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State of New York Public Employment Relations Board Decisions from August 19, 2011

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from August 19, 2011

Keywords

NY, NYS, New York State, PERB, Public Employment Relations Board, board decisions, labor disputes, labor relations

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-6007

COUNTY OF WESTCHESTER,

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,

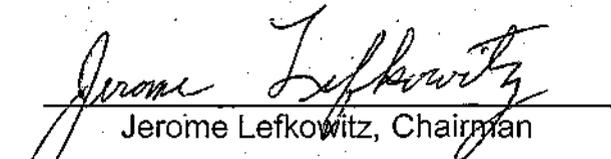
IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for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

Included: All regularly scheduled seasonal and hourly employees in the following titles: Recreation Attendant, Department Aide, Life Guard, Medical Emergency Attendant, Maintenance Laborer, Range Officer, Senior Graphic Illustrator, Senior Recreation Leader, Teacher Assistant, Cleaner, Bridge Attendant, Junior Administrative Assistant, Laborer, Maintenance Mechanic 1 and Secretary 1.

Excluded: Employees in the titles of Assistant Games Manager, Facility Manager, Life Guard Captain, Life Guard Lieutenant, Principle Teacher and all other employees (specifically, but not limited to "ushers" at the County Center for Events, and Community Service Aides for Special Events at County Parks).

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., 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: August 19, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6011

SETAUKET FIRE DISTRICT,

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

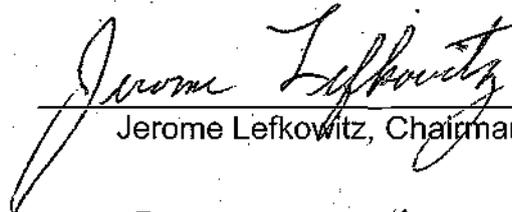
Included: All full-time and regularly working part-time EMT Basic, EMT Critical Care, EMT Paramedic, Maintenance Mechanic II & III,

Automotive Mechanic II & III, Automotive Equipment Operator,
Clerk Typist, Senior Clerk Typist, Emergency Services Dispatcher I
& II, Custodial Worker I, and Fire Protection Coordinator.

Excluded: All other employees.

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

DATED: August 19, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

-and-

CASE NO. C-6045

VILLAGE OF HOLLEY,

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,

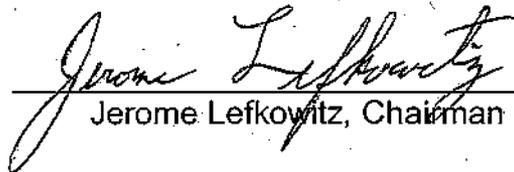
IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for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

Included: Electric and Water Technician, MEO, Clerk/Treasurer, Deputy Clerk/Treasurer, Laborer and Electric Clerk.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., 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: August 19, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**POLICE BENEVOLENT ASSOCIATION OF
NEW YORK STATE, INC.,**

Petitioner,

-and-

CASE NO. C-6056

STATE OF NEW YORK,

Employer,

-and-

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

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 Employment Act,

IT IS HEREBY CERTIFIED that the Police Benevolent Association of New York State, Inc. has been designated and selected by a majority of the employees of the

¹ During the processing of the petition, the incumbent bargaining agent, New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO, advised that it disclaimed any interest in representing the unit and declined to further participate in the proceeding.

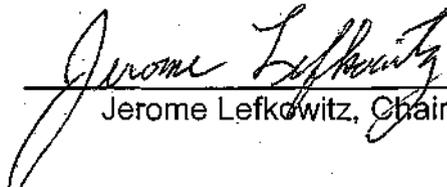
above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Traffic and Park Officer, Park Patrol Officer, Park Patrol Officer (Spanish), Sergeant Park Patrol, Lieutenant Park Patrol, Captain Park Patrol, Environmental Conservation Officer, Environmental Conservation Officer Trainee I and II, Supervising Environmental Conservation Officer, Chief Environmental Conservation Officer, University Police Officer I, University Police Officer I (Spanish), University Police Officer II, University Police Investigator I and II, and Forest Ranger I, II and III.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Police Benevolent Association of New York State, Inc.. 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: August 19, 2011
Albany, New York



Jerome Lefkowitz, Chairman



Sheila S. Cole, Member

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

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, LOCAL 815, ERIE
COUNTY MEDICAL CENTER CORPORATION UNIT
6700-09,**

Charging Party,

- and -

COUNTY OF ERIE,

CASE NO. U-28856

Respondent,

- and -

ERIE COUNTY MEDICAL CENTER CORPORATION,

Intervenor.

**NANCY E. HOFFMAN, GENERAL COUNSEL (MIGUEL G. ORTIZ of
counsel), for Charging Party**

**JAECKLE FLEISCHMANN & MUGEL, LLP (SEAN P. BEITER AND
ELISHA J. BURKART of counsel), for Respondent**

**COLUCCI & GALLAHER, P.C. (GILLIAN D. BROWN AND PAUL G.
JOYCE of counsel), for Intervenor**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the County of Erie (County) and cross-exceptions by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 815, Erie County Medical Center Corporation Unit 6700-09 (CSEA) to a decision by an Administrative Law Judge (ALJ) finding that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it

refused to execute memoranda of agreement negotiated and signed by CSEA and the Erie County Medical Center Corporation (ECMCC).¹ In her decision, the ALJ concluded that the County violated §209-a.1(d) of the Act by refusing to execute the at-issue agreements based upon its legal obligations under Public Authorities Law §3629.

EXCEPTIONS

The County asserts in its exceptions that CSEA failed to present sufficient evidence to demonstrate that the County violated §209-a.1(d) of the Act by failing to execute the at-issue agreements. In addition, the County claims that the ALJ erred in finding a binding past practice that requires the County to execute negotiated agreements reached between ECMCC and CSEA. Finally, it contends that the ALJ made errors of law in concluding that Public Authorities Law §3629 requires the County to sign such agreements and by finding that the County violated §209-a.1(d) of the Act by failing to do so.

CSEA and ECMCC support the ALJ's decision. CSEA, however, has filed a cross-exception to the ALJ's proposed remedial order. CSEA seeks an order requiring the County to pay interest at the maximum legal rate to the employees who have not received salary increases as the result of the improper practice. In addition, CSEA seeks an order requiring the County to cease and desist from refusing to execute future agreements reached between CSEA and ECMCC. The County opposes CSEA's cross-exception.

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

¹ 43 PERB ¶4529 (2010).

FACTS

During the hearing, the parties entered into a stipulation of facts and agreed to the admission of joint exhibits. The stipulated facts and evidence were supplemented by the testimony of three witnesses.

CSEA and the County are parties to a collectively negotiated agreement, which expired on December 31, 2006, for a bargaining unit of certain County employees and employees working at the Erie County Medical Center (ECMC).

In 2003, ECMCC was created as a public benefit corporation to manage and operate the pre-existing ECMC health care network that included: ECMC, a public hospital owned and operated by the County; the Erie County Home and several clinics in the County.² Prior to the creation of ECMCC, ECMC engaged in direct negotiations with employee organizations representing employees at the medical center, without County participation, resulting in memoranda of agreements modifying the terms and conditions of employment of medical center employees. Most of the agreements were also signed by a representative of the County Office of Labor Relations (OLR). During the same period, however, OLR signed memoranda of agreement with employee organizations regarding medical center employees without ECMC as a signatory.³

Following ECMCC's creation, ECMCC Vice President of Human Resources Kathleen O'Hara (O'Hara) routinely negotiated memoranda of agreement with employee organizations that changed the terms and conditions of employment for medical center employees, including providing for upgrades. The County had no involvement in these

² Pub Auth Law §§3626.1, 2, 3 and 4.

³ Joint Exhibit 5.

negotiations except as a signatory to most of the agreements. From March 2004 through March 2008, 20 memoranda of agreements were reached directly between ECMCC and CSEA, and were signed by OLR. Two other agreements in 2006, however, did not conform to this pattern. An agreement to upgrade the ECMCC Director of Imaging was signed only by ECMCC and CSEA and another agreement regarding out-of-title audits at the medical center was signed only by OLR and CSEA.⁴

Two agreements finalized in March 2008 included upgrades for various ECMCC titles in exchange for reductions in their paid lunch period to one-half hour and the elimination of a paid holiday. ECMCC submitted the March 2008 agreements to OLR Commissioner Christopher M. Putrino (Putrino), who signed them on behalf of the County.

In April 2008, Erie County, ECMCC and CSEA commenced unit-wide negotiations for a successor collectively negotiated agreement. The parties exchanged negotiation proposals calling for a general wage increase for the entire bargaining unit. There were, however, no discussions or proposals for upgrades of ECMCC titles. Other proposals called for unit-wide changes in summer work hours, employee lunch periods and paid holidays. The County proposed that the paid one-hour lunch period be replaced by an unpaid half-hour lunch period and that two paid holidays be eliminated.

During the course of the unit-wide negotiations, ECMCC and CSEA continued their direct negotiations without the County's participation, which resulted in numerous ECMCC-CSEA memoranda of agreement. In July and August 2008, Putrino signed all of the ECMCC-CSEA agreements including some that upgraded ECMCC titles in exchange

⁴ Joint Exhibit 5.

for reductions in the paid lunch period and eliminated a paid holiday for the at-issue employees. Putrino testified that he signed these agreements reluctantly because the terms related to pending County unit-wide proposals. There is no evidence, however, that he advised ECMCC or CSEA that the County would not execute subsequent agreements that were negotiated directly between ECMCC and CSEA.

In October 2008, ECMCC and CSEA signed approximately 20 additional memoranda of agreements to upgrade ECMCC laboratory and pharmacy titles. Under the agreements for the laboratory titles, CSEA agreed to waive the contractual right to summer hours and agreed to a reduction in the paid lunch period under the expired collectively negotiated agreement. In addition, many of the agreements required the at-issue laboratory employees to work Election Day without additional compensation. The agreement for the pharmacists' upgrades included a waiver of any wage increases that may be negotiated for calendar years 2007 and 2008.

Following ratification of the agreements by the affected employees, the agreements were sent to Putrino for his signature. However, after consulting with the County Executive, the County Attorney and the County Commissioner of Personnel, Putrino declined to sign the agreements and returned them to ECMCC.

In a November 5, 2008 e-mail to ECMCC Vice President of Human Resources O'Hara, Putrino explained the rationale for the County's actions:

As you know, Erie County and ECMC are in formal negotiations with CSEA for a successor collective bargaining agreement. I believe the title-by-title upgrade approach undermines and weakens our bargaining position with the CSEA unit as a whole. I realize ECMC is experiencing a staff shortage and that the title-by-title upgrades would give ECMC a quick-fix to this need, however, I believe Erie

County must protect its bargaining position strengths as full-scale negotiations continue.⁵

During the hearing, Putrino supplemented the County's explanation. According to Putrino, executing the agreements would have weakened the County's negotiation position because the approximate 80 employees affected by the memoranda of agreements would be less likely to vote to ratify a negotiated unit-wide successor agreement.

It is not disputed that the October 2008 memoranda of agreement have not been implemented and that the salary increases resulting from the upgrades in the ECMCC titles would be paid from ECMCC's budget and not from the County's general budget. However, implementation of reallocation or modification of ECMCC job titles is subject to approval by the County Department of Civil Service.

DISCUSSION

We begin with the County's exception asserting that CSEA failed to meet its burden of proof demonstrating that the County violated §209-a.1(d) of the Act.

Although CSEA did not prove its allegation that the decision by Putrino not to execute the ECMCC-CSEA memoranda of agreement emanated from a directive from the County Executive, proof of such an order is unnecessary to demonstrate that the County violated §209-a.1(d) of the Act. The record establishes that Putrino, as the County's chief negotiator, is vested with the responsibility to execute negotiated agreements consistent with the County's legal obligations. Furthermore, whether the County is obligated to execute the agreements negotiated directly between ECMCC and

⁵ Joint Exhibit 8.

CSEA, without County participation, is a legal, rather than a factual issue, under the Public Authorities Law and the Act. Therefore, we deny the County's first exception.

Contrary to the County's second exception, the ALJ did not conclude that there was a binding past practice between ECMCC and the County. Instead, the portion of the sentence quoted by the County from the ALJ's decision⁶ reveals that the ALJ utilized the history of the relationship between the County and ECMC, and later ECMCC, regarding negotiated agreements as an interpretive tool in construing Public Authorities Law §3629.

Extrinsic aids, such as the historical background of a law, may be employed when seeking to determine the Legislature's intent with respect to an ambiguous statute.⁷ In the present case, however, we conclude that the record evidence regarding the history of negotiated agreements involving medical center terms and conditions of employment cannot be relied upon in interpreting Public Authorities Law §3629.

The primary source of that history is a single joint exhibit in the record identifying the subject matter, the finalization date and the signatories to memoranda of agreement dating back to 1982, well before the creation of ECMCC. The joint exhibit reveals an inconsistent pattern regarding the signatories to the agreements. Some are signed by ECMCC, the County and CSEA, while others are executed only by the County and CSEA or only by ECMCC and CSEA. Furthermore, there is nothing in the legislative

⁶ The fragment quoted by the County is contained in the following sentence from the ALJ's decision: "Even more apparent is the fact that the agency language of §3629.2 of the Public Authorities Law reflects the existence of the bargaining accommodation the parties have developed and acceded to over the years." *Supra* note 1, 43 PERB ¶4529 at 4625.

⁷ McKinney's Statutes §§122, 124.

history of Article 10-C, Title 6 of the Public Authorities Law,⁸ which created ECMCC, indicating that the Legislature was cognizant of any pattern and practice regarding the negotiations and signing of such agreements when the law was enacted. Therefore, we modify the ALJ's decision accordingly.

Next, we turn to the County's contention that the ALJ misinterpreted Public Authorities Law §3629.2 and erred in concluding that the County violated §209-a.1(d) of the Act by failing to execute the memoranda of agreements delivered to the County in October 2008.

The best evidence of legislative intent is the plain language of a statute.⁹ When statutory language is unambiguous, it alone is determinative, and an interpretation of a statute must give effect to the plain meaning of the terms used.¹⁰ As the ALJ correctly recognized, however, a well-established principle of statutory construction requires that the provisions of a statute be construed together, and, if possible, all parts of the statute be harmonized with each other and the general intent of the statute.¹¹

The fundamental legal dispute between the parties in this matter stems from the potentially conflicting provisions contained in Public Authorities Law §§3629 and 3630

⁸ Pub Auth Law §§3625-3646.

⁹ *Webster Cent Sch Dist v New York State Pub Empl Rel Bd*, 75 NY2d 619, 23 PERB ¶7013 (1990); *Brooklyn Excelsior Charter Sch and Buffalo United Charter Sch*, 44 PERB ¶3001 (2011).

¹⁰ *Charter Development Co v City of Buffalo*, 6 NY3d 578 (2006).

¹¹ *See, Friedman v Connecticut General Life Ins. Co.*, 9 NY3d 105 (2007); *People v Mobil Oil Corp*, 48 NY2d 192 (1979); McKinney's Statutes §98.

with respect to the powers and responsibilities of the County and ECMCC under the Act.¹²

¹² Sections 3629.2, 3, and 5 of the Public Authorities Law state:

2. The employees of [ECMCC] shall, for all purposes of article fourteen of the civil service law, be deemed to be employees of the county of Erie and shall be employed within the current county of Erie bargaining unit designation. The county office of labor relations shall, for all purposes of article fourteen of the civil service law, act as agent for [ECMCC] and shall, with respect to [ECMCC], have all the powers and duties provided under article twenty-four of the executive law. Those persons who become employees of [ECMCC] pursuant to subdivision one of this section or who enter into the service of [ECMCC] following the effective date of the transfer shall retain their current bargaining unit designations. [ECMCC] and the county shall recognize the existing certified or recognized employee organizations for county employees as the exclusive collective bargaining representatives for such employees.

Titles within collective bargaining units in existence prior to the transfer of operations to [ECMCC] shall remain in those units and shall not be altered by the public employment relations board without the consent of [ECMCC], the county, and the recognized or certified representatives of the negotiating units involved. New titles created after the date of the transfer of operations to [ECMCC] shall be placed in the appropriate unit of county employees consistent with the provisions of article fourteen of the civil service law.

3. [ECMCC] shall be bound by all collective bargaining agreements between the county of Erie and such collective bargaining representatives in effect as of the date of transfer of operations to [ECMCC] and any successor agreements between such parties.

5. Nothing contained in this title shall be construed to affect:

- (a) the rights of employees pursuant to a collective bargaining agreement;
- (b) the bargaining relationship between the executive branch of the county and an employee organization; or
- (c) existing law with respect to an application.

Public Authorities Law §§3630.21 and 27, which grant ECMCC certain general powers, as limited by Article 10-C, Title 6 of the Public Authorities Law, state:

ECMCC was created as a corporate body in 2003 to manage and operate the pre-existing ECMC health care network.¹³ The purpose for creating ECMCC was to ensure that health care services would be provided to the residents of the State of New York and the County of Erie, including those without the financial means to pay for such services.¹⁴ In Public Authorities Law §3626.5, the Legislature declared that:

The needs of the residents of the state of New York and of the county of Erie can best be served by the operation of the Erie County Medical Center healthcare network through a public benefit corporation having the legal, financial, and managerial flexibility to take full advantage of opportunities and challenges presented by the evolving health care environment.

In their respective briefs, ECMCC and CSEA contend that ECMCC and the County do not constitute a joint employer for purposes of the Act. However, in *Brooklyn Excelsior Charter School and Buffalo United Charter School*,¹⁵ we concluded that Public Authorities Law §3629 creates a statutory joint employer relationship between the County and ECMCC. Similarly, an ALJ in *County of Erie and Erie County Medical*

21. to appoint such officers, employees, and agents as [ECMCC] may require for the performance of its duties and to fix and determine their qualifications, duties, and compensation, subject to the provisions of the civil service law and any applicable collective bargaining agreement, and to retain or employ counsel, auditors, engineers, and private consultants on a contract basis or otherwise for rendering professional, management, or technical services and advice;

27. to make, adopt, amend, enforce, and repeal rules for its governance and internal management and personnel practices, subject to article fourteen of the civil service law, where applicable.

¹³ Pub Auth Law §§3626.1, 2, 3 and 4.

¹⁴ Pub Auth Law §3625.6.

¹⁵ *Supra*, note 8.

*Center Corporation*¹⁶ reached a similar legal conclusion citing the shared responsibilities and control by the County and ECMCC over the terms and conditions of employment of the at-issue unit employees in that case. The County and ECMCC did not file exceptions to that portion of the ALJ's decision, and we, therefore, concluded that they had waived a challenge to her joint employer determination under our Rules of Procedure.¹⁷

Read together, the terms of Public Authorities Law §§3629 and 3630 demonstrate a clear legislative intent to create a statutory joint employment relationship between the County and ECMCC, but with unique characteristics distinct from those of other joint employers designated under the Act.

When the facilities and operations of the ECMC health care network were transferred from the County to ECMCC in January 2004, County medical center employees became ECMCC employees and are deemed public employees for all purposes.¹⁸ Nevertheless, as a matter of law, ECMCC employees are also deemed County employees for purposes of the Act, remain within the applicable bargaining unit

¹⁶ 42 PERB ¶4511 (2009), *affd*, 43 PERB ¶3008 (2010).

¹⁷ *Supra*, note 16, 43 PERB ¶3008 at 3027, n. 2. Furthermore, in an earlier decision, we found that both the County and ECMCC violated §209-a.1(d) of the Act when ECMCC unilaterally implemented drug and alcohol testing and criminal background checks on County employees transferring into ECMCC or returning from being laid-off. *County of Erie and Erie County Medical Center Corp*, 39 PERB ¶3036 (2006), *confirmed Erie County Medical Center Corp v New York State Pub Empl Rel Bd*, 48 AD3d 1094, 41 PERB ¶7002 (4th Dept 2008).

¹⁸ Pub Auth Law §3629.1. *See also*, *County of Erie and Erie County Medical Center Corp*, 39 PERB ¶3036 (2006), *confirmed sub nom.*, *Erie County Medical Center Corp v New York State Pub Empl Rel Bd*, 48 AD3d 1094, 41 PERB ¶7002 (4th Dept 2008).

of County employees, and the bargaining relationships between the County and the applicable employee organizations remain unaffected.¹⁹

Both the County and ECMCC are required to recognize the existing certified and recognized employee organizations and this Board is prohibited from altering the composition of those units without the consent of the County, ECMCC and the applicable employee organization.²⁰ These Public Authorities Law provisions are at sharp variance with our well-established precedent under the Act that a separate bargaining unit is the most appropriate for employees of a joint employer.²¹

To compound the complexity of the legislatively created County-ECMCC relationship, ECMCC is bound by the terms of existing collectively negotiated agreements as well as the terms of any successor agreements negotiated by the County with the certified or recognized employee organization.²² At the same time, ECMCC is granted certain general powers, as limited by Article 10-C, Title 6 of the Public Authorities Law, to appoint employees, determine employee duties, set compensation and create, amend, enforce and repeal managerial and personnel practices subject to the applicable provisions of the Act.²³

¹⁹ Pub Auth Law §§3629.2 and 5(b).

²⁰ See, Pub Auth Law §3629.2.

²¹ *County of Ulster and Ulster County Sheriff*, 3 PERB ¶13032 (1970) *confirmed*, *County of Ulster and Ulster County Sheriff Office v CSEA*, 64 Misc2d 799, 3 PERB ¶17013 (Supreme Court Albany County 1970), *modified*, 37 AD2d 437, 4 PERB ¶17015 (3d Dept 1971); *County of Putnam*, 33 PERB ¶13001 (2000).

²² Pub Auth Law §3629.3.

²³ Pub Auth Law §3630.21 and 27.

In the present case, the ALJ concluded that the County violated §209-a.1(d) of the Act by failing to execute the October 2008 ECMCC-CSEA agreements between ECMCC and CSEA based upon the County's legal obligations pursuant to §204.3 of the Act and the following sentence in Public Authorities Law §3629.2:

The county office of labor relations shall, for all purposes of article fourteen of the civil service law, act as agent for [ECMCC] and shall, with respect to [ECMCC], have all the powers and duties provided under article twenty-four of the executive law.

This sentence explicitly mandates that, for purposes of the Act, the County OLR acts as the "agent for" ECMCC and OLR is granted the same "powers and duties" of the Governor's Office of Employee Relations (GOER) under Executive Law, Article 24. Unlike GOER's permissive responsibilities for assisting the Governor under Executive Law §653, however, OLR's agency responsibilities for ECMCC in conducting collective negotiations and in executing agreements is mandatory. Therefore, we must modify the ALJ's decision finding that the OLR-ECMCC relationship is equivalent to the Governor-GOER relationship under the Executive Law.

In harmonizing the provisions of Public Authorities Law §§3629 and 3630 we reiterate that the County and ECMCC are a joint employer and we conclude that OLR is a common agent for both components of the joint employer for purposes of the Act. Under the facts and circumstances of this case, however, it is not necessary for us to resolve the core statutory issue raised in the County's exceptions: whether OLR, as ECMCC's statutory agent, has a legal obligation to sign on behalf of the County all negotiated agreements reached directly between ECMCC and CSEA.

We conclude that §209-a.1(d) of the Act was violated when OLR failed to sign the October 2008 agreements because the County had previously acquiesced in ECMCC's conducting separate direct negotiations with CSEA resulting in memoranda of agreement. As a general matter, each component of a joint employer has an obligation to notify the other when engaging in direct negotiations with an employee organization. The evidence in the present case, however, reveals that the County had actual knowledge of the direct ECMCC-CSEA negotiations since the creation of ECMCC. Those negotiations resulted in the County executing multiple agreements that included upgrades for specific titles at ECMCC. For example, OLR Commissioner Putrino executed agreements in March, July and August 2008 that had been negotiated directly between ECMCC and CSEA. Although Putrino testified of his purported reluctance to sign the July and August 2008 agreements, it is not disputed that he did not notify ECMCC and CSEA that OLR would no longer execute similar future agreements on behalf of the County. Under the particular facts and circumstances of this case, we conclude that the County was obligated to inform ECMCC and CSEA of its intent to refrain from signing future agreements resulting from their direct negotiations. The County's failure to provide such notification created a reasonable belief that ECMCC had the authority to continue to engage in binding direct negotiations with CSEA on behalf of the joint employer under the Act. "[W]hen there is a joint employer relationship and one of the joint employers apparently cloaks the other joint employer to act on his behalf in negotiations," the refusal of either component of the joint employer to execute the agreement memorializing the negotiated terms and conditions violates §209-a.1(d)

of the Act.²⁴ Therefore, we affirm the ALJ's decision finding a violation of §209-a.1(d) of the Act, as modified.

In reaching our decision today, we are fully cognizant that our interpretation of the Public Authorities Law is not subject to judicial deference because statutory construction is a function of the courts.²⁵ Indeed, a plenary action might be the most appropriate venue for resolving future disputes between the County and ECMCC over their unique statutory joint employment relationship under Public Authorities Law §§3629 and 3630. In fact, the County's financial obligations to ECMCC under Public Authorities Law §3632 were previously resolved only through extensive litigation by and between those parties in Erie County Supreme Court.²⁶

CSEA's Cross-Exception

Pursuant to §205.5(d) of the Act, PERB has broad remedial authority to order make-whole relief including ordering a party to cease and desist from engaging in an improper practice, and to order such affirmative relief, including back wages, which will effectuate the policies of the Act. Following a careful review of the record, we grant CSEA's cross-exception, in part, and modify the ALJ's proposed remedial order to mandate that the County refrain from interfering with ECMCC offering a make-whole

²⁴ *William B. Martin, Sheriff of Ulster County*, 6 PERB ¶3084 at 3136 (1973) enforced, *New York State Pub Empl Rel Bd v Martin*, 78 Misc2d 1072, 7 PERB ¶7014 (Supreme Court Albany County 1974).

²⁵ *Newark Valley Cent Sch Dist v New York State Pub Employ Rel Bd*, 83 NY2d 315, 27 PERB ¶7002 (1994).

²⁶ *Erie County Medical Center Corp v County of Erie, New York*, Index No. 12005-1853 (Supreme Court Erie County 2005), *affd*, 41 AD3d 1244 (4th Dept 2007).

remedy including back wages and benefits, along with interest at the maximum legal rate, to all ECMCC employees adversely impacted by the improper practice.²⁷

In addition, we modify the ALJ's remedial order to require that the notice be posted at all physical and electronic locations customarily used to post notices to unit employees.²⁸

However, we deny CSEA's request for an order requiring the County to cease and desist from refusing to execute future agreements reached between CSEA and ECMCC because such an order would be inappropriate under the facts and circumstances of the present case.

Based upon the foregoing, we affirm the ALJ's decision, as modified.

IT IS, THEREFORE, ORDERED that the County:

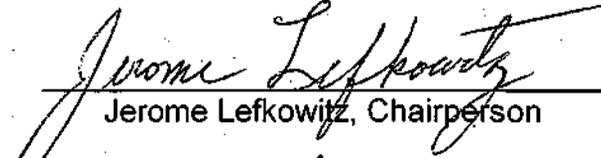
1. Forthwith execute the memoranda of agreement proffered in October 2008;
2. Refrain from interfering with ECMCC offering a make-whole remedy, including back wages and benefits, along with interest at the maximum legal rate, to all ECMCC employees adversely affected by the County's improper practice based upon the County's failure to execute the October 2008 memoranda of agreement between ECMCC and CSEA;

²⁷ Ordinarily, we would have found a violation against the County and ECMCC as a joint employer, and issued a remedial order against that joint employer. See, *County of Erie and Erie County Medical Center Corp*, *supra*, note 17. However, CSEA filed its charge against the County and not the joint employer. Therefore, our remedial order is directed at the County for violating the Act. See, *William B. Martin, Sheriff of Ulster County*, *supra*, note 24. We note that consistent with the parties' stipulation before the ALJ, the implementation of the upgrades of the ECMCC job titles remain subject to approval by the County Department of Civil Service. See also, *Evans v Newman*, 74 AD2d 240, 12 PERB ¶7022 (3d Dept 1979), *affd*, 49 NY2d 904, 13 PERB ¶7004 (1980).

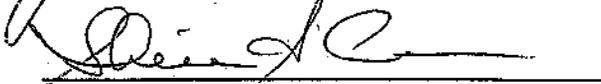
²⁸ NYCTA, 43 PERB ¶3038 (2010).

3. Sign and post the attached notice in all physical and electronic locations normally used for written communications to CSEA-represented employees at ECMCC.

DATED: August 19, 2011
Albany, New York



Jerome Lefkowitz, Chairperson



Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO THE DECISION AND ORDER OF THE

NEW YORK STATE PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the County of Erie in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 815, Erie County Medical Center Corporation Unit 6700-09 that the County of Erie shall:

1. Execute the ECMCC-CSEA memoranda of agreement proffered in October 2008;
2. Not interfere with ECMCC offering a make-whole remedy, including back wages and benefits, along with interest at the maximum legal rate, to all ECMCC employees adversely affected by the County's improper practice based upon the County's failure to execute the October 2008 memoranda of agreement between ECMCC and CSEA.

Dated

By
on behalf of County of Erie

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

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

In the Matter of

**COUNTY OF ORANGE and SHERIFF OF ORANGE
COUNTY,**

Charging Party,

-and-

CASE NO. U-28693

**ORANGE COUNTY DEPUTY SHERIFF'S POLICE
BENEVOLENT ASSOCIATION, INC.,**

Respondent.

**ORANGE COUNTY DEPUTY SHERIFF'S POLICE
BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

-and-

CASE NO. U-28738

**COUNTY OF ORANGE and SHERIFF OF ORANGE
COUNTY,**

Respondent.

**LAMB AND BARNOSKY, LLP (RICHARD K. ZUCKERMAN of counsel), for
County of Orange and Sheriff of Orange County**

**JOHN M. CROTTY, ESQ., for Orange County Deputy Sheriff's Police
Benevolent Association**

BOARD DECISION AND ORDER

These cases come to the Board on exceptions filed by the Orange County Deputy Sheriff's Police Benevolent Association, Inc., (PBA) and cross-exceptions by the County of Orange and Orange County Sheriff (Joint Employer) to a decision of an Administrative

Law Judge (ALJ).¹ In Case No. U-28693, the Joint Employer alleges that PBA violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it sought interest arbitration of proposals that are nonarbitrable pursuant to §209.4(g) of the Act. In Case No. U-28738, PBA alleges that the Joint Employer violated §209.a-1(d) of the Act when it sought interest arbitration of proposals that are nonarbitrable under §209.4(g) of the Act.

On a stipulated record, the ALJ held that PBA violated §209-a.2(b) of the Act by submitting the following demands to interest arbitration because they are not directly related to compensation as required by §209.4(g) of the Act: PBA proposal #2, sick leave; proposal #4, compensatory time to the extent it deals with the conversion of accumulated leave; PBA proposal #7, holidays, PBA proposal #8, vacation; and PBA proposal #9, personal leave. In addition, the ALJ found that the Joint Employer violated the Act by submitting its proposal #9, leave without pay to interest arbitration because it is also not directly related to compensation. The ALJ determined that PBA did not violate the Act when it submitted PBA proposal #1, flex time to interest arbitration and the Joint Employer did not violate the Act when it submitted its proposal #8, excused absences to interest arbitration.

EXCEPTIONS

In its exceptions, PBA contends that the ALJ erred in finding its sick leave, compensatory time, holidays, vacation and personal leave proposals are nonarbitrable. In addition, PBA excepts to the ALJ's finding that the County's excused absence proposal is arbitrable. The Joint Employer supports the ALJ's conclusion that PBA's sick leave, compensatory time, holidays, vacation and personal leave proposals are

¹ 43 PERB ¶4511 (2010).

nonarbitrable. The Joint Employer, however, excepts to the ALJ's finding that PBA's flex time demand is arbitrable and to her determination that the Joint Employer's leave without pay proposal is nonarbitrable.

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

FACTS

PBA and the Joint Employer are parties to a collective bargaining agreement, which expired on December 31, 2006. After the parties failed to reach agreement on terms for a successor agreement, PBA filed a petition for compulsory interest arbitration. The Joint Employer filed a response to the petition and an improper practice charge, Case No. U-28693, which alleges that PBA violated §209-a.2(b) of the Act by submitting to interest arbitration various proposals including proposals concerning flex time, sick leave, compensatory time, holidays, vacation, and personal leave. Shortly thereafter, PBA filed an improper practice charge, Case No. U-28738, which alleges that the Joint Employer violated §209-a.1(d) of the Act when it submitted to interest arbitration certain demands including the proposals regarding excused absence and leave without pay. The charges were consolidated by the ALJ and determined based upon a stipulated record in lieu of a hearing.

The specific terms of the at-issue proposals before us are set forth in the appendix to this decision.

DISCUSSION

We begin with PBA's exceptions to the ALJ's finding that PBA's proposals on sick leave, compensatory time, holidays, vacation and personal leave are nonarbitrable

pursuant to §209.4(g) of the Act.

Section 209.4(g) of the Act states, in relevant part:

With regard to any organized unit of deputy sheriffs...the provisions of this section shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions proscribed² [sic] by law.

In *New York State Police Investigators Association* (hereinafter, *State Police*),³ the Board interpreted the subject matter exclusions to interest arbitration for impasses involving members of the State Police set forth in former §209.4(e) of the Act. The interpretation of former §209.4(e) of the Act in *State Police* is relevant in determining the exceptions and cross-exceptions in the present cases because the arbitrable and nonarbitrable subjects in that former provision are identical to those set forth in §209.4(g) of the Act.⁴

² Should be "prescribed".

³ *New York State Police Investigators Assn*, 30 PERB ¶3013 (1997), *confirmed sub nom.*, *New York State Police Investigators Assn v New York State Pub Empl Rel Bd*, 30 PERB ¶7011 (Supreme Court Albany County 1997).

⁴ *Putnam County Sheriff's Dept PBA, Inc.*, 38 PERB ¶3013 (2005); *Ulster County Deputy Sheriff's PBA, Inc.*, 38 PERB ¶3033 (2005). In 2001 and 2002, the Legislature amended §209.4(e) of the Act to modify the subject matter exclusions for impasses involving members of the State Police. L 2001, c 587, L 2002, c 232. See, *Town of Wallkill*, 42 PERB ¶3017 (2009), *pet dismissed*, 43 PERB ¶7005 (Supreme Court Albany County 2010). Section 209.4(e) of the Act currently excludes from interest arbitration "issues relating to disciplinary procedures and investigations or eligibility and assignment to details and positions, which shall be governed by other provisions prescribed by law."

As part of the Board's analysis in *State Police*, it examined the Legislature's use of the term "compensation" in other provisions of the Act, including §209.5(d)(ii), regarding interest arbitration for certain transit workers, which states:

the overall compensation paid to the employees involved in the impasse proceeding, including direct wage compensation, overtime and premium pay, vacations, holidays and other excused time, insurance, pensions, medical and hospitalization benefits, food and apparel furnished, and all other benefits received;

In interpreting and applying the statutory phrase "directly relating to compensation" in former §209.4(e), the Board emphasized the importance of the non-exclusive examples of arbitrable subjects "directly relating to compensation" listed by the Legislature: "salary, stipends, location pay, insurance, medical and hospitalization benefits." In addition, based upon the Legislature's use of the limiting term "directly", the Board concluded that the phrase "directly relating to compensation" is one which makes a proposal arbitrable according to the degree of the relationship between the proposal and compensation.⁵ Furthermore, the Board set forth the following test for arbitrability:

The degree of a demand's relationship to compensation is measured by the characteristic of the demand. If the sole, predominant or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent *directly* relates to compensation. A demand has compensation as its sole, predominant or primary characteristic only when it seeks to effect some change in amount or level of compensation by either payment from the State to or on behalf of an employee or the modification of an employee's financial obligation arising from the

⁵ *Supra*, note 3, 30 PERB ¶¶3013 at 3028. See also, *County of Suffolk and Suffolk County Sheriff*, 40 PERB ¶¶3022 (2007) where we found the use of the term 'directly' in §209.4(g) of the Act demonstrated a legislative intent to narrow the range of arbitrable proposals involving deputy sheriffs to those proposals where the sole, predominant or primary characteristic seeks a modification in the amount or level of compensation.

employment relationship (e.g., a change in an insurance co-payment).⁶ [Emphasis in original]

Applying this test, the Board affirmed the ALJ's conclusion that the employee organization's various demands for time-off from work without loss of pay were not arbitrable because they were not directly related to compensation.⁷ In reaching that conclusion, the Board found that the sole predominant characteristic of each leave proposal was hours of work noting that the demands sought only the maintenance of the level of compensation by disallowing a wage reduction based upon an employee's absence.

In contrast, the Board reversed the ALJ's findings with respect to the proposals for dependent education costs and funeral expenses when a unit member dies in the line of duty, concluding that those proposals were arbitrable because they were indistinguishable from the conditional insurance, medical and hospitalization benefits listed as arbitrable in the statute.

On appeal, Supreme Court, Albany County adopted the Board's test for arbitrability and confirmed the conclusion that the leave proposals seeking time-off without a loss of pay were nonarbitrable and that the proposals for dependent education costs and funeral expenses were arbitrable. In the portion of the Court's decision confirming the nonarbitrability of the leave proposals, the Court stated that "these demands may eventually confer an economic benefit upon the employee; however,

⁶ *Supra* note 3, 30 PERB ¶3013 at 3028.

⁷ The at-issue leave proposals related only to the amount of holiday, meal period, sick leave, vacation and bereavement leave entitlement. *Supra*, note 3, 30 PERB ¶3013 at 3032-3033.

simply because they represent potential compensation does not mean that they are arbitrable because they do not *directly* relate to compensation.”⁸ [Emphasis in original.]

In *Putnam County Sheriff's Department Police Benevolent Association*⁹ (hereinafter, *County of Putnam*), the Board held that proposals to increase the sick leave buyout provision of the parties' agreement and to create a monetary sick leave incentive program were nonarbitrable under §209.4(g) of the Act because they related only to future “potential” compensation and, therefore, the sole or predominant characteristic of the proposals was not compensation. In reaching this conclusion, the Board reiterated the *State Police* arbitrability test and then cited to the Court's *dicta* in *State Police* indicating that the potentiality of future compensation resulting from a proposal does not necessarily render it directly related to compensation. At the same time, the Board ruled in *County of Putnam* that proposals seeking retroactive payment of “wages, economic and other benefits” and health insurance benefits for current employees upon retirement were arbitrable under §209.4(g) of the Act.¹⁰

In *Sullivan County Patrolmen's Benevolent Association*¹¹ (hereinafter, *County of Sullivan*), the Board found that various demands were nonarbitrable under §209.4(g) of the Act. In that case, the Board concluded that a proposal seeking the conversion of

⁸ *New York State Police Investigators Assn v New York State Pub Empl Rel Bd, supra*, note 3, 30 PERB ¶7011, at 7020.

⁹ *Supra*, note 4.

¹⁰ In *County of Putnam, supra*, note 4, the Board also held that a demand regarding a procedure for the resolution of overtime disputes and clarification of the employees covered by a prior stipulation between the parties were nonarbitrable.

¹¹ 39 PERB ¶3034 (2006).

overtime compensation to compensatory time and a method of payment for accumulated compensatory time related to potential compensation and therefore is not directly related to compensation under *County of Putnam*. The Board also held in *County of Sullivan* that a proposal regarding the accumulation of and payment for holiday leave was not nonarbitrable under *State Police* because it was predominantly a demand for paid time off from work. Finally, the Board found in *County of Sullivan* that proposals to increase the rate of accumulation of vacation and sick leave and to permit the conversion of such unused leave to cash or be banked in a health insurance retirement account were predominantly proposals with respect to the accrual of leave time under *County of Putnam*.

PBA concedes in its exceptions that the arbitrability test originally articulated in *State Police* is applicable to determining whether its proposals in the present case are arbitrable under §209.4(g) of the Act. PBA contends, however, that the arbitrability of its proposals should not be analyzed based upon *County of Putnam* and *County of Sullivan* because those decisions misconstrued and misapplied the *State Police* arbitrability test, and the decisions are inconsistent with the purposes and policies of §209.4(g) of the Act. PBA argues, therefore, that *County of Putnam* and *County of Sullivan* should be reversed. PBA also urges partial reversal of *State Police* on the grounds that the finding of nonarbitrability of the leave provisions in that case constituted a misapplication of the arbitrability test.

In response to PBA's exceptions, the Joint Employer contends that the arbitrability of PBA's proposals should be examined based upon the decisions in *County of Putnam* and *County of Sullivan*, and that there is no reason for PERB to reverse

those decisions.

It is well-settled that the doctrine of *stare decisis* is applicable to administrative agencies, as well as the courts.¹² The purpose of *stare decisis* is "to promote efficiency and provide guidance and consistency in future cases by recognizing that legal questions, once settled, should not be reexamined every time they are presented."¹³ We recognize, further, that the doctrine of *stare decisis* is particularly important for public sector labor relations because predictability and consistency are essential for assuring harmonious labor-management relations. At the same time, like the courts, PERB may correct erroneous interpretations of law by reversing prior precedent when to do so would effectuate the policies of the Act.¹⁴

Following a careful review of the Act and our precedent, we reaffirm that the appropriate test for determining whether a particular demand is arbitrable under §209.4(g) of the Act is the one originally announced in *State Police*. Under that test, each proposal must be examined separately to discern whether its sole, predominant or primary characteristic is a modification in the amount or level of compensation. Consistent with *State Police*, in applying that test, we will compare a proposal with the subjects specifically identified by the Legislature as being arbitrable: "salary, stipends,

¹² *Charles A. Field Delivery Service, Inc. v Roberts*, 66 NY2d 516 (1985).

¹³ *People v Bing*, 76 NY2d 331, 338 (1990).

¹⁴ *County of Orange*, 14 PERB ¶3060 (1981); *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), *confirmed and mod, in part*, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶3016 (2009); *City of Cohoes*, 31 PERB ¶3020 (1998), *confirmed sub nom., Uniformed Firefighters of Cohoes, Local 2562 v Cuevas*, 32 PERB ¶7026 (Supreme Court Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶7019 (3d Dept 2000) *lv denied*, 96 NY2d 711 (2001).

location pay, insurance, medical and hospitalization benefits." In addition, we will compare the proposal with those subjects declared by the Legislature to be nonarbitrable: "job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation."

Contrary to PBA's argument, the *State Police* decision correctly applied the arbitrability test by concluding that proposals limited to seeking an increase in the amount of accumulated leave without a wage reduction are not directly related to compensation. We, however, agree with PBA that the Board in *County of Putnam* misapplied the *State Police* test for arbitrability when it concluded that the two proposals that were limited to seeking supplemental compensation for the nonuse of sick leave were nonarbitrable under §209.4(g) of the Act because they related only to future "potential" compensation. In reaching its decision in *County of Putnam*, the Board overlooked the substantive differences between those proposals, which explicitly sought monetary compensation, and the proposals in *State Police* that sought only an increase in leave accumulation that would result in additional time off *without* a cumulative change in employee compensation. Furthermore, the *County of Putnam* decision misconstrued the meaning and significance of the *dicta* in the court's decision in *State Police* regarding "potential compensation." That *dicta* related only to the leave accumulation proposals that did not seek an increase in the level of compensation. Although the dependent education costs and funeral proposals in *State Police* offered only the "potential" for economic benefits, the court confirmed the Board's decision that both proposals were arbitrable.

Indeed, by definition, all compensatory provisions of an agreement or an interest

arbitration award provide for only "potential" compensation including subjects such as salary, stipends and location pay, which are arbitrable under §209.4(g) of the Act.

There is nothing in §209.4(g) of the Act or the *State Police* test that requires a proposal to be directly related to actualized – as opposed to potential – compensation in order to be arbitrable. At the same time, a proposal primarily focused upon hours of work is nonarbitrable even though it may be indirectly related to compensation.

We note that on the same day that *County of Putnam* was decided, the Board issued *Ulster County Deputy Sheriff's Police Benevolent Association, Inc.*,¹⁵ (*County of Ulster*) in which it held that a proposal for unlimited sick leave accumulation was nonarbitrable under §209.4(g) of the Act because the proposal sought to maintain unit member's level of compensation when absent from work. In reaching that particular legal conclusion, the Board relied upon *State Police* but not *County of Putnam*.¹⁶

Based upon the foregoing, we reverse *County of Putnam* to the extent it held that a proposal limited to seeking a change in the aggregate amount or level of compensation received by unit members resulting from the nonuse of sick leave is nonarbitrable under §209.4(g) of the Act because it represents "potential" compensation. The primary characteristic of such a demand is the monetization of sick leave, a compensatory benefit not ordinarily available to public employees.¹⁷ Similarly, we reverse the Board's decision in *County of Sullivan* to the extent it relied upon *County of Putnam* to conclude that a proposal seeking to permit the conversion of overtime

¹⁵ 38 PERB ¶3033 (2005).

¹⁶ *Supra*, note 16, 38 PERB ¶3033, at 3115-3116.

¹⁷ See, GML §92.

compensation into compensatory leave and to permit the subsequent remonetization of that leave back into cash or to be applied to health insurance is nonarbitrable because it relates only to "potential" compensation. We conclude that both aspects of that type of demand, whether proposed by an employer or employee organization, directly relate to the amount of overtime compensation for unit members.¹⁸

Partial reversal of *County of Putnam* and *County of Sullivan* is necessary to correct the Board's prior transformation of the judicial *dicta* in *State Police* about the potentiality of compensation into an administrative mantra to support the nonarbitrability of proposals directly related to compensation in contravention of the clear public policy dictates of §209.4(g) of the Act.

However, we reaffirm the Board's holding in *County of Sullivan* that a unitary demand that includes leave accumulation and compensation to unit members for unused leave does not satisfy the arbitrability test under *State Police*. A demand that includes an inseparable component calling for an increase in leave accumulation cannot be characterized as being solely, predominantly or primarily related to increasing the level or amount of compensation under *State Police*.

¹⁸ The practical impact of the distinction drawn by the Legislature in §209.4(g) of the Act between arbitrable and nonarbitrable subjects might lead parties to choose to segregate arbitrable subjects from the nonarbitrable in their initial proposals or to sever them during the course of negotiations. While such an approach is not obligatory under §209.4(g) of the Act, it can help avoid unnecessary delays in the issuance of interest arbitration awards and fact-finding reports following an impasse. In contrast, the tactic of bundling together arbitrable and nonarbitrable subjects into a single unitary demand, like a unitary demand that includes mandatory and nonmandatory subjects, assumes the high risk that the proposal will be treated as nonarbitrable. See, *Town of Haverstraw*, 11 PERB ¶3109 (1978)(subsequent history omitted); *Pearl River Union Free Sch Dist*, 11 PERB ¶3085 (1978); *Highland Falls PBA, Inc.*, 42 PERB ¶3020 (2009)(applying the unitary demand doctrine to mandatory and nonmandatory subjects).

In the present case, we conclude that PBA proposal #2, sick leave, PBA proposal #7, holidays, PBA proposal #8, vacation and PBA proposal #9, personal leave are arbitrable pursuant to §209.4(g) of the Act because each seeks a form of deferred compensation for unused accumulated leave that is ordinarily forfeited at the time of separation from service.¹⁹ Therefore, the proposals to permit the conversion of unused leave time to cash or to be applied to health insurance costs are directly related to modifying the amount or level of compensation a unit employee would be entitled to at the time of separation or retirement.

We reach different conclusions regarding PBA proposal #4, compensatory time. This demand contains two distinct components: 1) a proposed increase in the amount of compensatory leave time that can be accumulated from year to year; and 2) the proposed conversion of unused leave time to cash or to be applied to health insurance costs. The ALJ ruled that these components are severable and that the first component is arbitrable but the latter is not under §209.4(g) of the Act.

In its exceptions, PBA asserts that the ALJ erred in concluding that the second part of the proposal is nonarbitrable and the Joint Employer has filed a cross-exception to the ALJ's conclusion that the first part is subject to interest arbitration.²⁰ Based upon the holding in *State Police*, we grant the Joint Employer's cross-exception and reverse

¹⁹ See generally, *Garrigan v Incorporated Vill of Malverne*, 12 AD3d 400, (2d Dept 2004); *Rubinstein v Simpson*, 109 AD2d 885 (2d 1985).

²⁰ Neither party filed an exception to the ALJ's conclusion that the two components were severable. Therefore, that issue is waived under §213.2(b)(4) of the Rules of Procedure (Rules). See, *Town of Orangetown*, 40 PERB ¶3008 (2007), *confirmed*, *Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶7008 (Supreme Court Albany County 2007).

the ALJ with respect to the arbitrability of the first component, which is limited to the accumulation of leave. In addition, we grant PBA's exception with respect to the latter component because it seeks deferred compensation for unused accumulated leave ordinarily forfeited at the time of separation.

We recognize that our ruling with respect to the arbitrability of the two parts of the proposal makes them subject to separate final negotiation impasse resolution procedures. This is an unavoidable consequence of the Legislature's public policy choice reflected in §209.4(g) of the Act to have impasses directly related to compensation resolved through compulsory interest arbitration while leaving other negotiability impasses subject to the Act's preexisting track, which includes fact-finding.²¹

PBA asserts in its exceptions that the ALJ erred in concluding that Joint Employer proposal #8, excused absence, is subject to interest arbitration. We agree with PBA, in part. The proposal would delete Article Ten of the parties' agreement, which contains three severable paragraphs. The primary or predominant characteristic of the first paragraph of Article Ten is scheduling, a nonarbitrable subject under §209.4(g) of the Act. The second and third paragraphs of Article Ten, however, are directly related to compensation of unit members during the suspension of County operations. We, therefore, conclude that Joint Employer proposal #8 is arbitrable only to the extent it seeks to delete the two paragraphs in Article Ten that are directly related to compensation.

We next turn to the Joint Employer's cross-exception challenging the ALJ's

²¹ See, *State of New York*, 43 PERB ¶3046 (2010).

finding that PBA proposal #1, flex time is arbitrable. This proposal seeks to delete Article Five of the parties' agreement, which includes provisions related to flex time, pass days and overtime. Pursuant to §209.4(g) of the Act, the amount of overtime compensation to be paid to eligible unit members is arbitrable,²² while scheduling and deployment are explicitly excluded from arbitration. Because the subject of this unitary proposal includes flex time and scheduling, it is nonarbitrable even though it may touch upon overtime. We, therefore, reverse the ALJ accordingly.

Finally, we deny the Joint Employer's exception to the ALJ's conclusion that Joint Employer proposal #9, leave without pay is nonarbitrable. This proposal, which would require that an employee's unpaid leave of absence run simultaneously with leave under the Family and Medical Leave Act²³ (FMLA), is nonarbitrable because its predominant characteristic is utilization of unpaid leave by unit employees.

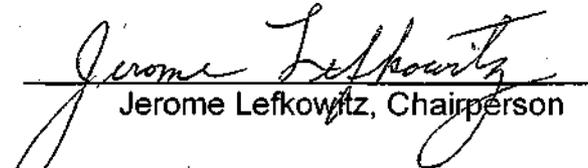
Based upon the foregoing, we reverse the ALJ's decision to the extent that she concluded that PBA violated §209-a.2(b) of the Act when it submitted PBA proposal #2, sick leave, a portion of PBA proposal #4, compensatory time, PBA proposal #7, holidays, PBA proposal #8, vacation, PBA proposal #9, personal leave, and directed PBA to withdraw those proposals. We also grant PBA's exception with respect to Joint Employer proposal #8, excused absence, in part, and conclude that the Joint Employer violated §209-a.1(d) of the Act to the extent it seeks to delete paragraph one of Article Ten of the parties agreement and direct the Joint Employer to withdraw that portion of its proposal #8. Finally, we grant the Joint Employer's cross-exception with respect to

²² *New York State Police Investigators Assn, supra, note 3.*

²³ 29 USC §2612.

PBA proposal #1, flex time and PBA proposal #4, with respect to the accumulation of leave, and conclude that PBA violated §209.a.2(b) of the Act by submitting those proposals to interest arbitration and hereby direct PBA to withdraw the proposals.

DATED: August 19, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

APPENDIX**PBA Proposal 1 - Flex Time**

The proposal seeks to delete Article Five – Hours of Work, §11. Flex Time

- a. Subject to the conditions found in this agreement, the Sheriff may assign an employee up to 11 hours flex time in a 28-day work period without overtime being incurred. Effective January 1, 2006, the number of flex hours shall become 8 hours in a 28-day work period.
- b. Absent consent of an employee, flex time may not be scheduled or assigned during an employee's approved leave time and pass days contiguous to vacation leave.
- c. If an employee works more than four hours of flex time on their regular pass day or chart day, the employee will be rescheduled for a new pass day within the 28-day work schedule selected by the employee subject to supervisory approval. If the new pass day cannot be scheduled within the current 28-day work schedule, it will be scheduled in the following 28-day schedule.
- d. There will be no "make work" when an employee is scheduled to work flex time.
- e. The entitlement to overtime for working more than 171 hours in a 28-day work schedule period is calculated based on each 28-day work schedule period standing alone. If an employee is not scheduled to work all of his/her flex time in a 28-day schedule cycle, the unscheduled time is not carried over to the following 28-day schedule cycle.

PBA Proposal 2 – Sick Leave

Effective January 1, 2007, at employee's option upon separation or retirement, paid [sic] for all unused sick leave accumulation at the rate of pay in effect at the time, or can designate all or any portion to pay for health insurance, dental and optical cost, if any, not paid by the Employer, until all of the dollar amount is applied, for individual and/or eligible dependent coverage.

PBA Proposal 4 – Compensatory Time

Increase existing amount of hours to be carried over from year to year as follows:

(+ 80 Hours)	(N/C)
<u>1/1/07</u>	<u>1/1/08</u>
120 Hours	120 Hours

Effective January 1, 2007, at the employee's option upon separation or retirement, paid [sic] for all unused accumulated compensatory time, at the rate of pay in effect at that time, or can designate all or any portion to pay for health insurance, dental and optical cost, if any, not paid by the Employer, until all of the dollar amount is applied, for individual and/or eligible dependent coverage.

PBA Proposal 7 – Holidays

Effective January 1, 2007, at employee's option upon separation or retirement, paid [sic] for all unused Holiday accumulation at the rate of pay in effect at that time, or can designate all or any portion to pay for health insurance, dental and optical cost, if any, not paid by the Employer, until all of the dollar amount is applied, for individual and/or eligible dependent coverage.

PBA Proposal 8 – Vacation

Effective July 1, 2007, at employee's option upon separation or retirement, paid [sic] for all unused Vacation accumulation up to forty-five (45) days, at the rate of pay in effect at that time, or can designate all or any portion to pay for health insurance, dental and optical cost, if any, not paid by the Employer, until all of the dollar amount is applied, for individual and/or eligible dependent coverage.

PBA Proposal 9 – Personal Leave

Effective January 1, 2007, at employee's option and upon an employee's retirement, he/she shall be paid for all unused Personal Leave accumulation at the rate of pay in effect at that time, or can designate all or any portion to pay for health insurance, dental and optical cost, if any, not paid by the Employer, until all of the dollar amount is applied, for individual and/or eligible dependent coverage.

Joint Employer Proposal 8 – Excused Absence

The proposal seeks to delete Article Ten of the parties' agreement, which states:

1. In the event that the County Executive or his designated representative(s) shall declare County operations suspended, employees who are scheduled to work need not report for work unless they have been designated essential. Employees who are at work at

- the time of such declaration shall leave work unless they have been declared essential.
- 2: An employee who reports for work, as scheduled, and does work prior to said County Executive's declaration, shall receive compensatory time equal to such actual hours worked on a "one for one" basis.
 3. Employees shall continue to be paid for the duration of the declared suspension of County operations without charge to paid leave accruals; except that employees on paid leave or otherwise absent at the time of said declaration shall continue on paid leave, and their paid leave accruals shall continue to be charged for the duration of such authorized leave or other absence.

Joint Employer Proposal 9-Leave Without Pay

The proposal seeks to amend Article 11(1) of the parties' agreement by adding the following sentence:

Where eligible, leaves of absence will run simultaneously with FMLA leave:

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

In the Matter of

**COUNTY OF CHEMUNG and CHEMUNG COUNTY
SHERIFF,**

Charging Party,

-and-

CASE NO. U-29007

CHEMUNG COUNTY SHERIFF'S ASSOCIATION, INC.,

Respondent.

**COUGHLIN & GERHART, LLP (MARY LOUISE CONROW 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 Chemung County Sheriff's Association, Inc. (Association) and cross-exceptions by the County of Chemung and the Chemung County Sheriff (Joint Employer) to a decision of an Administrative Law Judge (ALJ) finding that the Association violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it sought interest arbitration of a nonarbitrable proposal under §209.4(g) of the Act.¹

On a stipulated record, the ALJ concluded that the Association violated §209-a.2(b) of the Act by submitting to interest arbitration a demand for a General Municipal Law (GML) §207-c hearing procedure and ordered the Association to withdraw that demand.

¹ 44 PERB ¶4564 (2011).

EXCEPTIONS

The Association excepts to the ALJ's conclusion that the Joint Employer's improper practice charge, amended charge, and second amended charge are timely under our Rules of Procedures (Rules) and precedent. In addition, the Association asserts that its GML §207-c hearing procedure proposal is a mandatory subject under the Act and is arbitrable under §209.4(g) of the Act because it is directly related to compensation. The Joint Employer generally supports the ALJ's decision, but contends that the hearing procedure proposal is both nonmandatory and nonarbitrable.

The Joint Employer has filed a cross-exception asserting that the ALJ misconstrued its second amended charge and erred in failing to conclude that the Association's entire GML §207-c proposal constitutes a prohibited subject of arbitration under §209.4(g) of the Act. In response to the cross-exception, the Association asserts *inter alia* that the Joint Employer waived its right to challenge the arbitrability of the entire GML §207-c proposal.

Following our careful review of the record, the exceptions and cross-exceptions, we reverse the decision of the ALJ.

FACTS AND PROCEDURAL BACKGROUND

Following an impasse in negotiations limited to the Association's comprehensive GML §207-c proposal, the Association filed a petition for compulsory interest arbitration on February 23, 2009. The Association's GML §207-c proposal included multiple separate paragraphs with respect to distinct subjects including the application procedures for benefits, the Joint Employer's right in determining initial eligibility, directing medical examinations and treatment, assigning light duty assignments, and

terminating benefits. Section 11 of the GML §207-c proposal is entitled "Hearing Procedures," and states:

Hearing requests under the provision of this procedure shall be conducted by a neutral Hearing Officer, from a list of four Hearing Officers mutually agreed upon by the parties. The names of the Hearing Officers will be placed on a list numbered 1-4. When a hearing is requested, the Employer will request the first Hearing Officer on the list. Each name will be moved to the bottom of the list after each hearing. The fees and expenses of the Hearing Officer shall be borne equally by the parties. The Claimant/Recipient may be represented by a designated representative and may subpoena witnesses. Each party shall be responsible for all fees and expenses incurred in their representation. Either party or the Hearing Officer may cause a transcript to be made. The Claimant/Recipient and the Employer agree to share equally the costs of the transcript. After the hearing, the Hearing Officer shall render a determination which shall be final and binding upon all parties.

Any such decision of the Hearing Officer shall be reviewable only pursuant to the provisions of Article 78 of the Civil Practice Law and Rules.

On March 10, 2009, the Joint Employer filed a charge alleging that the Association engaged in an improper practice by submitting a nonmandatory subject, the hearing procedure contained in §11 of the GML §207-c proposal, to interest arbitration. The following day, the Joint Employer filed its response to the Association's petition for compulsory interest arbitration under §205.5 of the Rules. Following an examination of the charge's allegations, the Director of Public Employment Practices and Representation (Director) notified the Joint Employer that its pleading was deficient. The Joint Employer responded to the deficiency notice on March 26, 2009 by filing an amended charge adding the detail that it received the Association's petition on or about February 25, 2009. The Director assigned the case to an ALJ, the Association filed its

answer, which included a timeliness defense, and a pre-hearing conference was held.

Thereafter, the Joint Employer sought leave to file a second amendment to allege "that the 207 procedure is a prohibited subject for interest arbitration," which was opposed by the Association on the basis that the proposed amendment would allege a new and different claim.² In granting the Joint Employer's application, the ALJ stated:

Specifically, the charge as originally filed alleged that the procedure is non-mandatory. The proposed second amendment seeks to add that the procedure is also a prohibited subject. The request to amend is granted because the proposed amendment simply adds a second legal argument as to why the §207-c procedure is not a proper subject for interest arbitration.³

The Joint Employer filed its second amended charge on April 17, 2009, which added the following new allegation:

In addition, the 207 procedure is a prohibited subject for interest arbitration as Civil Service Law §209(4)(c)(vii)(g) clearly requires that only matters directly related to compensation are appropriate subjects for interest arbitration.

The Association then filed an amended answer responding to the new allegation, again asserting a timeliness defense.

DISCUSSION

The Original Charge and First Amended Charge

We reject the Association's argument that the Joint Employer's original and first amended charge are untimely under §205.6(b) of the Rules because they were not filed "simultaneously" with the Joint Employer's response to the petition for interest

² Joint Exhibits 9 and 10.

³ Joint Exhibit 14.

arbitration. The applicable timeframe for the filing of the charge is set forth in §205.6(b) of the Rules, which states that a charge "may not be filed *after* the date of the filing of the response" (emphasis added). In *City of Elmira*⁴ (*Elmira*), we stated:

In relevant respect, §§205.5(a) and 205.6(b) of our Rules together require an improper practice charge raising a [sic] objection to the arbitrability of a demand to be filed at or before the time the response to the petition for interest arbitration is filed.⁵

In *Canton Police Association*⁶ (*Canton*), we recently reaffirmed this interpretation and rejected a party's reliance upon an obvious misstatement regarding simultaneous filings contained in a footnote in *South Nyack/Grand View Joint Police Administration Board (South Nyack)*.⁷

In the present case, based upon the explicit terms of the applicable Rule and our decisions in *Elmira* and *Canton*, we reject the Association's contention that the charge and the first amended charge are untimely based upon the misstatement in *South Nyack*.

Similarly, we reject the Association's attacks upon the processing and timeliness

⁴ 25 PERB ¶3072 (1992).

⁵ *Supra*, note 4, 25 PERB ¶3072 at 3148.

⁶ 44 PERB ¶3019 (2011).

⁷ 35 PERB ¶3007 (2002). The footnote in *South Nyack* stated:

Notwithstanding the Assistant Directors [sic] determination, §205.6(c) of our Rules requires that a petition for declaratory ruling may not be filed after the date of the filing of the response to the petition for interest arbitration. The Police Board's January 9, 2002 filing of the declaratory ruling petition on PERB's form was not, therefore, timely as it was not filed *simultaneously* with its response to the PBA's petition. (emphasis added) 35 PERB ¶3007 at 3015, n. 3.

of the first amended charge. During his initial review of a charge, pursuant to §204.2(a) of the Rules, the Director is responsible for conducting a facial examination of the pleading to determine whether the alleged facts state a violation of the Act as a matter of law, and whether the alleged violation occurred more than four months prior to the filing of the charge. Frequently, following the Director's initial review of a charge, a charging party is sent a deficiency notice that includes an opportunity for the charge to be withdrawn or amended.

In *Manhattan and Bronx Surface Transit Operating Authority*,⁸ we described the Director's practice with respect to deficient charges:

As a matter of practice, the Director sends a notice to a charging party setting forth the reason(s) for the deficiency. The notice informs the charging party that it may either amend the charge by a certain date, withdraw the charge or stand by its initial pleading. In addition, the notice warns the charging party that if it fails to respond to the notice the charge will be deemed withdrawn and the matter will be closed. Although the Director sends the respondent a copy of the notice, along with a copy of the deficient charge, the respondent is not obligated to respond until such time as the charge is processed.

In response to a deficiency notice, a charging party has a variety of options: it can voluntarily withdraw the charge; ignore the notice and have the charge be deemed withdrawn by the Director; amend the charge with the aim of correcting the deficiencies, and/or have the charge be subject to the Director's summary dismissal.⁹

In the present case, after conducting his facial examination of the allegations of the original charge pursuant to §204.2(a) of the Rules, the Director notified the Joint

⁸ 40 PERB ¶3023 (2007).

⁹ *Supra*, note 8, 40 PERB ¶3023 at 3095.

Employer that the pleading was deficient because it did not allege when the Association's petition for compulsory interest arbitration was received, an alleged fact necessary for the Director to determine whether the charge is timely on its face. The Director's notice granted the Joint Employer an opportunity to file an amendment to correct the deficiency by a certain date, which the Joint Employer did.

Contrary to the Association's argument, the factual detail regarding when the Joint Employer received the petition for interest arbitration was not a fundamental defect requiring dismissal. Furthermore, the Director's act of permitting the Joint Employer to file an amendment with that detail was well within his discretion under §§204.1(d) and 204.2(a) of the Rules because it was necessary in order for him to conduct a facial review of the timeliness of the charge.

In addition, we are not persuaded by the Association's contention, premised upon *dicta* in *United Federation of Teachers (Fearon)*,¹⁰ that the first amended charge does not relate back to the filing of the original charge for purposes of timeliness. Although the factual allegations of a charge may be superseded by an amended pleading, the timeliness of an amended charge is examined based upon the filing date of the original charge so long as the claims relate back to the original charge.¹¹ In the present case, the first amended charge merely alleged the detail requested by the Director without adding a new or distinct claim. Therefore, we reject the Association's assertion that the first amended charge should have been dismissed as untimely.

¹⁰ 34 PERB ¶3031 (2001).

¹¹ See, *State of New York (Dept of Transportation)*, 23 PERB ¶3005 (1990), *confirmed sub nom.*, *State of New York (Dept of Transportation)*, 174 AD2d 905, 24 PERB ¶7014 (3d Dept 1991); *Oyster Bay-East Norwich Cent Sch Dist*, 23 PERB ¶3031 (1990).

Second Amended Charge

We reach a different conclusion regarding the Association's exception asserting that the second amended charge is untimely under §205.6(b) of the Rules. Under our Rules, the timeframe for filing of improper practice charges, including those objecting to the arbitrability of a proposal, are strictly construed.¹²

The original and first amended charge raise a timely scope issue as to whether the hearing procedure contained in §11 of the Association's comprehensive GML §207-c proposal is a mandatory subject of negotiations under the Act. In contrast, the second amended charge, filed well after the Joint Employer filed its response to the petition for arbitration, asserts a new and distinct statutory claim under the Act: whether "the 207 procedure" is not directly related to compensation, and, therefore nonarbitrable under §209.4(g) of the Act.

Based upon our conclusion that the Joint Employer's arbitrability claim does not relate back to its scope claim, we grant the Association's exception, reverse the ALJ, and dismiss the second amended charge as untimely.¹³

Even if we were to find the second amended charge timely, we would deny the Joint Employer's argument that the ALJ misconstrued its second amended charge, which purportedly set forth a claim that the Association's entire GML §207-c proposal is nonarbitrable under §209.4(g) of the Act.

Contrary to the Joint Employer's argument, the supplemental pleading cannot

¹² *Fulton Firefighters Assn, Local 3063, IAFF, AFL-CIO*, 29 PERB ¶16501 (1996); *Elmira PBA*, 25 PERB ¶13072 (1992).

¹³ *State of New York (Dept of Transportation)*, *supra*, note 11; *Oyster Bay-East Norwich Cent Sch Dist*, 23 PERB ¶13031 (1990), *supra*, note 11; *City of Buffalo*, 15 PERB ¶13027 (1982).

reasonably be construed as asserting a claim of nonarbitrability with respect to the Association's entire GML §207-c proposal. Read in the context of the allegations of its original charge and first amended charge, the Joint Employer's supplemental pleading sought to add a new nonarbitrability claim limited to the proposed hearing procedure in §11 of the Association's GML §207-c proposal. In fact, the second amended charge repeats word for word the allegations from the earlier pleadings challenging the negotiability of the proposed hearing procedure, and then adds an additional paragraph claiming that the hearing procedure is nonarbitrable.

Finally, we deny the Joint Employer's claim that it may challenge the arbitrability of the Association's entire GML §207-c proposal whether or not it filed a timely charge. Under our Rules, a party objecting to the arbitrability of a proposal is obligated to file a timely charge under §205.6(b) of the Rules. By failing to file a timely charge, the Joint Employer has waived any right to claim under §209-a.2(b) of the Act that the Association's GML §207-c proposal is nonarbitrable under §209.4(g) of the Act. Although only proposals directly related to compensation are subject to compulsory interest arbitration under §209.4(g) of the Act, the Legislature did not place a similar limitation regarding voluntary interest arbitration involving organized units of deputy sheriffs under §209.2 of the Act. Based upon the fact that the Joint Employer has waived any objection to the arbitrability of the GML §207-c proposal under §209-a.2(b) of the Act, we do not have to determine whether the proposal, in whole or in part, is directly related to compensation under §209.4(g) of the Act.

Negotiability of the GML §207-c Hearing Procedure

Although the ALJ did not reach the Joint Employer's claim that the hearing

procedure in §11 of the GML §207-c proposal is nonmandatory under the Act, the Association urges the Board to do so if we determine that the charge and the first amendment are timely.¹⁴ In response, the Joint Employer does not object to the Association's request and it has briefed the issue of negotiability, as well.¹⁵ In light of our conclusion that the initial charge and the first amended charge are timely, and the fact that the negotiability issue has been fully briefed by the parties, we have chosen to determine the issue without a remand to the ALJ.

In its brief, the Joint Employer contends that the proposed GML §207-c hearing procedure is nonmandatory under *Poughkeepsie Professional Firefighters' Association, Local 596, IAFF v New York State Public Employment Relations Board*¹⁶ (*Poughkeepsie*). We disagree.

In *City of Watertown v New York State Public Employment Relations Board*¹⁷ (*Watertown*), a divided Court of Appeals upheld our decision finding the following proposed general arbitration clause concerning GML §207-c 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

¹⁴ Brief in Support of Exceptions, pp. 20-25.

¹⁵ Memorandum of Law in Support of Answer, pp.1, 17-21.

¹⁶ 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 (Supreme Court Albany County 2003), *revd*, 16 AD3d 797, 38 PERB ¶7005 (3d Dept 2005) *affd*, 6 NY3d 514, 39 PERB ¶7005 (2006).

¹⁷ 30 PERB ¶3072 (1997), *confirmed*, *City of Watertown v New York State Pub Empl Rel Bd*, 31 PERB ¶7013 (Supreme Court Albany County 1998), *revd*, 263 AD2d 797, 32 PERB ¶7016 (3d Dept 1999) *revd*, 95 NY2d 73, 33 PERB ¶7007 (2000).

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 *Poughkeepsie*, however, a unanimous Court affirmed the confirmation of our decision finding that a much more detailed GML §207-a arbitration procedure in that case was nonmandatory based upon our interpretation that the proposal sought to give an arbitrator the ultimate authority for determining a statutory claim of entitlement to GML §207-a statutory benefits, rather than limiting the arbitrator's binding power to reviewing the employer's determination.

In the present case, we conclude that the proposed GML §207-c hearing procedure in §11 is mandatory under *Watertown*.¹⁸ Unlike *Poughkeepsie*, the proposed hearing procedure does not expressly or implicitly call for a *de novo* review of the Joint Employer's determination of a claim for statutory benefits subject to limited judicial review under CPLR Article 75. Instead, it proposes a hearing before a hearing officer resulting in a binding decision with the ultimate authority for resolving the dispute resting with the courts under CPLR Article 78.¹⁹ In interpreting the proposal, we rely upon other

¹⁸ See also, *City of Middletown*, 42 PERB ¶13022 (2009) (subsequent history omitted) (finding a proposed GML §207-c arbitration procedure to be mandatory under both *Watertown* and *Poughkeepsie*).

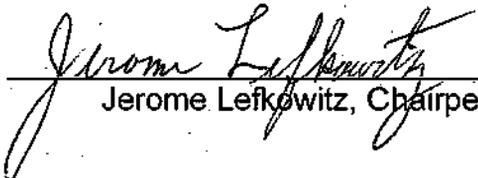
¹⁹ See generally, *Ridge Road Fire Dist v Schiano*, 16 NY3d 494, 44 PERB ¶17507 (2011) (a divided Court of Appeals held that the particular provisions of a collective bargaining agreement [agreement] mandated that a GML §207-a hearing officer under the agreement defer to the employer's denial of statutory benefits to a firefighter if the employer's determination was supported by substantial evidence and that the firefighter bore the burden of demonstrating that the employer's denial determination was not supported by substantial evidence.)

provisions of the Association's GML §207-c proposal that expressly recognize the Joint Employer's statutory rights and authority including the right to render an initial determination.²⁰

Based upon the foregoing, we reverse the ALJ's decision, and dismiss the Joint Employer's charge.

IT IS, THEREFORE, ORDERED that the charge is hereby dismissed.

DATED: August 19, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

²⁰ Joint Exhibit 1, ¶¶4, 6, 7, 9 and 10.

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

In the Matter of

**COUNTY OF TOMPKINS and TOMPKINS COUNTY
SHERIFF,**

Charging Party,

-and-

CASE NO. U-28437

**TOMPKINS COUNTY DEPUTY SHERIFF'S
ASSOCIATION, INC.,**

Respondent.

**TOMPKINS COUNTY DEPUTY SHERIFF'S
ASSOCIATION, INC.,**

Charging Party,

-and-

CASE NO. U-28483

**COUNTY OF TOMPKINS and TOMPKINS COUNTY
SHERIFF,**

Respondent.

**ROEMER WALLENS GOLD & MINEAUX LLP (DIONNE A. WHEATLEY of
counsel), for County of Tompkins and Tompkins County Sheriff**

**JOHN M. CROTTY, ESQ., for Tompkins County Deputy Sheriff's
Association, Inc.**

BOARD DECISION AND ORDER

These cases come to the Board on exceptions filed by the Tompkins County Deputy Sheriff's Association, Inc. (Association) and cross-exceptions by the County of Tompkins and the Tompkins County Sheriff (Joint Employer) to a decision of an

Administrative Law Judge (ALJ).¹ In Case No. U-28437, the Joint Employer's amended charge alleges that the Association violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it sought interest arbitration of certain proposals that are nonarbitrable under §209.4(g) of the Act. In Case No. U-28483, the Association's amended charge alleges that the Joint Employer violated §209-a.1(d) of the Act when it sought interest arbitration of a prohibited subject of negotiations.

On a stipulated record, the ALJ concluded in Case No. U-28437 that the Association violated §209-a.2(b) of the Act by submitting the following demands to interest arbitration because they are nonarbitrable under §209.4(g) of the Act: Association proposal 2-Article 3, §12 (Road Patrol) and §15 (Mandatory On-Call); Association proposal 4-Article 8, §5 (Health Insurance Buy-Out); Association proposal 5-Article 9 (Road Patrol Schedule); Association proposal 8-Article 16 (General Municipal Law §207-c Procedure); Association proposal 9-Article 21 (Clothing Allowance), 1st paragraph, 3rd and 4th sentences and 3rd paragraph, last sentence; and Association proposal 10-Article 28 (Reciprocal Rights).

In Case No. U-28483, however, the ALJ dismissed the Association's charge concluding that Joint Employer proposal-16 (Retroactivity) is not a prohibited subject of negotiations and was arbitrable under §209.4(g) of the Act because it is directly related to compensation under §209.4(g) of the Act.

EXCEPTIONS

The Association asserts in its exceptions that Joint Employer proposal-16 (Retroactivity) is a prohibited subject of negotiations, and therefore the ALJ erred in

¹ 44 PERB ¶14517 (2011).

concluding that it is arbitrable under §209.4(g) of the Act. The Association also contends that the ALJ erred in finding that certain of its proposals or portions of other proposals are nonarbitrable. The Joint Employer supports the ALJ's conclusion to the extent that he found the Association's proposals or portions thereof to be nonarbitrable. In its cross-exceptions, however, the Joint Employer asserts that the ALJ erred in finding that other aspects of the Association's proposals are arbitrable.

Following a careful review of the record, the exceptions and cross-exceptions, we affirm, in part, and reverse, in part, the ALJ's decision.

FACTS

The collectively negotiated agreement between the Association and the Joint Employer expired on February 28, 2004. In September 2006, an interest arbitration panel issued an opinion and award resolving an impasse for the period of March 1, 2004 through February 28, 2006.

After negotiations for a successor agreement failed, the Association filed a petition for compulsory interest arbitration. The Joint Employer filed a response to the petition and an improper practice charge, Case No. U-28437, alleging that the Association violated §209-a.2(b) of the Act by submitting various proposals to interest arbitration that are not directly related to compensation. In addition, the Association filed an improper practice charge, Case No. U-28483, which alleges that the Joint Employer violated §209-a.1(d) of the Act when it submitted certain of its demands to interest arbitration. The charges were consolidated by the ALJ and determined based upon a stipulated record in lieu of a hearing.

DISCUSSION

The Association's Exceptions

We begin with the Association's claim that Joint Employer proposal-16 (Retroactivity) is a prohibited subject of negotiations and, therefore, nonarbitrable under the Act because the proposal seeks to exclude all unit employees not on the payroll at the time of contract ratification and/or the date of an interest arbitration award from receiving retroactive payments of wages and benefits.

A demand regarding retroactivity of wages and benefits is generally a mandatory subject of negotiations under the Act² and arbitrable under §204.9(g) of the Act.³ Nevertheless, the Association contends that the rationale in *Baker v Board of Education, Hoosick Falls Central School District*⁴ (*Hoosick Falls*) supports its argument that a demand for retroactive payments to only current employees is a prohibited subject of negotiations under the Act. We disagree and, therefore, affirm the ALJ's dismissal of the Association's amended charge.⁵

In *Hoosick Falls*, the Appellate Division, Third Department affirmed a lower court decision denying motions to dismiss a complaint for declaratory relief filed by a group of retired employees alleging that an employee organization breached its duty of fair

² See, *Uniformed Fire Fighters Assn, Mount Vernon, Local 107, IAFF*, 11 PERB ¶13095 (1978).

³ See, *Putnam County Sheriff's Dept PBA, Inc.*, 38 PERB ¶13031 (2005).

⁴ 194 Misc2d 116, 35 PERB ¶17501 (Rensselaer County Supreme Court 2002), *affd*, 3 AD3d 678, 37 PERB ¶17502 (3d Dept 2004).

⁵ We note that the same argument has been rejected by other ALJs as well. See, *Village of Montgomery PBA, Inc*, 43 PERB ¶14603 (2010); *Madison County Deputy Sheriff's PBA, Inc.*, 44 PERB ¶14511 (2011) (exceptions pending).

representation when it: 1) entered into an agreement with the employer excluding the plaintiffs, but not current employees, from negotiated retroactive salary increases under a new collectively negotiated agreement for the period that the plaintiffs had worked during the term of that new agreement; and 2) refused to process grievances on behalf of the plaintiffs with respect to their entitlement to retroactive salary increases.

In affirming the lower court, the Appellate Division concluded, *inter alia*, that the employee organization had a duty to represent the plaintiffs because of the nexus between their former employment and the issue of retroactivity under the new agreement. In addition, the Appellate Division ruled that the complaint stated a cause of action for a breach of the duty of fair representation because it alleged that the employee organization did not provide any representation to the plaintiffs over the issue of retroactivity during the negotiations. Notably, the court distinguished the particular allegations of arbitrariness and bad faith made in the plaintiffs' complaint with the Court of Appeals decision in *Civil Service Bar Association, Local 237, IBT v City of New York*⁶ (*Civil Service Bar Association*).

In *Civil Service Bar Association*, the Court of Appeals found that a bargaining agent did not breach its duty of fair representation when it made a good faith differentiation between classes of employees in a negotiated settlement with an employer with respect to benefits. Under the negotiated settlement in that case, employees who resigned prior to ratification of the agreement were excluded from receiving a negotiated lump sum payment being made to current employees. In affirming the merits-based dismissal of the duty of fair representation claim in *Civil Service Bar Association*, the Court of Appeals stated:

Where the union undertakes a good-faith balancing of the

⁶ 64 NY2d 188, 18 PERB ¶7502 (1984).

divergent interests of its membership and chooses to forego benefits which may be gained for one class of employees in exchange for benefits to other employees, such accommodation does not, of necessity, violate the union's duty of fair representation.⁷

As the Association concedes in its brief, the Board has also long held that an agreement granting retroactive salary increases or other benefits to current employees, to the exclusion of former employees in the unit, does not constitute a violation of the duty of fair representation so long as the employee organization acted in good faith.⁸

Contrary to the Association's argument, the rationale in *Hoosick Falls* for affirming the denial of the motions to dismiss in that plenary action does not constitute an expression of a New York public policy that outweighs New York's strong and sweeping policy supporting collective negotiations under the Act.⁹ Indeed, *Hoosick Falls* applied preexisting duty of fair representation standards when it concluded that the particular factual allegations made in plaintiffs' complaint stated a cause of action.¹⁰ In making its procedural determination, the court was obligated to grant all reasonable inferences to the factual allegations of bad faith and arbitrariness in the complaint

⁷ *Supra*, note 6, 64 NY2d at 197, 18 PERB ¶7502 at 7512. See also, *Calkins v Assn of New York State Troopers, Inc.*, 21 Misc3d 1119(A), 2007 NYSlip Op 52569(U) (Supreme Court Ontario County 2007), *affd*, 55 AD3d 1328, 41 PERB ¶7517 (4th Dept 2008), *lv denied*, 11 NY3d 714 (2009).

⁸ See, *Plainview-Old Bethpage Cent Sch Dist and Local 237, Int'l Brotherhood of Teamsters*, 7 PERB ¶3058 (1974); *County of Erie and Erie County Sheriff and Teamsters Local 264 (Penna)* 27 PERB ¶3081 (1994); *County of Dutchess and Dutchess County Deputy Sheriffs' PBA, Inc. (Heady)*, 31 PERB ¶3068 (1998) (subsequent history omitted).

⁹ See, *Cohoes City Sch Dist v Cohoes Teachers Assn*, 40 NY2d 774, 9 PERB ¶7529 (1976); *Bd of Educ of City Sch Dist of City of New York v New York State Pub Empl Rel Bd*, 75 NY2d 660, 23 PERB ¶7013 (1990); *Patrolmen's Benevolent Assn of the City of New York, Inc v New York State Pub Empl Rel Bd*, 6 NY3d 563, 39 PERB ¶7006 (2006).

¹⁰ *Smith v Sipe*, 67 NY2d 928 (1986).

against the employee organization without regard to whether the plaintiffs would be able to ultimately prove those allegations.¹¹

In contrast, a court will not grant inferences to a complaint's allegations when determining the merits of a duty of fair representation cause of action. For example, at the summary judgment stage of litigation, a court will dismiss a duty of fair representation cause of action if the defendant employee organization presents sufficient undisputed facts demonstrating that it engaged in a good faith balance of the different unit members' interests as required under *Civil Service Bar Association*.¹²

Therefore, *Hoosick Falls* does not stand for the substantive proposition that an employer or an employee organization is prohibited from proposing the exclusion of one group of employees from a negotiated retroactive salary increase or other benefits.¹³ Nor does the decision establish a *per se* prohibition against such a proposal being considered by an interest arbitration panel pursuant to §204.4 of the Act or limit the ability of a party to advocate before the panel that such a proposal is inequitable or otherwise inappropriate, and therefore should not be included in the panel's opinion and award.

Based upon the foregoing, we deny the Association's exceptions with respect to Joint Employer proposal-16 (Retroactivity) and affirm the dismissal of Case No. U-28483.

Next, we turn to the Association's exceptions challenging the ALJ's conclusion that certain of its proposals are nonarbitrable pursuant to §209.4(g) of the Act.

¹¹ See, *219 Broadway Corp v Alexander's, Inc.*, 46 NY2d 506 (1979).

¹² *Calkins v Assn of New York State Troopers, Inc.*, *supra*, note 7.

¹³ See also, *Anastacio v County of Putnam*, 41 PERB ¶7519 (Supreme Court Putnam County 2008).

Section 209.4(g) of the Act states, in relevant part:

With regard to any organized unit of deputy sheriffs... the provisions of this section shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions proscribed¹⁴ [sic] by law..

As we reiterated today in *Orange County Deputy Sheriff's Police Benevolent Association, Inc*¹⁵ (*County of Orange*), in deciding whether a particular proposal is directly related to compensation, and therefore arbitrable under §209.4(g) of the Act, we will examine the proposal to determine whether its sole, predominant or primary characteristic is a modification in the amount or level of compensation under the test first articulated in *New York State Police Investigators Association*¹⁶ (*State Police*):

The degree of a demand's relationship to compensation is measured by the characteristic of the demand. If the sole, predominant or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent *directly* relates to compensation. A demand has compensation as its sole, predominant or primary characteristic only when it seeks to effect some change in amount or level of compensation by either payment from the State to or on behalf of an employee or the modification of an employee's financial obligation arising from the employment relationship (e.g., a change in an insurance co-payment).¹⁷ [Emphasis in original.]

¹⁴ Should be "prescribed".

¹⁵ 44 PERB ¶30__ (2011).

¹⁶ 30 PERB ¶3013 (1997), *confirmed sub nom.*, *New York State Police Investigators Assn v New York State Pub Empl Rel Bd*, 30 PERB ¶7011 (Supreme Court Albany County 1997).

¹⁷ *Supra*, note 16, 30 PERB ¶3013 at 3028.

We found in *County of Orange*, however, that when a unitary demand includes an inseparable nonarbitrable component under §209.4(g) of the Act, it cannot be reasonably interpreted to be solely, predominantly or primarily related to increasing the level or amount of compensation. Therefore, we reaffirmed the conclusion in *Sullivan County Patrolmen's Benevolent Association, Inc.*¹⁸ (*County of Sullivan*) that a unitary demand that includes both nonarbitrable and arbitrable subjects does not satisfy the applicable arbitrability test under §209.4(g) of the Act.

The application of the unitary demand principle to arbitrability disputes under §209.4(g) of the Act is necessitated by the Legislature's public policy choice of dividing the subject matter of proposals for deputy sheriffs into two classes with distinct impasse procedures. An employer or an employee organization cannot avoid the statute's clear public policy by inextricably combining in a single proposal, a nonarbitrable subject with a subject that is directly related to compensation.¹⁹ As a practical matter, a party that

¹⁸ 39 PERB ¶3034 (2006).

¹⁹ We have applied the unitary demand doctrine for decades with respect to a proposal containing mandatory and nonmandatory subjects. *Town of Haverstraw*, 11 PERB ¶3109 (1978) (subsequent history omitted); *Pearl River Union Free Sch Dist*, 11 PERB ¶3085 (1978); *City of Rochester*, 12 PERB ¶3010 (1979); *City of Oneida PBA*, 15 PERB ¶3096 (1982); *Highland Falls PBA, Inc*, 42 PERB ¶3020 (2009). Under this precedent, a party presenting a single demand containing both mandatory and nonmandatory subjects must reasonably indicate to the other party a willingness to negotiate the mandatory subjects separately. Such intent can be demonstrated on the basis of the wording of the proposal and/or the manner that it is presented at negotiations. To the extent that *Town of Fishkill*, 39 PERB ¶3035 (2006), can be construed as articulating a different test for determining whether a demand is unitary, it is hereby reversed. Finally, we reject the Association's argument that the unitary demand doctrine should be abandoned. Contrary to the Association's claim, the doctrine enhances negotiations by requiring a party to communicate its intent regarding a multifaceted proposal and, when necessary, amending such a proposal to sever the mandatory from the nonmandatory.

chooses such a tactic assumes the high risk of having its unitary proposal treated as nonarbitrable under §209.4(g) of the Act as well as causing inevitable delay in the ultimate resolution of the impasse.

In the present case, we affirm the ALJ's conclusion that Association Proposal 2-Article 3, §15 (Mandatory On-Call), and Association Proposal 8-Article 16 (General Municipal Law §207-c Procedure) are nonarbitrable under §209.4(g) of the Act. While compensation is a component of each, these unitary proposals are not "wage payment procedures" nor are they "purely compensatory in nature" as claimed by the Association.²⁰ Each unitary proposal addresses subjects that are not directly related to compensation, and, is therefore nonarbitrable. Association Proposal 2-Article 3, §15 (Mandatory On-Call) includes the timing and posting of on-call assignments and the distribution of an on-call schedule, both of which are not directly related to compensation.²¹ Similarly, components of Association Proposal 8-Article 16 (General Municipal Law §207-c Procedure) address nonarbitrable subjects under §209.4(g) of the Act such as the content of the medical information release form. The content of the particular form, unlike other components of the proposal, is not directly related to whether a unit member is eligible to receive, or to continue to receive, monetary benefits pursuant to GML §207-c.

We reach a different conclusion, however, with respect to Association Proposal

²⁰ Association's Brief in Support of Exceptions, pp. 9-10.

²¹ The ALJ correctly identified other nonarbitrable aspects of this proposal, which we need not repeat. *Supra*, note 1, 44 PERB ¶4517 at 4545. Following our review of the proposal, we also reject the Association's argument that the ALJ erred in finding the proposal unitary. There is nothing in the Association's proposal or set of proposals that reasonably indicate the Association's willingness to treat the various components of the proposal separately.

4-Article 8, §5 (Health Insurance Buy-Out). The primary and predominant characteristic of this proposal is to increase the level of compensation for unit employees based upon declination and waiver of employer health insurance coverage, and the conversion of that benefit into compensation. Following a declination and waiver, the employee is eligible to receive additional compensation under a formula set forth in the proposal. In addition, the proposal would allow an employee to terminate receipt of the additional compensation through a request to re-establish health care coverage. While there are components of the proposal that are procedural in nature, those procedures directly relate to whether a unit employee is eligible for an increase or decrease in the level of compensation. Therefore, we reverse the ALJ's conclusion that this proposal is nonarbitrable under §209.4(g) of the Act.

In *County of Orange*,²² we reaffirmed the holding in *State Police*²³ that proposals limited to seeking an increase in the amount of accumulated leave without a wage reduction are not directly related to compensation. In the present case, the ALJ correctly found Association proposal 10-Article 28 (Reciprocal Rights) to be a demand seeking leave from work for Association activities without a loss in pay, and therefore it is nonarbitrable under *State Police*.

We also affirm the ALJ's finding that Association proposal 2-Article 3, §12 (Road Patrol) and Association proposal 5-Article 9 (Road Patrol Schedule) are nonarbitrable under §209.4(g) of the Act.

The parties stipulated that the alternating biweekly schedule in Association

²² *Supra*, note 15.

²³ *Supra*, note 16.

proposal 2-Article 3, §12 (Road Patrol) would result in unit employees working 1944 hours per year or 243 days per year. In its brief, the Association argues that the immediate consequence of this proposal is a shortened work year and a lower number of mandatory hours of work thereby increasing the hourly rate of pay for unit employees. We reject the Association's argument on three grounds. First, we are unable to conclude that the proposal would shorten the days and hours worked because the record is silent with respect to the annual number of days or hours currently worked. In addition, the Association's unit members are not paid on an hourly basis, and therefore, under *State Police* the proposal is nonarbitrable because it would result in additional time off for unit employees without a cumulative increase in compensation. Finally, the proposal, like Association proposal 5-Article 9 (Road Patrol Schedule), is primarily related to scheduling, a subject that the Legislature chose to expressly define as nonarbitrable under §209.4(g) of the Act.

Finally, the Association asserts in its exceptions that the ALJ erred by holding that the fourth sentence of the first paragraph in Association proposal 9-Article 21 (Clothing Allowance) is nonmandatory and, therefore, nonarbitrable under §209.4(g) of the Act. As the Association correctly points out, the Joint Employer's amended charge alleges only that the proposal is not directly related to compensation; the pleading does not allege that the demand was nonmandatory. Nevertheless, we affirm the ALJ finding that the sentence is nonarbitrable because its primary and predominant characteristic is equipment, a subject that is not compensatory in nature.

Joint Employer's Cross-Exceptions

In its cross-exceptions, the Joint Employer challenges the ALJ's findings that the

separate demands in Association proposal 2-Article 3, §§2 and 5 are arbitrable under §209.4(g) of the Act. Contrary to the Joint Employer's arguments, we find each to be directly related to compensation. The first proposes modification of the current agreement by mandating, rather than permitting, the Joint Employer to pay the working rate of pay to a deputy sheriff who is hired with at least one year of prior experience. We reject the Joint Employer's assertion that the predominant characteristic of this demand is to restrain managerial discretion with respect to hiring. The second demand would amend the current agreement by requiring that deputy sheriffs be paid overtime compensation for all travel time to and from training, including study time and notebook preparation. While the Fair Labor Standards Act of 1938²⁴ (FLSA) may arguably treat such periods as noncompensable,²⁵ it is well-settled that the FLSA sets the floor but not the ceiling regarding compensation. Therefore, the FLSA has no relevancy to this particular Association demand, which would increase the aggregate level of compensation for Association unit members, and therefore, is arbitrable under §209.4(g) of the Act.

Finally, we grant, in part, the Joint Employer's cross-exception challenging the ALJ's conclusion that Association proposal 9-Article 21 (Clothing Allowance) is not a unitary demand. Based upon the proposal's structure and wording, we conclude that it includes three distinct and severable unitary demands. The first and third paragraphs

²⁴ 29 USC §201, *et seq.*

²⁵ 29 CFR §553.226(b)(3)(c) states: "Police officers or employees in fire protection activities, who are in attendance at a police or fire academy or other training facility, are not considered to be on duty during those times when they are not in class or at a training session, if they are free to use such time for personal pursuits. Such free time is not compensable."

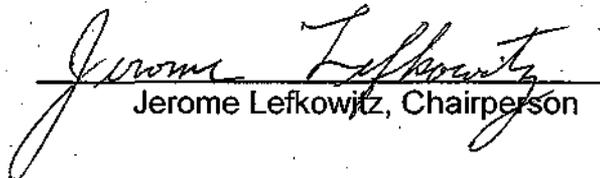
are nonarbitrable under §209.4(g) of the Act because they include arbitrable and nonarbitrable subjects. The second paragraph, however, is arbitrable because its sole characteristic is an increase in compensation.

Based upon the foregoing, we find that the Association violated §209-a.2(b) of the Act when it submitted the following proposals to compulsory interest arbitration: Association proposal 2-Article 3, §12 (Road Patrol) and §15 (Mandatory On-Call); Association proposal 5-Article 9 (Road Patrol Schedule); Association proposal 8-Article 16 (General Municipal Law §207-c Procedure); Association proposal 9-Article 21 (Clothing Allowance), 1st and 3rd paragraphs; and Association proposal 10-Article 28 (Reciprocal Rights).

In light of our finding that Joint Employer proposal 16 (Retroactivity) is arbitrable, we dismissed Case No. U-28483 in its entirety.

IT IS, THEREFORE, ORDERED that Case No. U-28483 is dismissed and that the Association withdraw the above-listed proposals from interest arbitration.

DATED: August 19, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

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

In the Matter of

**INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, LOCAL 2028,**

Petitioner,

CASE NO. CP-1287

- and -

**NIAGARA FRONTIER TRANSPORTATION
AUTHORITY,**

Employer.

WILLIAM E. GRANDE, ESQ., for Petitioner

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of the International Longshoremen's Association, Local 2028 (Local 2028) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing its petition for the placement of the position of Safety Specialist employed by the Niagara Frontier Transportation Authority (NFTA) into its existing negotiating unit.¹

In his decision, the Director ruled that:

A petition for unit placement cannot be used to decertify a bargaining agent with respect to certain titles by fragmenting them from an existing unit. While such petitions may be used under limited circumstances to contest the employer's placement of a title into an existing negotiating unit shortly after such placement, such circumstances do not here exist.² (citations omitted)

Local 2028 argues in support of its exceptions that the Board has never

¹ 44 PERB ¶4003 (2011).

² *Supra*, note 1, 44 PERB ¶4003 at 4009.

decisively confirmed the proposition stated in the first sentence of the above-quoted ruling, and it urges us to repudiate it. Although we have not previously addressed this proposition definitively, our decision in *Ogdensburg City School District*³ states that "the intent [of our Rules of Procedure] was only to allow for the placement into the appropriate unit of ... positions which had been excluded ... from representation."⁴ In any event, we now affirm the Director's ruling and hold that a unit placement petition is not a proper procedural vehicle for seeking to remove a position from an existing unit except under very limited circumstances.

Local 2028 filed its unit placement petition to remove the at-issue position of Safety Specialist from a unit represented by the Civil Service Employees Association, Local 1000, AFSCME, AFL-CIO (CSEA) and to place the position in the unit it represents. Local 2028's petition was filed approximately 11 months after the position was placed in the CSEA unit pursuant to a decision by an Administrative Law Judge (ALJ) granting a unit placement petition filed by CSEA.⁵

Local 2028 contends that its unit placement petition should have been processed by the Director because CSEA's earlier representation petition had been processed to completion without its knowledge and participation.

The record reveals that Local 2028 was not referenced by CSEA or NFTA in their respective pleadings during the processing of CSEA's earlier petition before the ALJ.

³ 31 PERB ¶3060 (1998).

⁴ *Supra*, note 3, 31 PERB ¶3060 at 3131.

⁵ *Niagara Frontier Transportation Auth*, 43 PERB ¶4003 (2010). CSEA had filed a similar petition seeking, *inter alia*, to place the same position into its unit but withdrew that request under the terms of a stipulation with NFTA. See, *Niagara Frontier Transportation Auth*, 38 PERB ¶4021 (2005); *Niagara Frontier Transportation Auth*, 43 PERB ¶4003 (2010).

As a result, Local 2028 was never notified of the pendency of the petition. NFTA's opposition to CSEA's petition centered upon its arguments that the duties of the position warranted a managerial/confidential designation, and that CSEA waived the right to seek placement based upon the terms of a prior stipulation between the parties. Those were the issues presented by the parties and determined by the ALJ.

Pursuant to §201.5(c)(6) of our Rules of Procedure (Rules), a petitioner seeking unit clarification or placement is obligated to set forth in its petition "the name and address of any other employee organization which claims to represent the position." In addition, §201.5(d) of the Rules requires a response to such a petition to set forth "a specific admission, denial or explanation of each allegation made by the petitioner... and a clear and concise statement of any other facts which the responding party claims may affect the processing or disposition of the petition."

In the present case, Local 2028 does not allege that CSEA and/or NFTA were aware that Local 2028 claimed to represent the Safety Specialist position, which has existed for a number of years. Indeed, Local 2028 does not claim that it had been previously unaware of the existence of the position or allege facts that, if proven, would demonstrate it had previously claimed to represent or claimed the right to represent the position. Therefore, we are not persuaded that Local 2028's petition fits within the very narrow circumstances where a unit placement petition may be utilized to remove a position from an existing unit. As a result, we affirm the Director's dismissal of the unit placement petition filed by Local 2028.

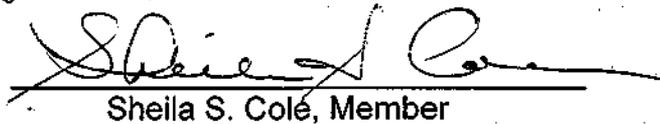
Although this case does not present us with circumstances that warrant the processing of a unit placement petition for the removal of the title from the CSEA unit, we emphasize that a different set of alleged facts might have led us to reach a

different conclusion. For example, in a case in which a unit placement was based upon an intentional failure of a party and/or parties to disclose the identity of another employee organization claiming to represent the at-issue position, or that may be affected by the petition, might warrant the processing of a unit placement petition to remove the position from one unit and place it in another.⁶

Based upon the foregoing, we deny the exceptions by Local 2028 and affirm the decision of the Director.

DATED: August 19, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

⁶ In addition, the deliberate failure to disclose the identity of the other employee organization may also constitute grounds for an improper practice charge under §§209-a.1(a) and 209-a.2(a) of the Act.

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

In the Matter of

**TRANSPORT WORKERS UNION, LOCAL 106,
TRANSIT SUPERVISORS ORGANIZATION,**

Charging Party,

- and -

CASE NO. U-27583

NEW YORK CITY TRANSIT AUTHORITY,

Respondent,

-and-

SUBWAY SURFACE SUPERVISORS ASSOCIATION,

Intervenor.

**COLLERAN O'HARA & MILLS (MICHAEL B. BOSSO of counsel), for
Charging Party**

**MARTIN B. SCHNABEL, VICE PRESIDENT AND GENERAL COUNSEL
(ROBERT K. DRINAN of counsel), for Employer**

**LAW OFFICES OF STUART SALLES, ESQ. (STUART SALLES of counsel),
for Intervenor**

BOARD DECISION AND ORDER

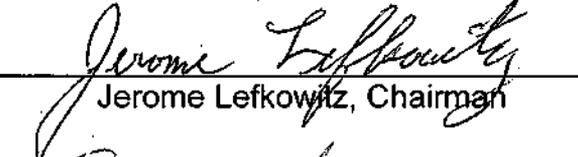
This case comes to the Board on exceptions by the Transport Workers Union, Local 106, Transit Supervisors Organization (TSO) to a decision by an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the New York City Transit Authority (Authority) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by transferring unit work previously performed exclusively by Office Managers, a title within TSO's unit, to Administrative Station Supervisors Level 1 (ASSI), which are in a unit represented by the Subway Surface Supervisors Association

(SSSA).¹

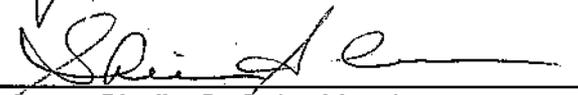
Following our review of the testimony of the witnesses and the exhibits herein, we affirm the findings of fact of the ALJ, and her conclusion that neither Office Managers nor any other TSO-represented employees ever performed the at-issue clerical and administrative duties exclusively. Rather, prior to the assignment of those duties to ASSIs, the duties were performed by Zone Superintendents, who are also not in the TSO represented unit. Inasmuch as TSO has not demonstrated that it exclusively performed the work, we deny its exceptions and affirm the decision of the ALJ.²

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

DATED: August 19, 2011
Albany, New York



Jerome Lefkowitz, Chairman



Sheila S. Cole, Member

¹ 43 PERB ¶4505 (2010). At the commencement of the first day of hearing, SSSA appeared and placed a statement on the record. SSSA stated that it was satisfied that its position would be well-represented by the Authority but wanted to participate in any settlement discussions that may take place. SSSA then left the hearing and did not participate in subsequent hearings.

² See, *Niagara Frontier Transportation Auth*, 18 PERB ¶3083 (1985); *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), *confirmed and mod, in part*, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶3016 (2009).