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State of New York Public Employment Relations Board Decisions from May 2, 2011

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from May 2, 2011

Keywords

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In the Matter of

ALBANY POLICE BENEVOLENT ASSOCIATION,

Petitioner,

- and -

CASE NO. C-6019

CITY OF ALBANY,

Employer,

- and -

**ALBANY POLICE OFFICERS UNION, LOCAL 2841,
COUNCIL 82, AFSCME, AFL-CIO,**

Intervenor/Incumbent.

**GLEASON, DUNN, WALSH AND O'SHEA (RONALD G. DUNN
of counsel), for Petitioner**

**JOHN J. REILLY, CORPORATION COUNSEL (TARA B. WELLS
of counsel), for Employer**

ENNIO CORSI, ESQ., for Intervenor

BOARD DECISION AND ORDER


On October 8, 2010, the Albany Police Benevolent Association (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the City of Albany (employer).

Excluded: All others.

Pursuant to that agreement, a secret-ballot election was held on December 22, 2010, at which a majority of ballots were cast against representation by the petitioner.

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

DATED: May 2, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6024

MAHOPAC CENTRAL SCHOOL DISTRICT,

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION,
INC., LOCAL 1000, AFSCME, AFL-CIO, PUTNAM
COUNTY LOCAL 840**

Intervenor/Incumbent.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has

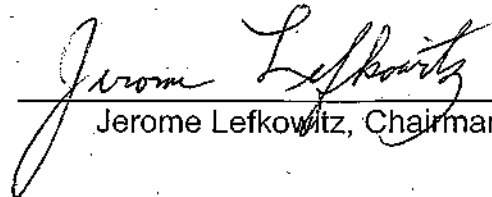
public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Monitors.

Excluded: Substitute (per diem) Monitors and all other titles.

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: May 2, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

In the Matter of

TEAMSTERS LOCAL 687,

Petitioner,

-and-

CASE NO. C-6034

TOWN OF MASSENA,

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,

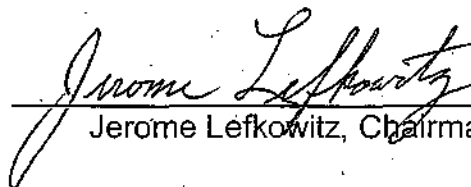
IT IS HEREBY CERTIFIED that the Teamsters Local 687 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of

Included: Receiver of Taxes and Assessments, Deputy Receiver of Taxes and Assessments, Deputy Town Clerk, Court Clerk and Building Maintenance Worker.

Excluded: Part-time employees, Assessor, Library Director, Library Personnel, Highway Superintendent and Secretary/Bookkeeper.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 687. 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: May 2, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

In the Matter of

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

Petitioner,

-and-

CASE NO. C-6036

GATES CHILI CENTRAL SCHOOL DISTRICT,

Employer,

-and-

**GATES CHILI CUSTODIAN, MAINTENANCE AND
SECURITY ASSOCIATION,**

Intervenor/Incumbent.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,¹

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

¹ By letter dated January 18, 2011, the incumbent bargaining agent, Gates Chili

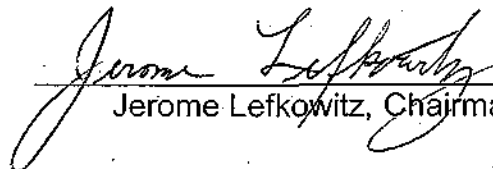
IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Head Custodians, Custodians, Maintenance Mechanics, Groundsmen, Head Groundsmen, Cleaners and Security Workers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: May 2, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

MAJID ZARINFAR,

Charging Party,

CASE NO. U-30336

- and -

BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK and
UNITED FEDERATION OF TEACHERS,

Respondents.

MAJID ZARINFAR, *pro se*

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Majid Zarinfar (Zarinfar) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing an improper practice charge, as amended, filed by Zarinfar alleging that the Board of Education of the City School District of the City of New York (District) violated §§209-a.1(a), (b), (c) and (d) of the Public Employees' Fair Employment Act (Act) and that the United Federation of Teachers (UFT) violated §§209-a.2(b) and (c) of the Act.¹

Pursuant to §204.2 of the Rules of Procedure (Rules), the Director informed Zarinfar that his charge was deficient on the grounds that: he lacks standing to allege violations of §§209-a.1(d) and 209-a.2(b) of the Act; the charge fails to allege any facts that, if proven, would arguably establish a violation of the Act by the District; and the charge fails to clearly and concisely identify specific conduct by UFT that, if proven, would demonstrate that its actions violated the duty of fair representation

After Zarinfar amended his charge, the Director dismissed it on the grounds that it fails to allege sufficient facts to allege violations of the Act by the District or UFT.

EXCEPTIONS

In his exceptions, Zarinfar asserts the Director's decision should be reversed because the allegations of his amended charge, along with the documents attached to his original pleading, were sufficient to state a claim that his termination by the District was discriminatory, arbitrary and in bad faith.² In addition, Zarinfar claims that the Director's dismissal of his amended charge was arbitrary, and based upon a misinterpretation of applicable law. Neither the District nor UFT has filed a response to the exceptions.

FACTS

In considering Zarinfar's exceptions, we assume the truth of the allegations in his amended charge, granting all reasonable inferences to those alleged facts.³

Prior to the discontinuance of his teaching license in September 2010, Zarinfar taught mathematics and was a coordinator of the Technology Department at the Brooklyn School for Global Studies. In January 2010, a co-worker made disparaging remarks regarding his race and ethnicity. When Zarinfar attempted to complain about the comments, the school's interim principal and assistant principal refused to meet

² Subsequent to filing his exceptions, Zarinfar filed a letter with the Board making new allegations against UFT regarding events that took place following the dismissal of his charge. Such allegations are not properly before the Board pursuant to §§204 and 213 of our Rules and will not be considered.

with him.

On May 7, 2010, the interim principal discussed with him the possibility that his probationary period would be extended for another year due to the fact that a formal performance observation had not been conducted. In response, Zarinfar stated that if his probation was extended he would file a grievance. Later that month, Zarinfar was counseled by the assistant principal with respect to alleged inappropriate comments he made to a student. On June 28, 2010, Zarinfar received a satisfactory annual probationary report, his third consecutive satisfactory report.

On September 1, 2010, Zarinfar met with a UFT representative regarding his tenure status. Following an examination of District records, the UFT representative informed Zarinfar that the District had denied him tenure but that he remained on the payroll. The UFT representative provided Zarinfar with documents relating to his status. The following day, the new principal of the Brooklyn School for Global Studies granted Zarinfar permission to attend a professional development session at another high school. However, on September 3, 2010, the principal verbally informed Zarinfar that his license had been discontinued and that he should not report to work on September 7, 2010. During their meeting, the principal refused to provide Zarinfar with documentation regarding his status, and also refused to grant him UFT representation. Thereafter, the District replaced Zarinfar with a younger teacher at the school.

On September 7, 2010, Zarinfar met again with the UFT representative. During their meeting, the UFT representative refused Zarinfar's request that he telephone the

had not received the required written 60-day notice. In addition, the UFT representative refused to represent Zarinfar on two unspecified prior occasions.

DISCUSSION

To the extent that Zarinfar alleges that District took adverse action against him because of his race, national origin and age, or because he reported alleged discriminatory remarks by a co-worker, we lack jurisdiction to hear such claims.⁴ Pursuant to §§209-a.1(a) and (c) of the Act, our jurisdiction is limited to claims of interference and discrimination by an employer with respect to the rights protected under the Act.

Pursuant to §204.2(a) of the Rules, the Director is required to review all newly filed charges to weed out facially deficient claims.⁵ Under the Rule, the Director has the authority to dismiss a charge on the grounds that it fails to allege facts that, as a matter of law, constitute a violation under § 209-a of the Act.

Following our careful review of Zarinfar's amended charge, we affirm the Director's decision because his pleading fails to allege sufficient facts which, if proven, would demonstrate a violation of the Act by the District or UFT.

As the Director correctly held, Zarinfar does not have standing to pursue claims

⁴ Claims of employment discrimination and retaliation in the public sector can be pursued under various other laws including Title VII of the Civil Rights Act of 1964, 42 USC §§2000e, *et seq.*, 42 USC §1983, Executive Law §§296 and 297, and the New York City Administrative Code, §§8-101, *et seq.*

under §§209-a.1(d) and 209-a.2(b) of the Act,⁶ and the amended charge does not allege any facts to support a claim that the District has dominated or interfered with the formation or administration of an employee organization in violation of §209-a.1(b) of the Act.

With respect to his claim under §§209-a.1(a) and (c) of the Act, the amended charge fails to allege sufficient facts to suggest a causal connection between the District's actions and Zarinfar's protected activity. Over a month after Zarinfar allegedly told the school's interim principal that he planned to file a grievance if his probationary term were extended, Zarinfar received a satisfactory probationary evaluation. Although his mathematics license was thereafter discontinued, the amended charge does not allege sufficient facts which, if proven, would create an inference that the District representatives who decided to discontinue his license were aware of his threat to pursue a grievance. In addition, Zarinfar does not allege that the District had knowledge of his meetings with the UFT representative. Finally, Zarinfar's claim that he was denied UFT representation during the September 3, 2010 meeting with the principal does not state a claim under §209-a.1(a) of the Act.⁷

In order to state a claim of a breach of the duty of fair representation in violation of §209-a.2(c) of the Act, the amended charge must allege sufficient facts that, if

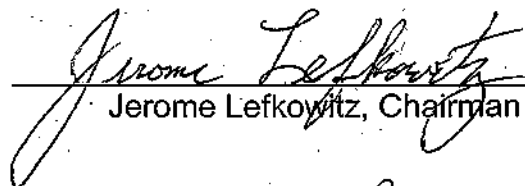
⁶ *Board of Educ of the City Sch Dist of the City of New York (Jenkins)*, 38 PERB ¶13012 (2005).

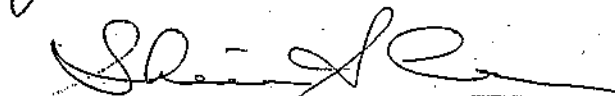
⁷ *State of New York (DOCS)*, 43 PERB ¶12021 (2010); *State of New York (DOCS)*, 43

proven, would demonstrate that UFT's conduct was arbitrary, discriminatory or in bad faith. It is well-settled that an employee organization is entitled to a wide range of reasonable discretion in the representation of its unit members.⁸ The mere allegation that the UFT representative refused to comply with Zarinfar's directive to telephone the school principal, without additional alleged facts, does not state a claim for a breach of the duty of fair representation. Under the Act, an employee organization representative may reasonably decline to accede to a unit member's tactical preference. Zarinfar has not alleged any facts to suggest that the application of that discretion by the UFT representative was arbitrary, discriminatory or in bad faith. Finally, the conclusory assertion that UFT's representative declined to represent him previously does not strengthen any value to Zarinfar's claim because it fails to meet the specificity requirements set forth in §204.1(b)(3) of the Rules.

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

DATED: May 2, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

In the Matter of

EUGENIA PINKARD,

Charging Party,

-and-

CASE NO. U-28996

UNITED FEDERATION OF TEACHERS,

Respondent,

-and-

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

Employer.

EUGENIA PINKARD, *pro se*

**SCHWARTZ, LICHTEN & BRIGHT, PC (STUART LICHTEN of counsel), for
Respondent**

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE
BARGAINING (SETH J. BLAU of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Eugenia Pinkard (Pinkard) to a decision of an Administrative Law Judge (ALJ) dated December 21, 2010, dismissing an improper practice charge, as amended, alleging that the United Federation of Teachers (UFT) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when an attorney assigned from the New York State United Teachers (NYSUT) failed to explain to Pinkard why her employer, the Board of Education of the City School District of the City of New York (District), had not rendered

a decision following a hearing on her grievance.¹

On January 13, 2011, the Board granted Pinkard's request for an extension of time to file exceptions to the ALJ's decision, and she was notified that her exceptions would be considered timely if they were filed and served in accordance with our Rules of Procedure (Rules) not later than February 14, 2011. On February 14, 2011, the Board received Pinkard's exceptions without proof of service upon UFT and the District as required by §213.2 of the Rules. Following a request from the Board, Pinkard submitted written proof demonstrating that on February 16, 2011 she served her exceptions upon UFT and the District by certified mail, return receipt requested.

UFT filed a response seeking dismissal of the exceptions on the grounds that they were untimely served and that they lack merit. The District's response to the exceptions seeks dismissal on the same grounds raised by UFT, and one additional basis: the exceptions fail to meet the specificity requirements of §213.2(b) of the Rules.

EXCEPTIONS

In her exceptions, Pinkard contends that her statutory rights under Education Law §3020-a, and her contractual rights under the District-UFT collectively negotiated agreement (agreement), were violated and should be remedied. In addition, the exceptions include allegations against UFT that are not part of her improper practice charge, and were not determined by the ALJ.

DISCUSSION

Pursuant to § 213.2(a) of the Rules, a party filing exceptions must submit proof of service to the Board demonstrating that the exceptions were served upon all other parties within 15 working days period following receipt of an ALJ's decision. Timely service of exceptions upon all other parties is a necessary component for the timely filing of exceptions under the Rules, and this timeliness requirement is strictly applied.²

In the present case, the Board extended Pinkard's time to serve and file her exceptions until February 14, 2011. The documentation submitted by Pinkard to the Board, however, demonstrates that she did not serve her exceptions upon UFT and the District by certified mail until February 16, 2011. Therefore, her exceptions are untimely, and must be denied.

In the alternative, we would deny Pinkard's exceptions on the merits. Our agency has limited jurisdiction, and we do not have authority to determine alleged violations of Education Law §3020-a, or alleged violations of the terms of an unexpired agreement. There are other venues for such claims. In addition, the filing of exceptions is not a proper vehicle for making allegations that are not included in a charge that was the subject of the ALJ's decision.

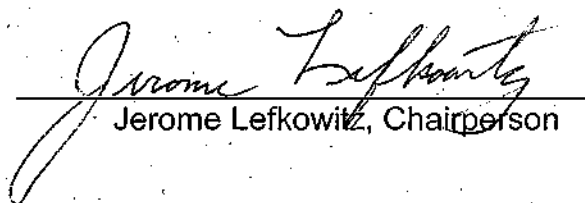
Finally, Pinkard's exceptions are deficient under §213.2(b) of the Rules because they do not specify the grounds for the exceptions, the questions or policy issues she wants the Board to consider, the portion of the ALJ's decision she is challenging and

the sections of the record she relies upon. Although we are mindful that Pinkard is *pro se*, and that her exceptions should be liberally construed, we are unable to discern an arguably meritorious basis for her challenge to the ALJ's decision.

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

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

DATED: May 2, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

In the Matter of

TOWN OF FISHKILL POLICE FRATERNITY, INC.,

Charging Party,

- and -

CASE NOS. U-27331
& U-27568

TOWN OF FISHKILL,

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

**DONOGHUE, THOMAS, AUSLANDER & DROHAN, LLP (JUDITH
CREYLIN MAYLE of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions by the Town of Fishkill Police Fraternity, Inc. (PBA) to a decision by an Administration Law Judge (ALJ) that dismissed a portion of an improper practice charge filed by PBA alleging that the Town of Fishkill (Town) violated §§209-a.1(d) and (e) of the Public Employees' Fair Employment Act (Act) when it changed the tours of duty and work schedules of PBA President Stephen Gallo (Gallo) and PBA Secretary Nicholas DeAntonio (DeAntonio) thereby reducing their total weekly hours of work. The ALJ dismissed that portion of the PBA charge on the basis that the Town satisfied its duty to negotiate the at-issue subject matter.¹

¹ 42 PFRR ¶14577 (2009). However, the ALJ concluded that the Town violated §§209-

EXCEPTIONS

In its exceptions, PBA contends that the ALJ mischaracterized its allegations, misconstrued certain facts, and erred in sustaining the Town's duty satisfaction defense because the parties' expired collectively negotiated agreement (agreement) does not address the subject matter of reducing the hours of work of unit employees. PBA also asserts that the ALJ should have found that the Town violated §209-a.1(e) of the Act by discontinuing the terms of the agreement. The Town supports the ALJ's decision.

FACTS

PBA represents a unit of all part-time Town police officers, including officers holding the in-house title of detective. The town began appointing police officers to the detective position in 1978. Gallo and DeAntonio are part-time Town detectives. Each has a full-time job with other employers: Gallo works as a teacher in New York City and DeAntonio works at a power plant. Pursuant to civil service regulations, the hours of work for part-time Town employees is limited to 20 hours per week.

The Town and PBA are parties to a collectively negotiated agreement that expired on December 31, 2005. Under the agreement, unit members are compensated on an hourly basis pursuant to a negotiated hourly wage schedule.

Article XVII of the agreement is entitled "Scheduling" and states, in pertinent part:

The Chief Executive Officer shall schedule or assign employees to tours of duty on a monthly scheduling basis after obtaining and considering their work hours at their primary jobs for the pertinent month of scheduling. However, assignments to tours of duty shall be in the sole discretion of the Chief Executive Officer or his designee

prior approval of the Chief, may be subject to disciplinary action by the Town Board, and said disciplinary action shall be non-grievable and non-reviewable under the terms of this Agreement or otherwise.

* * * *

The designation of tours of duty, and the number of officers per tour, shall be subject to modification by the Town within its sole discretion and, in consideration thereof, the Town shall not create any full-time police officer positions during the duration of this Agreement, if the creating of any such full-time position results in elimination of any part-time position currently held by any actual member of the Association's bargaining unit as of the date of this Agreement.

* * * *

Assignment of employees to non-regular scheduled tours of duty during any calendar month, shall be based on seniority, within title, on a rotating basis. The list shall flow continuously starting with the next senior employee from where the last employee accepted the non-regular scheduled tour of duty. All employee shall be canvassed. A declination shall move the list to the next employee and so on. An employee who does not respond to the canvass call within ten (10) minutes of that call, shall be deemed a declination.

If an officer scheduled for a regular tour of duty is unable to work that tour, due to excused illness, injury, or emergency, the Chief Executive Officer or his/her designee may hold over the least senior officer working the previous tour, to work the vacant tour of duty, so long as (a) the Chief has exhausted the call-in procedures without obtaining a volunteer, if he/she has had a reasonable opportunity to do so, and (b) the hold-over does not conflict with the officer's primary employment schedule. Hold-over time shall be compensated at time and one-half (1.5X) of the officer's hourly rate of pay.²

Article XVI of the agreement states:

Any other terms and conditions of employment currently existing

agreement. One of PBA's negotiation demands, which the Town opposed, proposed amending Article XVII to include a minimum numbers of hours of a detective's tour and workweek:

The Detective Sergeant shall be scheduled and work three (3) tours of duty Monday through Friday in a minimum of six (6) hour blocks of time, mutually agreeable to the Chief of Police or designee, and the Detective Sergeant. The three (3) Detectives shall be scheduled and work three (3) tours of duty, Monday through Saturday, in a minimum of six (6) hour blocks of time, mutually agreeable to the Chief of Police or designee and the Detective(s).⁴

During his testimony, Gallo acknowledged that PBA made this proposal so that "we would all have the same hour shifts."⁵

Following an impasse in the negotiations, PBA filed a petition for compulsory interest arbitration on March 29, 2006, the interest arbitration took place on January 26, 2007, and an award was issued in January 2008. The interest arbitration panel unanimously rejected PBA's proposal to create a minimum number of hours for tours and workweeks of detectives.⁶

The Town's patrol division has a daily schedule of four six-hour tours. However, there is a different schedule system for detectives. Originally, detective tours were 5

³ Charging Party Exhibit 10, p. 10.

⁴ Respondent Exhibit 8, Attachment, p.4, PBA proposal 9.

⁵ Transcript p. 138

Sunday. Subsequently, the Town created daytime tours to accommodate the availability of detectives.

It is undisputed that detectives are assigned to work different hours, days and tours, depending on each detective's availability and the Town's needs. Prior to November 27, 2006, the Town created monthly schedules based, in part, on the number of hours each detective was available. Detective schedules are subject to modification based upon the time demands of the detective's full-time jobs and the needs of the Town.

Generally, Gallo worked 18 hours in three six-hour tours each week. On occasion, he worked a total of 20 hours per week if an incident held him over from his scheduled tour. DeAntonio, on the other hand, generally worked 20 hours each week with a schedule of two seven-hour tours and one six-hour tour. Due to his full-time job responsibilities, however, DeAntonio worked 18 hours a week in April and May 2006, with a schedule of two three-hour tours and one 12-hour tour. Effective December 1, 2005, the Town changed the schedules of Gallo and DeAntonio to a defined weekly schedule of four five-hour tours.

In January 2007, the Town announced a new schedule for detectives. Three detectives were assigned to weekly daytime tours totaling 18 hours each with the opportunity to work two additional hours per week as flex time. Three other detectives, including Gallo and DeAntonio, were assigned tours totaling 15 hours and they were allotted five hours of flex time. To be eligible to work flex time hours, a detective has to

hours "they'll usually say, okay, go ahead and do it."

DISCUSSION

We begin with PBA's exception asserting that the ALJ misconstrued its allegations by describing the charge as relating to "changes in work schedules" or "tours of duty."⁸ We deny this exception because it is meritless. The express wording of PBA's charge alleges that the Town reduced the hours of Gallo and DeAntonio by unilaterally changing their tours of duty and their work schedules.⁹

We also reject PBA's exceptions regarding the ALJ's description of the number of hours worked by Gallo and DeAntonio prior to January 1, 2007. The evidence presented by PBA during the hearing concerning the respective length of tours and workweeks of each Town detective is incomplete and confusing, at best. This is a by-product of a negotiated scheduling system that grants the Town discretion to designate tours based upon the time commitments of each detective's outside full-time employment. Finally, PBA's arguments regarding the ALJ's conclusions regarding the varying work hours of Gallo and DeAntonio are irrelevant because the Town satisfied its duty to negotiate the subject matter of the charge.

To establish a duty satisfaction defense, evidence must be presented demonstrating that the parties have negotiated an agreement with terms that are

⁷ Transcript, p. 141-4.

⁸ PBA Exception 1

have negotiated a subject to completion, we apply standard principles of contract interpretation focused on discerning the parties' intent by giving a practical interpretation to the language utilized. If the contract language is reasonably clear but susceptible to more than one interpretation, we will consider parol evidence in the record to determine the parties' intent.¹¹

Pursuant to Article XVII of the parties' agreement, the Town has sole discretion to designate tours of duty and to schedule or assign a detective to any particular tour of duty after considering the detective's work hours in his or her primary full-time job. A change to a detective's tour is also subject to the Town's sole discretion. In addition, the Town has contractual authority under Article XVII to create regular and non-regular tours of duty.

The fact that the Town has full contractual authority to unilaterally designate a tour of duty, create both regular and non-regular tours, and assign a detective to tours based upon his or her work hours in outside employment demonstrates that it is reasonably clear that Article XVII grants the Town the authority to unilaterally change the number of hours of a detective's weekly tours and thereby unilaterally decrease the

¹⁰ *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶3023 (2009); *NYCTA*, 41 PERB ¶3014 (2008). We reject PBA's contention that the waiver standard applied in *Onondaga-Madison BOCES*, 13 PERB ¶3015 (1980), *confirmed sub nom. Board of Cooperative Educational Services Sole Supervisory District, Onondaga and Madison Counties v New York State Pub Empl Rel Bd*, 82 AD 2d 691, 14 PERB ¶7025 (3d Dept 1981) is applicable to the present case. The earlier decision resolved a waiver argument premised upon management rights and zipper clauses, which is not the same standard for a duty satisfaction defense. See, *Town of Shawangunk*, 32 PERB ¶3042 (1999); *County of Columbia*, 41 PERB ¶3023 (2008).

Nevertheless, Article XVII may be reasonably interpreted to have more than one meaning based upon its reference to regular and non-regular tours, with certain of those assignments subject to a seniority roster. Therefore, we consider parol evidence in the record to determine whether the Town satisfied its duty to negotiate.

The parties' bargaining history demonstrates that the Town has satisfied its duty to negotiate the subject of reducing the weekly total of hours of detectives. One and one-half years before the at-issue change, PBA placed on the bargaining table a proposed modification to Article XVII to eliminate the Town's discretion regarding the number of hours worked by detectives. Under the proposal, each detective would work a minimum of 18 hours per week over three six-hour tours of duty. PBA unsuccessfully pursued this demand through interest arbitration. We conclude that PBA's pursuit of this proposal eliminates any ambiguity that Article XVII grants the Town sole discretion to reduce or increase the number of hours worked by a particular detective.

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

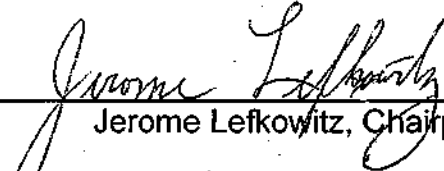
IT IS THEREFORE ORDERED that the Town forthwith:

1. return to the status quo ante with respect to the use of the Town's e-mail system by PBA members;
2. rescind and remove the December 13, 2006 counseling memo from Sergeant DiPalma's personnel file;
3. rescind and delete from Sergeant DiPalma's calendar year 2006

4. sign and post the attached notice at all physical and electronic locations at

which notices to unit employees are customarily posted

DATED: May 2, 2011
Albany, New York



Jerome Lefkowitz, Chairperson



Sheila S. Cole, Member

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 Town of Fishkill in the bargaining unit represented by the Town of Fishkill Police Fraternity, Inc. that the Town of Fishkill will forthwith:

1. return to the status quo ante with respect to the use of the Town's e-mail system by PBA members;
2. rescind and remove the December 13, 2006 counseling memo from Sergeant DiPalma's personnel file;
3. rescind and delete from Sergeant DiPalma's calendar year 2006 evaluation all less than satisfactory ratings based on the limits on his ability to work and all references to the December 13, 2006 counseling memo.

Dated

By

On behalf of the Town of Fishkill

This Notice must remain posted for 30 consecutive days from the date of posting, and

In the Matter of

**ONTARIO COUNTY SHERIFF'S ROAD PATROL
UNIT 7850-05, ONTARIO COUNTY LOCAL 835,
CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO,**

Charging Party,

-and-

CASE NO. U-30353

**COUNTY OF ONTARIO and ONTARIO COUNTY
SHERIFF,**

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK of
counsel), for Charging Party**

KRISTEN J. THORSNESS, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by joint employer County of Ontario and Ontario County Sheriff (Joint Employer) to an interim ruling of an Administrative Law Judge (ALJ) denying the Joint Employer's prehearing motion to dismiss an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) alleging that the Joint Employer violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it allegedly retaliated against CSEA unit president Matthew Peone (Peone) for engaging in protected activity under the Act including presenting CSEA unit member complaints to Ontario County Sheriff Philip Povero (Povero)

After CSEA filed the charge, the Joint Employer moved for particularization pursuant to §204.3(b) of our Rules of Procedure (Rules), which was denied by an Administrative Law Judge (ALJ). Thereafter, the Joint Employer filed an answer to the charge. During the prehearing processing of the charge, CSEA submitted a multi-page document containing additional allegations in support of its charge.

On January 10, 2011, a joint verified notice of claim was served upon the Joint Employer by Peone and co-worker Brain Raeman (Raeman) in their personal capacity. The notice of claim, which was prepared by a private attorney for Peone and Raeman, contains 107 paragraphs alleging, *inter alia*, that each has been the subject of retaliation for rebuffing sexual advances by a superior officer within the Ontario County Sheriff's Office. Some of the alleged acts of retaliation in the notice of claim are the same or similar to the allegations in the charge.

Four days following service of the notice of claim, the Joint Employer made a motion to the ALJ seeking dismissal of CSEA's charge on the grounds that PERB lacks jurisdiction to hear the charge and that Peone has waived the right to pursue his claim before PERB. In a letter decision dated March 1, 2011, the ALJ denied the Joint Employer's motion. Thereafter, the Joint Employer advised the ALJ of its intention to pursue exceptions pursuant to §212.4(h) of the Rules.

EXCEPTIONS

The Joint Employer contends that it has a right to file exceptions to the ALJ's

jurisdiction to hear CSEA's charge based upon the allegations in the notice of claim and that the service of the notice constitutes a waiver of the right of Peone and CSEA to pursue remedies at PERB.

CSEA opposes the Joint Employer's effort at obtaining interlocutory review of the ALJ's interim decision and supports the ALJ's denial of the Joint Employer's motion.

DISCUSSION

In support of its purported right to file exceptions to the ALJ's decision denying its motion, the Joint Employer relies upon the Board's decision in *State of New York*,¹ which determined that a motion for leave to file exceptions was unnecessary when a party seeks to challenge an interim decision of an ALJ on an "ultimate issue." In *State of New York (Division of Parole)*,² however, we reversed *State of New York*³ because it was an aberration from well-established Board precedent requiring a party to seek permission to file exceptions from interim decisions and rulings pursuant to §212.4(h) of the Rules. Therefore, we reject the Joint Employer's argument that it has a right to file exceptions to the ALJ's decision

Although the Joint Employer made a clear tactical decision not to seek leave to file exceptions, we will treat its pleading as a motion for leave pursuant to §212.4(h) of

¹ 39 PERB ¶13032 (2006).

² 40 PERB ¶13007 (2007).

Under our case law, a motion for leave to file exceptions will be granted only when a party demonstrates extraordinary circumstances.⁵ The reasoning underlying this standard is our recognition that it is far more efficient to await final disposition of the merits of a charge before we examine interim determinations. Furthermore, the improvident grant of leave will result in unnecessary delays in the processing of improper practice charges.

The Joint Employer asserts that, as a matter of law, service of the notice of claim divests PERB of jurisdiction and waives the right of Peone and CSEA to pursue the charge. In addition, the Joint Employer submits an affidavit from Sheriff Provero stating that since November 2009, Peone has filed multiple grievances, workplace violence complaints, demands for arbitration, improper practice charges as well as baseless claims with the United States Department of Justice. Sheriff Provero also asserts that "Peone's conduct as road patrol president has significantly undermined the previously harmonious relations" between the Joint Employer and the CSEA unit.⁶ Finally, Sheriff Provero contends that it would be prohibitively expensive for the Joint Employer to

⁴ *CSEA (Arredondo)*, 43 PERB ¶¶3021 (2010); *State of New York-United Court System (McConnell)*, 41 PERB ¶¶3038 (2008).

⁵ *Mt Morris Cent Sch Dist*, 26 PERB ¶¶3085 (1993); *Greenburgh No 11 Union Free Sch Dist*, 28 PERB ¶¶3034 (1995); *Town of Shawangunk*, 29 PERB ¶¶3050 (1996); *New York State Housing Finance Agency*, 30 PERB ¶¶3022 (1997); *Council 82, AFSCME (Bruns)*, 32 PERB ¶¶3040 (1999); *Watertown City Sch Dist*, 32 PERB ¶¶3022 (1999); *UFT (Grassel)*, 32 PERB ¶¶3071 (1999); *City of Newburgh*, 33 PERB ¶¶3031 (2000); *State of New York (Division of Parole)*, *supra*, note 1; *UFT (Gray)*, 41 PERB ¶¶3025 (2008).

would have to produce to respond to the charge's allegations.

Following our review of the Joint Employer's arguments, we conclude that it fails to demonstrate extraordinary circumstances warranting the grant of leave to file exceptions. Pursuant to §205.5(d) of the Act, PERB has exclusive jurisdiction to determine whether an employer has engaged in an improper practice in violation of §209-a.1 of the Act.⁷ The fact that Peone included in the notice of claim an alternative motivational theory underlying the alleged retaliation neither deprives PERB of jurisdiction to hear the charge, nor does it constitute a waiver of jurisdiction.

In drafting §205.5(d) of the Act, the Legislature did not include a choice of forum provision limiting or denying our jurisdiction to hear an improper practice when a party has asserted an arguably inconsistent statutory claim in another forum.⁸ Based upon the plethora of federal and state laws prohibiting discrimination and retaliation in the workplace, it is by no means unusual for there to be related ancillary litigation or administrative proceedings involving the same set of facts in a charge pending before our agency. Although the pursuit of ancillary litigation may not deprive of us of jurisdiction or constitute a waiver, the results of such litigation may, in certain circumstances, form the basis for a collateral estoppel defense to a charge pending at

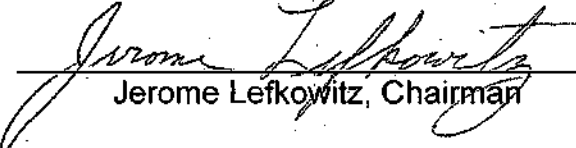
⁷ *West Genesee Cent Sch Dist*, 31 PERB ¶13005 (1998).

⁸ In contrast, other New York labor statutes prohibiting workplace retaliation and

While we are appreciative of the cost concerns raised by Sheriff Provero, such concerns do not justify depriving a charging party of an evidentiary hearing. Nevertheless, the Joint Employer may, if it so chooses, request the ALJ to apply her considerable discretion in the conduct of the hearing.¹⁰

Based upon the foregoing, we deny the Joint Employer's motion for leave to file exceptions.

DATED: May 2, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

⁹ *City of Fulton*, 31 PERB ¶3021 (1998).

¹⁰ *Board of Educ of the City Sch Dist of the City of New York (Ruiz)* 43 PERB ¶3022