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New York State Public Employment Relations  
Board (PERB)

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9-17-2009

## State of New York Public Employment Relations Board Decisions from September 17, 2009

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from September 17, 2009

### 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

**TEAMSTERS LOCAL UNION No. 294,  
INTERNATIONAL BROTHERHOOD OF  
TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA,**

Petitioner,

-and-

**CASE NO. C-5882**

**TOWN OF WHITEHALL,**

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 Teamsters Local Union No. 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described

below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time Motor Equipment Operators and Deputy Highway Superintendent.

Excluded: Highway Superintendent, part-time employees, and clerical staff.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local Union No. 294, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 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 17, 2009  
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

**LOCAL 317, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN  
AND HELPERS OF AMERICA,**

Petitioner,

-and-

**CASE NO. C-5883**

**TOWN OF OTISCO,**

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 Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of

grievances.

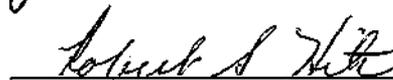
Included: All full-time and regularly scheduled part-time Motor Equipment Operators and Laborers.

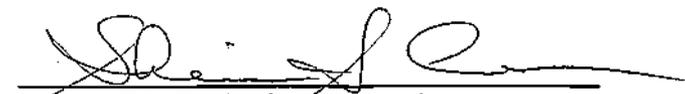
Excluded: Town Highway Superintendent.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 317, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 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 17, 2009  
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

**TEAMSTERS LOCAL UNION NO. 693,  
INTERNATIONAL BROTHEROOD OF TEAMSTERS,  
CHAUFFEURS, WAREHOUSEMEN AND HELPERS  
OF AMERICA,**

Petitioner,

-and-

**CASE NO. C-5886**

**TOWN OF SMITHVILLE,**

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 Teamsters Local Union No. 693, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described

below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

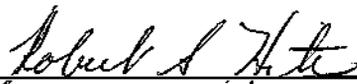
Included: All full-time Heavy Equipment Operators.

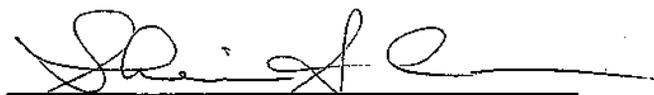
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local Union No. 693, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. 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 17, 2009  
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

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5891**

**TOWN OF SCHODACK,**

Employer,

-and-

**NEW YORK STATE LAW ENFORCEMENT OFFICERS  
UNION, COUNCIL 82,**

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,<sup>1</sup>

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

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<sup>1</sup>The incumbent bargaining agent, New York State Law Enforcement Officers Union, Council 82, has disclaimed any interest in representing the existing bargaining unit.

been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

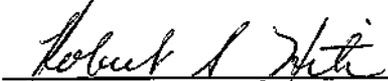
Included: All full-time employees of the Town of Schodack in the following positions: Police Officer, Sergeant, Detective Sergeant, Lieutenant and Dispatcher.

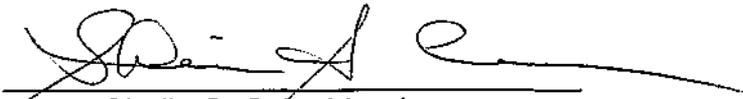
Excluded: Chief of Police.

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 17, 2009  
Albany, New York

  
Jerome Leikowitz, 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

**LOCAL 264, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,**

Petitioner,

-and-

**CASE NO. C-5898**

**TOWN OF LEON,**

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,

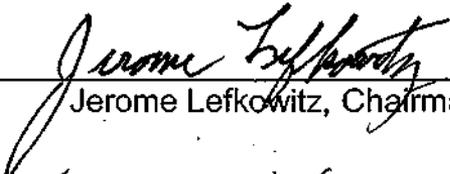
IT IS HEREBY CERTIFIED that the Local 264, International Brotherhood of Teamsters has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

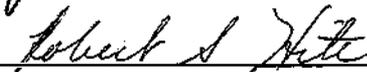
Included: All full-time and regular part-time Highway Department employees employed by the Town of Leon.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 264, International Brotherhood of Teamsters. 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 17, 2009  
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

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

- and -

**CASE NO. C-5727**

**COUNTY OF WASHINGTON,**

Employer,

- and -

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

Incumbent/Intervenor.

---

**RICHARD M. GREENSPAN, PC (ERIC J. LARUFFA of counsel), for Petitioner**

**THEALAN ASSOCIATES (JOSEPH A. IGOE, Representative),  
for Employer**

**NANCY E. HOFFMAN, GENERAL COUNSEL (DAREN J. RYLEWICZ of  
counsel), for Incumbent/Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the United Public Service Employees Union (UPSEU) to a decision of the Director of Public Employment Practices and Representation (Director) which voided seven ballots cast in a mail-ballot election conducted pursuant to a petition that UPSEU filed seeking to represent a unit of employees of the County of Washington (County) in a unit of titles represented by the

Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). Having voided the ballots, the Director held that CSEA received a majority of the valid votes cast.

UPSEU argues that the ballots should not have been voided because the PERB election agent who challenged them had no authority to do so. CSEA argues that UPSEU's exceptions should be denied because it did not file objections to the conduct of the election under §201.9(h)(2) of PERB's Rules of Procedure (Rules). Alternatively, CSEA supports the Director's decision. The County has not responded.

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

#### FACTS

Pursuant to a consent agreement executed by the parties and approved by the Director, PERB scheduled a secret mail ballot election among the at-issue County employees to determine whether they wished to be represented by CSEA, UPSEU, or neither. PERB mailed the ballots and pre-paid return envelopes to eligible voters at the addresses provided by the County. Attached to each ballot were "Instructions to Voters" (Instructions), which, among other things, directed the voter to return his or her ballot in the enclosed return envelope and to sign the outside of the return envelope on the signature line provided for that purpose. In addition a "Notice of Election" (Notice) was posted by the County at various work locations. The Notice also stated the signature requirement. A copy of the Instructions and the Notice was also provided to CSEA and UPSEU. The Instructions and the Notice stated that the failure to sign the return envelope "may" result in the ballot not being counted.

The count was conducted on August 31, 2007. Of 155 eligible voters, 55 cast ballots for CSEA, 35 for UPSEU and 14 for "Neither." Seven ballots were challenged by PERB's election agent because the ballot envelopes were not signed by the voters. Pending resolution of the challenge, the interim tally of ballots showed that there were 104 valid votes cast, of which CSEA had a majority (55 votes). Therefore, the seven challenged ballots could affect the outcome of the election.<sup>1</sup> The election agent gave the parties a copy of the Interim Tally of Ballots and forwarded the matter to the Director to determine how to resolve the challenge. CSEA submitted a letter arguing that the challenged ballots should be voided.

By decision dated September 12, 2007, the Director sustained the election agent's challenge to the unsigned envelopes and he voided the ballots, which remain sealed in their envelopes. Quoting *Town of Islip*,<sup>2</sup> the Director observed:

The purpose of the instruction on the Notice of Election and in the letter to the voter to sign the return envelope is to permit for a ready determination, without resorting to any additional investigation, whether the ballot was cast by an eligible employee.

Having sustained the challenge and voided the ballots, the Director's decision provided a "Final Tally of Ballots" reflecting the voided ballots and declaring that CSEA received a majority of the valid votes cast.

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<sup>1</sup> If the challenged ballots were counted as valid votes, and none were for CSEA, the total number of valid votes cast would have been 111, not 104, and CSEA, with 55 votes, would have been one short of the necessary majority of valid votes cast. In that event, a run-off election would have been conducted between the two entities that received the most votes - UPSEU and CSEA. The "Neither" option would have been dropped from the available choices. On the other hand, if any of the challenged ballots were for CSEA, CSEA would win the election with a majority of the valid votes cast (56 of 111). Therefore, the challenge had to be resolved.

<sup>2</sup> 15 PERB ¶4082, at 4116 (1982).

### DISCUSSION

We first address CSEA's argument that UPSEU's exceptions are not properly before the Board because it failed to file timely objections to the conduct of the election as provided in §201.9(h)(2) of the Rules, which, in relevant part, states:

Any party may file with the director an original and three copies of objections to the conduct of the election or conduct affecting the results of the election within five working days after its receipt of a final tally of ballots.

However, that provision is inapplicable in this case. It is not necessary to file objections to the conduct of an election to resolve challenges to ballots where the challenged ballots may affect the outcome of the election. Such challenges must be resolved irrespective of whether objections are filed under §201.9(h)(2) of the Rules. Moreover, the Director's decision to void the seven challenged ballots was final, subject only to review by the Board. Thus, although his decision also contained the final tally of ballots, which triggered the time within which objections to the conduct of the election could be filed with the Director, we find that exceptions to his decision to void the challenged ballots are properly taken pursuant to §213 of the Rules.

Turning now to the merits of UPSEU's exception, the applicable Rule is §201.9(h)(1), which, in relevant part, states:

Any party *or the board's agent* may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election, the director shall cause to be furnished to the parties a tally of ballots.  
[Emphasis added.]

In order to be eligible to participate in a mail-ballot election – here, to have one's ballot

counted – the envelope containing the ballot must be signed in accordance with PERB's Instructions and Notices. Therefore under §201.9 (h)(1) of the Rules, the election agent was authorized to challenge the unsigned ballot envelopes because the challenge went to the eligibility of the person to participate in the election.<sup>3</sup>

Because the unsigned ballot envelopes were properly challenged by the election agent and absent agreement by the parties to count the ballots, we affirm the Director's decision that those ballots must be voided.<sup>4</sup> Indeed, the practice of voiding ballots under the circumstances presented in this case is so long-standing that it would be inappropriate to alter it retroactively here.<sup>5</sup>

In affirming the Director's decision, we note that the general, but not universal, practice is that unsigned ballot envelopes are challenged by the election agent before any envelopes are opened for the count, sometimes called a "pre-sort." Without showing the unsigned envelopes to the parties or revealing the identity of the voters, the election agent asks the parties what their positions are with respect to those ballots.<sup>6</sup> If the parties agree to waive the signature requirement for all of the unsigned ballot envelopes,

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<sup>3</sup> See, e.g., *County of Albany and Sheriff*, 37 PERB ¶4012 at 4048 n1 (2004).

<sup>4</sup> See, e.g., *County of Oneida*, 29 PERB ¶3001 (1996), *affg* 28 PERB ¶4075 (1995); *Nassau County Regional Off-Track Betting Corp*, 17 PERB ¶4066 (1984); *Town of Hamburg*, 16 PERB ¶4082 (1983); *Town of Islip*, *supra* note 2 (unsigned ballot envelopes were voided). Compare, *County of Erie and Sheriff of Erie County*, 18 PERB ¶4031, 4071 (1985) (Director declined to void ballots returned in signed envelopes without the PERB-affixed return address label).

<sup>5</sup> *Id.*

<sup>6</sup> Such an "all-or-none" method of addressing unsigned ballot envelopes avoids the potential for "cherry picking" which unsigned envelopes to challenge, which can occur if individual challenges are left to the parties, because each envelope bears the employee's name and address.

PERB withdraws its challenge, and all of the unsigned envelopes are returned to the mix of signed envelopes to be opened for the count.<sup>7</sup> However, if any party is unwilling to stipulate to waive the signature requirement for all of the unsigned ballot envelopes, all of the challenged, unsigned envelopes are set aside, and the challenge is resolved by the Director, if necessary. If the challenged ballots can affect the outcome of the election, under settled practice,<sup>8</sup> the unsigned envelopes are not opened and the ballots are voided by the Director.

We consider this an appropriate practice, provided that the parties' stipulation to waive the signature requirement is in writing and included in the record of the proceeding, and that the Director is satisfied that the integrity of the election is not compromised by the waiver.<sup>9</sup> In order to ensure consistency in mail ballot elections, we instruct the Director to incorporate this process in all future mail-ballot elections.

We do not know whether this procedure was applied in this case.<sup>10</sup> What we know from the record before us is that the election agent challenged the ballots cast in unsigned envelopes, with full authority to do so, and that CSEA argued to the Director

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<sup>7</sup> Cf. *County of Rockland*, 10 PERB ¶3084 (1977) (Based on the parties' stipulation, PERB counted ballots of persons who might not have been in the bargaining unit).

<sup>8</sup> See, *supra* note 4.

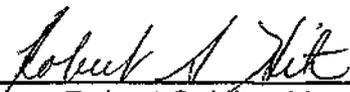
<sup>9</sup> Cf. *South Huntington UFSD*, 25 PERB ¶3069 (1992) (the integrity of an election was compromised by the failure to timely post a notice of election). See, also, *State of New York (Division of State Police)*, 15 PERB ¶3014 (1982) (PERB is not bound by parties' agreement as to the form of a showing of interest); *County of Rockland*, 22 PERB ¶4023 (1989) (PERB is not bound by the stipulations of the parties in a representation case).

<sup>10</sup> In its brief, CSEA contends that the election agent challenged the unsigned ballot envelopes at the outset of the count, and that she asked the parties what their positions were with respect to them. According to CSEA, the UPSEU and CSEA agents agreed that those ballots should not be counted. There is no record evidence in support.

that the ballots should be voided. Therefore, absent the consent of all parties to waive the signature requirement, we find that the Director properly voided the ballots.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast valid ballots desire to be represented for the purpose of collective bargaining by CSEA, it is, therefore, ordered that the petition should be, and it hereby is, dismissed.<sup>11</sup>

DATED: September 17, 2009  
Albany, New York

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

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

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<sup>11</sup> Chairman Lefkowitz and Deputy Chair Herbert did not participate in the deliberations and decision concerning this matter.

**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-5606**

**CITY OF TROY,**

Employer,

- and -

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

Incumbent/Intervenor.

---

**GARY M. FAVRO, for Petitioner**

**GOLBERGER AND KREMER (BRYAN J. GOLDBERGER of counsel),  
for Employer**

**NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL G. ORTIZ of counsel), for  
Incumbent/Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the United Public Service Employees Union (UPSEU) to a decision of the Director of Public Employment Practices and Representation (Director) which voided three ballots cast in a mail-ballot election conducted pursuant to a petition that UPSEU filed seeking to represent a unit of employees of the City of Troy (City) in an existing unit of titles represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). Because the three ballots were void, CSEA

received a majority of the valid votes cast.<sup>1</sup>

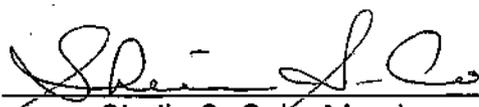
UPSEU argues that the ballots should not have been voided because the PERB election agent who challenged them had no authority to do so. CSEA argues that UPSEU's exceptions should be denied because it did not file objections to the conduct of the election as required by §201.9(h)(2) of PERB's Rules of Procedure. Alternatively, CSEA supports the Director's decision. The City has not responded.

Based on our review of the record and our consideration of the parties' arguments, we affirm the decision of the Director for the reasons stated in our decision in *County of Washington*, which we issued today.<sup>2</sup>

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast valid ballots desire to be represented for the purpose of collective bargaining by CSEA, it is ORDERED that the petition should be, and hereby is, dismissed.<sup>3</sup>

Dated: September 17, 2009  
Albany, New York

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

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

<sup>1</sup> The ballots were counted on October 3, 2006. Of 238 eligible voters, 72 voted for CSEA and 71 voted for UPSEU. Although an option on the ballot, no employee voted for "Neither." In its brief, CSEA contends that the election agent asked the parties what their positions were regarding the three challenged ballots and that UPSEU wanted them counted but that CSEA objected.

<sup>2</sup> 42 PERB ¶3021 (2009).

<sup>3</sup> Chairman Lefkowitz and Deputy Chair Herbert did not participate in the deliberation and decision concerning this matter.

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, and  
DONNA GREEN,**

Charging Parties,

CASE NO. U-26139

- and -

**INCORPORATED VILLAGE OF HEMPSTEAD,**

Respondent.

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In the Matter of

**PATRICIA McNEIL,**

Charging Party,

CASE NO. U-25994

- and -

**INCORPORATED VILLAGE OF HEMPSTEAD,**

Respondent.

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In the Matter of

**MYNITA ATKINSON,**

Charging Party,

CASE NO. U-26192

- and -

**INCORPORATED VILLAGE OF HEMPSTEAD,**

Respondent.

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In the Matter of

**J. BARRINGTON JACKSON,**  
Charging Party,

**CASE NO. U-26193**

- and -

**INCORPORATED VILLAGE OF HEMPSTEAD,**  
Respondent.

---

In the Matter of

**GERALDINE BARROWS,**  
Charging Party,

**CASE NO. U-25995**

- and -

**INCORPORATED VILLAGE OF HEMPSTEAD,**  
Respondent.

---

**NANCY E. HOFFMAN, GENERAL COUNSEL (STEVEN A. CRAIN of counsel)  
for Charging Parties Donna Green and Civil Service Employees  
Association, Inc., Local 1000, AFSCME, AFL-CIO**

**STAFFORD H. BYERS, ESQ., for Charging Parties Patricia McNeil,  
Geraldine Barrows, J. Barrington Jackson, and Mynita Atkinson**

**BOND, SCHOENECK AND KING, PLLC (TERENCE M. O'NEIL of  
counsel), for Respondent**

**BOARD DECISION AND ORDER<sup>1</sup>**

These cases come to us on exceptions to a consolidated decision and

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<sup>1</sup> Chairman Lefkowitz and Depty Chair Herbert did not participate in the deliberations and decision concerning this matter.

recommended remedial order of an Administrative Law Judge (ALJ) filed by the Village of Hempstead (Village) and cross-exceptions filed by the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO (CSEA) and Robert Clark, Geraldine Barrows, Jay Jackson, Patricia MacNeil, Michelle Banks and Mynita Atkinson, the individual charging parties.

As relevant here, the ALJ held that the Village violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) by repudiating a November 26, 2003 agreement with CSEA which added certain titles to CSEA's existing collective bargaining unit, including those held by the individual charging parties.<sup>2</sup> To remedy the violation, the ALJ directed the Village to cease and desist from repudiating the agreement.

The Village excepts to the ALJ's conclusion that it repudiated the agreement. It argues that the agreement was not legislatively approved by the Village's Board of Trustees and, therefore, that it was never binding on the parties. It also excepts to the ALJ's ruling at the hearing which precluded it from adducing evidence as to whether the at-issue titles were properly included in CSEA's unit.

CSEA and the individual charging parties except to the ALJ's remedial order. Because the individual charging parties were terminated after the Village repudiated the agreement that placed them in CSEA's bargaining unit, they and CSEA argue that the ALJ should have ordered the Village to restore them to their

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<sup>2</sup> The ALJ dismissed all of the charges to the extent they alleged that employees holding the at-issue titles, including the individual charging parties, were terminated in retaliation for their successful efforts to be represented by CSEA, finding no evidence that their terminations were improperly motivated. No exceptions were filed regarding that finding.

former positions with full back pay and benefits. CSEA further argues that the ALJ should have ordered the Village to collect and remit membership dues to CSEA that it would have received had the Village not repudiated the agreement.

As discussed herein, we affirm the decision of the ALJ to the extent he concluded that the Village violated §§209-a.1(a) and (d) of the Act, but on different grounds. We deny the Village's exceptions concerning the ALJ's ruling not to allow testimony as to whether the titles should have been included in CSEA's bargaining unit, and we deny the cross-exceptions based on the failure of the ALJ to order the Village to restore the employees who held the at-issue titles to their former positions with back pay and benefits. We also deny CSEA's exceptions to the extent it seeks dues it was allegedly owed.

#### FACTS

The material facts are not in dispute. CSEA and the Village have an established collective bargaining relationship concerning a unit of employees, and they had a collective bargaining agreement covering the period June 1, 2003 through May 31, 2008.

On April 18, 2003, CSEA filed a unit placement petition with PERB, designated CP-883, seeking to add fourteen titles (fifteen individuals) to its unit. The Village filed a response in opposition, alleging that the individuals are either managerial or confidential employees, or that the titles are not appropriately included in CSEA's existing unit. A hearing was scheduled to be conducted by an ALJ on December 9, 2003. However, on November 26, the Village and CSEA entered into a written stipulation of settlement pursuant to which eight of the

fourteen titles were placed into CSEA's unit. The settlement states, in relevant part:

WHEREAS, the Village and [CSEA], in order to effectuate an agreement to make certain changes to the Collective Bargaining Agreement between both parties dated June 1, 2003 – May 31, 2008 and

WHEREAS, the Village and [CSEA], in order to effectuate settlement to the Improper Practice Charge [sic] in PERB case # CP-883 in an effort to promote a harmonious relationship between the parties in interest herein, agree to:

Allow the following positions in the C.S.E.A. Collective Bargaining Agreement; Deputy Village Treasurer, Deputy Village Attorney, Secretary to the Planning Board, and Superintendent of Parks and Recreation, [Here the agreement in evidence contains illegible writing indicating additional titles. However, the parties stipulated that the illegible titles are Secretary to the Board of Trustees, Research Assistant to the Board of Trustees, Secretary to the Fire Department and Assistant Superintendent of the Department of Public Works].

Allow the Mayor of the Village full control over such positions in regards to starting salary, posting and filling of said positions.

The agreement was signed by CSEA's Local President, John C. Shepard, and the Village's Mayor, James A. Garner.<sup>3</sup>

In consideration for the Village's agreement to place the eight aforementioned titles into CSEA's bargaining unit, CSEA agreed to withdraw its petition to accrete all fourteen titles. The Director of Public Employment Practices and Representation approved CSEA's withdrawal of the petition by notice to the parties dated December 12, 2003.

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<sup>3</sup> In a letter to Shepard, also dated November 26, Garner stated that the included titles were not "management confidential titles in the Village of Hempstead."

Following the settlement, the newly accreted employees signed dues deduction authorization cards, and the Village remitted their dues to CSEA. In addition, the Village granted them contractual benefits consistent with the collectively negotiated agreement with CSEA. The record does not indicate what benefits they were actually accorded.

Although, as Mayor, Garner was one of the Village's five Trustees, he did not put the settlement before the other Trustees for their consideration or approval. Indeed, he testified that in his 16 years as Mayor, no similar settlements were submitted to the Trustees for their approval.

Following an election in March 2005, effective April 4, Garner ceased to be Mayor. Former Trustee Wayne Hall assumed that post. Eleven days later, on April 15, 2005, the Village Trustees adopted a resolution which, after acknowledging the prior petition and settlement agreement, declared that the accretion of the at-issue titles to CSEA's bargaining unit constituted an amendment to the parties' collective bargaining agreement which required approval by the Trustees. It renounced the November 26, 2003 settlement, and it rescinded "any approval of such agreement which may have previously taken place." Finally, the resolution stated that "all such titles remain outside the collective bargaining agreement, and not governed by the terms and conditions contained therein."

Beginning in May 2005, Hall requested each of the individual charging parties to submit their resignations. When they declined, they were fired.

The ALJ sustained CSEA's charge to the extent it alleged that the

Village's April 15, 2005 renunciation of its obligations under the November 26, 2003 settlement agreement constituted a repudiation of the agreement. He relied on our decision in *Board of Education of the City School District of the City of Buffalo*,<sup>4</sup> where we stated:

In several decisions, we have distinguished a contract repudiation, which is cognizable as an improper practice, from a contract breach or a contract enforcement, which is not. In making that distinction, we have emphasized that a meritorious repudiation claim arises only in "extraordinary circumstances" in which a party to the contract denies the existence of an agreement or acts in total disregard of the contract's terms without any colorable claim of right.

Finding no colorable claim of right for the Village's April 15, 2005 renunciation of the November 26, 2003 agreement, the ALJ held that the Village violated §§209-a.1 (a) and (d) of the Act. To remedy the violation, the ALJ ordered the Village to cease and desist from repudiating the November 26 settlement agreement.

#### DISCUSSION

In *Town of Clay* (hereinafter "*Clay*"),<sup>5</sup> the Board found that a town's legislative body had acquiesced to the executive recognition of a union. The Appellate Division, Fourth Department, reversed, finding insufficient record

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<sup>4</sup> 25 PERB ¶¶3064, at 3135 (1992). See also *State of New York (Department of Correctional Services)*, 39 PERB ¶¶3033 (2006); *Board of Educ of the City Sch Dist of the City of Buffalo*, 39 PERB ¶¶3029 (2006); *State of New York (SUNY College at Potsdam)*, 22 PERB ¶¶3045 (1989); *Monticello Cent Sch Dist*, 22 PERB ¶¶3002 (1989); *Addison Cent Sch Dist*, 17 PERB ¶¶3076, *affg* 17 PERB ¶¶4566 (1984).

<sup>5</sup> 6 PERB ¶¶3072 (1973), *reversed and remanded sub nom. Town of Clay v Helsby*, 45 AD2d 292, 7 PERB ¶¶7012 (4th Dept 1974), *decision on remand*, 7 PERB ¶¶3059 (1974), *revd*, 51 AD2d 200, 9 PERB ¶¶7001 (4th Dept 1976). The decision on remand and its later reversal are not relevant here.

evidence of such acquiescence. The Court went on to note that recognition under the Act is a legislative function, and that the legislative body there neither "approved" nor "authorized" the recognition.<sup>6</sup>

*Clay* lends support to the Village's assertion that it had a colorable claim of right to renounce the Mayor's settlement of the earlier unit placement petition by which he, arguably, recognized CSEA as bargaining agent for a newly configured unit without legislative approval. Therefore, we find that the Village did not repudiate the agreement. Our inquiry, however, does not end there. The gravamen of the improper practice charges here is not that the Village denied negotiated benefits with no colorable claim of right, but that it unilaterally denied the employees the representational rights that they obtained under the settlement agreement that they enjoyed for nearly 18 months.

In *County of Orange*,<sup>7</sup> we held that a public employer violates the Act by unilaterally altering an existing collective bargaining unit, reversing a line of cases which held that such unilateral action was permissible during an "open period" when a representation petition could be filed. In a later decision, also involving the County of Orange,<sup>8</sup> we held that the wholesale withdrawal of recognition of an incumbent union for an existing bargaining unit was, likewise, unlawful. There, again, the Board reversed a line of cases which suggested that such a withdrawal was permissible during an open period if the employer had "objective

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<sup>6</sup> *Cf.*, *Town of Evans*, 18 PERB ¶3006 (1985) (Board found legislative approval of a recognition, despite possible technical non-compliance with NYS Town Law).

<sup>7</sup> 14 PERB ¶3060 (1981)

<sup>8</sup> *County of Orange*, 25 PERB ¶3004 (1992).

evidence that the employee organization no longer represents an appropriate unit or enjoys majority status. . . ."<sup>9</sup> In the second *County of Orange* decision, we observed:<sup>10</sup>

[T]he policies of the Act are best served by requiring that representation disputes be channeled through the procedures available under our Rules rather than left to an employer's unilateral action. We believe that in this way instability and uncertainty in the parties' labor relations will be eliminated or minimized and the rights of all parties can best be protected.

Therefore, while we find that the Village did not "repudiate" the settlement agreement with CSEA, it violated §§ 209-a.1(a) and (d) of the Act by unilaterally altering CSEA's existing bargaining unit, unless there is merit to its defense; *i.e.*, that the at-issue titles were never in CSEA's unit, as a matter of law, because the November 26, 2003 agreement which placed them there was not legislatively approved.

Although *Clay* stands for the proposition that recognition is a legislative function, the recognition at issue there was to establish an initial bargaining relationship with a union under the Act. The term "recognition" is defined in the Act as "the designation of an employee organization as negotiating representative of employees in an appropriate unit by a government not acting through an impartial agency". In light of this definition, we read *Clay* to mean that where a stranger to the employment relationship – an employee organization – first seeks to establish a bargaining relationship under the Act, recognition requires some form of legislative action. *Clay* does not speak to the legislative

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<sup>9</sup> *Hempstead Union Free Sch Dist*, 7 PERB ¶3017, at 3025 (1974).

<sup>10</sup> *County of Orange*, *supra* note 8, at 3016.

body's involvement in the bargaining relationship after a union has been recognized.

Under the Act a legislative body has a very limited role in the collective bargaining relationship. Section 201.12 of the Act defines the term "agreement" as "the result of the exchange of mutual promises between the chief executive officer of a public employer and an employee organization," and modifications to a contractual recognition clause are permissive subjects for such negotiations.<sup>11</sup>

The Act also provides that agreements between the employer's chief executive officer and a recognized or certified employee organization are binding, "except as to any provisions therein which require approval by a legislative body, and as to those provisions, shall become binding when the appropriate legislative body gives its approval."<sup>12</sup> Section 204-a identifies those aspects of an agreement that require legislative approval; *i.e.*, terms of the agreement that require an "amendment of law" or "additional funds" to permit their implementation.

As relevant here, the accretion of employees to an existing unit simply effectuates the representational rights that they possess under the Act. No amendment of the Village's laws would be required.<sup>13</sup> Likewise, the mere accretion of employees to a unit does not require the appropriation of "additional

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<sup>11</sup> See, *e.g.*, *Onondaga-Cortland-Madison BOCES*, 25 PERB ¶13044 (1992), modified on other grounds *sub nom. Matter of Onondaga-Cortland-Madison Bd of Coop Educ Servs v Kinsella*, 198 AD2d 824, 26 PERB ¶17015 (4th Dept 1993).

<sup>12</sup> Act, §201.12.

<sup>13</sup> A local law that would prevent employees from exercising their rights under the Act would be unenforceable.

funds." Although negotiated benefits for accreted employees might require such approval, the issue here is not whether the employees are entitled to negotiated benefits.

Accordingly, we find that the November 26, 2003 agreement did not require legislative action under *Clay* or legislative approval under §204-a of the Act. It was, therefore, binding on the parties. Indeed, in reliance on the agreement, CSEA withdrew its petition to add the at-issue titles and others to its bargaining unit, and the Village honored the agreement for nearly 18 months.

If the Village believes that the at-issue employees should be designated managerial or confidential by PERB, or that their titles should be fragmented from the unit, it may file the appropriate application or petition under PERB's Rules of Procedure. But, under both decisions involving the *County of Orange, supra*, it may not unilaterally exclude the titles from CSEA's unit. By doing so here, the Village violated §§209-a.1(a) and (d) of the Act. In that regard, the ALJ properly excluded the Village's evidence concerning the appropriateness of the inclusion of the at-issue titles and employees in CSEA's unit under the settlement agreement. Irrespective of whether the employees should be designated managerial or confidential, or whether their titles should have been included in CSEA's bargaining unit, under both *County of Orange* decisions discussed above, such evidence is relevant only in the context of a properly commenced representation proceeding under PERB's Rules.

As for the remedy, we disagree with CSEA and the individual charging parties' argument that we must order the Village to reinstate the employees

holding the at-issue titles to their former positions with full back pay and benefits. There is no basis to conclude that their terminations were the result of the Village's April 15, 2005 resolution that excluded their titles from CSEA's bargaining unit, and no exceptions were taken to the ALJ's dismissal of the charges to the extent they alleged that the terminations were improperly motivated.

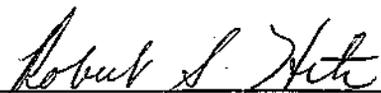
However, in order to restore the *status quo ante*, we order the Village to forthwith restore the at-issue titles to CSEA's bargaining unit, effective April 15, 2005, when it unilaterally excluded them. We note that as of that date the employees holding those titles were still employed and covered by the parties' collective bargaining agreement. We express no opinion as to the contractual rights they may have had, or may yet assert, under that contract regarding their subsequent terminations because the issue raises questions of contract enforcement that lie outside of our jurisdiction under §205.5 (d) of the Act.

As for CSEA's argument that it is entitled to membership dues, we first note that it is entitled to such remittances from the Village only from unit employees. While our order contemplates that the at-issue employees were unit employees from April 15, 2005 until their terminations, approximately two months, we find that the policies of the Act are not effectuated by requiring the Village to track down the employees whom it terminated and collect the membership dues they would have had deducted from their wages between April 15, 2005 and the date of their terminations about two months later, to remit such dues to CSEA.

THEREFORE, the Village is hereby ordered to:

1. Forthwith restore the following titles to the bargaining unit represented by CSEA, effective April 15, 2005: Deputy Village Treasurer, Deputy Village Attorney, Secretary to the Planning Board, Superintendent of Parks and Recreation, Secretary to the Board of Trustees, Research Assistant to the Board of Trustees, Secretary to the Fire Department and Assistant Superintendent of the Department of Public Works;
2. Cease and desist from implementing the April 15, 2005 resolution of the Village Trustees that excluded the aforementioned titles from CSEA's bargaining unit;
3. Sign and post the attached notice at all locations customarily used to post notices to employees in CSEA's bargaining unit.

DATED: September 17, 2009  
Albany, New York

  
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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 Incorporated Village of Hempstead in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, that the Village:**

1. Forthwith restore the following titles to the bargaining unit represented by CSEA, effective April 15, 2005: Deputy Village Treasurer, Deputy Village Attorney, Secretary to the Planning Board, Superintendent of Parks and Recreation, Secretary to the Board of Trustees, Research Assistant to the Board of Trustees, Secretary to the Fire Department and Assistant Superintendent of the Department of Public Works;
2. Refrain from implementing the April 15, 2005 resolution of the Village Trustees that excluded the aforementioned titles from CSEA's bargaining unit.

Dated . . . . .

By . . . . .

on behalf of Incorporated Village of Hempstead

*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

**PLUMBERS LOCAL UNION NO. 1, U.A., AFL-CIO,**

Charging Party,

-and-

**CASE NO. U-25883**

**BOARD OF EDUCATION OF THE CITY SCHOOL  
DISTRICT OF THE CITY OF NEW YORK,**

Respondent.

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**BROACH & STULBERG, LLP (ROBERT B. STULBERG & LAUREVE D.  
BLACKSTONE of counsel), for Charging Party**

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE  
BARGAINING (KAREN SOLIMANDO of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Plumbers Local Union No. 1, U.A., AFL-CIO (Local 1) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by Local 1 on April 21, 2005, alleging that the Board of Education of the City School District of the City of New York (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred exclusively performed unit work at a specified plumbing supply shop to a private contractor. In addition, the charge alleges that the District violated §209-a.1(d) of the Act when it failed to respond to Local 1's demand to negotiate the decision to

transfer the unit work, and when the District failed to respond to Local 1's request for information related to the decision to transfer the unit work.

In his decision, the ALJ dismissed, as untimely, Local 1's allegations that the District violated §209-a.1(d) of the Act with respect to its unilateral transfer of the unit work.<sup>1</sup>

### EXCEPTIONS

In its exceptions, Local 1 contends that the ALJ erred in concluding that its unilateral transfer allegations are time-barred. In addition, it asserts that the ALJ erred by failing to address two remaining claims in its charge: the District's refusal to negotiate the decision to unilaterally transfer the work, and the District's failure to provide Local 1 with certain requested information about the transfer of the unit work. The District 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 dismissing Local 1's unilateral transfer and failure to negotiate claims, but we remand the case to the ALJ to address Local 1's claim that the District violated §209-a.1(d) of the Act by failing to respond to the request for information.

### PROCEDURAL BACKGROUND

This is the second time that the issues raised by Local 1's charge have come before the Board.

In 2006, at the conclusion of Local 1's direct case, the ALJ issued a decision<sup>2</sup> dismissing, as untimely, Local 1's allegations that the District violated §209-a.1(d) of the

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<sup>1</sup> 41 PERB ¶4537 (2008).

<sup>2</sup> 39 PERB ¶4527 (2006).

Act by unilaterally transferring unit work to nonunit employees and by failing to negotiate its decision to transfer the work. The ALJ found, however, that the District violated §209-a.1(d) of the Act when it failed to provide Local 1 with certain requested information about the transfer of the unit work, and he ordered the District to provide Local 1 with the following: a list of the work to be performed by the private contractor; a statement setting forth financial savings the District expects to realize as a consequence of the transfer of the unit work; and copies of all documents relating to the transfer of the work including any contract specifications.

Local 1 filed exceptions to the ALJ's decision dismissing the unilateral transfer and failure to negotiate claims and the District filed cross-exceptions challenging the ALJ's conclusion that it had violated §209-a.1(d) of the Act by not supplying Local 1 with the requested information.

After granting all reasonable inferences to the evidence presented by Local 1 during its direct case, the Board reversed and remanded the case to the ALJ<sup>3</sup> on the basis that there was insufficient evidence in the record to establish that the charge was untimely. In addition, the Board found that Local 1 had presented sufficient evidence to demonstrate a *prima facie* case that the unit work had been performed exclusively by unit employees. The Board remanded the case to the ALJ to permit the parties to present additional evidence on the issues of timeliness and exclusivity.

With respect to the District's cross-exceptions to that portion of the ALJ's decision finding that the District violated §209-a.1(d) of the Act by failing to respond to Local 1's request for information, the Board "reserved decision" and stated:

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<sup>3</sup> 39 PERB ¶3014 (2006).

The District has raised arguments in its exceptions that cannot be addressed based on the evidence in the record at the time of the motion to dismiss. The District may renew its exceptions to this portion of the ALJ's decision after it has presented evidence on this point.<sup>4</sup>

Following the remand, the ALJ conducted three additional days of hearing during which both Local 1 and the District presented additional evidence. After consideration of the evidence contained in the full record, the ALJ issued a decision dismissing the unilateral transfer and failure to bargain allegations as untimely. However, the ALJ did not readdress Local 1's claim that the District violated §209-a.1(d) by failing to respond to portions of its information request.

#### FACTS

The District maintains a plumbing supply shop on the second floor of a six-story building in Long Island City (LIC), Queens. The LIC plumbing supply shop is comprised of two rooms: an office for administrative duties and a larger adjacent warehouse containing plumbing materials and supplies. The District has other trade-specific and general supply shops in the LIC building and in buildings in the other boroughs.

In 2002, pursuant to a mayoral directive, the District advertised a request for proposals for the consolidation and integration of its supply shops. Strategic Distribution, Inc. (SDI) was awarded the bid. In July 2003, the Bronx plumbing supply shop was closed and consolidated with the LIC supply shop. As part of that consolidation, Eric Weinbaum (Weinbaum), a Regional Facilities Manager with supervisory responsibilities over the Bronx and Manhattan supply shops, relocated his office to the third floor of the LIC building. In addition, Frank Podmore (Podmore), a District plumber, was transferred

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<sup>4</sup> 39 PERB ¶3014 at 3049.

from the Bronx to the LIC plumbing supply shop. In March 2004, Podmore became the Local 1 shop steward at the LIC plumbing supply shop.

Local 1 represents District plumbers, plumber's helpers and supervisor plumbers who are responsible for performing plumbing field assignments at the District locations throughout New York City.

Prior to September 2004, six unit employees worked in the office and warehouse of the LIC plumbing supply shop performing various duties including: purchasing plumbing supplies; taking orders from field plumbers for tools and materials; retrieving tools and materials from the warehouse; packaging and shipping tools and materials to plumbers in the field; receiving and restocking tools and materials returned from the field; and completing forms and entering inventory information into a computer.

As a shop steward, Podmore communicates with Thomas Kempf (Kempf), a full-time Local 1 staff member, when work-related issues arise in the LIC plumbing shop. Kempf is a former Local 1 Vice President with city-wide representational responsibilities. Podmore is authorized to speak directly with Weinbaum and other supervisors to resolve work-related issues without the necessity of filing a formal grievance. In his role as shop steward, Podmore has spoken with Weinbaum on a number of occasions about various issues including overtime, the demotion of a supervisor plumber, and transfers.

SDI employees began working in the LIC plumbing supply shop alongside unit employees in August 2004. In September 2004, Weinbaum directed Podmore and other unit employees to return copies of the keys to the locked warehouse and to assist SDI employees working in the office and the warehouse. During the same period, Weinbaum told Podmore that SDI would be taking over all supply shop duties and the District changed the lock to the warehouse.

In response to the District's directive, Podmore contacted Kempf in September 2004. Kempf advised Podmore to comply with the directive by returning the warehouse keys and by continuing to work with the SDI employees.<sup>5</sup> Following the directive, Podmore had further conversations with Weinbaum and other Regional Facilities Managers about SDI employees working in the LIC plumbing supply shop. He also had additional conversations with Kempf about SDI employees working in the plumbing supply shop.

After the District's September 2004 directive, the responsibilities of unit employees inside the LIC plumbing supply shop were substantially curtailed to occasional administrative office duties and their access to the warehouse limited to assisting SDI employees.

In late December 2004, Podmore informed Kempf that unit employees would no longer be working in the supply shop and that the work would now be handled exclusively by SDI. After Kempf contacted Local 1's counsel, a letter was faxed to the District on December 30, 2004 objecting to the transfer of the unit work, demanding the commencement of negotiations over the District's decision to transfer the work and requesting certain information from the District.

It is undisputed that the District did not respond to Local 1's information request.

#### DISCUSSION

In its exceptions, Local 1 challenges the ALJ's dismissal of portions of its charge as untimely. In *New York State Thruway Authority*,<sup>6</sup> we reiterated that when determining the timeliness of a charge, we will examine when the employee

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<sup>5</sup> Transcript pp. 12, 89, 315-316.

<sup>6</sup> 40 PERB ¶3014 (2007).

organization had actual or constructive knowledge of the act or acts that form the basis for its charge.<sup>7</sup>

Unlike the procedural setting in our earlier decision with respect to Local 1's charge, the case now comes to us on a full evidentiary record. Therefore, Local 1 is not entitled to all reasonable inferences to its evidence as we granted in our prior decision. Rather, we examine the record to determine whether a preponderance of the evidence demonstrates that the charge was filed within the four month period after Local 1 knew or should have known of the unilateral transfer pursuant to §204.1(a)(1) of the Rules of Procedure (Rules).

The evidence establishes that, in September 2004, Local 1 had actual knowledge that the performance of unit work in the LIC plumbing supply shop was transferred by the District to SDI. Therefore, the charge is untimely with respect to the unilateral transfer of the work as well as the District's decision to transfer.

Contrary to Local 1's argument, the District's transfer of the unit work was not done in secret. Local 1 shop steward Podmore was aware in September 2004 that SDI employees were performing unit work in the LIC plumbing supply shop and that the District had placed substantial limitations on unit employee access to the warehouse where the plumbing supplies were maintained. In fact, the District changed the lock to the warehouse and thereafter unit employees were permitted access only to assist SDI employees.

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<sup>7</sup> See also, *Otselic Valley Cent Sch Dist*, 29 PERB ¶3005 (1996); *Cold Spring Cent Sch Dist*, 36 PERB ¶3016 (2003), *confirmed sub nom. Cold Spring Harbor Teachers Assn v New York State Pub Empl Rel Bd*, 12 AD3d 442, 37 PERB ¶7009 (2d Dept 2004); *Board of Educ of the City Sch Dist of the City of New York*, 39 PERB ¶3014 (2006).

Podmore is authorized to speak with District representatives on behalf of Local 1 to resolve work related issues at the LIC plumbing supply shop and he had several conversations with Weinbaum and other Regional Facilities Managers about SDI employees working in the supply shop. In addition, Podmore had a series of conversations, beginning in September 2004, with Local 1 staff member Kempf about the work being performed by SDI employees in the supply shop. Kempf was aware that the District had directed unit employees to turn in their keys to the warehouse.

Based upon our review of the entire record, we conclude that both Podmore and Kempf had representational duties and responsibilities sufficient to bind Local 1 to the information they received in September 2004 of the District's decision to transfer the unit work as well as the transfer of such work. Local 1's subsequent demand on December 30, 2004 to negotiate the District's decision to unilaterally transfer the work did not toll the applicable four-month time period. Therefore, Local 1's charge, filed on April 21, 2005, is untimely because it was filed more than four months after it became aware of the unilateral change.

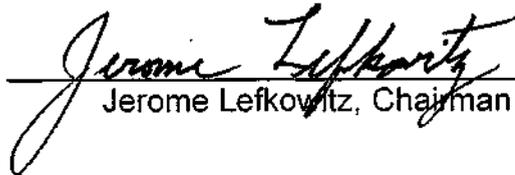
Finally, we grant Local 1's exceptions challenging the ALJ's failure to address its claim that the District violated §209-a.1(d) of the Act by failing to respond to Local 1's information request. There was an inconsistency in the Board's earlier decision with respect to this aspect of the charge. In the decision, the Board stated that it had "reserved decision" on the District's cross-exception to the ALJ's finding of a violation of §209-a.1(d) of the Act but, at the same time, remanded the case for the presentation of additional evidence on the issue. This inconsistency resulted in the ALJ inadvertently failing to readdress the issue following the close of the evidentiary record. To ensure that all parties have a full and fair opportunity to address the issue in exceptions to the

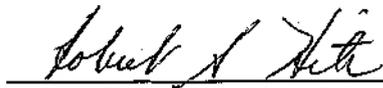
Board, we are remanding the case to the ALJ for a decision on this aspect of Local 1's charge.

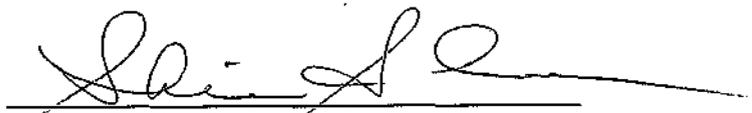
Based on the foregoing, we grant Local 1's exceptions, in part, and remand the case to the ALJ for the limited purpose of addressing Local 1's allegations in the charge that that the District failed to provide necessary and relevant information.

IT IS, THEREFORE, ORDERED that the allegations of the charge with respect to the District's unilateral transfer of the unit work must be, and hereby is, dismissed and the case is remanded to the ALJ for further processing consistent with this decision.

DATED: September 17, 2009  
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

**WESTCHESTER COUNTY DEPARTMENT OF PUBLIC  
SAFETY POLICE BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

-and-

**CASE NO. U-27042**

**COUNTY OF WESTCHESTER,**

Respondent.

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

**CHARLENE M. INDELICATO, COUNTY ATTORNEY (FREDRICK M.  
SULLIVAN of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the County of Westchester (County) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge filed by the Westchester County Department of Public Safety Police Benevolent Association, Inc. (PBA) alleging that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred the exclusive PBA unit work of air transporting extradited prisoners to the United States Marshals Service (Marshals Service).

The County filed an answer admitting that PBA unit employees exclusively performed the duties of air transporting extradited prisoners prior to the County assigning air transport duties to the Marshals Service in June 2006. In its answer, the County affirmatively asserts that the at-issue work being performed by the Marshals Service is not substantially similar to the work performed by the unit employees.

Following a hearing, the ALJ issued her decision<sup>1</sup> concluding that the County violated §209-a.1(d) of the Act when it unilaterally transferred the air transporting duties to the Marshals Service.

#### EXCEPTIONS

The County asserts three grounds in its exceptions challenging the ALJ's decision finding that it violated §209-a.1(d) of the Act: a) the work being performed by the Marshals Service is not substantially similar to work performed by PBA unit employees; b) there has been a significant change in job qualifications warranting the application of a balancing test between the respective interests of the County and PBA; and c) the County's interests in utilizing the Marshals Service outweigh PBA's interest in retaining exclusivity over the at-issue work. PBA supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.<sup>2</sup>

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<sup>1</sup> 41 PERB ¶4601 (2008).

<sup>2</sup> We infer from the record that the ALJ applied her discretion not to defer the merits of the charge to arbitration based upon the preference of the parties to have a merits decision rendered on the charge. A merits deferral would have been appropriate, however, because PBA has a reasonably arguable source of right from the maintenance of standard clause in the parties' expired collectively negotiated agreement. *County of Westchester*, 30 PERB ¶3073 (1987), *on remand* 31 PERB ¶4623 (1998), *affd* 32 PERB ¶3016 (1999), *pet dismissed*, *Westchester County Police Officers' Bene Assn v New York State Pub Empl Rel Bd*, 32 PERB ¶7023 (Sup Ct Albany County 1999), *revd and remanded*, 279 AD2d 847, 34 PERB ¶7002 (3d Dept 2001), *lv denied*, 34 PERB ¶7016 (3d Dept 2001), *lv dismissed*, 96 NY2d 886, 34 PERB ¶7033 (2001), 97 NY2d 692, 35 PERB ¶7001 (2002), *on remand, pet dismissed*, 34 PERB ¶7032 (Sup Ct Albany County 2001), *affd*, 301 AD2d 850, 36 PERB ¶7001 (3d Dept 2003). Based upon the demonstrated preference of the parties in the present case, and the development of a full record before the ALJ, the Board will not, on its own motion, defer the merits of PBA's charge. *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶3006 (2008).

FACTS

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

PBA represents a unit of County employees which includes detectives working in the County Department of Public Safety's Fugitive Warrant Unit (FWU). For at least two decades prior to June, 2006, FWU detectives exclusively performed the duties associated with transporting extradited prisoners incarcerated in other states and jurisdictions. Depending on the location of the prisoner, detectives drive and/or fly to effectuate the extradition. In general, two detectives are assigned to escort a single prisoner; however, when two prisoners are being extradited, three detectives will be assigned.

When the location of a prisoner requires air transport, detectives take a commercial flight and rent a car to drive to the detention facility where the prisoner is incarcerated or detained. After obtaining custody of the prisoner, detectives drive back to the airport and escort the prisoner during a return commercial flight. Prior to boarding, detectives search the prisoner, interface with airline staff and show the required documentation. While on board, detectives are armed and sit on each side of the handcuffed prisoner in the back of the plane. Detectives have complete supervision over the prisoner during the flight, including providing medication to the prisoner, if necessary. In case of an emergency or disturbance, detectives are instructed to defer to airline crew members.

In June, 2006, the County began to utilize the Marshals Service for air transport extraditions of prisoners pursuant to a Cooperative Prisoner Transportation Agreement.

County Department of Public Safety Chief Inspector Martin McGlynn (McGlynn) testified that air transport extraditions were reassigned to the Marshals Service for purposes of economy.

FWU detectives, however, continue to exclusively perform extraditions that do not require air travel. In addition, they continue to be assigned to specifically defined air transport extraditions and perform other air transport extraditions when the Marshals Service declines or is unable to perform an assignment.

The Marshals Service utilizes its own aircraft, staffed by aviation enforcement officers, for air transport extraditions; it does not utilize commercial airlines for that purpose. The Marshals Service's aircraft has the capacity to transport 200 federal and state prisoners per flight. Aviation enforcement officers have custodial responsibilities over the prisoners while in flight on the Marshals Service's aircraft and they are required to respond to emergencies and disturbances that may arise.

#### DISCUSSION

It is well-settled that a unilateral transfer of exclusively performed bargaining unit work to nonunit employees, for economic or other reasons, will be found to violate §209-a.1(d) of the Act unless the work reassigned is not substantially similar to the exclusively performed unit work.<sup>3</sup> If, however, there has been a significant change in job qualifications or there has been a curtailment in the level of services, we will balance

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<sup>3</sup> 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 remittitur*, 42 PERB ¶3016 (2009).

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.<sup>4</sup>

The County, in its exceptions, argues that the air transport extradition duties performed by the Marshals Service are not substantially similar to the work previously performed exclusively by the PBA unit. The basis for the County's argument is premised on the fact that aviation enforcement officers, unlike FWU detectives, supervise a plane-load of prisoners being extradited or transported to and from various jurisdictions on a specially equipped Marshals Service aircraft. In addition, aviation enforcement officers are required to respond to emergencies and disturbances that occur during flight.

In determining whether work performed by nonunit employees is substantially similar, we examine the nature of the work itself.<sup>5</sup> In the present case, the record firmly supports the ALJ's conclusion that the air transport extradition duties performed by the Marshals Service are substantially similar, if not identical, to the work performed by PBA unit employees: obtaining physical custody of a prisoner from a detention facility on behalf of the County; searching and accompanying the prisoner during flight; and delivering the prisoner to County law enforcement officials.

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<sup>4</sup> *Supra* note 3.

<sup>5</sup> *State of New York (Dept of Correctional Serv)*, 27 PERB ¶3055 (1994), *confirmed sub nom. State of New York Dep't of Correctional Serv v New York State Pub Empl Rel Bd*, 220 AD2d 19, 29 PERB ¶7008 (3d Dept 1996); *City of Niagara Falls*, 31 PERB ¶3085 (1998).

Contrary to the County's argument, differences between the aircrafts used by the County and the Marshals Service does not demonstrate dissimilarity in the work performed on behalf of the County.<sup>6</sup> Similarly, the fact that aviation enforcement officers are assigned additional duties by the Marshals Service, including supervising the transport of a much larger number of prisoners for multiple other jurisdictions, is immaterial to our determination whether the nature of the air extradition transport work performed on behalf of the County is substantially similar.<sup>7</sup>

Finally, we reject the County's contention that there has been a significant change in job qualifications requiring a balancing between the respective interests of the parties. In support of its argument, the County relies on the terms of the aviation enforcement officer job description to identify nominal differences in qualifications such as knowledge of Marshal Service's policies and training in penology.

The fact that PBA unit work was "reassigned to employees with different qualifications does not mean that the qualifications for performing the work have changed."<sup>8</sup> In order for such differences to trigger the application of the balancing test,

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<sup>6</sup> *Niagara Frontier Transit Metro Sys, Inc*, 30 PERB ¶3068 (1997); *New York State Thruway Auth*, 33 PERB ¶3017 (2000), *confirmed sub nom. New York State Thruway Auth v Cuevas*, 279 AD2d 851, 34 PERB ¶7003 (3d Dept 2001); *Erie County Water Auth*, 35 PERB ¶3043 (2002).

<sup>7</sup> *County of Erie and Erie Community Coll*, 39 PERB ¶3005 (2006).

<sup>8</sup> *Supra* note 7, at 3020.

the different job qualifications must be substantially related to the duties actually performed.<sup>9</sup>

In the present case, application of the balancing test is unnecessary because it is undisputed that the County's decision to transfer the unit work to the Marshals Service was unrelated to the minor differences that exist in the qualifications between an aviation enforcement officer and an FWU detective. The cited differences in the qualifications are not substantially related to the tasks performed on behalf of the County. Neither is there evidence in the record demonstrating that the Marshals Service provides an altered level or quality of services on behalf of the County than that provided by FWU detectives.

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

IT IS, THEREFORE, ORDERED that the County:

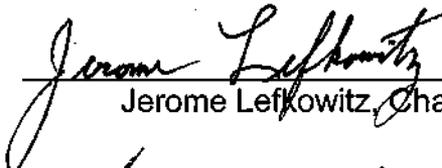
1. Cease and desist from unilaterally transferring to nonunit personnel the work of air transport extradition exclusively performed by employees within the bargaining unit represented by PBA;
2. Forthwith restore the work of air transport extradition to employees in the unit represented by PBA;

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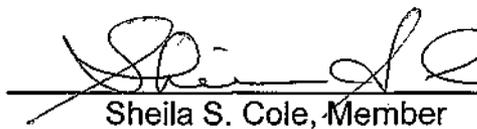
<sup>9</sup> *Hewlett-Woodmere Union Free Sch Dist*, 28 PERB ¶3039 (1995), confirmed *Hewlett-Woodmere Union Free Sch Dist v New York State Pub Empl Rel Bd*, 232 AD2d 560, 29 PERB ¶7019 (2d Dept 1996).

3. Offer reinstatement to all unit employees transferred as a result of the County's transfer of air transport extradition work, under the prevailing terms and conditions of employment as they existed when the work was transferred;
4. Make whole all unit employees affected by the transfer of air transport extradition for any loss of wages, including overtime pay, suffered by reason of the transfer of the unit work, with interest at the maximum legal rate; and
5. Sign and conspicuously post the attached notice at all locations throughout the County customarily used to communicate information to unit employees.

DATED: September 17, 2009  
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 Westchester (County) in the unit represented by the Westchester County Department of Public Safety Police Benevolent Association, Inc. (PBA) that the County will:**

1. Not unilaterally transfer to nonunit personnel the work of air transport extradition exclusively performed by employees within the bargaining unit represented by PBA;
2. Forthwith restore the work of extradition by aircraft to employees in the unit represented by PBA;
3. Offer reinstatement to all unit employees transferred as a result of the County's transfer of air transport extradition work, under the prevailing terms and conditions of employment as they existed when the work was transferred; and
4. Make whole all unit employees affected by the transfer of the work of extradition by aircraft for any loss of wages, including overtime pay, suffered by reason of the transfer of unit work, with interest at the maximum legal rate.

Dated .....

By .....  
on behalf of County of Westchester

*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

**WESTCHESTER COUNTY DEPARTMENT OF PUBLIC  
SAFETY POLICE BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

-and-

**CASE NOS. U-27815  
U-27845**

**COUNTY OF WESTCHESTER,**

Respondent.

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

**CHARLENE M. INDELICATO, COUNTY ATTORNEY (FREDERICK M.  
SULLIVAN of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Westchester County Department of Public Safety Police Benevolent Association, Inc. (PBA) to a decision by an Administrative Law Judge (ALJ) conditionally dismissing two charges filed by PBA against the County of Westchester (County).

In Case No. U-27815, PBA alleges that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally issued Operations Order 2007-037, requiring unit employees to report their involvement in a domestic violence incident resulting in police intervention. In its second charge, Case No. U-27845, PBA alleges that the County violated §§209-a.1(d) and (e) of the Act when it unilaterally subjected the emergency sick leave bank, established under the parties'

expired collectively negotiated agreement (agreement), to an audit, and froze employee access to the leave bank pending completion of the audit. In response to each charge, the County filed an answer which, *inter alia*, asserts a jurisdictional defense and, in the alternative, argues that the charge should be conditionally dismissed and deferred to the parties' negotiated grievance arbitration procedure.

Following the submission of briefs from the parties on the deferral issue, the ALJ issued a decision concluding that both charges are subject to the Board's merits deferral policy premised upon the maintenance of standards clause in the parties' expired agreement and, therefore, conditionally dismissed the charges.<sup>1</sup>

#### EXCEPTIONS

In its exceptions, PBA contends that the ALJ erred in conditionally dismissing the charges on the grounds that she purportedly misinterpreted and misapplied the Board's merits deferral policy and its decision in *County of Sullivan and Sullivan County Sheriff*<sup>2</sup> (hereinafter *County of Sullivan*). In addition, PBA claims that the ALJ's decision is inconsistent with *Manhasset Union Free School District*<sup>3</sup> (hereinafter *Manhasset*). The County supports the ALJ's decision.

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

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<sup>1</sup> 41 PERB ¶4590 (2008).

<sup>2</sup> 41 PERB ¶3006 (2008).

<sup>3</sup> 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 remittitur*, 42 PERB ¶3016 (2009).

FACTS

The parties' expired agreement contains a maintenance of standards provision, §1.6, which states:

Conditions of employment in effect prior to this agreement and not covered by this agreement shall not be reduced without good cause during the term of this agreement. "Good Cause" may be determined through the grievance procedure herein, including Step 3.

The agreement also includes §8.5, which establishes an emergency sick leave bank administered by PBA, with a PBA board responsible for approving a member's eligibility for the sick leave benefits.

Article X of the agreement sets forth a grievance procedure which ends in binding arbitration.

On June 18, 2007, PBA was notified by the County Commissioner of Human Resources that PBA's sick bank records were going to be audited by the County. Subsequently, PBA was informed that the emergency sick leave bank would be frozen until the County's audit was completed.

On July 20, 2007, Commissioner-Sheriff Thomas Belfiore issued Operations Order 2007-037, requiring unit employees involved in an off-duty domestic violence incident resulting in a police response, to provide all relevant information to the Desk Officer. Under the prior practice, a unit employee was required to provide such notification only when he or she is the subject of a criminal investigation by an outside agency.

PBA did not grieve either the County's actions with respect to the sick leave bank or the new off-duty domestic violence notice requirement.

### DISCUSSION

In *County of Westchester*<sup>4</sup> the Board held that a PBA improper practice charge alleging that the County violated §209-a.1(d) of the Act by unilaterally transferring exclusively performed unit work should be deferred on the merits to the parties' grievance procedure, and conditionally dismissed the charge, because the maintenance of standards clause in the parties' agreement is a reasonably arguable source of right to the PBA. This is the identical contract clause that the ALJ, in the present charges, found to be an appropriate basis for a merits deferral.

In its exceptions, PBA asserts that the ALJ erred by following the Board's decision in *County of Westchester*. We disagree. Contrary to the PBA's argument, while the subject matter of the alleged unilateral changes in the present charges are not a transfer of unit work, this difference does not constitute a colorable argument for distinguishing the holding in *County of Westchester*.

Similarly, we find no merit in PBA's argument that the ALJ applied an incorrect standard by inadvertently omitting the prefatory term "reasonably" from the phrase "arguable source of right" when articulating the standard. In *County of Westchester*, the Board held, without modifying the applicable standard for a merits deferral, that the maintenance of standards clause in the parties' agreement "is a source of right to the

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<sup>4</sup> 30 PERB ¶3073 (1997), *on remand*, 31 PERB ¶4623 (1998), *affd*, 32 PERB ¶3016 (1999), *petition dismissed*, *Westchester County Police Officers' Benevolent Assn v New York State Pub Empl Rel Bd*, 32 PERB ¶7023 (Sup Ct Albany County 1999), *revd and remanded*, 279 AD2d 847, 34 PERB ¶7002 (3d Dept, 2001), *lv denied*, 34 PERB ¶7016 (3d Dept 2001), *lv dismissed*, 96 NY2d 886, 34 PERB ¶7033 (2001), 97 NY2d 692, 35 PERB ¶7001 (2002), *on remand, petition dismissed*, 34 PERB ¶7032 (Sup Ct Albany County 2001), *affd*, 301 AD2d 850, 36 PERB ¶7001 (3d Dept 2003). In its brief, PBA omitted reference to its four years of unsuccessful litigation seeking to overturn the Board's decision to defer its earlier charge.

PBA"<sup>5</sup> with respect to that unilateral change. (emphasis added) In the present case, we are satisfied that the ALJ, by citing Board precedent,<sup>6</sup> and reiterating the applicable standard for merits deferral, applied the proper standard in conditionally dismissing the charges.

We also reject PBA's contract interpretation argument, which asserts that because the County policies at issue are new, they are outside the scope of the maintenance of standards clause. In contending that the Board should determine the merits of PBA's contract argument as part of its review of the ALJ's conditional dismissal, PBA demonstrates a misunderstanding of the Board's decades-old merits deferral doctrine. The merits deferral policy favors resolution of contract arguments, like the ones made by the PBA in its exceptions, through the parties' negotiated grievance arbitration procedure when the agreement is a reasonably arguable source of right and a final arbitration award may be dispositive of the charge.

We next turn to PBA's assertion that the ALJ misapplied the Board's decision in *County of Sullivan*. Based upon our review of PBA's arguments, it is clear that PBA has substantially misconstrued *County of Sullivan*. Our decision in that case did not constitute a paradigmatic shift, as claimed by PBA, or even a modification in our merits deferral policy. In fact, in *County of Sullivan*, we reaffirmed that merits deferral is ordinarily appropriate, as in the present case, when an alleged violation of §209-a.1(d) of the Act and an alleged violation of §209-a.1(e) of the Act rests upon the same set of facts. At the same time, we reiterated that a merits deferral of an alleged violation of

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<sup>5</sup> 30 PERB ¶3073 at 3181.

<sup>6</sup> See, *State of New York (SUNY Health Science Center of Syracuse)*, 30 PERB ¶3019 (1997); *County of Sullivan*, *supra* note 2.

§209-a.1(e) of the Act is not always appropriate because PERB has been granted exclusive jurisdiction over such claims and, therefore, deferral will be dependent on the circumstances of each case.<sup>7</sup>

In the present case, we affirm the ALJ's conclusion that PBA has failed to demonstrate any circumstances warranting our retention of jurisdiction over either charge beyond that which is implicit in *New York City Transit Authority (Bordansky)*.<sup>8</sup> It is clear from the record that there is not a mutual preference by the parties for the Board to retain jurisdiction over the alleged violation of §§209-a.1(d) and (e) of the Act. Furthermore, we are unpersuaded by PBA's conclusory assertion that an arbitration award will not be dispositive of the charges. In support of its argument, PBA does not allege or demonstrate that the merits deferral in *County of Westchester*<sup>9</sup> resulted in an arbitration award that was not dispositive of its earlier charge.

Finally, PBA's reliance on our decision in *Manhasset* is without merit. In *Manhasset* we found that an employer violated §209-a.1(d) of the Act when it unilaterally transferred exclusively performed unit work. In discussing the inapplicability of a notice of claim under Educ Law §3813.1, to an improper practice charge, we described both the public policy and legislative history underlying our improper practice jurisdiction. Our discussion in *Manhasset* cannot be reasonably interpreted as an abandonment or modification of our merits deferral policy, which was first articulated by

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<sup>7</sup> *State of New York (SUNY Health Science Center of Syracuse)*, *supra* note 6, 30 PERB ¶¶3019 at 3043.

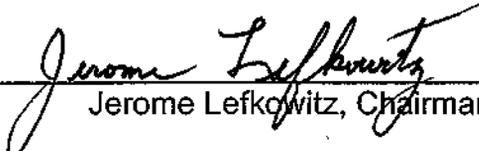
<sup>8</sup> 4 PERB ¶¶3031 (1971).

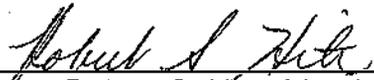
<sup>9</sup> *Supra* note 4.

the Board shortly after the grant of improper practice jurisdiction by the Legislature.<sup>10</sup>

Based upon the foregoing, we affirm the decision of the ALJ and conditionally dismiss charges Case No. U-27915 and Case No. U-27845, subject to a motion to reopen should the County interpose any objections to arbitrability, or should the award not satisfy the criteria under *New York City Transit Authority (Bordansky)*.<sup>11</sup>

DATED: September 17, 2009  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

<sup>10</sup> *NYCTA (Bordansky)*, *supra* note 8.

<sup>11</sup> *Supra* note 8.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**AMALGAMATED TRANSIT UNION, LOCAL 1342,**

Charging Party,

-and-

**CASE NO. U-27133**

**NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.,**

Respondent.

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**REDEN & O'DONNELL (JOSEPH E. O'DONNELL and TERRY M. SUGRUE, of  
counsel), for Charging Party**

**DAVID M. GREGORY (WILLIAM R. GRADL, of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by Amalgamated Transit Union, Local 1342 (ATU) to a decision by an Administrative Law Judge (ALJ) dismissing a charge, as amended, alleging that Niagara Frontier Transit Metro System, Inc. (Metro) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the use and purpose of a medical examination, under the terms of the parties' collectively negotiated agreement (agreement), by treating the examination as the equivalent of an independent medical examination (IME) under the Workers' Compensation Law and by submitting the resultant medical reports to the Workers'

Compensation Board for purposes of reducing or eliminating an employee's workers' compensation benefits.<sup>1</sup>

At the hearing, the parties stipulated to the admission of the pleadings as ALJ exhibits, and the parties' collectively negotiated agreement as a joint exhibit; no other evidence was admitted. In addition, the charge was amended and clarified on the record. During a colloquy, ATU agreed to the ALJ's description of the charge as alleging that Metro:

...has unilaterally changed the use and purpose of information obtained from medical examinations. That historically [Metro] has used the medical exams to determine an employee's ability to return to work. The change is that now [Metro] has unilaterally decided to use these medical examinations as the equivalent of an Independent Medical Exam... and is submitting such related medical reports to [the Workers' Compensation Board] for the purpose of reducing or eliminating Workers' Compensation benefits.<sup>2</sup>

Following the colloquy, the ALJ directed ATU to file an offer of proof, and for Metro to respond to the offer, with respect to two issues: Metro's duty satisfaction defense; and whether the subject matter of the amended charge is a mandatory subject of negotiations under the Act.

In its offer of proof, ATU relied solely upon the facts alleged in the amended charge, as clarified, and reiterated that Metro historically utilized the negotiated medical examination to determine an employee's ability to return to work from a leave of

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<sup>1</sup> The original charge alleged direct dealing by Metro, in violation of §§209-a.1(a) and (c) of the Act. At the hearing before the ALJ, ATU withdrew the claim along with the related allegations contained in the details of the charge. Transcript, pp. 10-13.

<sup>2</sup> Transcript, pp. 12-13.

absence. In addition, it reframed, in part, the allegations of the charge by claiming that Metro unilaterally changed the purpose of the negotiated examination by treating it as the equivalent of an IME and submitting resultant medical reports to the Workers' Compensation Board to reduce or eliminate the subject employee's Workers' Compensation benefits. According to ATU's offer, Metro did not satisfy its duty to negotiate because the negotiated provisions of the agreement do not explicitly or implicitly touch upon the subject matter of the charge. Finally, it argued that the subject of the unilateral change is a mandatory subject under the Act. In response, Metro argued that the provisions of the agreement supported its duty satisfaction defense.

Following submission of ATU's offer and Metro's response, the ALJ issued a decision dismissing the charge concluding that Metro had satisfied its duty to negotiate the subject of the alleged change and that the subject is a nonmandatory subject under the Act.<sup>3</sup>

#### EXCEPTIONS

In its exceptions, ATU contends that the ALJ misinterpreted the allegations of the amended charge and ATU's arguments, inappropriately placed the burden of proof on ATU with respect to Metro's duty satisfaction defense, erred in sustaining that defense, and erred in concluding that the subject matter of the charge constitutes a nonmandatory subject of negotiations. Metro supports the ALJ's decision.

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

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<sup>3</sup> 41 PERB ¶4566 (2008).

### FACTS

Metro and ATU are parties to an agreement for the period August 1, 2006- July 31, 2009 for the Operating and Maintenance and the Office and Clerical Units.<sup>4</sup> Section 8 of the agreement includes negotiated benefits with respect to leaves of absence due to a disability. The agreement defines the term "disability" broadly in §8-3 to include the following:

heart condition, back condition, injury to limbs or conditions affecting use of limbs, pregnancy, vision impairment or any other illness, condition, or injury of any type which might in any way affect the employee's ability to perform all the duties required of his or her job classification.

Section 8.3 requires unit employees to immediately report all such disabilities to Metro and it grants Metro the right to require an employee to obtain a medical determination as to his or her ability to continue to perform work, and, if necessary, the last day when the employee will be able to physically perform all of his or her job duties. Under certain circumstances, Metro may require the employee to submit periodic medical reports:

Such employee may, if the condition or doctor's report so warrants, be required by the Company to obtain periodic physician reports to be delivered to the Company with respect to such disability. The employee shall have the option to obtain such examination by the Company's physician, at Company expense, or the employee's physician, at the employee's expense, provided if the employee elects to go to his or her own physician such physician shall submit to the Company on a form provided by the Company a report of the employee's disability.

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<sup>4</sup> Joint Exhibit 1, §2-1.

Finally, §8-3 states, in relevant part, that:

Should at any time the opinion of the applicable physician of the employee be that the employee is physically unfit to continue his or her duties, such employee shall be granted a leave of absence as provided in Section 8-3.1 or Section 8-3.2, whichever are applicable, under all of the terms and conditions provided in this Section 8.

Section 8-3.1 of the agreement entitles a full-time employee to a sick leave of absence during a period when the employee is unable to reasonably perform his or her job duties because of a compensable injury or illness. The right to such a leave of absence is conditioned on the employee providing Metro with satisfactory evidence with respect to the compensable injury or illness.

Section 8-3.3 of the agreement states, in relevant, part that:

The employee on such leave, *compensable or non-compensable*, shall report personally and sign in, or if not reasonably possible then in writing, to the Company's Industrial Nurse during normal business hours for the Human Resources Department at least every thirty (30) days and the Company shall be privileged from time to time during the period of such leave to have the employee examined by a physician of its choice....Prior to returning to work an employee on such leave of absence, in addition to any physical examination that the Company may require to be performed by its physician, must submit to the Company his or her physician's report that he or she is physically able in all respects to perform all of the duties and responsibilities of his or her job classification. (emphasis added).

Pursuant to §8-7 of the agreement, disputes between the parties over Metro's unreasonable denial or withdrawal of a contractual leave benefit is subject to medical arbitration before an impartial physician.

When an employee is examined by a Metro doctor "to receive a certificate on returning from sick leave, or in connection with required ICC examination, or in connection with a claim of such employee under the Worker's Compensation Law" the employee is not entitled to his or her regular wages for the time needed to attend the examination pursuant to §6-2 of the agreement. The agreement does, however, provide that employees, upon request, are entitled to paid leave in order to attend a Workers Compensation Board hearing with respect to his or her claim for benefits.

Metro is self-insured under the Workers' Compensation Law and EM Risk Management acts as Metro's third party administrator for workers' compensation claims.<sup>5</sup>

#### DISCUSSION

In its exceptions, ATU contends that the ALJ misconstrued the amended charge by failing to recognize that a component of the pleading is an allegation that Metro has unilaterally changed the scope and purpose of the negotiated medical examination for a compensable injury or illness by treating it as the equivalent of an IME. According to ATU, its use of the term "equivalent" to describe the unilateral change in the negotiated medical examination should have been understood by the ALJ as alleging that the scope of the examination has been expanded to include all medical issues that are subject to review at an IME under the Workers Compensation Law and regulations.

ATU also claims that the ALJ erred by failing to interpret the charge as alleging that Metro is violating the IME notice requirements of the Workers Compensation Law.<sup>6</sup>

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<sup>5</sup> ALJ 1, ¶4.

<sup>6</sup> Workers' Compensation Law §§137(7) and 11.

In considering ATU's exceptions, we accept the truth of the allegations in the amended charge, as clarified before the ALJ, and grant all reasonable inferences to the facts pleaded.<sup>7</sup>

Based upon our examination of the amended charge, as clarified during the colloquy at the hearing, we cannot reasonably infer that ATU alleges in the charge that the scope of the medical examination has been unilaterally expanded. Our conclusion is premised upon two factors: a) the failure of ATU to set forth any alleged facts relevant to this issue in its offer of proof; and b) the definition of an IME under the Workers' Compensation Law and regulations, which includes an examination for determining a claimant's ability to return to work.<sup>8</sup> Although ATU's offer states that an IME has a functional workers' compensation purpose, ATU did not describe any evidence it intended to introduce at a hearing that would demonstrate a substantive expansion in the scope of the medical issues considered or the amount of information obtained during the negotiated medical examination, beyond an employee's ability to return to

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<sup>7</sup> *City of Yonkers*, 23 PERB ¶3055 (1990); *UFT (Saidin)*, 40 PERB ¶3003 (2007); *ATU (Delahaye)*, 41 PERB ¶3004 (2008); *Rochester Teachers Assn (Danna)*, 41 PERB ¶3003 (2008).

<sup>8</sup> 12 NYCRR §300.2(b)(4) states: "Independent medical examination means an examination performed by an authorized or qualified independent medical examiner, pursuant to section 13-a, 13-k, 13-l, 13-m or 137 of the Workers' Compensation Law, for purposes of evaluating or providing an opinion with respect to schedule loss, degree of disability, validation of treatment plan or diagnosis, causal relationship, diagnosis or treatment of disability, maximum medical improvement, *ability to return to work*, permanency, appropriateness of treatment, necessity of treatment, proper treatment, extent of disability, second opinion or any other purpose recognized or requested by the board." (emphasis added)

work.<sup>9</sup>

We reach a similar conclusion with respect to ATU's argument over the issue of notice. It cannot be reasonably inferred from the allegations that the charge alleges a violation of Workers' Compensation Law notice requirements. Furthermore, PERB does not have jurisdiction over alleged violations of the Workers' Compensation Law. Therefore, we deny ATU's exceptions challenging the ALJ's construction of the pleadings.<sup>10</sup>

ATU asserts, in its exceptions, that the ALJ reversed the burden of proof when she required it to file an offer of proof responding to Metro's duty satisfaction defense. It is well-settled that a respondent must plead and prove a duty satisfaction defense.<sup>11</sup> However, the primary purpose of an offer of proof is to clarify the relevant facts, and thereby aid the ALJ in further processing the charge. In general, an ALJ is granted considerable discretion in the processing of an improper practice charge.<sup>12</sup> Requiring an offer of proof does not alter the applicable burden of proof. Such a requirement provides the party with an opportunity to identify the facts it intends to prove at a hearing. In the present case, the ALJ's directive requiring ATU to file an offer of proof responding to the duty satisfaction defense was well within her discretion because the

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<sup>9</sup> Similarly, it cannot be reasonably inferred from the charge, as amended and clarified, that ATU alleges that Metro is now treating medical examinations for a non-compensatory injury and illness as the equivalent of an IME and submitting the results of such examinations to the Workers' Compensation Board.

<sup>10</sup> We also reject ATU's contention that the ALJ violated §212.3 of the Rules of Procedure (Rules) by failing to address issues which can not be reasonably inferred from its pleading and offer of proof.

<sup>11</sup> *NYCTA*, 41 PERB ¶13014 (2008).

<sup>12</sup> *City of Elmira*, 41 PERB ¶13018 (2008).

alleged facts ATU intended to prove with respect to the defense are integral to the merits of the charge, as amended.

Next, we consider ATU's exceptions challenging the ALJ's upholding of Metro's duty satisfaction defense on the merits. When parties have negotiated a subject to completion and have entered into an agreement with respect to that subject, a respondent has satisfied its duty to negotiate and, therefore, cannot be found to have acted unilaterally in violation of the Act when it takes an action permitted under the negotiated terms of the agreement.<sup>13</sup> In *New York City Transit Authority*,<sup>14</sup> the Board reiterated the applicable standard for determining a duty satisfaction defense:

A satisfaction of the duty to negotiate necessitates record evidence of facts establishing that the parties negotiated an agreement upon terms which are reasonably clear on the subject presented to us for decision.<sup>15</sup>

In the present case, §8 of the agreement includes a negotiated supplemental workers' compensation leave benefit for a compensable injury or illness which is conditioned on an employee being subject to periodic medical examinations to determine whether the employee is able to return to work. Based upon the direct interrelationship between this negotiated supplemental leave benefit and a statutory workers compensation claim, we conclude that the subject of the submission of medical reports to the Workers' Compensation Board is inherently and inextricably intertwined

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<sup>13</sup> *County of Nassau (Police Department)*, 31 PERB ¶3064 (1998); *State of New York (Workers' Compensation Board)*, 32 PERB ¶3076 (1999); *County of Columbia*, 41 PERB ¶3023 (2008).

<sup>14</sup> *Supra*, note 11.

<sup>15</sup> 41 PERB ¶3014 at 3076 (quoting from *Town of Shawangunk*, 32 PERB ¶3042 at 3094-3095 [1999]).

with the negotiated procedures for the compensable injury or illness leave benefit.<sup>16</sup>

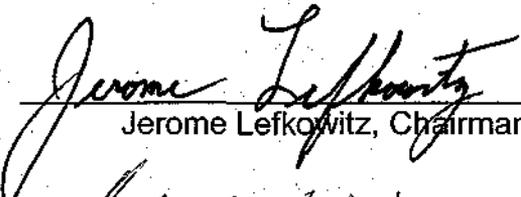
Having reached an agreement with Metro on the subject, ATU must seek to enforce that agreement if it believes that Metro has violated the negotiated terms. We lack, however, jurisdiction to enforce an agreement pursuant to §205.5(d) of the Act.<sup>17</sup>

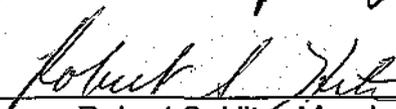
Based upon the foregoing, we deny ATU's exceptions and affirm the decision of the ALJ sustaining Metro's duty satisfaction defense. In light of our determination, we do not reach ATU's exceptions claiming that the subject matter of the amended charge is a mandatory subject of negotiations under the Act.

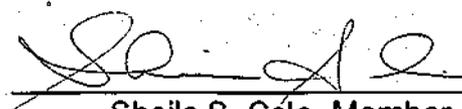
IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

SO ORDERED.

DATED: September 17, 2009  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

  
Sheila S. Cole, Member

<sup>16</sup> *County of Nassau (Police Department)*, *supra*, note 13.

<sup>17</sup> Contrary to ATU's argument, the fact that disputes over the grant or withdrawal of the supplemental leave benefit are subject to medical arbitration does not defeat Metro's duty satisfaction defense. A medical examination to determine an employee's ability to return to work is equally relevant to a workers' compensation claim for payment of benefits and a grievance over the grant or denial of the negotiated supplemental leave benefit.

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

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In the Matter of

**CITY OF MIDDLETOWN,**

Charging Party,

**CASE NO. U-27423**

- and -

**CITY OF MIDDLETOWN POLICE BENEVOLENT  
ASSOCIATION,**

Respondent.

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**KORNFELD, REW, NEWMAN & SIMEONE (FRANK T. SIMEONE of counsel),  
for Charging Party**

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

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the City of Middletown Police Benevolent Association (PBA) and on exceptions filed by the City of Middletown (City) to a decision by an Administrative Law Judge (ALJ) on an improper practice charge, as amended, filed by the City alleging PBA violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it submitted three negotiation proposals to compulsory interest arbitration: proposal 11, bill of rights; proposal 12, disciplinary procedure; and proposal 13, General Municipal Law (GML) Section 207-c procedure.

Following submission of the case on a stipulated record, the ALJ issued a decision<sup>1</sup> concluding that the disciplinary procedure proposal is prohibited and the bill of

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<sup>1</sup> 42 PERB ¶4502 (2009).

rights proposal is both prohibited and nonmandatory, in part.<sup>2</sup> Therefore, the ALJ directed PBA to withdraw both proposals. She, however, dismissed the remainder of the charge concluding that the PBA's proposal for a GML §207-c procedure is a mandatory subject under the Act.

### EXCEPTIONS

In its exceptions, PBA contends that the ALJ erred in concluding that its disciplinary procedure proposal is a prohibited subject of negotiations. It also challenges the ALJ's conclusion that the bill of rights proposal is both prohibited and nonmandatory, in part. In support of its exceptions, PBA claims that the ALJ misinterpreted and misapplied Board and judicial precedent in reaching the decision. In addition, it asserts that the ALJ erred in concluding that Civ Serv Law §75 is inapplicable to PBA unit employees and that she misinterpreted the City of Middletown Charter (City Charter).<sup>3</sup> The City supports the ALJ's decision with respect to these two proposals.

The City, in its exceptions, challenges the ALJ's conclusion that the proposed GML §207-c procedure is a mandatory subject claiming that the ALJ misapplied applicable law in reaching her decision. Specifically, the City asserts that the following portions of the proposal are nonmandatory because they usurp the City's right under GML §207-c to

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<sup>2</sup> In the decision's penultimate sentence, however, the ALJ inadvertently referred to the bill of rights and disciplinary procedure proposals as being nonmandatory.

<sup>3</sup> We deny PBA's exception seeking a policy ruling prohibiting an ALJ from rejecting a meritless argument raised by a party without the ALJ specifically articulating a rationale addressing the demerits of the argument. Section 212.5 of our Rules of Procedure (Rules) does not obligate an ALJ to substantively address every argument presented regardless of merit and/or frivolity. Such a rule would be fundamentally impractical and would result in unnecessary administrative delays in the processing of improper practice charges. Pursuant to §213 of the Rules, a party is entitled to file exceptions to portions of an ALJ decision when a party believes the ALJ did not -correctly or properly address an argument.

render an initial eligibility determination: a) the time period for the submission of documentation to the claims manager; b) the time frame for an initial determination by the claims manager; c) the pre-arbitration procedure permitting a claimant to submit additional information to the claims manager for reconsideration of the claim; and d) the arbitration procedure for the review of an initial determination denying benefits. PBA supports the ALJ's decision finding the GML §207-c proposal to be mandatory.

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

#### FACTS

PBA is the recognized representative of a unit of City police officers, sergeants, lieutenants and detectives. The most recent collectively negotiated agreement (agreement) between the City and PBA expired on December 31, 2006. The expired agreement does not include a negotiated disciplinary procedure. However, §18.7 of the agreement references suspensions made pursuant to Civil Serv Law §75:

Employees suspended under the provisions of Section 75 of the Civil Service Law shall have their health insurance premiums paid during the period of unpaid suspension unless the period is extended by an action of the employee's representative. Periods of imposed penalty after hearing shall not require such payment.

In 1995, the City's Board of Police Commissioners established disciplinary procedures for the police department, which were later incorporated, as amended, into General Order AGO-027-27 (General Order) issued by the City's Chief of Police.

Section G(1) of the General Order states:

Any determination by the Board of Police Commissioners shall be final, except that it may be appealed pursuant to Section 76 of the N.Y.S. Civil Service Law.

During an unspecified period, the City issued at least three notices of discipline

against PBA unit members identifying Civ Serv Law §75 as the legal basis for issuance of the notices. The most recent notice, dated February 4, 2008, was issued well after the City filed its charge.<sup>4</sup>

Following an impasse in negotiations for a successor agreement, PBA filed a petition for compulsory interest arbitration containing the three proposals that are the subject of the City's charge.<sup>5</sup> The disciplinary procedure proposal calls for granting unit members a choice between Civ Serv Law §75 and binding arbitration when a notice of discipline seeks a suspension of more than 30 days, a demotion or a termination. PBA's bill of rights proposal seeks procedural rights for unit members being interrogated or interviewed during the course of an official City investigation which may lead to disciplinary charges. One section of the bill of rights, §1.D.7, addresses questioning that may relate to a possible criminal investigation. The GML §207-c proposal seeks to establish a comprehensive procedure relating to statutory benefits when a unit member is injured in the performance of his or her duties, including a hearing procedure before an arbitrator to determine whether the City's claims manager had a reasonable basis for denying or terminating benefits.

### DISCUSSION

#### A. PBA's Exceptions to the ALJ's Decision

In its exceptions, PBA asserts that the ALJ erred when she concluded that the provisions in the City Charter render PBA's disciplinary procedure and bill of rights

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<sup>4</sup> The stipulated record contains two additional redacted copies of notices of discipline that are undated. Joint Exhibit I, Attachment E.

<sup>5</sup> The full bill of rights and disciplinary procedure proposals and relevant excerpts from the GML §207-c proposal are reprinted in the ALJ's decision. *Supra* note 1, 42 PERB ¶4502 at 4503-04, 4510-13.

proposals prohibited subjects of negotiations. According to PBA, the proposals are mandatory under *Auburn Police Local 195 v Helsby*<sup>6</sup> (*Auburn*) because Civ Serv Law §75 is applicable to members of the PBA unit. In addition, it asserts that the ALJ misinterpreted and misapplied *Patrolmen's Benevolent Assn of the City of New York, Inc. v New York State Pub Empl Rel Bd*<sup>7</sup> (hereinafter *NYCPBA*), *Police Benevolent Assn of New York State Troopers, Inc. v Division of State Police*<sup>8</sup> (hereinafter *NYS Troopers PBA*) *New York City Transit Auth v New York State Pub Empl Rel Bd*,<sup>9</sup> (hereinafter *NYCTA*) and the Board's decision in *Tarrytown Patrolmen's Benevolent Association, Inc*<sup>10</sup> (hereinafter *Tarrytown*).

In general, the subject of police disciplinary procedures is mandatorily negotiable under the Act because it is a term and condition of employment.<sup>11</sup> Furthermore, the Legislature, in a series of amendments to the Act since 1974, has demonstrated a clear and explicit public policy choice for the subject of police disciplinary procedures to be, in general, negotiable but excluded from the subjects that can be resolved in compulsory

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<sup>6</sup> 62 AD2d 12, 11 PERB ¶7003 (3d Dept 1978), *affd*, 46 NY2d 1034, 12 PERB ¶7006 (1979).

<sup>7</sup> 6 NY3d 563, 39 PERB ¶7006 (2006).

<sup>8</sup> 11 NY3d 96, 41 PERB ¶7511 (2008).

<sup>9</sup> 8 NY3d 226, 40 PERB ¶7001 (2007).

<sup>10</sup> 40 PERB ¶3024 (2007).

<sup>11</sup> See, *City of Albany*, 42 PERB ¶3005 (2009); *Town of Wallkill*, 42 PERB ¶3017 (2009); See also, *Binghamton Civil Service Forum v City of Binghamton*, 44 NY2d 23, 11 PERB ¶7508 (1978).

interest arbitration for specifically defined negotiations units.<sup>12</sup> In *Auburn*, the Court of Appeals affirmed the reversal of a Board decision<sup>13</sup> and held that a proposal to negotiate a grievance/arbitration procedure for a unit of police officers, as an alternative to Civ Serv Law §§75 and 76, was not a prohibited subject of negotiations.

Subsequently, in *NYCPBA*, the Court reaffirmed the holding in *Auburn* but held that the New York City Charter and Administrative Code, State police disciplinary laws pre-dating Civ Serv Law §§75 and 76 delegating police disciplinary authority to City officials, demonstrate a public policy that outweighs the strong and sweeping policy supporting collective negotiations under the Act. The Court, therefore, concluded that negotiations over procedures for the interrogation of police officers and police disciplinary procedures in New York City were prohibited.<sup>14</sup>

In reaching its decision in *NYCPBA*, the Court cited with favor the decision in *City of Mount Vernon v Cuevas*<sup>15</sup> (hereinafter *Mount Vernon*) where the Appellate

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<sup>12</sup> See, L 1995, c 432; L 1995, c 447; L 2001, c 586; L 2002, c 220; L 2002, c 232; L 2003, c 641; L 2003, c 696; L 2004, c 63; L 2005, c 737; L 2007, c 190; L 2008, c 179; L 2008, c 234; §§209.4(e), (f), (g), (h) and (i) of the Act. See, *City of Albany*, supra note 11; *Town of Wallkill*, supra note 11; *Tarrytown Patrolmen's Benevolent Association, Inc*, supra note 9, n.14. The general negotiability of police disciplinary procedures is reinforced by Civ Serv Law §75-a and Exec Law §215-a which recognize a right of police officers to grieve, under a collectively negotiated agreement, a transfer or penalty imposed for failing to obey an order to issue a certain number of tickets and summons within a set period of time.

<sup>13</sup> *Auburn Police Local 195*, 10 PERB ¶3045 (1977).

<sup>14</sup> In addition, the Court held in *NYCPBA* that another special State law, the Rockland County Police Act, rendered a negotiated police disciplinary procedure in the Town of Orangetown invalid as violative of public policy.

<sup>15</sup> 33 PERB ¶7015 (Sup Court Albany County 2000); nor *affd*, 289 AD2d 674, 34 PERB ¶7038 (3d Dept 2001) *lv denied*, 97 NY2d 613, 35 PERB ¶7005 (2002).

Division, Third Department held that the police disciplinary procedure in a 1922 municipal charter, enacted by the Legislature, preempts the negotiability of the subject under the Act. In *NYCPBA and Mount Vernon*, the parties did not dispute the inapplicability of Civ Serv Law §75 to police officers in those municipal jurisdictions.

Since *NYCPBA*, both the Courts and the Board have held, consistent with *Auburn*, that where Civ Serv Law §75 or analogous general disciplinary statutes are applicable to police officers, the subject of police discipline is not a prohibited subject of negotiations under the Act.<sup>16</sup>

In *Town of Wallkill*<sup>17</sup> (hereinafter *Wallkill*) we recently interpreted the negotiated waiver of Civ Serv Law §75 procedures in a collectively negotiated agreement as constituting a recognition by the parties that those statutory procedures were applicable to unit police officers who are honorably discharged veterans and volunteer firefighters. Our interpretation was supported by judicial precedent and early 20<sup>th</sup> century legislation granting special disciplinary procedural protections for honorably discharged veterans and volunteer firefighters.<sup>18</sup> We, therefore, concluded in *Wallkill* that a negotiated procedure to replace Civ Serv Law §75 for honorably discharged veterans and volunteer firefighters was not prohibited under *Auburn* and *NYCPBA*.

In the present case, PBA contends that *Auburn*, rather than *NYCPBA*, is

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<sup>16</sup> See, *Werner v Town of Niskayuna* 41 PERB ¶¶7518 (Sup Ct Schenectady County 2008) nor; *Elias v Town of Crawford*, 17 Misc3d 176, 41 PERB ¶¶7505 (Sup Ct Orange County 2007); *City of Albany*, *supra* note 11; *Town of Wallkill*, *supra* note 11.

<sup>17</sup> *Supra* note 11.

<sup>18</sup> See, *Owen v Town of Wallkill*, 94 AD2d 768 (2d Dept 1983) *lv denied*, 60 NY2d 560 (1983); L 1909, c 15; L 1930, c 214. See also, *Brown v Stephan*, 245 AD 588 (4th Dept 1935); *Wamsley v East Ramapo Cent Sch Dist Bd of Educ*, 281 AD2d 633 (2d Dept 2001).

applicable because unit members are covered by Civ Serv Law §75. In its brief, PBA's argument vacillates between a claim that Civ Serv Law §75 is applicable to the entire unit and an assertion that the statutory procedure applies "at least in certain respects."<sup>19</sup> In support of its argument, PBA does not cite to case law specifically holding that Civ Serv Law §75 is applicable to a City police officer in any respect.<sup>20</sup> Instead, PBA relies on references to Civ Serv Law §75 in the three disciplinary pleadings in the record and in §18.7 of the agreement.

Contrary to PBA's contention, the ALJ correctly concluded that the City is not bound by the asserted legal predicate contained in its disciplinary pleadings.<sup>21</sup> Nevertheless, we find some merit to PBA's argument that Civ Serv Law §75 is applicable to some PBA unit members based, in part, upon the parties' agreement.

Section 18.7 of the parties' agreement is a negotiated health insurance benefit for police officers who are suspended pursuant to Civ Serv Law §75.3. When read in conjunction with General Order AGO-027-27, §G.1, stating that police discipline is appealable under Civ Serv Law §76, we conclude that both parties recognize in the agreement that Civ Serv Law §75 is applicable to at least some members of the PBA unit.<sup>22</sup> This conclusion is supported by appellate precedent holding that the unique

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<sup>19</sup> PBA Brief in Support of Exceptions, pp. 7-10. PBA does not explain, however, to what extent it asserts Civ Serv Law §75 is applicable to unit members.

<sup>20</sup> Our research has found two appellate decisions reviewing the imposition of police discipline in the City of Middletown. See, *Birmingham v Police Commissioners of City of Middletown*, 282 AD2d 531 (2d Dept 2001); *Burns v City of Middletown*, 119 AD2d 674 (2d Dept 1986). However, the decisions are not dispositive as to the applicability of Civ Serv Law §75 to City police officers.

<sup>21</sup> See, *Race v Krum*, 163 AD 924 (3d Dept 1914), *affd*, 222 NY 410 (1918).

<sup>22</sup> By definition, Civ Serv Law §76 is applicable only to employees entitled to Civ Serv Law §75 disciplinary procedures. *Montella v Bratton*, 93 NY2d 424 (1999).

procedural protections granted by the Legislature to honorably discharged veterans and volunteer firefighters under former Civ Serv Law §22, and currently codified in Civ Serv Law §75.1(b), preempt police disciplinary procedures set forth in a city charter enacted by the State Legislature.<sup>23</sup>

Therefore, consistent with our holding in *Wallkill*, we reverse the ALJ, in part, and conclude that PBA's proposals for disciplinary procedures and a bill of rights are not prohibited under *Auburn* and *NYCPBA* to the extent that they seek to replace Civ Serv Law §75 for unit members eligible, as a matter of law, to those disciplinary procedures, *i.e.* honorably discharged veterans and volunteer firefighters.

We affirm, however, the ALJ's finding that the disciplinary procedure and bill of rights proposals for unit members subject to the City Charter police disciplinary procedures are prohibited subjects under *NYCPBA* and *Mount Vernon*. Our conclusion that the proposals are negotiable for those unit members eligible for Civ Serv Law §75 under *Auburn*, does not preclude a scope decision finding that the same proposals are prohibited under *NYCPBA* for those unit members who are ineligible for those statutory disciplinary procedures.<sup>24</sup>

In 1942, at the urging of newly elected City officials, the New York Legislature enacted a bill amending the City Charter by transferring the control and supervision of the City police department from the City Mayor to a newly created five-member Board of

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<sup>23</sup> *Eisle v Woodin*, 205 AD 452 (4<sup>th</sup> Dept 1923), *affd*, 238 NY 551 (1924); *Morris v Neider*, 259 AD 49 (4<sup>th</sup> Dept 1940).

<sup>24</sup> *City of Albany*, 7 PERB ¶¶3078 and 3079, *confirmed, as modified, City of Albany v Helsby*, 48 AD2d 998, 8 PERB ¶7012 (3d Dept 1975), *affd*, 38 NY2d 778, 9 PERB ¶7005 (1976) (bargaining proposal to make Retirement and Social Security Law §360-b available to eligible unit members is a mandatory subject but a prohibited subject for unit members ineligible for those benefits.)

Police Commissioners.<sup>25</sup> The expressed purpose for the legislation was to depoliticize and stabilize the City's police force, which had become a "political football" according to Assemblyman Charles N. Hammond, the bill's sponsor.<sup>26</sup> In an effort to eliminate the problems caused by partisan-based police appointments and terminations, the Board of Police Commissioners was granted the following powers: to appoint police officers but only from competitive civil service eligibility lists; to enact, modify and repeal rules and regulations for the governance and discipline of the department; to discipline police officers pursuant to the procedure codified in the City Charter; and to compel testimony as part of investigations into "all matters pertaining to the police force."<sup>27</sup>

Despite the public policy rationale for the amendments articulated in the legislative history, *NYCPBA* and *Mount Vernon* compel us to conclude that implicit in the 1942 special law was a policy favoring strong disciplinary authority by the Board of Police Commissioners that, in general, outweighs negotiability under the Act. As we stated in *Tarrytown*:

In *NYCPBA*, the Court held that when a special state law, that pre-existed Civil Service Law (CSL) §§75 and 76, specifically commits the discipline of police officers to local government officials, New York's public policy favoring strong disciplinary authority over police officers outweighs New York's 'strong and sweeping policy' supporting collective negotiations under the Act.<sup>28</sup> (footnote omitted)

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<sup>25</sup> L 1942, c 339, §1.

<sup>26</sup> L 1942, c 339 Bill Jacket, Letter from Assemblyman Hammond to Governor's Counsel Sobel, dated March 24, 1942.

<sup>27</sup> L 1942, c 339, §1, City Charter, §§129(2)-(9). Subsequently, the City enacted local legislation modifying the 1942 City Charter amendments enacted by the Legislature.

<sup>28</sup> *Supra*, note 10, 40 PERB ¶3024 at 3101.

In its exceptions, PBA contends that the ALJ failed to follow the Board's analysis in *Tarrytown* and misinterpreted the City Charter provisions. We disagree. The disciplinary authority delegated to City officials by City Charter §§129.7, 129.8 and 129.9 is far more specific and detailed than the charter provisions in *NYCPBA* and *Mount Vernon*, and the special statute in *Tarrytown*. In all three cases, the police disciplinary authority delegated to the local officials was found to preempt negotiability.

According to PBA, the disciplinary procedures in City Charter §129.8 are superseded when "inconsistent with laws of the state." We reject this proposed construction of City Charter §129.8. The phrase referenced by PBA is, at best, a limitation on the powers of the Board of Police Commissioners with respect to the penalties that may be included in its rules and regulations. It does not constitute a broad statutory supersession clause with respect to the detailed disciplinary procedures outlined in City Charter §129.8.<sup>29</sup>

As an alternative argument, PBA contends that the following two components of its disciplinary procedure proposal remain mandatory even if the proposal is generally prohibited: a) the provision permitting settlements for minor infractions without the issuance of written charges; and b) the suspension without pay provision. Contrary to PBA's argument, both aspects of the proposal are well within the police disciplinary authority delegated to City officials by City Charter §§129.7 and 129.8.<sup>30</sup> Furthermore,

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<sup>29</sup> In contrast, Second Class Cities Law §4 states explicitly that all of its provisions may be "otherwise changed, repealed or superseded pursuant to law." See, *City of Albany*, *supra* note 11.

<sup>30</sup> Although General Order AGO-027-27 cross-references Civ Serv Law §76, the adoption of that procedure by the Board of Police Commissioners was done pursuant to their authority under City Charter §129.8. Therefore, as a product of a special State law, the adoption of Civ Serv Law §76 does not render City police disciplinary procedures mandatorily negotiable for the entire PBA unit under *Auburn*.

unlike the proposal in *City of New York*<sup>31</sup> we do not construe PBA's suspension without pay proposal to be a wage demand.

We next examine PBA's additional arguments seeking to overturn the ALJ's conclusion that the bill of rights proposal is prohibited. As the ALJ correctly found, and PBA concedes, its proposal is virtually identical to the proposal we concluded was prohibited in *Tarrytown*. In *Tarrytown*, we specifically rejected an argument that the bill of rights proposal was mandatory based upon the *dicta* in *NYCTA* and the enactment of §209-a.1(g) of the Act. Nevertheless, in its brief, PBA makes the same argument without presenting any rationale for the Board to abandon our *Tarrytown* analysis.<sup>32</sup>

In both *Wallkill*<sup>33</sup> and *City of Albany*,<sup>34</sup> we recognized that the Legislature's failure to exempt police officers from coverage under 209-a(1)(g) of the Act supports a narrow construction of *NYCPBA*. Nevertheless, as we concluded in *Tarrytown*, the 2007 amendment to the Act was aimed at overturning the Court of Appeal's decision in *NYCTA*, and not its *NYCPBA* decision.

Therefore, we affirm the ALJ's conclusion that the bill of rights proposal is

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<sup>31</sup> 40 PERB ¶3017 (2007), *confirmed City of New York v New York State Pub Empl Rel Bd*, 41 PERB ¶7001 (Sup Ct Albany County 2008), *appeal dismissed*, 54 AD3d 480, 41 PERB ¶7004 (3d Dept 2008), *lv denied*, 12 NY3d 701, 42 PERB ¶7001 (2009).

<sup>32</sup> PBA's Brief in Support of Exceptions, pp. 20-21.

<sup>33</sup> *Supra* note 12, fn. 46.

<sup>34</sup> The concurrence in *City of Albany*, however, did not reach the issue. *Supra* note 12.

prohibited<sup>35</sup> under *NYCPBA* and *Tarrytown* for unit members ineligible for Civ Serv Law §75 procedures. We differ, however, with her rationale in part, which was based only on City Charter §128.7. In fact, City Charter §128.9 expressly grants the Board of Police Commissioners broad investigatory authority to compel testimony, consistent with its rules and regulations, with respect to "all matters concerning the department or the duties of any officer." This City Charter provision deals directly with investigatory authority over police officers. Indeed, City Charter §128.9 is far more specific in its delegation of investigatory authority than the New York City charter provision in *NYCPBA* and the statutory provision in *Tarrytown*.

Finally, we are not persuaded by PBA's argument that *NYS Troopers PBA* renders the bill of rights proposal mandatory.<sup>36</sup> In *NYS Troopers PBA*, the Court held that an employee organization waived the right of its members to representation during non-disciplinary critical incident interviews. The holding in *NYS Troopers PBA* cannot be reasonably interpreted as upholding the "validity of the contractual disciplinary due process provisions"<sup>37</sup> or constituting an implicit overruling of *NYCPBA* where interrogation procedures in an expired agreement for police officers were found to be prohibited.

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<sup>35</sup> We also affirm the ALJ's alternative conclusion that §1.D.7 of the proposal, which seeks to negotiate rights relating to a criminal investigation, is nonmandatory because criminal investigations are not a term and condition of employment under the Act. See, *City of Rochester*, 12 PERB ¶¶3010 (1979). We are not persuaded by PBA's assertion that *City of Rochester* is distinguishable or that §1.D.7 should be analyzed under *City of Cohoes*, 31 PERB ¶¶3020 (1998), *confirmed sub nom. Uniform Firefighters of Cohoes, Local 2562 v Cuevas*, 32 PERB ¶¶7026 (Sup Ct Albany County 1999), nor *affd*, 276 AD2d 184, 33 PERB ¶¶7019 (3d Dept 2000), *lv denied*, 96 NY2d 711, 34 PERB ¶¶7018 (2001). Nevertheless, we deem the bill of rights proposal to be non-unitary and therefore will not order the remainder of the proposal withdrawn with respect to those PBA unit members eligible to Civ Serv Law §75 procedures.

<sup>36</sup> *Supra* note 7.

<sup>37</sup> PBA's Brief in Support of Exceptions p.18.

B. City's Exceptions to ALJ's Decision

In its exceptions, the City asserts that the ALJ erred in concluding that PBA's GML §207-c proposal is mandatory.<sup>38</sup> We disagree.

PBA's proposed GML §207-c procedure includes a 15-day limitation relating to the following three distinct acts in the initial eligibility process: a) the time for filing an application for benefits; b) the time for the claims manager to render an initial eligibility determination; and c) the time for a claimant to request an arbitral hearing to review the claims manager's denial of an application for benefits.

The proposed GML §207-c procedure also permits a claimant, following a request for a hearing with respect to an initial determination, to request reconsideration by the claims manager of the determination through submission of additional information. Within seven days following receipt of the request for reconsideration, the claims manager must determine whether to modify the determination under consideration at the hearing.

Contrary to the City's assertion, the proposed 15-day time limitation for

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<sup>38</sup> The City's exceptions are limited to the proposed procedures for initial GML §207-c eligibility determinations. The exceptions do not address the negotiability of PBA's proposed procedures relating to disputes over light duty assignments and the termination of benefits. Therefore, they are waived. Rules of Procedure §213.2. We note, however, that the negotiability analysis with respect to GML §207-c termination procedures must include consideration of the property right protected by constitutionally-based minimum due process requirements. *Uniform Firefighters of Cohoes v City of Cohoes*, 94 NY2d 686 (2000).

determining an application for GML §207-c procedures is mandatorily negotiable.<sup>39</sup>

While it is well-settled that GML §207-c grants a municipality the authority to make an initial eligibility determination, the proposed time limitation for a determination does not usurp that statutory right.<sup>40</sup> The argument that the proposed timeframe is unreasonable and impractical targets the merits, rather than the negotiability, of the proposal.

We reach a similar conclusion with respect to the proposed reconsideration procedure. The proposed procedure is fully consistent with the maintenance of the City's statutory right to make eligibility determinations. There is nothing in GML §207-c that precludes a municipality from reconsidering its determination after receiving and evaluating additional information submitted by a claimant.

The City also asserts that the proposed seven-day period for the claims manager to review the new documentation is too short to conduct an adequate review and investigation of the request for reconsideration.<sup>41</sup> This concern, along with the City's expressed fear of potential future manipulation of the proposed procedure by claimants, is relevant to the merits of the proposal, but not to its negotiability.

Finally, we turn to the City's exceptions challenging the ALJ's conclusion that the

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<sup>39</sup> See, *City of Schenectady*, 19 PERB ¶4544 (1986), *affd*, 19 PERB ¶3051 (1986), *confirmed City of Schenectady v New York State Pub Empl Rel Bd*, 135 Misc2d 1088, 19 PERB ¶7023 (Sup Ct Albany County 1986) *affd*, 132 AD2d 242, 20 PERB ¶7022 (3d Dept 1987), *lv denied*, 71 NY2d 803, 21 PERB ¶7007 (1988); *City of Schenectady*, 24 PERB ¶3016 (1991); *City of Schenectady*, 25 PERB ¶3022 (1992) *confirmed sub nom; in part, and modified in part, Schenectady PBA v New York State Pub Empl Rel Bd*, 25 PERB ¶7009 (Sup Ct Albany County 1992), *affd, as modified*, 196 AD2d 171, 27 PERB ¶7001 (3d Dept 1994) *affd*, 85 NY2d 480, 28 PERB ¶7005 (1995).

<sup>40</sup> See, *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>41</sup> City's Brief in Support of Statement of Exceptions pp, 6-8.

proposed arbitration procedure is mandatorily negotiable under *Watertown Police Benevolent Association*<sup>42</sup> (hereinafter *Watertown*) and *Poughkeepsie Firefighters' Association, Local 596, IAFF*<sup>43</sup> (hereinafter *Poughkeepsie*).

The provisions and legislative history of the Act reflect New York's explicit, strong and sweeping public policy favoring the negotiability of grievance-arbitration procedures for the resolution of public sector labor disputes. As the Court of Appeals noted in *Board of Education of Watertown City School District v Watertown City School District*<sup>44</sup>

The enormous growth in the use of collective bargaining agreements has generated vast experience in drafting arbitration clauses. Public sector parties may now use phrases that have been litigated into familiarity. They are free to negotiate language that will define disputes in areas of the broadest permissible scope. Parties are likewise free to negotiate exclusions, and to word arbitration clauses with sufficient clarity for a court to be able to tell, on a threshold determination, whether they intended a permissible subject or type of dispute to be arbitrable or not.<sup>45</sup>

At the same time, the scope of mandatorily negotiable arbitration procedures can be subject to public policy limitations established by the Legislature, in statute, or otherwise

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<sup>42</sup> 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).

<sup>43</sup> 36 PERB ¶¶3014 (2003), *annulled sub nom. Poughkeepsie Prof Firefighters' Assn, Local 596, IAFF v New York State Pub Empl Rel Bd*, 36 PERB ¶¶7016 (Sup Ct Albany County 2003), *revd*, 16 AD3d 797, 38 PERB ¶¶7005 (3d Dept 2005), *affd*, 6 NY3d 514, 39 PERB ¶¶7005 (2006)

<sup>44</sup> 93 NY2d 132, 32 PERB ¶¶7502 (1999).

<sup>45</sup> 93 NY2d at 141-142, 32 PERB ¶¶7502 at 7510.

determined by controlling decisional law.<sup>46</sup>

The Court of Appeals 4-3 decision in *Watertown*, upholding an arbitration proposal with respect to GML §207-c determinations, is reflective of the tension that exists in the law between the expressed public policy favoring the negotiability of grievance-arbitration procedures in the public sector and decisional law, interpreting statutes external to the Act determining that a particular subject is either nonmandatory or prohibited.

In *Watertown*, the majority upheld the Board's decision finding the following proposed general arbitration clause was mandatory under the Act:

Article 14, Section 12--Miscellaneous Provision--the PBA is not seeking to divest any (purported statutory) right the City may have under § 207(c) to initially determine whether the officer was either injured in the line of duty or taken sick as a result of the performance of duty, but rather, the PBA seeks to negotiate the forum--and procedures associated therewith-- through which disputes related to such determinations are processed, to wit: should the officer disagree with the City's conclusion, the PBA proposes the expeditious processing of all disputes related thereto to final and binding arbitration pursuant to PERB's Voluntary Disputes Resolution Procedure.

In contrast, the dissent in *Watertown* opined that the majority's decision was inconsistent with GML §207-c, its' legislative history and precedent holding that eligibility determinations are within the sole province of the municipality.

In *Poughkeepsie*, a unanimous Court affirmed the confirmation of a Board decision finding that a much more elaborate proposed arbitration procedure is

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<sup>46</sup> See, *Watertown*, supra note 42; *Schenectady PBA v. New York State Pub Empl Rel Bd*, supra note 39; *NYCPBA*, supra note 7; *County of Chautauqua v CSEA*, 8 NY3d 513, 40 PERB ¶7522 (2007); *City of Long Beach v CSEA*, 8 NY3d 465, 40 PERB ¶7521 (2007); *Cohoes City Sch Dist v Cohoes Teachers Assn*, 40 NY2d 774, 9 PERB ¶7529 (1976).

nonmandatory. In *Poughkeepsie*, we concluded, based on our interpretation of the proposal, that the proposal sought to give an arbitrator the authority to determine a firefighter's statutory claim of entitlement to GML §207-a benefits, rather than limiting the arbitrator's binding power to review the City's initial determination.

In the present case, PBA's GML 207-c proposal is mandatory under both *Watertown* and *Poughkeepsie*.<sup>47</sup> Like the proposal in *Watertown*, it seeks an arbitral process to resolve disputes over GML §207-c benefits while at the same time recognizing the City's statutory right to determine initial eligibility. Contrary to the City's argument, permitting reconsideration by the claims examiner of the initial eligibility determination does not render the proposal nonmandatory; rather, it constitutes a further recognition of the City's statutory right under GML §207-c.

In addition, the proposal is mandatory under *Poughkeepsie*. It expressly proposes that the arbitrator's scope of review will be limited to determining whether the claims manager had a reasonable basis for the eligibility determination based upon the record before him or her. The mandatory nature of the proposal under *Poughkeepsie* is further bolstered by the proposed prohibition against either party presenting any new documentary evidence at arbitration.

Finally, we reject the City's contention that the proposal is nonmandatory under *Poughkeepsie* because it permits parties to subpoena witnesses. We interpret the subpoena provision, in conjunction with the clause permitting testimony at the arbitration, as granting the arbitrator the discretion to permit testimony by the individuals whose reports were reviewed by the claims manager. A trial may be ordered to resolve

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<sup>47</sup> Therefore, we need not reach PBA's argument that *Poughkeepsie* should be overruled.

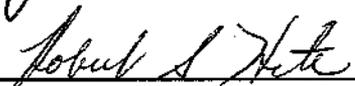
certain questions of fact in an Article 78 proceeding seeking review of an administrative determination issued without a hearing.<sup>48</sup> Therefore, nothing in *Poughkeepsie* prohibits PBA's proposal that would grant an arbitrator the discretion to hear testimony to the same extent that a court might hear testimony in an Article 78 proceeding.<sup>49</sup>

Based on the foregoing, we grant PBA's exceptions, in part, and deny the City's exceptions and affirm the decision of the ALJ, as modified.

IT IS, THEREFORE, ORDERED that the PBA immediately withdraw its disciplinary procedure and bill of rights proposals for unit employees who are ineligible for Civ Serv Law §75 procedures.

DATED: September 17, 2009  
Albany, New York

  
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Jerome Leikowitz, Chairman

  
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Robert S. Hite, Member

  
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Sheila S. Cole, Member

<sup>48</sup> CPLR §7804(g); see also, *Kirley v Department of Fire, City of Oneida*, 138 AD2d 842 (3d Dept 1988); *Faliveno v City of Gloversville*, 215 AD2d 71 (3d Dept 1995), appeal dismissed, 87 NY2d 896 (1995); *lv denied*, 87 NY2d 1055 (1996). See generally, *Mandle v Brown*, 5 NY2d 51 (1958). In addition, discovery may be ordered, when appropriate, pursuant to CPLR §408.

<sup>49</sup> By analogizing to CPLR Article 78 procedures, it is clear that a *de novo* review by an arbitrator would be inappropriate. Furthermore, we are not suggesting that a binding award by an arbitrator provides the only acceptable procedure or standard that would be consistent with *Poughkeepsie*. By way of example, an advisory arbitration proposal would be mandatorily negotiable if it protected a municipality's statutory right to render an initial GML §207-c eligibility determination, and, at the same time, granted a claimant with an opportunity to obtain an advisory opinion with respect to the underlying statutory claim. See, *Plainedge Fed of Teach v Plainedge Union Free Sch Dist*, 58 NY2d 902 (1983).