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9-21-2010

# State of New York Public Employment Relations Board Decisions from September 21, 2010

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from September 21, 2010

Keywords

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

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In the Matter of

**TEAMSTERS LOCAL 294,**

Petitioner,

-and-

**CASE NO. C-5972**

**GLOVERSVILLE-JOHNSTOWN JOINT SEWER BOARD,**

Employer,

-and-

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Intervenor/Incumbent.

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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,[1]

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

IT IS HEREBY CERTIFIED that the Teamsters Local 294 has been designated and selected by a majority of the employees of the above-named public employer, in

[1] By letter dated July 28, 2010, United Public Service Employees Union disclaimed any representational interest in the unit.

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: Cleaner, Wastewater Treatment Plant (WTP) Attendant, Motor Equipment Operator, Industrial Waste Monitoring Supervisor, Industrial Waste Monitoring Technician, WTP Laboratory Technician, Industrial Monitoring Mechanic, Motor Equipment Maintenance Mechanic, Senior WTP Maintenance Mechanic, WTP Maintenance Mechanic, Lead WTP Operator, WTP Operator Trainee, WTP Operator and Account Clerk Typist.

Excluded: WTP Maintenance Supervisor, Fiscal Officer, Senior Plant Operator, Laboratory Director, Industrial Engineer, Plant Superintendent, Administrative Aide, Manager Wastewater Programs and/or Chief Operating Officer.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamster Local 294. 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: September 21, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

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

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In the Matter of

**NIAGARA COUNTY COMMUNITY COLLEGE ADJUNCTS ASSOCIATION, NYSUT/AFT, AFL-CIO,**

Petitioner,

-and-

**CASE NO. C-5979**

**NIAGARA COUNTY COMMUNITY COLLEGE,**

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 Niagara County Community College Adjuncts Association, NYSUT/AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All part-time Instructors who teach at least three credit hours.

Excluded: Part-time Instructors who exclusively teach in the summer, managerial/confidential employees and all others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Niagara County Community College Adjuncts Association, NYSUT/AFT, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 21, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

**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-5983**

**RIDGE FIRE 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.

Included: All regular full-time and regular part-time EMT and paramedic employees and regular weekly per diem and regular monthly per diem EMT and paramedic employees.

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: September 21, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

**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-5965**

**TOWN OF ISLIP,**

Employer,

-and-

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

Intervenor/Incumbent.

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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.

Included: All Blue Collar titles set forth in "Schedule A" annexed hereto.

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: September 21, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

C-5965

## SCHEDULE A

## BLUE COLLAR TITLES

LEVEL 1

Custodial Worker I
Guard I
Kennel Attendant
Laborer I
Watchman

LEVEL 2

Automotive Equipment Operator
Automotive Mechanic I
Bay Constable I
Custodial Worker II
Dispatcher
Driver Messenger
Guard II
Harbormaster I
Laborer II
Maintenance Mechanic I
Minibus Driver
Public Safety Dispatcher I
Scale Operator
Senior Guard

LEVEL 3

Guard III
Taxi & Tow Truck License
Safety Inspector

LEVEL 4

Animal Control Officer I
Assistant Airport Lighting Specialist
Automotive Body Mechanic
Automotive Mechanic II
Maintenance Mechanic II
Warehouse Worker II

LEVEL 5

Automotive Parts Clerk
Courier
Heavy Equipment Operator
Park Ranger I

C-5965

LEVEL 6
Warehouse Worker III

LEVEL 7

Airport Lighting Specialist
Airport Maintenance Mechanic
Airport Security Guard
Automotive Mechanic III (Diesel)
Bay Constable II
Construction Equipment Operator
Harbormaster II
Maintenance Mechanic III
Tree Trimmer I
Town Investigator
Water Treatment Plant Operator 2B

LEVEL 8

Animal Control Officer II
Custodial Worker III
Groundskeeper III
Harbormaster III
Highway Labor Crew Leader
Labor Crew Leader
Maintenance Mechanic IV
Sr. Airport Fire Safety Officer
Sr. Airport Security Guard
Sr. Guard (Prior to 7/1/89)
Park Ranger II
Veterinary Technician
Waterways Maintenance Mechanic II

LEVEL 9

Highway Construction Supervisor
Highway Maintenance Crew Leader
Tree Trimmer II
Waterways Maintenance Mechanic III

LEVEL 10

Automotive Mechanic IV (Diesel)
Chief Harbormaster
Groundskeeper III (Coordinator)
Custodial Worker IV
Highway Labor Crew Leader (Zone)
Maintenance Mechanic IV (Coordinator)
Sanitation Site Crew Leader

LEVEL 11

Airport Construction Supervisor
Airport Maintenance Supervisor
Chief Airport Fire Safety Officer
Groundskeeper III (Zone)
Maintenance Mechanic IV (Zone)

**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-5969**

**TOWN OF ISLIP,**

Employer.

---

**KOEHLER & ISAACS LLP (HOWARD WIEN, ESQ., of counsel) for Petitioner**

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

## BOARD DECISION AND ORDER

On May 4, 2010, the United Public Service Employees Union (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Town of Islip (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: All White Collar titles set forth in "Schedule A" annexed hereto.

Excluded: All other employees.

Pursuant to that agreement, a secret-ballot election was held on August 17, 2010, at which a majority of ballots were cast against representation by the

petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective bargaining by the petitioner, IT IS ORDERED that the petition should be, and it hereby is, dismissed.

DATED: September 21, 2010
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

SCHEDULE "A"

| GRADE | TITLE |
|---|---|
| 9 | Account Clerk |
| 9 | Account Clerk Typist |
| 14 | Administrative Aide |
| 16 | Administrative Assistant |
| 14 | Adult Day Care Program Supervisor |
| 16 | Airport Administrative Assistant |
| 18 | Airport Administrative Supervisor |
| 10 | Airport Identification Technician |
| 14 | Alcoholism Counselor |
| 14 | Alcoholism Counselor – (Spanish Speaking) |
| 11 | Animal Health Technician |
| 14 | Architectural Drafter I |
| 18 | Architectural Drafter II |
| 8 | Assessment Aide |
| 11 | Assessment Assistant |
| 6 | Assessment Clerk |
| 16 | Assistant Architect |
| 16 | Assistant to Assessor |
| 18 | Assistant Civil Engineer |
| 8 | Assistant Cook |
| 17 | Assistant Federal & State Aid Claims Coordinator |
| 16 | Assistant Federal & State Aid Coordinator |
| 16 | Assistant Intergovernmental Relations Coordinator |
| 10 | Assistant Recreation Leader |
| 10 | Asst. Senior Citizen Center Manager |
| 14 | Assistant Site Plan Reviewer |
| 16 | Assistant to Town Tax Receiver |
| 18 | Assistant Waterways Management Supervisor |
| 14 | Bay Management Specialist I |
| 15 | Bay Management Specialist II |
| 16 | Bay Management Specialist III |
| 12 | Budget Assistant |
| 16 | Budget Technician |
| 14 | Building Inspector |
| 18 | Building Permits Coordinator |
| 16 | Building Plans Examiner |
| 16 | Case Manager |
| 16 | Case Manager – (Spanish Speaking) |
| 11 | Caseworker |
| 10 | Caseworker Trainee |
| 10 | Cashier |
| 17 | Chief Fire Marshall |

| | |
|---|---|
| 6 | Clerk |
| 6 | Clerk Typist |
| 6 | Clerk-Typist (Spanish Speaking) |
| 12 | Community Development Assistant |
| 13 | Community Development Program Technician |
| 12 | Community Development Specialist |
| 11 | Community Relations Assistant |
| 16 | Community Relations Specialist |
| 8 | Community Service Aide |
| 5 | Community Service Worker |
| 11 | Computer Operator I |
| 13 | Computer Operator II |
| 15 | Computer Operator III |
| 17 | Computer Programmer |
| 16 | Computer Programmer Trainee |
| 12 | Computer Technician |
| 16 | Contracts Examiner |
| 14 | Contract Technician |
| 10 | Cook |
| 18 | Coordinator of Alcoholism Services |
| 15 | Cultural Affairs Supervisor |
| 6 | Data Entry Operator |
| 10 | Data Processing Equipment Operator |
| 10 | Drafter I |
| 12 | Drafter II |
| 16 | Drug Abuse Educator |
| 14 | Drug & Alcohol Community Coordinator I |
| 14 | Drug & Alcohol Counselor I |
| 14 | Drug & Alcohol Counselor I (Spanish Speaking) |
| 16 | Drug & Alcohol Counselor II |
| 14 | Drug & Alcohol Hotline Coordinator |
| 17 | Employees Assistance Program Coordinator |
| 10 | Engineering Aide |
| 11 | Engineering Inspector |
| 7 | Environmental Aide |
| 15 | Environmental Analyst |
| 7 | Environmental Assistant |
| 15 | Environmental Planner |
| 10 | Environmental Technician |
| 12 | Environmentalist I |
| 16 | Environmentalist II |
| 13 | Fire Marshall I |
| 15 | Fire Marshall II |
| 6 | Food Service Worker |
| 17 | Graphics Materials Designer |
| 18 | Graphics Supervisor |

| | |
|---|---|
| 18 | Head Clerk |
| 14 | Health Financial Analyst |
| 8 | Home Health Aide |
| 16 | Hotline Coordinator |
| 12 | Housing Inspector |
| 13 | Industrial Development Assistant |
| 11 | Legal Stenographer |
| 11 | Lighting Inspector |
| 6 | Mail Clerk |
| 14 | Map Drafter I |
| 9 | Micrographics Operator |
| 8 | Museum Restoration Specialist |
| 11 | Neighborhood Aide |
| 12 | Network Communication Specialist |
| 18 | Network & Systems Coordinator |
| 12 | Ordinance Inspector |
| 8 | Paralegal Assistant |
| 11 | Park Interpretive Specialist |
| 18 | Payroll Supervisor |
| 12 | Photographer |
| 14 | Planner |
| 12 | Planner Trainee |
| 14 | Planner-Youth Services |
| 12 | Planning Aide |
| 12 | Plumbing Inspector |
| 14 | Principal Account Clerk |
| 12 | Principal Assessment Clerk |
| 18 | Principal Building Inspector |
| 12 | Principal Clerk |
| 12 | Principal Data Entry Operator |
| 14 | Principal Engineering Aide |
| 16 | Principal Housing Inspector |
| 18 | Principal Planner |
| 12 | Principal Stenographer |
| 16 | Principal Zoning Inspector |
| 16 | Real Property Appraiser II |
| 6 | Recreation Aide |
| 12 | Recreation Center Manager |
| 11 | Recreation Leader |
| 16 | Recreation Program Coordinator |
| 8 | Recreation Specialist |
| 14 | Recreation Supervisor |
| 14 | Sanitation Inspector |
| 14 | Sanitation Inspector (Spanish Speaking) |
| 14 | Secretarial Assistant |
| 12 | Senior Account Clerk |

| | |
|---|---|
| 18 | Senior Administrative Assistant |
| 13 | Senior Assessment Assistant |
| 9 | Senior Assessment Clerk |
| 16 | Senior Building Inspector |
| 18 | Senior Case Manager |
| 9 | Senior Cashier |
| 6 | Senior Citizen Aide |
| 12 | Senior Citizen Center Manager |
| 10 | Senior Citizen Club Leader |
| 12 | Senior Citizen Nutrition Center Manager |
| 16 | Senior Citizen Program Supervisor |
| 18 | Senior Civil Engineer |
| 9 | Senior Clerk |
| 9 | Senior Clerk Typist |
| 8 | Senior Data Entry Operator |
| 16 | Senior Drug Abuse Educator |
| 12 | Senior Engineering Aide |
| 12 | Senior Engineering Inspector |
| 18 | Senior Environmental Analyst |
| 17 | Senior Environmental Planner |
| 14 | Senior Housing Inspector |
| 13 | Senior Lighting Inspector |
| 12 | Senior Mail Clerk |
| 12 | Senior Micrographics Operator |
| 18 | Senior Micrographics Technician |
| 14 | Senior Neighborhood Aide |
| 16 | Senior Planner |
| 14 | Senior Plumbing Inspector |
| 18 | Senior Program Analyst |
| 11 | Senior Recreation Leader |
| 12 | Senior Sanitation Inspector |
| 12 | Senior Sign Inspector |
| 9 | Senior Stenographer |
| 12 | Senior Tax Cashier |
| 14 | Senior Zoning Inspector |
| 10 | Sign Inspector |
| 18 | Site Plan Reviewer |
| 7 | Stenographer |
| 18 | Surveyor |
| 6 | Switchboard Operator |
| 10 | Switchboard Supervisor |
| 18 | Systems Analyst |
| 18 | Systems Programmer |
| 10 | Tax Cashier |
| 13 | Telecommunications Specialist |
| 12 | Telecommunications Technician |

| | |
|---|---|
| 15 | Traffic Engineer I |
| 17 | Traffic Engineer II |
| 18 | Traffic Engineer III |
| 10 | Traffic Technician I |
| 12 | Traffic Technician II |
| 14 | Traffic Technician III |
| 12 | Volunteer Program Coordinator |
| 17 | Youth Services Program Coordinator |
| 15 | Youth Services Specialist |
| 12 | Zoning Inspector |
| 12 | Zoning Inspector (Spanish Speaking) |

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**ROCKVILLE CENTRE VILLAGE EMPLOYEES CIVIL SERVICE ASSOCIATION, INC.,**

Charging Party,

-and-

**CASE NO. U-28846**

**INCORPORATED VILLAGE OF ROCKVILLE CENTRE,**

Respondent.

**LAW OFFICES OF WAYNE J. SCHAEFER, LLC (WAYNE J. SCHAEFER) for Charging Party**

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

## BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Incorporated Village of Rockville Center (Village) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by the Rockville Centre Village Employees Civil Service Association, Inc. (Association) alleging that the Village violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred the duties of parking meter coin collection to a nonunit employee. The ALJ concluded that the Village's unilateral transfer of those duties violated §209-a.1(d) of the Act.[1]

[1] 42 PERB ¶4571 (2009)

## EXCEPTIONS

In its exceptions, the Village challenges both the ALJ's conclusion that it violated §209-a.1(d) of the Act, and the proposed remedial order. The Village contends that the ALJ erred in concluding that it violated §209-a.1(d) of the Act on the grounds that: its unilateral action constitutes a managerial prerogative involving a decrease in the number of hours worked; the reassigned duties were not substantially similar to the work previously performed by unit employees; and the Association never demanded negotiations. Finally, the Village claims that the ALJ's proposed remedial order interferes with its managerial prerogatives and violates public policy. The Association supports the ALJ's decision.

Based upon our review of the record, and consideration of the parties' arguments, we affirm the ALJ's decision but modify his remedial order, in part.

## FACTS

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

For at least seventeen years, the duties of parking meter coin collection and minor meter repairs have been performed exclusively by Association unit employees. Approximately six years ago, the Village installed electronic and municipal meters resulting in an 18%-20% decline in coin collection work, and an even greater decrease in the amount of minor repairs performed by unit employees.

For sixteen years, Noel Johnson (Johnson) was the unit employee who primarily performed the work. For a number of those years, he frequently worked part-time, performing his duties in the morning and taking vacation leave in the afternoons. On

days when he was absent, two other unit employees performed the work, each completing their respective tasks within two hours. Following Johnson's death in the autumn of 2007, other unit employees continued to exclusively perform the work. In November 2008, the Village hired a nonunit part-time employee to work four hours a day, and the at-issue work was reassigned to him.

## DISCUSSION

A unilateral transfer of exclusively performed bargaining unit work to nonunit employees violates §209-a.1(d) of the Act unless the work reassigned is not substantially similar to the exclusively performed unit work.[2] However, when there has been a significant change in job qualifications or there has been a curtailment in the level of services, we will balance the respective interests of the public employer and the unit employees, both individually and collectively, to determine whether there has been a violation of §209-a.1(d) of the Act.[3]

Contrary to the Village's argument, the unilateral action in this case does not involve a reduction in the work hours of unit employees resulting from a diminution in the amount of work to be performed.[4] Rather, the charge alleges, and the evidence demonstrates, that the Village unilaterally transferred unit work without a related

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[2] *See, Niagara Frontier Transp Auth,* 18 PERB ¶3083 (1985); *Town of West Seneca*, 19 PERB ¶3028 (1986); *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), *confirmed and mod, in part, Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd*, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009), *on remittiur*, 42 PERB ¶3016 (2009); *County of Westchester*, 42 PERB ¶3025 (2009).

[3] *Supra* note 2.

[4] *Lackawanna Cent Sch Dist,* 12 PERB ¶3122 (1979). *See also, Vestal Cent Sch Dist,* 15 PERB ¶3006 (1982), *confirmed sub nom. Vestal Teachers Assn v Newman,* 95 AD2d 940, 16 PERB ¶7020 (1983); *County of Erie*, 43 PERB ¶3016 (2010).

curtailment in the level of services. The reduction in work cited by the Village began at least six years ago and led to unit employees performing the work on a part-time basis until the Village unilaterally transferred the work to a nonunit part-time employee in 2008. The Village's related argument that the reassigned work is not substantially similar to the work exclusively performed by unit employees is equally without merit. The changes resulting from the installation of electronic and municipal meters took place six years before the unilateral transfer. There is no evidence of any change in the nature of the work at the time of the transfer, if ever; the duties were performed by unit employees on a part-time basis, well before the transfer of the unit work. Therefore, the Village's unilateral action constitutes a mandatory subject of negotiations. Furthermore, the Association was not obligated to request negotiations.[5]

PERB has broad remedial make-whole powers, pursuant to §205.5(d) of the Act, to order a party to cease and desist from engaging in an improper practice, and to order such affirmative action that will effectuate the policies of the Act including ordering the reinstatement of employees with or without back wages.[6]

While an employer has the prerogative under the Act to determine the manner and means by which services are provided, a unilateral decision to subcontract those services is a mandatory subject of negotiations that can be remedied pursuant to §205.5(d) of the Act. The ALJ's proposed order requiring *inter alia*, restoration of the work of parking meter coin collection to Association unit employees, and to make unit employees whole for wages and benefits that may have been lost as a result of the

[5] *Board of Educ of the City Sch Dist of the City of New York*, 39 PERB ¶3014 (2006); *Wappingers Cent Sch Dist*, 19 PERB ¶3037 (1986).

[6] *County of Erie*, *supra* note 4.

unilateral transfer, is fully consistent with our precedent, and it does not constitute a violation of public policy.[7]

Based upon the foregoing, we affirm the ALJ's decision finding that the Village violated §209- a.1(d) of the Act but modify, in part, the recommended remedial order.[8]

THEREFORE, IT IS HEREBY ORDERED that the Village shall:

1. Not unilaterally transfer to nonunit employees the work of parking meter coin collection;

2. Make unit employees whole for wages and benefits, if any, lost as a result of the unilateral transfer of the work of parking meter coin collection to a nonunit employee plus interest at the maximum legal rate;

3. Restore to unit employees the bargaining unit work of parking meter coin collection;

4. Sign and post a notice in the form attached at all physical and electronic locations normally used for communications with employees in the unit.

DATED: September 21, 2010
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

[7] See, *Manhasset Union Free Sch Dist, supra* note 2; *FIT*, 41 PERB ¶ 3010 (2008), *confirmed*, *FIT v New York State Pub Empl Re Bd*, 68 AD3d 605, 42 PERB ¶7011 (1st Dept 2009).

[8] We have modified the posting requirement to be consistent with our recent precedent. *See*, *County of Monroe*, 43 PERB ¶3025 (2010); *Town of Wallkill*, 43 PERB ¶3026 (2010).

# 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 Rockville Centre in the bargaining unit represented by Rockville Centre Village Employees Civil Service Association, Inc. that the Village of Rockville Centre will:

1. Not transfer to nonunit employees the work of parking meter coin collection;

2. Make Association unit employees whole for wages and benefits, if any, lost as a result of its unilateral transfer to nonunit employees of the parking meter coin collection work with interest at the maximum legal rate;

3. Restore to unit employees the bargaining unit work of parking meter coin collection.

Dated . . . . . .

By . . . . . .
on behalf of Village of Rockville Centre

*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 m*

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Charging Party,

**CASE NO. U-28160**

- and -

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

Respondent.

---

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

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (GARY SIMPSON of counsel), for Respondent**

## BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the State of New York (Department of Correctional Services) (State) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director), on an improper practice charge filed by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) concluding that the State violated §§209-a.1(a) and (g) of the Public Employees' Fair Employment Act (Act) when it denied NYSCOPBA representation of a probationary correction officer during questioning by a Department of Correctional Services (DOCS) Office of Inspector General (OIG) investigator on

January 28, 2008 about the attempted suicide of an inmate under the correction officer's immediate supervision at the Great Meadow Correctional Facility.[1]

EXCEPTIONS

In its exceptions, the State advances a number of legal arguments to support its contention that the NYSCOPBA-represented probationary employee was not entitled to representation under §209-a.1(g) of the Act including: a) probationary employees are not covered by §209-a.1(g) of the Act because they cannot be the subject of potential disciplinary action; b) the purpose of §209-a.1(g) of the Act was to grant representational rights only to those employees who are subject to Civ Serv Law §75 disciplinary procedures or who are subject to disciplinary procedures under a collectively negotiated agreement; c) federal precedent is irrelevant to a proper interpretation of the rights granted by §209-a.1(g) of the Act; and d) an interpretation of §209-a.1(g) of the Act that recognizes representational rights to probationary employees is an impairment of the State's contractual rights in violation of Article 1, §10 of the United States Constitution.

In addition, the State contends that the Assistant Director erred in concluding that it violated §§209-a.1(a) and (g) of the Act on the grounds that: a) the correction officer did not explicitly request representation on January 28, 2008; b) at the time of the questioning, it did not reasonably appear that the correction officer was a potential subject or target of disciplinary action; c) the questioning of the correction officer by DOCS OIG does not establish that he was a potential subject of discipline; d) the Assistant Director improperly placed the burden of proof on the State to demonstrate

[1] 42 PERB ¶4552 (2009).

that the correction officer was not the subject of potential disciplinary action at the time of questioning; and e) the denial of representation during employer questioning of a public employee does not constitute a violation of §209-a.1(a) of the Act. Finally, the State excepts to the Assistant Director's proposed remedial order.

Based upon our review of the record, and our consideration of the parties' arguments, we affirm the Assistant Director's decision and order, in part, but reverse her finding that the State violated §209-a.1(a) of the Act, and modify the proposed remedial order.

## FACTS

Article 8 of the collectively negotiated agreement (agreement) between the State and NYSCOPBA includes a negotiated disciplinary procedure in lieu of the procedures and remedies contained in Civ Serv Law §§75 and 76. Section 8.1 of the agreement states:

> Discipline shall be imposed upon employees otherwise subject to the provisions of Section 75 and 76 of the Civil Service Law only pursuant to this Article, and the procedure and remedies herein provided shall apply in lieu of the procedure and remedies prescribed by such sections of the Civil Service Law which shall not apply to employees.[2]

The agreement's Bill of Rights expressly grants unit members the right to NYSCOPBA representation during an interrogation if it is contemplated that the employee will be served with a notice of discipline pursuant to Article 8. In addition, the Bill of Rights prohibits the State's use of a statement or admission made by a unit employee during

[2] Joint Exhibit 1, pp. 25-26.

an interrogation if an employee's contractual right to NYSCOPBA representation is denied.[3]

Section 9.7 of the DOCS employee manual sets forth a specific protocol for employees to follow when responding to inmate suicides and attempted suicides:

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[3] In relevant part, the Bill of Rights states that:

> (C) No employee shall be requested to sign a statement of an admission of guilt to be used in a disciplinary proceeding under Article 8 without having Union representation.
>
> (G) An employee shall be entitled to Union representation at an interrogation if it is contemplated that such employee will be served a notice of discipline pursuant to Article 8 of this Agreement. Such employee shall not be required to sign any statement arising out of such interrogation.
>
> (H) Except as provided below, any statements or admissions made by an employee during such and interrogation without the opportunity to have Union representation may not be subsequently used in a disciplinary proceeding against that employee.
>
> (I) If representation is requested by the employee and if such representation is not provided by the Union within a reasonable period of time, the Employer may proceed with the interrogation.
>
> (K) Any employee who is subject to questioning by his/her Department's Inspector General's Office shall, whenever the nature of the investigation permits, be notified at least 24 hours prior to the interview.

Joint Exhibit 1, pp. 6-7.

> In cases of suicide or attempted suicide, the physician and supervising officer will be notified immediately. If an inmate is found hanging, he/she will be taken down immediately and first aid administered until medical arrives. In case of death, all precautions will be taken to preserve evidence of the manner of death.[4]

Jason Chagnon (Chagnon) commenced employment as a DOCS correction officer in May 2007. On January 28, 2008, Chagnon had not completed the probationary period applicable to his position. On that date, he was assigned to the Great Meadow Correctional Facility and worked the 3:00 p.m. – 11:00 p.m. shift in the Special Housing Unit. (SHU). SHU houses approximately 30 inmates, and Chagnon was the primary correction officer responsible for their direct care, custody and control. A second correction officer was assigned to the locked SHU console, but he was not permitted to leave the console unless all the gates were closed, and he was relieved by another officer.

While making his rounds during the second hour of his shift, Chagnon observed an inmate in a cell with a sheet tied around his neck and attached to the cell bars, in an apparent suicide attempt. Without entering the cell, Chagnon made two unsuccessful attempts at getting a verbal response from the inmate by calling his name and kicking the cell. Thereafter, the console officer contacted medical staff. A short time later, a sergeant and another officer arrived at SHU, and they entered the inmate's cell with Chagnon. While in the cell, the sergeant ordered Chagnon to open a small sliding gate in the front of the cell to permit the cutting of the sheet attached to the inmate's neck.

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[4] The text of the DOCS employee manual provision is set forth in a DOCS counseling memorandum in the record. Joint Exhibit 5.

The inmate was then transferred to the facility hospital by security staff and died three days later.[5]

At approximately 7:30 p.m. on January 28, 2008, Chagnon was relieved of his SHU duties, and directed to prepare a memorandum describing the events relating to the inmate's suicide attempt for the facility's superintendent. Later, Chagnon and other DOCS employees on duty at the time of the attempted suicide were placed in an office together, and they were directed not to discuss the incident until DOCS OIG investigators arrived to question them.

DOCS OIG is responsible for investigating cases of possible employee misconduct or violations of law by staff and inmates. Although the Bill of Rights states that, in general, employees are to receive 24 hours notice before being questioned by DOCS OIG, it is undisputed that such notice was not provided in the present case because of the exigencies associated with an investigation into an attempted inmate suicide.[6]

Following their arrival at the facility on the evening of January 28, 2008, DOCS OIG investigators separately questioned at least five NYSCOPBA represented employees, including Chagnon. With the exception of Chagnon, each correction officer, including a sergeant who had not completed his promotional probationary period, was permitted NYSCOPBA representation during the questioning.[7]

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[5] Joint Exhibits 2 and 3.

[6] Transcript, pp. 104, 106, 120.

[7] Transcript, pp. 97, 99-100, 123-124.

At approximately midnight, a DOCS OIG investigator met with Chagnon and his NYSCOPBA shop steward for the purpose of questioning Chagnon about the suicide attempt. Prior to the meeting, the DOCS OIG investigator had reviewed the memorandum that Chagnon had prepared for the facility superintendent, and was aware that Chagnon was the first employee to discover the inmate.

At the commencement of questioning, Chagnon was asked to state his name and seniority date. After learning of Chagnon's seniority date, the investigator informed Chagnon that he was not entitled to continued NYSCOPBA representation during questioning because he was still on probation. In response, the shop steward stated that Chagon had a right to NYSCOPBA representation during the questioning based upon a newly enacted law. During his testimony, the investigator acknowledged that in response to the shop steward's question about whether Chagnon was going to be disciplined, the investigator stated: "I couldn't make that determination. It's not my decision."[8] The investigator also admitted that the shop steward explicitly requested that Chagnon be permitted to have NYSCOPBA representation during the questioning.[9]

The investigator asked Chagnon and the shop steward to leave the room to afford him the opportunity to telephone his supervisor with respect to the shop steward's reference to the newly enacted law.[10] Following the investigator's unsuccessful efforts at reaching a supervisor, Chagnon and the shop steward returned and were informed

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[8] Transcript, pp. 114-115.

[9] Transcript, pp. 113, 137.

[10] At the time, the DOCS OIG investigator was unaware that §209-a.1(g) of Act had been enacted. Transcript, p. 115.

that Chagnon would be questioned without NYSCOPBA representation. As a result, the shop steward was not present during the questioning of Chagnon, which lasted approximately 30 minutes and focused on the content of his earlier memorandum about the suicide attempt. Chagnon testified that during the questioning, he again requested employee organization representation. In contrast, the investigator testified that the only request for representation was made by the shop steward.[11] According to the investigator, NYSCOPBA representation was denied to Chagnon because he was on probation, and probationary employees are not subject to discipline.

Pending completion of the DOCS OIG investigation, Chagnon was placed on administrative leave with pay for three weeks, effective February 15, 2008. Under the terms of the leave, Chagnon was prohibited from leaving his home during normal work hours. Following issuance of the DOCS OIG investigatory report, he returned to work. On March 22, 2008, he was formally counseled for violating §9.7 of the DOCS employee manual based upon his delays after discovering the suicide attempt.[12] Specifically, Chagnon was counseled for failing to immediately cut the ligature used by the inmate, remove the inmate from the cell, and provide the inmate with first aid aimed at saving his life.

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[11] Transcript, pp. 24, 113.

[12] Joint Exhibit 5. In addition, the counseling memorandum referenced a 2007 memorandum from the DOCS Deputy Commissioner for Correctional Facilities that stated, in part: "Therefore, prompt action can mean the difference between life and death. If the first individuals who respond to the scene of a health care emergency, such as an inmate hanging, are security staff, they can not await the arrival of medical staff before CPR and other first aid measures are started."

## DISCUSSION

This case presents the Board with its first opportunity to examine the breadth of the representation rights, and the employer's affirmative defense, afforded under §209-a.1(g) of the Act.[13] Therefore, prior to examining the State's specific exceptions from the Assistant Director's decision, it is appropriate to review the background, text and legislative history of §209-a.1(g) of the Act.

### A. Background, Text and Legislative History of §209-a.1(g) of the Act

In *New York City Transit Authority v New York State Public Employment Relations Board*[14] (hereinafter *NYCTA*), the Court of Appeals reversed a Board decision[15] finding a violation of §§209-a.1(a) and (c) of the Act when an employer denied an employee's request for employee organization representation during an investigatory interview that may have reasonably led to disciplinary action. In reversing the Board, the Court of Appeals held that §202 of the Act did not grant public employees an inherent statutory right to representation similar to the right that was recognized in *NLRB v J Weingarten, Inc*[16] (hereinafter *Weingarten*) for private sector employees under §7 of the National Labor Relations Act (NLRA).[17]

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[13] L 2007, c. 244.

[14] 8 NY3d 226, 40 PERB ¶7001 (2007).

[15] 35 PERB ¶3029 (2002).

[16] 420 US 251 (1975).

[17] 29 USC §157.

In construing §202 of the Act, the *NYCTA* Court compared it with two other statutes: §7 of the NLRA and Civ Serv Law §75. It reasoned that, unlike §7 of the NLRA, §202 of the Act does not grant public employees the right to "engage in concerted activities for . . . mutual aid or protection," a right relied upon by the United States Supreme Court decision in *Weingarten* when it determined that private sector employees had the right to representation during employer questioning. In addition, the *NYCTA* Court cited the statutory language and related legislative history of the 1993 amendment to Civ Serv Law §75.2, which granted an explicit right to representation during employer questioning of an employee who is subject to Civ Serv Law §75 disciplinary procedures.[18] It concluded that the Legislature's inclusion of an explicit

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[18] Civ Serv Law §75.2 states, in relevant part, that:

> An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified in advance, in writing, of such right. A state employee who is designated managerial or confidential under article fourteen of this chapter, shall, at the time of questioning, where it appears that such employee is a potential subject of disciplinary action, have a right to representation and shall be notified in advance, in writing, of such right. If representation is requested a reasonable period of time shall be afforded to obtain such representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee. A hearing officer under this section shall have the power to find that a reasonable period of time was or was not afforded. In the event the hearing officer finds that a reasonable period of time was not afforded then any and all statements obtained from said questioning as well as any evidence or information obtained as a result of said questioning shall be excluded, provided, however, that this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to article fourteen of this chapter.

statutory right to such representation in Civ Serv Law §75.2 demonstrated that §202 of the Act did not grant an implicit representational right.

In direct response to the *NYCTA* decision, the Legislature amended the Act in 2007 by adding §209-a.1(g) to create a new improper employer practice, and a related affirmative defense to such a charge. In amending the Act, however, the Legislature did not amend §§202 or 203 to reference a right to employee organization representation during employer questioning when it reasonably appears that the employee may be a potential subject of discipline.

Section 209-a.1(g) of the Act states that it is an improper employer practice

> to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action. If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation.

In order to demonstrate a violation of §209-a.1(g) of the Act, a charging party must prove, by a preponderance of evidence, that: a demand for representation was made by a public employee; the employer failed to permit or refused to afford the employee organizational representation during questioning by the employer; and at the time of the employer's questioning, it reasonably appeared that the employee may have been the subject or target of potential disciplinary action.

In drafting §209-a.1(g) of the Act, the Legislature did not distinguish between an employer questioning an employee during an interrogation, interview, meeting or any other particular setting. Furthermore, it placed a relatively low threshold for an entitlement to representation by conditioning it upon a request for representation and a reasonable appearance that the employee may be the subject or target of potential discipline.

The legislative history of the provision supports the conclusion that, as remedial legislation aimed at overturning the result in *NYCTA*, §209-a.1(g) of the Act "is entitled to a liberal construction with respect to the representational rights protected."[19] In his memorandum in support of the bill, Assembly member Peter J. Abbate, Jr., the primary Assembly sponsor, stated that the purpose of the legislation was to overturn *NYCTA* by extending to public employees the representational rights of private sector employees as interpreted in *Weingarten,* and thereby eliminating any "uncertainty and disagreement over the question to the benefit of public employees, unions and public employers alike who will be freed from exposure to potentially costly and disruptive litigation."[20]

Governor Spitzer expressed a similar rationale in his approval statement of the legislation:

> In approving this bill, and in finding that allowing such representation is a good practice both for finding the truth and for protecting employee's rights, I am following the

[19] *Tarrytown PBA*, 40 PERB ¶3024 at 3104 (2007); *State of New York (DOCS) (Biegel),* 42 PERB ¶3013 (2009); *McKinney's Statutes* §321.

[20] L 2007, c. 244, Bill Jacket, p. 8.

> position previously adopted by the Public Employment Relations Board ("PERB") and the United States Supreme Court, as well as the practice adhered to by most public employers, and currently set forth in the Civil Service Law.[21]

Unlike other improper practices defined in §§209-a.1 and 2 of the Act, however, the Legislature codified an affirmative defense to a charge alleging a violation of §209-a.1(g) of the Act, which states:

> It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure.

In his approval statement, Governor Spitzer explained the genesis and purpose of this affirmative defense:

> [C]ontrary to the assertions of some of the bill's opponents, *this bill does not give an employee "two bites at the apple"* - i.e., allow the employee to argue for exclusion of evidence based on the violation of a right to representation in an internal disciplinary proceeding, and then again before the PERB. Indeed, the bill was amended at my insistence to eliminate that problem, by making it a defense to an improper practice charge before PERB when the employer has a policy or practice of allowing an employee to demonstrate a violation of this right before an arbitrator or hearing officer. *Thus, so long as an employee is provided with the chance to prove that this right was violated, and to exclude evidence if it has been, there can be no improper practice charge.*[22] (emphasis added)

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[21] Governor Spitzer's Approval Memorandum No. 10, *supra* note 21 at p. 3.

[22] *Supra* note 21.

Governor Sptizer's approval statement supports the conclusion that the affirmative defense was the result of a legislative compromise, and was crafted to ensure that an employee covered by the Act would have only a single forum in which to obtain relief for an alleged violation of a right to employee organization representation during employer questioning.

Under the affirmative defense, a respondent can defeat a charge alleging a violation of §209-a.1(g) of the Act by pleading and proving that the at-issue employee had a right to: a) employee organization representation during such questioning under a separate "statute, interest arbitration award, collectively negotiated agreement, policy or practice; and b) seek a ruling from a hearing officer or arbitrator to exclude evidence stemming from the employer's failure to permit employee organizational representation during the questioning.

Finally, §209-a.1(g) of the Act expressly excludes the right to employee organization representation "in any criminal investigation."[23]

We next examine the State's exceptions to the Assistant's Director's decision finding that an employer can violate §209-a.1(g) of the Act by denying employee organizational representation during questioning of a probationary employee.

B. Exceptions Challenging the Applicability of §209-a.1(g) to Probationary Employees

In drafting §209-a.1(g) of the Act, the Legislature granted representational rights to a "public employee," a phrase defined in §201.7(a) of the Act as "any person holding

[23] *See also*, *City of Rochester*, 37 PERB ¶3015 (2004), *reversed*, *City of Rochester v Pub Empl Rel Bd*, 15 AD3d 922, 38 PERB ¶7003 (4th Dept 2005) *lv denied*, 4 NY3d 710, 38 PERB ¶7008 (2005).

a position by appointment or employment in the service of a public employer...." While §201.7(a) of the Act excludes various positions from that definition, those exclusions are not premised upon an individual's civil service jurisdictional classification, form of civil service appointment, the degree of tenure protections, or whether a competitive class employee has satisfied the applicable probationary period.[24]

Based upon the definition of the phrase "public employee" in the Act, we conclude that §209-a.1(g) of the Act was intended to grant representational rights and the improper practice procedure to all public employees covered under the Act including those holding probationary, provisional and temporary appointments under the Civil Service Law,[25] subject to the affirmative defense that the employee has equivalent protections from a legal source external to the Act. Our conclusion is fully consistent with the purpose of §209-a.1(g) of the Act, as established by its text and legislative history.

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[24] In contrast, the rights to representation under Civ Serv Law §75.2 are limited to those classes of employees identified in Civ Serv Law §§75.1(a)-(e).

[25] Civ Serv Law §§63, 64 and 65. Contrary to the State's assertion the legislative history does mention probationary employees. Memorandum on Behalf of the State of New York, p. 38. In its memorandum in opposition to the legislation, the Governor's Office of Employee Relations stated:

> The bill does not differentiate between types of public employees. Probationary employees do not have tenure rights, thus rights to a disciplinary hearing if they fail probation and are thus terminated. However, as this bill is silent on the subject, this would be the first intrusion by unions into the probationary status of employees.

L 2007, c. 244, Bill Jacket, *supra* note 20 at p.28.

Prior to the enactment of §209-a.1(g) of the Act, it was well-settled that probationary employees can be subjected to discipline for misconduct or incompetence. In *County of Wyoming,*[26] the Board ordered the reinstatement of a probationary employee who had been terminated for purported misconduct, which the Board concluded was pretextual under the Act. In reaching our decision, we stated:

> The termination of a probationary employee's public employment must, therefore, implicate the protections afforded by the Act to trigger PERB's jurisdiction. It is in this area of discipline and/or termination of probationary employment that questions about the Act's coverage have arisen.[27]

Similarly, the courts have repeatedly recognized that probationary employees can be terminated for engaging in misconduct during the probationary period.[28]

Therefore, we are not persuaded by the State's argument that the representational rights granted by §209-a.1(g) of the Act are inapplicable to probationary employees because they are not subject to Civ Serv Law §75 disciplinary procedures. While §209-

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[26] 34 PERB ¶3042 (2001).

[27] *Supra* note 26 PERB ¶3042 at 3101. *See also*, *Council 82, AFSCME, AFL-CIO (Waldmiller)*, 27 PERB ¶3040 (1994) (employee organization did not breach its duty of fair representation by failing to challenge the termination of a probationary correction officer for misconduct).

[28] *Garcia v Bratton*, 90 NY2d 991 (1997) (affirming the termination of a probationary police officer, without a hearing, for misconduct at a homicide scene); *Vetter v Board of Education,* 14 NY3d 729 (2010) (upholding termination of a probationary school teacher based upon allegations of misconduct by his employer; *Matter of Campbell (State of New York)*, 37 AD3d 993 (3d Dept 2007) (affirming the termination of a State employee for misconduct who had been returned to probationary status pursuant to a prior disciplinary settlement). *See also*, *Dillon v Safir*, 270 AD2d 116 (lst Dept 2000) (probationary police officer terminated for use of excessive force; *Cade v Health and Hospitals Corp*, 15 AD3d 179 (lst Dept 2005) (provisional employee subjected to termination for misconduct).

a.2(g) of the Act utilizes the phrase "the subject of a potential disciplinary action," we do not interpret the use of that phrase as demonstrating a legislative intent to limit the provision's coverage to only those employees who are subject to "disciplinary action" under Civ Serv Law §75. The adoption of the State's argument would render §209-a.1(g) of the Act superfluous, and would nullify the Legislature's effort to ensure *Weingarten*-type rights for all public employees under the Act.

There are notable differences between §209-a.1(g) of the Act and Civ Serv Law §75.2 that support our conclusion that the Legislature intended the scope of the right to representation to be broader under the Act. The denial of representation constitutes an improper practice under §209-a.1(g) of the Act when it "reasonably appears" that an employee is either the "target" or the "subject" of potential disciplinary action. However, the right to representation attaches under Civ Serv Law §75.2 only when it "appears" that the employee is the "subject" of potential disciplinary action.[29]

Furthermore, the State's statutory construction argument aimed at excluding probationary employees from coverage under §209-a.1(g) of the Act is contradicted by 4 NYCRR §4.5(j), a subdivision of the State Civil Service regulations for probationary employees, which states:

> Removal during probationary term:
>
> Nothing contained in this section shall be construed to limit or otherwise affect the authority of an appointing authority, at anytime during the probationary term, to remove a probationer for *incompetency or misconduct, under section*

[29] At the same time, §209-a.1(g) of the Act does not require an employer to provide the employee with advance written notice of his or her right to representation as is required under Civ Serv Law §75.2.

> *75 of the Civil Service Law or an agreement* negotiated between the State and an employee organization pursuant to article 14 of such law. (emphasis added).

Under this regulation, a probationary employee can be terminated for misconduct or incompetence, prior to the expiration of the minimum period of probation, through Civ Serv Law §75 disciplinary procedures or procedures under a negotiated agreement.[30] In contrast, a probationary employee can be terminated without the employer following those disciplinary procedures at any time between the minimum and maximum periods of probation.[31]

In its answer, the State did not plead as an affirmative defense that the regulation provided Chagnon with a source of right external to the Act; therefore the defense is waived.[32] Additionally, the record does not support the conclusion that, at the time of the questioning on January 28, 2008, Chagnon was still in his minimum period of probation. As a result, it is unnecessary for us to determine whether the civil service regulation can form the basis for an affirmative defense under §209-a.1(g) of the Act.[33]

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[30] *See, Tuller v Cent Sch Dist No. 1 of the Towns of Conklin*, 40 NY2d 487, 492 (1976); New York State Department of Civil Service State Personnel Management Manual, 2010 Probation, §221.

[31] 4 NYCRR §4.5(a).

[32] ALJ Exhibit 2; *City of Oswego*, 41 PERB ¶3011 (2008).

[33] In addition, we do not have to determine whether, prior to questioning a probationary employee during the minimum period of probation, an employer is required to provide the probationary employee with the written notice of the right to representation set forth in Civ Serv Law §75.2.

In its exceptions, the State also challenges the Assistant Director's reliance upon federal private sector precedent. Consistent with §209-a.6 of the Act, however, private sector case law is a permissible reservoir of persuasive, but not binding, authority in determining improper practice charges. Federal precedent can be valuable when interpreting and applying §209-a.1(g) of the Act because the Legislature intended to extend to all public employees under the Act representational rights similar to those found under *Weingarten*. However, in reaching our decision today, we have not relied upon such precedent.

Finally, we examine the State's contention that recognition of representational rights for probationary employees under §209-a.1(g) of the Act constitutes an impairment of its contractual rights in violation of Article 1, §10 of the United States Constitution.[34] The State's constitutional argument is premised upon the undisputed fact that probationary employees in the NYSCOPBA unit are not covered by Article 8 of the parties' agreement, and therefore, they are not entitled to the related contractual right of NYSCOPBA representation during an interrogation. Based on the agreement's silence with respect to organizational representation of probationary employees during employer questioning, we find no merit to the State's argument that the application of §209-a.1(g) of the Act to probationary employees substantially impairs any right granted it by the parties' agreement. Indeed, Article 1, §10 does not constitute a constitutional

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[34] *See*, *Buffalo Teachers Federation v Tobe*, 464 F.3d 362 (2d Cir 2006), *cert den*, 550 US 918 (2007); *Condell v Bress*, 983 F.2d 415 (2d Cir 1993); *Association of Surrogates and Supreme Court Reporters Within City of New York v State of New York*, 940 F2d 766 (2d Cir 1991).

limitation on the power of the Legislature to expand the rights of employees such as ensuring that all employees covered by the Act are entitled to employee organizational representation during employer questioning.

C. Exceptions Challenging the Finding that §209-a.1(g) of the Act was Violated by Denying Representation to Chagnon

Pursuant to §209-a.1(g) of the Act, the right to employee organizational representation during questioning by an employer is triggered by a request for such representation by the employee.

Chagnon appeared for questioning by the DOCS OIG investigator along with a NYSCOPBA shop steward, who provided Chagnon representation during the preliminary questioning. The shop steward left the questioning only after unsuccessfully asserting to the investigator that Chagnon was entitled to continued representation. There is no evidence in the record that Chagnon objected to the shop steward's representation or objected to continued representation.

Although Chagnon did not explicitly request NYSCOPBA representation at the outset of the questioning, while the shop steward was present, his conduct demonstrates that he requested representation both before and during the questioning. He appeared at the questioning with his shop steward, he permitted the shop steward to represent him during the initial questioning, and he consented to the shop steward's continued advocacy in support of his representation.[35]

[35] Therefore, we need not remand the case for the resolution of the conflicting testimony as to whether Chagnon explicitly requested NYSCOPBA representation after the questioning recommenced without the presence of his shop steward.

Next, we turn to the State's exception challenging the Assistant Director's finding that, at the time of questioning by the DOCS OIG, it reasonably appeared that Chagnon was a potential subject or target of disciplinary action.

In determining this question, we consider the totality of the circumstances including the reasonableness of the employee's subjective perception, which may have precipitated the request for representation. Although an employee's perceptions are relevant to our inquiry, our primary focus is on objective facts in the record. Those facts include: the subject matter and context of the questioning; the verbal and written statements by the employer prior to the questioning; the verbal exchange between the employer representative and the employee; the timing and venue of the questioning; and the treatment of other employees similarly situated. This list is not intended to be exhaustive, but it underscores the importance of clarity in communications, and in purpose, by an employer at the outset and during the questioning of an employee.

It must be emphasized, however, that employee organization representation under §209-a.1(g) of the Act will not attach, in most situations, to verbal interactions with an employee during a meeting or discussion that is limited to counseling, training, evaluations, and updates on job assignments. For example, the right to representation will not ordinarily attach to a supervisory meeting with a probationary employee to discuss his or her status and progress.[36] However, when a meeting or a discussion metamorphosizes into questioning about an employee's conduct or omissions in a

[36] *See,* 4 NYCRR §4.5(b)(5)(iii).

context that makes it reasonably appear that the employee may be a potential subject or target of discipline, representation rights of §209-a.1(g) of the Act can attach.

In the present case, the record contains overwhelming objective evidence that at the time that Chagnon was questioned it reasonably appeared that he was a potential subject or target of discipline. The focus of the DOCS OIG investigation related to an attempted suicide by an inmate under Chagnon's direct care and control, an event of major significance and ramifications for the correctional institution and the inmate. Indeed, the DOCS employee manual contains a directive mandating a particular response to such incidents: the immediate extrication of an inmate found hanging, along with the immediate provision of first aid.

The DOCS OIG investigator arrived at the facility within hours of the incident to commence the investigation.[37] Prior to questioning Chagnon, the investigator had read Chagnon's earlier memorandum to the superintendent, which indicated that Chagnon delayed entering the cell, cutting the sheet attached to the inmate's neck, and providing the inmate with first aid. On its face, Chagnon's memorandum suggests that his actions in response to the suicide attempt may have violated the mandates of the DOCS employee manual, which would render him a potential subject or target of discipline. In addition, the fact that the investigator permitted NYSCOPBA representation at the outset of the questioning of Chagnon demonstrates that the investigator viewed Chagnon as a potential subject of discipline. Furthermore, during the meeting with

[37] The State does not argue that the DOCS OIG investigator was conducting a criminal investigation when he questioned Chagnon, and there is no evidence in the record to support such an argument. As noted, employee organizational representation under §209-a.1(g) of the Act does not apply to a criminal investigation.

Chagnon and the shop steward, the investigator reinforced the potential for discipline by stating that he was not the person who would be determining whether to proceed with disciplinary action.

Contrary to the State's contention, the fact that other NYSCOPBA employees were permitted representation during questioning that night is relevant to determining whether Chagnon was also a potential subject or target of discipline. Those other employees had a contractual right to be represented during an interrogation only when DOCS contemplated serving a notice of discipline under the parties' agreement. There is no evidence in the record to find that Chagnon was less vulnerable to potential disciplinary culpability than the other employees questioned regarding the response to the suicide attempt.

Finally, we reject the State's claim that the Assistant Director misapplied the applicable burden of proof. The charging party has the burden of proving by a preponderance of evidence the elements necessary to demonstrate a violation of §209-a.1(g) of the Act. The fact that the Assistant Director was not persuaded by the State's evidence aimed at demonstrating that Chagnon was not a potential subject of discipline does not constitute a misapplication of the burden of proof.

Based upon the foregoing, we affirm the Assistant Director's conclusion that the State violated §209-a.1(g) of the Act by denying NYSCOPBA representation to Chagnon during questioning on January 28, 2008.

D. Exception Challenging the Finding that §209-a.1(a) of the Act was Violated

When the Legislature enacted §209-a.1(g) of the Act, it chose not to amend §202 of the Act despite the *NYCTA* Court's conclusion that §202 did not grant public employees an inherent right to representation during investigatory questioning by an employer, resulting in the reversal of our decision finding a violation of §§209-a.1(a) and (c) of the Act.

Based upon *NYCTA*, and the Legislature's failure to amend §202 of the Act, we conclude that the mere denial of employee organizational representation during questioning does not constitute a violation of §209-a.1(a) of the Act. As a result, we reverse the Assistant Director's finding that the State violated §209-a.1(a) of the Act when it denied such representation to Chagnon.

E. Exception Challenging the Proposed Remedial Order

In its exceptions, the State challenges the Assistant Director's proposed remedial order asserting that it is inappropriate based upon the law and facts in the present case. In particular, it objects to that portion of the proposed remedial order directing the immediate removal and destruction of all documents in its possession relating to that portion of the January 28, 2008 questioning of Chagnon when he was denied NYSCOPBA representation.

Pursuant to §205.5(d) of the Act, PERB is granted broad remedial make-whole authority to order a party to cease and desist from engaging in an improper practice, and to order such affirmative action that will effectuate the policies of the Act, including

ordering the reinstatement of employees with or without back wages.[38]

In the present case, the evidence reveals that Chagnon was denied NYSCOBPA representation based upon an employer policy of denying such representation to probationary employees even when, at the time of questioning, it reasonably appears that the employee may be the subject of discipline, and despite the enactment of §209-a.1(g) of the Act. Therefore, we affirm the breadth of the Assistant Director's proposed remedial order mandating the State to permit, upon the employee's demand, representation of a DOCS probationary employee in the NYSCOPBA represented unit when at the time of questioning it reasonably appears that he or she may be the subject of potential disciplinary action. We, however, have modified the wording of the remedial order to track the provisions of §209-a.1(g) of the Act.

In *County of Monroe,*[39] we applied our authority to remedy improper practices by ordering an employer to, *inter alia*, destroy the results of a poll conducted of unit members, and to take all steps reasonably necessary to ensure such destruction. The Assistant Director, in the second numbered paragraph of her proposed remedial order, has recommended a similar remedy of mandating the State to remove and destroy documents that were prepared utilizing information obtained during that portion of the January 28, 2008 questioning when Chagnon was unrepresented. Following our review, we affirm that portion of the proposed remedial order but modify it to require the State to remove and destroy all documents maintained by the State, including

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[38] *County of Erie*, 43 PERB ¶3016 (2010).

[39] 43 PERB ¶3025 (2010).

documents in Chagnon's personnel history file and the DOC OIG's investigatory notes, memoranda, email, and reports, which may contain information obtained from Chagnon during the January 28, 2008 questioning while unrepresented.

Next, we examine that portion of the Assistant Director's proposed order requiring the State to reconsider its March 22, 2008 counseling, and the subsequent "suspension" with pay of Chagnon. The record reveals that Chagnon was not suspended, but rather was placed on an administrative leave with pay pending completion of the State's investigation. His placement on administrative leave may have resulted in the extension of his probationary period pursuant to 4 NYCRR §4.5(f), thereby delaying the date of his permanent appointment. Therefore, we have amended the Assistant Director's proposed order accordingly. Finally, we affirm the remainder of the Assistant Director's proposed remedial order but modify the posting requirement consistent with our recent precedent.[40]

Based upon the foregoing, we affirm the Assistant Director's decision finding that the State violated §209-a.1(g) of the Act, reverse the finding that it violated §209-a.1(a) of the Act, and modify the recommended remedial order.

IT IS THEREFORE ORDERED that the State:

1. permit, upon the employee's demand, representation for a DOCS probationary employee in the NYSCOPBA represented unit when at the time of questioning it reasonably appears that he or she may be the subject or target of potential disciplinary action;

[40] *County of Monroe, supra* note 39; *Town of Wallkill*, 43 PERB ¶3026 (2010).

2. immediately remove and destroy all documents maintained by the State, including documents in DOCS personnel records, correction officer Jason Chagnon's personnel history folder, and in DOCS OIG's investigatory notes, memoranda, email, and reports, which may contain information that was obtained during the January 28, 2008 questioning of Chagnon without representation;
3. reconsider the March 22, 2008 counseling of correction officer Jason Chagnon without regard to the information obtained during the January 28, 2008 questioning of Chagnon without representation;
4. reconsider the placement of correction officer Jason Chagnon on administrative leave with pay without regard to the information obtained during the January 28, 2008 questioning without representation, and, if appropriate, modify his date of permanent appointment;
5. sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: September 21, 2010
Albany, New York

Jerome Lefkowitz, Chairperson

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 State of New York (Department of Correctional Services) in the unit represented by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) that the State of New York (Department of Correctional Services) will:**

1. permit, upon the employee's demand, representation for a DOCS probationary employee in the NYSCOPBA represented unit when at the time of questioning it reasonably appears that he or she may be the subject or target of potential disciplinary action;

2. immediately remove and destroy all documents maintained by the State, including documents in DOCS personnel records, correction officer Jason Chagnon's personnel history folder, and in DOC OIG's investigatory notes, memoranda, email, and reports, which may contain information that was obtained during the January 28, 2008 questioning of Chagnon without representation;

3. reconsider the March 22, 2008 counseling of correction officer Jason Chagnon without regard to the information obtained during the January 28, 2008 questioning of Chagnon without representation;

4. reconsider the placement of correction officer Jason Chagnon on administrative leave with pay without regard to the information obtained during the January 28, 2008 questioning without representation, and, if appropriate, modify his date of permanent appointment.

**Dated** . . . . . **By** . . . . . .
**on behalf of**
**State of New York (Department of Correctional Services)**

*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

**POLICE BENEVOLENT ASSOCIATION OF MOUNT KISCO, NEW YORK, INC.,**

Charging Party,

**CASE NO. U-27706**

- and -

**VILLAGE OF MOUNT KISCO,**

Respondent.

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

**BOND, SCHOENECK & KING, PLLC (TERRY O'NEIL and CHRISTOPHER KURTZ of counsel), for Respondent**

## BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Police Benevolent Association of Mount Kisco, New York, Inc., (PBA) to a decision by the Administrative Law Judge (ALJ) dismissing a charge alleging that the Village of Mount Kisco (Village) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally terminated a practice of paying PBA unit members their full salaries, without charging their leave accruals, when they were absent from work due to work-related injuries, and were awaiting determinations on pending applications for benefits under General Municipal Law (GML) §207-c.

After a hearing, the ALJ determined that a past practice existed with respect to the Village paying employees their full salary without charging their leave accruals for absences occurring prior to the Village's initial determinations on the employees' GML §207-c applications. However, the ALJ dismissed the charge on the merits, concluding

that the Village's termination of the practice did not violate the Act because the Village had a right to revert to Article XXIV, §2(b)(4) of the parties' collectively negotiated agreement (agreement).[1]

## EXCEPTIONS

In its exceptions, PBA contends that the ALJ erred in her finding that no practice existed with respect to the Village paying employees without charging leave accruals after initial determinations were made on the employees' GML §207-c applications, and in her description of the scope of the applicable past practice. PBA also excepts to the ALJ's determination that the Village had the right to end the practice by reverting to the negotiated terms set forth in Article XXIV, §2(b)(4) of the agreement.

The Village supports the ALJ's decision.

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

## FACTS

PBA represents a unit of full-time police officers employed by the Village of Mount Kisco Police Department (Department), with the exception of the Chief of Police (Chief). PBA and the Village are parties to an expired June 1, 1999 to May 31, 2002 agreement, as modified by an August 2006 interest arbitration award for the period June 1, 2002 to May 31, 2004. The terms of the agreement, as modified by the arbitration award, were extended for the period June 1, 2004 through May 31, 2007 by a memorandum of agreement between the parties.

Article XXIV of the agreement includes negotiated procedures with respect to

[1] 42 PERB ¶4531 (2009).

GML §207-c benefits. Article XXIV, §2(b)(4) states: "Pending the determination of an application for benefits, an applicant who is unable to report for work may use all accumulated leave credits." Section 2(c) states: "A determination shall be made by the Chief within thirty (30) days of the date of receipt of the application. Upon a determination of entitlement to disability benefits all leave credits which were deducted as a result of time missed which are determined to have resulted from the injury will be re-credited to the officer." In addition, under §2(d), an employee may appeal to the Village Manager the Chief's determination of ineligibility, termination of entitlement to benefits, or fitness to return to full or light duty status. Section 2(d)(1) states that if an employee wishes to appeal the determination of the Village Manager, he or she may request a hearing before the Village Board or hearing officer designated by the Village Board within ten days of receipt of the Village Manager's determination. According to §2(d)(2), the final determination of the Village Board may be reviewed pursuant to Article 78 of the New York Civil Practice Law and Rules.

From at least 2001 until 2007, when an employee was absent from work as a result of a work-related injury and subsequently filed an application for GML §207-c benefits, the Village denoted the absence as "comp," and the Village paid the employee without requiring the employee to charge leave accruals for his or her absences.

In May 2007, Lieutenant Edward Dunnigan, the Department's Administrative Lieutenant, told PBA President Joseph Spinelli (Spinelli) that he had been instructed by acting Chief Louis Terlizzi, to change the notation on the time card for unit employee Michael Battenfeld (Battenfeld) from "comp" to sick leave and to charge Battenfeld's accrued personal leave for the time he was absent while his GML §207-c application was pending.

At the hearing before the ALJ on January 29, 2008, Spinelli testified that until May of 2007, the Village always paid injured employees for absences without requiring the employees to charge their accruals. Spinelli stated that he knew of no employees who had exhausted the appeal process for denial.

Village Deputy Treasurer Patti Hogan (Hogan), who was responsible for overseeing the processing of payments to employees, testified that she reviewed approximately one hundred occupational injury cases filed by unit employees from 2000 to 2007. She found that in every instance, when an employee was absent from work due to a work-related injury, the employee was paid without charge to leave accruals up to the Village's initial determination on the employee's GML §207-c application. Hogan did not state whether the employees who were paid without charge to leave accruals up to the Village's initial determination went back to work before initial determinations were made on their GML §207-c applications, or upon the denial of their GML §207-c applications. Additionally, Hogan did not testify as to whether the Village rendered the initial determinations on the approximately one hundred GML §207-c applications within thirty days pursuant to §2(c) of the agreement.

She found only one instance in which an employee's GML §207-c application was denied at the initial review, the employee remained out of work after the denial, and he continued to receive full pay without charge to accruals for his post-denial absences. Hogan testified that the employee continued to be paid by the Village because "comp" was indicated on the employee's time card for the dates following the denial when the employee remained out of work. Hogan did not indicate whether the Village reached its initial denial within thirty days of receipt of the employee's GML §207-c application.

## DISCUSSION

We begin with PBA's exception to the ALJ's finding of no past practice with respect to the Village paying employees without requiring them to charge leave accruals for absences occurring after initial denials of GML §207-c applications.

In order to establish a binding past practice, a charging party must show that the "practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."[2]

The past practice in this case is defined by the approximately one hundred employees who were absent from work due to injuries sustained on the job, who subsequently filed applications for benefits under GML §207-c, and who were paid full salary without charge to leave accruals up until the Village made an initial determination on the GML §207-c applications. The employees were paid without charge to accruals over a period of approximately seven years. We find that there was a past practice because it was unambiguous and uninterrupted for a period of time sufficient to create a reasonable expectation among unit employees that it would continue. Therefore, we affirm the ALJ's determination that a past practice existed whereby employees were paid without charge to accruals until the Village made initial determinations on their GML §207-c applications. However, that past practice is subject to being superseded by the Village's reversion to applicable contract language.

PBA argues that the scope of the practice is broader and is not limited by the date when the Village rendered its initial determination or the number of times that a unit

[2] *Chenango Forks Cent Sch Dist*, 40 PERB ¶3012, at 3046-47 (2007) (subsequent history omitted).

employee received a salary payment. It contends that the past practice is that the Village made salary payments to disabled unit employees without charge to their accruals, regardless of the status of their respective GML §207-c applications. According to PBA, the fact that the Village paid a single unit employee after the denial of his application, without charge to his leave accruals, expands the perimeter of the practice.

We disagree. The standard for an enforceable past practice under the Act requires that the practice continue uninterrupted for a sufficient period of time. Contrary to PBA's contention, the single situation of a unit employee continuing to be paid following the initial denial of his GML §207-c application is not sufficient, under the facts and circumstances of the present case, to enlarge the scope of the enforceable past practice. In order for a practice to "continue uninterrupted," the circumstances that make up the practice must occur on more than one occasion. Therefore, we affirm the ALJ's determination that the past practice did not extend to the Village paying employees without requiring the employees to charge leave accruals for absences occurring after the denial of their GML §207-c applications.

Significantly, PBA does not dispute that the Village has the right to revert to §2(b)(4) of the agreement and to require employees to charge leave accruals in order to be paid for absences occurring pre-initial determination. However, it argues that the Village's contract reversion defense applies only to the thirty-day time period during which the Village is contractually obligated to make its initial determination. According to PBA, the agreement is ambiguous as it pertains to requiring employees to charge leave accruals for absences occurring after their GML §207-c applications are denied. Therefore, PBA argues that the Village can only revert to the agreement and require

employees to charge accruals until either the initial determination is made or within thirty days from receipt of the GML §207-c application, whichever is shorter. If the determination is made after thirty days from receipt of the application, and the injured employee remains out of work after the expiration of the thirty days, or if the application is denied and the denial is then appealed by an employee who remains out of work, the right to revert does not apply.

We have held that "where parties have reached an agreement with respect to a specific subject following negotiations, a party may unilaterally end a past practice without violating the Act by reverting to the terms of a specifically negotiated provision of the agreement."[3] The burden rests with the respondent to plead and prove a duty satisfaction or contract reversion defense through negotiated terms that are reasonably clear on the specific subject at issue.[4] Consideration of a reversion defense requires a determination as to the meaning of the parties' agreement through the application of standard principles of contract interpretation.[5] If the language of the agreement is reasonably clear but susceptible to more than one interpretation, extrinsic evidence, such as negotiation history and/or a past practice, is admissible to determine the intent of the parties.[6]

In the present case, Article XXIV, §2 of the agreement is reasonably clear on the

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[3] *City of Albany*, 41 PERB ¶3019, at 3090 (2008), *New York City Transit Auth,* 41 PERB ¶3014 (2008).

[4] *New York City Transit Auth, supra* note 3. *New York City Transit Auth*, 20 PERB ¶3037 (1987), *confirmed*, *NYCTA v New York State Pub Empl Rel Bd*, 147 AD2d 574, 22 PERB ¶7001 (2d Dept 1989); *Town of Shawangunk*, 32 PERB ¶3042 (1999).

[5] *County of Livingston*, 30 PERB ¶3046 (1997).

[6] *New York City Transit Auth, supra* note 3.

requirement that employees use accruals in order to receive payment for absences occurring while the application is pending determination. Section 2(b)(4) explicitly states, "pending the determination of an application for benefits, an applicant who is unable to report to work may use all accumulated leave credits."

The plain language of the agreement does not support PBA's argument that the Village's right to revert to §2(b)(4) of the agreement is limited to either the initial determination or thirty days from receipt of the application, whichever is shorter. The agreement is silent with respect to returning disabled employees to full pay status without charge to leave accruals if the Village fails to render initial determinations within thirty days of receipt of the applications. If return to full pay status without charge to accruals for continued absence was the consequence bargained for by the parties, this particular consequence should have been explicitly stated in the agreement. Therefore, we affirm the ALJ's determination that there is no language in the agreement to support PBA's position that there are consequences for the Village's failure to render an initial determination within thirty days, specifically that the Village does not have the right to revert to the language of §2(b)(4) if the initial determination is not made within thirty days.

We conclude, therefore, that based on the record evidence, the Village's right to revert to §2(b)(4) extends up to the time of the Village's initial determination, whether the initial determination is made within thirty days. Reversion to the agreement permits the Village to require employees to charge accruals up to the initial determinations, when made. We affirm the ALJ's determination that the Village did not violate the Act when it did so.

Based upon the foregoing, PBA's exceptions are denied and the decision of the ALJ affirmed.

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

DATED: September 21, 2010
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member