charge under the Rules commenced following that December 2007 conversation.

In his exceptions, Buchalski contends that his time for filing a charge was tolled based upon the pendency of his attorney's letters requesting that the Steelworkers reconsider its decision not to pursue a contractual grievance or a proceeding to enforce the arbitration award. Based upon the facts and circumstances in the present case, we find that Buchalski has failed to demonstrate that his attorney's requests for reconsideration constitute a reasonable and objective basis for concluding that the Steelworkers' December 2007 decision was non-final. The evidence reveals that Buchalski's requests for reconsideration were not a part of a Steelworkers' internal appeals procedure that ends in a final determination on whether to pursue a contract grievance or a legal claim. The mere fact that the Steelworkers changed its mind in 2003, with respect to the merits of Buchalski's earlier grievance, does not establish a reasonable basis for him to believe that its subsequent 2007 decision was non-final. In fact, it is undisputed that Buchalski was informed in 2005 by a Steelworkers' representative that if he received New York State disability retirement benefits, his contractual right for health insurance benefits would end.

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<sup>10</sup> *County of Onondaga*, 12 PERB ¶3035 (1979), *confirmed*, *County of Onondaga v New York State Pub Empl Rel Bd*, 77 AD2d 783, 13 PERB ¶7011 (4<sup>th</sup> Dept 1980).

## 2. Merits of the Claim

Even if the charge were timely, we would dismiss it because of its lack of merit. In general, the duty of fair representation does not include an obligation by an employee organization to pursue litigation on behalf of a unit member. However, if an employee organization has represented other unit members in similar litigation that was successful, and the evidence demonstrates that the denial of representation to the charging party was arbitrary, discriminatory or in bad faith, a violation of §209-a.2(c) of the Act can be established.<sup>11</sup>

In the present case, Buchalski has not presented any evidence demonstrating that the Steelworkers has previously commenced similar litigation on behalf of other unit members seeking to enforce an arbitration award. Furthermore, he has failed to demonstrate that the Steelworkers' denial of his request to enforce the arbitration award aimed at challenging the termination of his contractual benefits in 2007 was arbitrary, discriminatory or in bad faith. We permit employee organizations a "wide range of reasonableness in making decisions associated with the processing of a grievance."<sup>12</sup> A similar standard is applicable to decisions by employee organizations on whether to pursue litigation on behalf of a unit member.

In the present case, the arbitration award cannot reasonably be interpreted as prohibiting the termination of Buchalski's contractual health insurance benefits following the grant of disability retirement benefits by the New York State and Local Retirement System. Finally, we conclude that the Steelworkers' decision to not pursue a new

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<sup>11</sup> *PEF (Hartner)*, 15 PERB ¶3066 (1982).

<sup>12</sup> *PEF (Reese)*, 29 PERB ¶3027 at 3062 (1996).

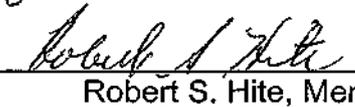
grievance or litigation on behalf of Buchalski was well within the wide range of reasonableness granted to employee organizations under the Act.

Based upon the foregoing, the exceptions filed by Buchalski are denied and the ALJ's decision is affirmed.

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

DATED: February 8, 2010  
Albany, New York

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

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

  
\_\_\_\_\_  
Sheila S. Cole, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**MICHAEL ABRAHAMS,**

Charging Party,

-and-

**CASE NO. U-28292**

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

Respondent,

-and-

**VILLAGE OF HEMPSTEAD,**

Employer.

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**MICHAEL ABRAHAMS, *pro se***

**NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel),  
for Respondent**

**BOND, SCHOENECK & KING, PLLC (CHRISTOPHER T. KURTZ of counsel),  
for Employer**

**INTERIM BOARD DECISION AND ORDER**

This case comes to the Board on a *pro se* motion, dated December 7, 2009, by Michael Abrahams (Abrahams) requesting an extension of time to file exceptions, pursuant to §213.4 of our Rules of Procedure (Rules), to a decision of an Administrative Law Judge (ALJ), dated October 6, 2009, on an improper practice charge, as amended, filed by Abrahams alleging that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) violated §§209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act).

PROCEDURAL BACKGROUND

On April 15, 2008, Abrahams filed an improper practice charge alleging that CSEA violated §§209-a.2(a) and (c) of the Act when it refused to process to arbitration his grievance challenging his termination by the Village of Hempstead (Village). During the processing of the charge, Abrahams was represented by attorney Stafford H. Byers (Byers).

CSEA and the Village filed answers to the charge and a pre-hearing conference was scheduled for September 3, 2008 at PERB's Brooklyn office. Byers and Abrahams failed to appear at the pre-hearing conference.

After CSEA and the Village moved to dismiss the charge, Byers filed an affidavit setting forth an explanation for the non-appearance. In his affidavit, Byers stated that he had a family emergency on the day of the conference and that he had mistakenly calendared the conference for September 10, 2008. In addition, his affidavit indicated that he believed that the conference would be conducted telephonically. Based upon Byers' affidavit, the ALJ denied the motions to dismiss and rescheduled the conference for September 18, 2008.

On April 14, 2009, a hearing was held on the charge before an ALJ. Following the submission of post-hearing briefs to the ALJ, the Appellate Division, Second Department suspended Byers from the practice of law for a one-year period commencing on September 11, 2009.<sup>1</sup> On October 6, 2009, the ALJ issued her

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<sup>1</sup> *Matter of Byers*, 66 AD3d 155 (2d Dept 2009).

decision dismissing the charge.<sup>2</sup>

On October 9, 2009, copies of the ALJ's decision were mailed by certified mail, return receipt requested, to Abrahams, Byers, CSEA's attorney, the Village and the Village's attorney. Our records establish that the envelope containing a copy of the ALJ's decision was received by Byers's office on October 13, 2009. The envelope addressed to Abrahams's last known address was not claimed and it was later returned to PERB by the United States Postal Service. In early December 2009, Abrahams contacted PERB's Brooklyn office about the status of his case and was informed that a decision had been issued.

#### MOTION FOR LEAVE FOR EXTENSION

In support of his motion, Abrahams states that he did not receive a copy of the decision because it was mailed to his former address and that Byers failed to advise him about the decision. In addition, he states that he first learned of the ALJ's decision when he contacted PERB's Brooklyn office. Thereafter, he contacted Byers's office and was informed that Byers was suspended from practicing law. Upon learning of Byers's suspension, Abrahams filed his motion with the Board for leave to extend his time to file exceptions.

CSEA and the Village oppose Abrahams's motion contending that he fails to disclose the specific date when he learned about the issuance of the ALJ's decision from PERB's Brooklyn office. In addition, they oppose the motion on the grounds that the processing of the charge before the ALJ had been unduly delayed by Abrahams.

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<sup>2</sup> 42 PERB ¶4573 (2009).

DISCUSSION

Under §§213.2(a) and 213.4 of the Rules, exceptions must be filed with the Board within 15 working days after the receipt of a decision, and requests for an extension must be filed within the same time period. However, the Board has discretionary authority under §213.4 of the Rules to extend the time to request an extension of time to file exceptions upon a showing of extraordinary circumstances.<sup>3</sup> Extraordinary circumstances can be established through specific and detailed facts demonstrating that the failure to make a timely request for an extension was not the result of a neglectful error or the burdens from other obligations.<sup>4</sup>

Under the unique facts and circumstances of the present case, we conclude that Abrahams has demonstrated extraordinary circumstances warranting the grant of additional time to file exceptions pursuant to §213.4 of the Rules. It is not disputed that he did not receive a copy of the ALJ's decision from Byers or from PERB prior to the expiration of the time to file exceptions or to request an extension of time under the Rules. The first time that he became aware of the decision was when he contacted PERB's Brooklyn office in early December. His motion for relief under §213.4 of the Rules was filed less than four-working days after he learned of the issuance of the ALJ's decision and the suspension of Byers from practicing law. His failure to make an earlier request for an extension of time to file exceptions was not the result of his own neglect, omission or delays. In reaching that conclusion, we note that Byers did not

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<sup>3</sup> *Onondaga Community Coll*, 11 PERB ¶3008 (1978).

<sup>4</sup> *Bd of Educ of the City Sch Dist of the City of New York*, 42 PERB ¶3037 (2009); *NYSCOPBA (Hunter)*, 42 PERB ¶3038 (2009).

inform PERB of his suspension from practice and/or provide the agency with the current mailing address of his client, Abrahams.

Finally, we are not persuaded that the previous delays cited by CSEA and the Village warrant a denial of Abrahams's motion. A review of the record establishes that the adjournments, and the related inconveniences to PERB and the other parties, were attributable to Byers and not his client. For example, in his affidavit explaining his failure to appear at the pre-hearing conference, Byers references his own personal and professional reasons for the non-appearance.

IT IS, THEREFORE, ORDERED that Abrahams's exceptions will be timely if filed with the Board on or before February 22, 2010 with proof of service upon CSEA and the Village.

DATED: February 8, 2010  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

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

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In the Matter of

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

Charging Party,

**CASE NO. U-27189**

- and -

**CITY OF ONEONTA,**

Respondent.

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**NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK of  
counsel), 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 Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the City of Oneonta (City) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when the City conditioned the promotion of CSEA unit president Dominic Pucci (Pucci) on CSEA agreeing to reopen the parties' collectively negotiated agreement (agreement) for the purpose of modifying the salary grade schedule.

Following a hearing, the ALJ issued a decision dismissing the charge concluding that CSEA had failed to meet its burden of proof of demonstrating that the City violated the Act when it did not promote Pucci.<sup>1</sup>

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<sup>1</sup> 40 PERB ¶4609 (2007).

### EXCEPTIONS

In its exceptions, CSEA asserts that the ALJ erred in dismissing its charge contending that it met its burden of proof demonstrating that the City violated §§209-a.1(a) and (c) of the Act when it failed to promote Pucci. The City supports the decision of the ALJ.

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

### FACTS

Pucci has been employed in the City's Police Department for over 17 years and holds the position of Data Entry Machine Operator (DEMO). Since July 2001, he has been the CSEA unit president for a bargaining unit of full-time City employees.

Toward the end of the negotiations, which resulted in the parties' January 1, 2000-December 31, 2003 agreement, the City and CSEA discussed proposed changes to the salary grade schedule contained in the prior agreement.<sup>2</sup> Among the proposed changes were moving the DEMO position from a Grade 10 to a Grade 3 and adding a Senior DEMO position as a Grade 10 to the list of positions on the schedule. The parties did not reach an agreement on the proposed changes, and the salary grade schedule in the agreement remained unchanged.<sup>3</sup>

In 2000, Police Chief John J. Donadio (Donadio) spoke with Pucci about a possible promotion as a means of increasing his salary. Among the promotional positions discussed was a future Senior DEMO position. In 2002, Donadio contacted

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<sup>2</sup> Charging Party Exhibit 10.

<sup>3</sup> Pucci was not a member of the CSEA negotiation team for the 2000-2003 agreement that was signed by the parties on August 2, 2001. Joint Exhibit 1.

the City of Oneonta Civil Service Commission (Commission)<sup>4</sup> requesting the certification and classification of a Senior DEMO position. Following a July 2002 request from the Commission, Donadio submitted the required civil service form, which included a duty statement for the proposed new position along with the current duty statements for DEMO and other positions. In March 2005, the Commission approved the classification request for the Senior DEMO position.

After the expiration of the 2000-2003 agreement, the parties engaged in collective negotiations for a successor agreement. Pucci was a member of CSEA's negotiation team. Between September 2004 and January 2006, he led CSEA members in informational picketing over the status of negotiations in front of City Hall and outside the homes of then Mayor Kim K. Muller, Alderman Keith Bott, and City Chamberlain David Martindale.

Following the election of Mayor John Nader (Nader), negotiations between the parties resumed in January 2006. On January 11, 2006, Pucci obtained a copy of the proposed changes to the salary grade schedule that had been discussed during the negotiations resulting in the 2000-2003 agreement. The City and CSEA held informal discussions about modifying the salary grade schedule but those changes were not incorporated into an April 2006 memorandum of agreement between the parties.<sup>5</sup>

In 2006, Mayor Nader created a Personnel Committee to review supervisory requests for new positions and recommendations for promotions. According to Mayor Nader, he recommended to the Personnel Committee that the City create positions

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<sup>4</sup> The Commission has jurisdiction over the City, the Oneonta City School District, the Oneonta Public Library and the City of Oneonta Housing Authority. Transcript, p. 104.

<sup>5</sup> Respondent Exhibit 14.

prior to deciding to fill them. The Personnel Committee is chaired by Alderman Paul Robinson (Robinson) and its other members are Alderman Julie Carney (Carney) and Alderman Michael Nader. Under City procedures, when the Personnel Committee approves a recommendation, it is forwarded to the City's Finance Committee for consideration. If the Finance Committee agrees with the recommendation, it is forwarded to the Common Council for final action. However, the committee structure can be circumvented with respect to a personnel matter by a Common Council member making a motion at the beginning of a Council meeting.

In May 2006, the Commission conducted a promotional examination for the Senior DEMO position. The stated purpose for the examination was to establish an eligibility list to fill a future vacancy with the City. As a result of the civil service examination, Pucci was the top ranked candidate on the eligibility list certified by the Commission on June 21, 2006. The second candidate on the list was Linda Stiefel (Stiefel), another DEMO, who is also a CSEA unit officer.<sup>6</sup>

One week after the list's certification, Chief Donadio sent a memorandum to Mayor Nader recommending Pucci for the Senior DEMO position at a starting annual salary of \$32,000, which constituted a proposed \$6,000 salary increase for Pucci. According to Donadio's memorandum, the Senior DEMO position had already been created by the Common Council. In the memorandum, Donadio described Pucci as an exemplary employee and he urged the Personnel Committee to approve his recommendation.

On July 17, 2006, the Personnel Committee met to consider the recommended

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<sup>6</sup> Stiefel was a CSEA Unit Executive Vice-President and a member of a prior CSEA negotiation committee. Joint Exhibit 1; Transcript, p. 93.

promotion of Pucci and the recommended promotion of Brian Cole to Central Garage Working Supervisor. The meeting was attended by the Personnel Committee members along with City Personnel Officer John Insetta and Donadio. During the meeting, the appropriateness of the proposed raise for Pucci was discussed. The Personnel Committee compared the proposed salary for the new position with Stiefel's salary as a DEMO along with the salary increases received by other unit members. In addition, Carney expressed reservations about Pucci's job performance, which she had witnessed as a fellow City Police Department employee. As a result of the meeting, the Personnel Committee approved Pucci's promotion but reduced the proposed salary increase from \$6,000 to \$2,500.<sup>7</sup> In addition, the Personnel Committee approved Cole's promotion without any change in the proposed salary.

Following the Personnel Committee meeting, Robinson notified the Finance Committee that the Personnel Committee would not be forwarding the recommendation for Pucci's promotion until CSEA agreed to modify the salary grade schedule in the recently concluded agreement.

Two days after the Personnel and Finance Committee meetings, Robinson sent an email to Pucci, about the status of his promotion, stating that:

There have been people promoted to position that did not exist. That is no more. The Chamberlain has a "proposed" updated Salary Grade Schedule. The Unit needs to review it and either agree to it or propose changes. The proposal does include Senior D.E.M.O. Once the Union and the City agree on the schedule, employees can be promoted to any position on it. The Chief has made a strong case for you.

The Personnel Committee thinks it is wrong to order a test for a position that does not exist. The process is being

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<sup>7</sup> Charging Party Exhibit 4.

worked out.

Hang in there, you will be promoted once the schedule is adopted.<sup>8</sup>

On the same day, Pucci sent an email to Mayor Nader alleging that the delay in considering his proposed promotion was based upon his status as a unit representative in violation of the Act.<sup>9</sup> In response, Mayor Nader sent an email to Pucci stating that:

I will follow thru. I am up to speed, I believe, with the promotion request. My understanding is that the personnel committee will review such matters. At this point do we even have a senior DEMO position created?<sup>10</sup>

In response to the City's request, Pucci refused, on behalf of CSEA, to agree to reopen the agreement and modify the salary grade schedule in exchange for the City's further consideration of the proposed promotion. In early August 2006, Mayor Nader learned that the City had the right to unilaterally create the new position and set the initial salary without CSEA's approval and without modifying the schedule.<sup>11</sup> Following receipt of this knowledge, the recommended promotion of Pucci did not receive any further consideration by the City.

#### DISCUSSION

In its exceptions, CSEA contends that the ALJ made a factual error in concluding that the Personnel Committee suspended the City's consideration of Pucci's promotion. CSEA also asserts that the ALJ erred in failing to find that the City violated §§209-

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<sup>8</sup> Charging Party Exhibit 5; Respondent Exhibit 11.

<sup>9</sup> Respondent Exhibit 11.

<sup>10</sup> Respondent Exhibit 11.

<sup>11</sup> Respondent 15; Transcript, pp. 209-210.

a.1(a) and (c) of the Act based upon her conclusion that the City met its burden of persuasion of demonstrating a legitimate nondiscriminatory reason for its actions toward the proposed promotion of Pucci.

Contrary to CSEA's fact-based exception, the evidence in the record supports the ALJ's finding that the Personnel Committee suspended consideration of Pucci's promotion by refusing to forward its recommendation to the Finance Committee until CSEA agreed to modify the salary grade schedule in the agreement. While the evidence demonstrates that the Personnel Committee initially approved Pucci's promotion, it later decided not to forward that recommendation to the Finance Committee until the negotiated schedule was changed.

Next, we consider CSEA's exceptions challenging the ALJ's conclusion that the City met its burden of persuasion demonstrating a legitimate nondiscriminatory reason for its conduct. In considering the exceptions, we note that CSEA does not contest the applicability of our burden-shifting analysis to the present case. Similarly, although CSEA contends that the City's conduct is inherently destructive, it does not dispute that the improper motivation inherent in a *per se* violation case is rebuttable by the City presenting evidence demonstrating a legitimate non-discriminatory reason.

Neither party has filed exceptions to the ALJ's conclusion that CSEA demonstrated a *prima facie* case of improper motivation under §§209-a.1(a) and (c) of the Act. Therefore, that argument is waived.<sup>12</sup>

Consequently, our focus centers on CSEA's claim that the ALJ erred in

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<sup>12</sup> See, Rules of Procedure, §213.2(b)(4); *Town of Orangetown*, 40 PERB ¶13008 (2007), *confirmed sub nom, Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶17008 (Sup Ct, Albany Co 2007).

concluding that the City met its burden of persuasion demonstrating a legitimate nondiscriminatory reason based upon the testimony of Alderman Robinson.

Robinson testified that the City's consideration of Pucci's promotion to Senior DEMO was postponed by the Personnel Committee based upon his good faith, but mistaken, belief that a modification to the salary schedule was a necessary prerequisite to promote Pucci. However, shortly after the Personnel Committee decided to delay sending its recommendation to the Finance Committee, Mayor Nader learned that the City had the right to unilaterally create positions and to set initial salaries without negotiating a modification of the schedule with CSEA. Although Nader was in communication with Robinson with respect to the Personnel Committee's actions, Nader did not take any action to correct the erroneous understanding of Robinson and the other members of the Personnel Committee. Similarly, he did not take any steps to have the proposed promotion considered by the Finance Committee or the Common Council. Instead, Nader continued to advise Pucci that his promotion was conditioned upon CSEA agreeing to changes in the agreement. During his testimony, Nader failed to explain his conduct with respect to the proposed promotion, after learning that the City had the unilateral authority to create positions and set initial salaries.

Based upon the foregoing, we reverse the ALJ's conclusion that the City met its burden of persuasion of demonstrating a legitimate nondiscriminatory reason for its conduct toward Pucci and conclude that the City violated §§209-a.1(a) and (c) of the Act.

In light of our finding of a violation of the Act, we next turn to the question of the appropriate remedy. The record establishes that the recommended promotion of Pucci to the position of Senior DEMO has not been reviewed or acted upon by the Finance

Committee and the Common Council as the result of the City's violation of the Act. Therefore, to return Pucci to the *status quo ante*, we order the City to forthwith take all necessary actions to render a final determination on the recommended promotion of Pucci to the position of Senior DEMO without regard to his union activities and the refusal by CSEA to reopen the agreement to modify the salary grade schedule.<sup>13</sup>

IT IS, THEREFORE, ORDERED that the City:

1. Take all necessary actions to render a final determination on the recommended promotion of Dominic Pucci to the Senior DEMO position;
2. Cease and desist from conditioning Dominic Pucci's promotion to the Senior DEMO promotion on the reopening of the agreement to modify the salary grade schedule;
3. Cease and desist from denying Dominic Pucci a promotion to the Senior DEMO position based upon his union activities;
4. Sign and post the attached notice at all locations customarily used to post notices to employees in CSEA's bargaining unit.

DATED: February 8, 2010  
Albany, New York



Robert S. Hite, Member

  
Sheila S. Cole, Member

<sup>13</sup> Board Chairman Lefkowitz took no part.

# 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 Oneonta in the unit represented by the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO that the City of Oneonta will:**

1. Forthwith take all necessary actions to render a final determination on the recommended promotion of Dominic Pucci to Senior DEMO;
2. Not condition Dominic Pucci's promotion to Senior DEMO on the reopening of the agreement to modify the salary grade schedule;
3. Not deny Dominic Pucci a promotion to Senior DEMO based upon his union activities.

**Dated .....**

**By .....**  
on behalf of City of Oneonta

*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.*