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State of New York Public Employment Relations Board Decisions from September 26, 2011

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from September 26, 2011

Keywords

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

Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF ALBION DPW EMPLOYEES ASSOCIATION,

Petitioner,

-and-

CASE NO. C-6066

VILLAGE OF ALBION,

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,

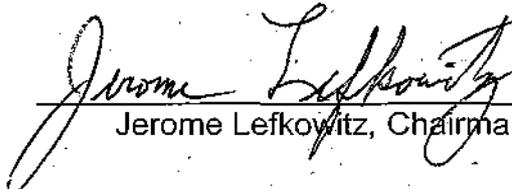
IT IS HEREBY CERTIFIED that the Village of Albion DPW Employees Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations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

Included: Laborer, Motor Equipment Operator, General Maintenance, Water Maintenance Worker, Sewage Treatment Plant Maintenance Mechanic, Water Treatment Plant Maintenance Mechanic, Auto Mechanic, Sewer Treatment Plant Operator, Water Treatment Plant Operator, Senior Sewage Treatment Plant Operator, Senior Water Treatment Plant Operator, Working Supervisor, and Water Treatment Plant Operator Trainee.

Excluded: All other employees.

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

DATED: September 26, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**UNITED FEDERATION OF TEACHERS,
LOCAL 2, AFL-CIO,**

Petitioner,

-and-

CASE NO. C-6064

OPPORTUNITY CHARTER SCHOOL,

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,

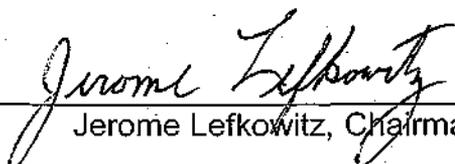
IT IS HEREBY CERTIFIED that the United Federation of Teachers, Local 2, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Teachers, Teacher Leaders, Assistant Teachers, Learning Specialists, Consultant Teachers, Behavioral Specialists, Special Education Teachers, Coaches, Assistant Deans, Guidance Counselors and Social Workers.

Excluded: CEO, Principal, Assistant Principals, Directors, Assistant Directors, Executive Assistants, Secretaries, Department Supervisors, Deans, Parent Coordinators, Business Managers, Operations Managers, Human Resource Consultants, School Aides and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Federation of Teachers, Local 2, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: September 26, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

GREECE UNIFORMED FIRE OFFICERS ASSOCIATION,

Petitioner,

-and-

CASE NO. C-6049

NORTH GREECE 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,

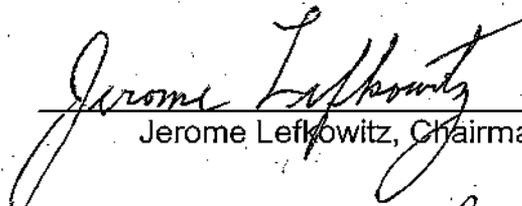
IT IS HEREBY CERTIFIED that the Greece Uniformed Fire Officers Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

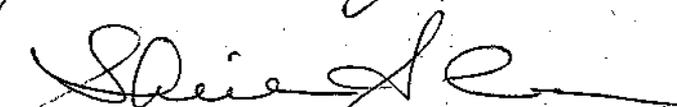
Included: Fire Captains and Lieutenants.

Excluded: EMT/Laborers, Dispatchers and Firefighters.

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

DATED: September 26, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

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

In the Matter of

RONALD GRASSEL,

Charging Party,

-and-

**CASE NOS. U-30052
& U-30189**

**UNITED FEDERATION OF TEACHERS, LOCAL 2, AFT,
AFL-CIO,**

Respondent.

RONALD GRASSEL, *pro se*

**DAVID BRODSKY (ALLISON S. BILLER, of counsel), for Board of
Education of the City School District of the City of New York**

**RICHARD E. CASAGRANDE (PAMELA PATTON FYNES, of counsel),
for United Federation of Teachers, Local 2, AFT, AFL-CIO**

BOARD DECISION AND ORDER

This matter comes to the Board on purported exceptions by Ronald Grassel (Grassel) to an interim determination by an Administrative Law Judge (ALJ) denying his request to amend his charges to allege that the Board of Education of the City School District of the City of New York (District) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it allegedly disclosed that he has a disability, and that he is pursuing a claim of disability discrimination before the United States Equal Employment Opportunity Commission (EEOC). In addition, Grassel requests the Board to review a series

of additional procedural arguments, some of which were not part of his motion to the ALJ. The District opposes the exceptions, and it has filed a cross-motion seeking sanctions against Grassel pursuant to §212.4(j) of our Rules of Procedure (Rules).

DISCUSSION

Although Grassel has labeled his pleading as exceptions, we will treat it as a motion for leave to file exceptions pursuant to §212.4(h) of the Rules because it seeks interlocutory review of an ALJ's interim ruling. Such motions are granted only when a moving party demonstrates extraordinary circumstances.¹ We are confident that Grassel is fully aware of this principle because we have cited it in our numerous prior decisions denying his earlier motions.²

In the present cases, Grassel has not demonstrated extraordinary circumstances warranting the grant of leave to file exceptions. Many of the issues raised to Board were not included in his motion to the ALJ, and the ALJ's denial of his motion to add a claim against the District does not constitute extraordinary circumstances.

In our last decision denying another of Grassel's motions for leave to file exceptions in Case No. 30052, we observed that:

Grassel's repetitious motions burden the administrative process with unnecessary costs and delays. We reiterate that Grassel may face

¹ *State of New York (Division of Parole)*, 40 PERB ¶3007 (2007).

² *UFT (Grassel)*, 43 PERB ¶3045 (2010); *UFT (Grassel)*, 43 PERB ¶3034 (2010); *UFT (Grassel)*, 43 PERB ¶3033 (2010); *UFT (Grassel)* 32 PERB ¶3071 (1999).

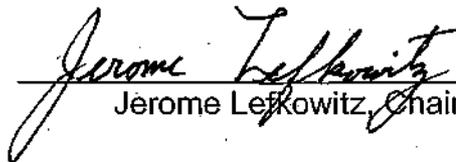
appropriate sanctions in the future under §212(j) of our Rules, if he continues his practice of filing vexatious motions and pleadings.³

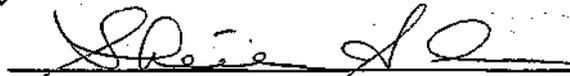
Despite this warning, Grassel's current application is a continuation of his pattern of behavior that is apparently aimed at delaying the conclusion of the administrative process concerning his two pending charges. However, we do not deem this application alone to be sufficient to constitute aggravated misconduct warranting the sanctions permitted under §212.4(j) of our Rules. Therefore, we deny the District's cross-motion for the imposition of sanctions at the present time without prejudice. We again, however, caution Grassel to refrain from filing similar meritless exceptions and motions or face the possibility of future sanctions.

Based upon the foregoing, the motion by Grassel and the cross-motion by the District are denied.

SO ORDERED.

DATED: September 26, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

³ *UFT (Grassel)*, *supra*, note 2, 43 PERB ¶3045 at 3161 (2010).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

COUNTY OF LIVINGSTON,

Charging Party,

CASE NO. U-29244

-and-

LIVINGSTON COUNTY COALITION OF PATROL
SERVICES,

Respondent.

DAVID W. LIPPITT, ESQ., for County of Livingston

**TREVETTE CRISTO SALZER & ANDOLINA (LAWRENCE J. ANDOLINA of
counsel), for Livingston County Coalition of Patrol Services**

BOARD DECISION AND ORDER

This matter comes to us on the exceptions of County of Livingston (County) to a decision of the Administrative Law Judge (ALJ) dismissing its charge that Livingston County Coalition of Patrol Services (COPS) violated §209-a.2(b) of the Public Employees Fair Employment Act (Act) by refusing to execute a final agreement containing the same terms set forth in a tentative agreement, which was executed and ratified by the parties. The at-issue language amended Article 10 of the prior collective bargaining agreement (agreement) through the insertion of the phrase "full time" between "continuous" and "service" in that article. This amendment was one of many changes to Article 10 contained in the tentative agreement.

The ALJ concluded that the addition of the phrase "full time" to Article 10 was substantive and that during the negotiations the parties had not discussed the change.

This persuaded the ALJ that there had not been a meeting of minds concerning the change and, therefore, there was no agreement between the parties.

The first proposal to have the phrase "full time" placed between "continuous" and "service" in Article 10 was in COPS' initial negotiation proposal. It was included in a complete proposed draft agreement prepared by COPS' negotiating team member Ron Huff, Jr. (Huff), which was prefaced by the statement that the draft agreement

"[i]s intended to be accepted or rejected as a whole. Should it be rejected then the proposal is withdrawn in its entirety and we revert back to the proposals submitted on October 14, 2008 and will continue to negotiate in good faith."

The COPS' proposal was not accepted by the County, and the parties continued to negotiate until they reached a tentative agreement. They also agreed that County Personnel Officer Tish Lynn (Lynn), a member of the County's negotiating team, would draft the tentative agreement, and would "clean up" the language of the expired agreement. Lynn prepared the tentative agreement, which contained multiple changes to Article 10, including insertion of the at-issue phrase. The modifications to Article 10 were highlighted with track changes.

COPS chief negotiator Randall Morris (Morris) approved the proposed changes contained in Lynn's draft and referred it to COPS' attorney, who also approved it. It was then ratified by COPS' membership. Subsequently, Huff raised a question with Morris concerning the insertion of "full time" in the ratified agreement, which precipitated the latter's refusal to execute the final agreement.

Lynn testified that insertion of the phrase "full time" in the tentative agreement was part of her "clean up" of the article. In support of this characterization, she testified

on cross-examination that part-time unit members had never received pro-rated credit for retirement health care, and that the language change merely clarified the terms of the agreement. Indeed, Article 18 of the agreement specifies the rates of compensation of part-time employees, but explicitly provides that part-time employees are not entitled to "other allowable expenses or benefits provided in this agreement,..." except for retirement benefits provided according to state law.

Lynn's testimony concerning the cosmetic nature of the change to Article 10 in the tentative agreement is undisputed in the record. Inclusion of the phrase "full time" was part of multiple cosmetic modifications she made to the article. COPS does not claim that those other modifications were substantive in nature. During the hearing, COPS did not offer any evidence explaining its original choice to include the very same phrase in its initial negotiation proposal, or why it considers that specific change to be substantive. Although Huff, the drafter of the COPS' original proposal, was present at the hearing, he was not called as a witness. Considering his central role in placing the phrase "full time" in COPS' initial proposal, we draw a negative inference from his failure to testify.¹

Based upon the evidence in this record, we conclude that the County's insertion of the phrase was in furtherance of the parties' agreement that Lynn would clean up the article. We find that there was a meeting of the minds concerning this change just as there was a meeting of minds with respect to the many other changes made to the

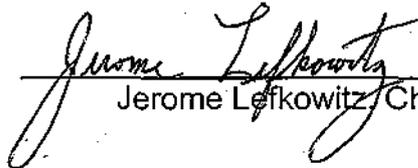
¹ *State of New York (Division of Parole)*, 41 PERB ¶3033, n.15 (2008); *County of Tioga*, 44 PERB ¶3016 (2011).

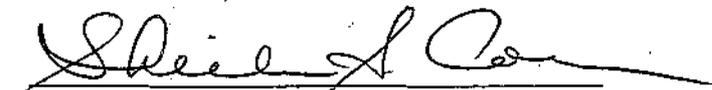
article by Lynn in the tentative agreement.² In light of our conclusion, we reverse the decision of the ALJ and find that COPS violated §209-a.2(b) of the Act by refusing to execute the final agreement.

IT IS, THEREFORE, ORDERED that:

1. Upon request of the County of Livingston, COPS shall execute the successor agreement incorporating the terms of the executed and ratified tentative agreement between the County of Livingston and COPS;
2. Sign and post the attached notice at all physical and electronic locations customarily used by COPS to post notices to employees in its bargaining unit.

DATED: September 26, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

² Union Springs Cent Sch Teachers Assn, 6 PERB ¶13074 (1973).

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 Livingston in the unit represented by the Livingston County Coalition of Patrol Services (COPS) that COPS will:

1. Upon request of the County of Livingston, execute the successor agreement incorporating the terms of the executed and ratified tentative agreement between the County of Livingston and COPS.

Dated

By

On behalf of the Livingston County
Coalition of Patrol Services

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

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

In the Matter of

VILLAGE OF BALDWINSVILLE,

Charging Party,

CASE NO. U-29453

- and -

BALDWINSVILLE POLICE BENEVOLENT ASSOCIATION,

Respondent.

BALDWINSVILLE POLICE BENEVOLENT ASSOCIATION,

Charging Party,

CASE NO. U-29481

- and -

VILLAGE OF BALDWINSVILLE,

Respondent.

**HANCOCK & ESTABROOK, LLP (MELINDA BURDICK BOWE of counsel),
for Village of Baldwinsville**

JOHN M. CROTTY, ESQ. for Baldwinsville Police Benevolent Association

BOARD DECISION AND ORDER

These cases come to the Board on exceptions filed by the Baldwinsville Police Benevolent Association (PBA) and cross-exceptions by the Village of Baldwinsville (Village) to portions of a decision of an Administrative Law Judge (ALJ).¹

¹ 43 PERB ¶4594 (2010).

On a stipulated record, the ALJ concluded, *inter alia*, in Case No. U-29453 that a portion of PBA's General Municipal Law (GML) §207-c proposal concerning continuation of benefits during the proposed light duty assignment appeal procedure is nonmandatory and ordered PBA to withdraw it from interest arbitration. The ALJ found, however, that PBA did not violate the Public Employees' Fair Employment Act (Act) by submitting to arbitration portions of another proposal concerning call-in and call-out procedures and overtime distribution. In Case No. U-29481, the ALJ dismissed the charge alleging that the Village violated §209-a.1(d) of the Act by filing a response to the petition for compulsory interest arbitration that included the Village's proposal to expand the anti-discrimination provision of the parties' expired agreement.

EXCEPTIONS

In its exceptions, PBA asserts that the ALJ erred in finding that its demand for the continuation of benefits during the proposed GML §207-c light duty assignment appeal procedure is nonmandatory and dismissing PBA's charge that alleged that the Village violated §209-a.1(d) of the Act by submitting to arbitration a proposal to expand the scope of the anti-discrimination provision of the expired agreement.

In its cross-exceptions, the Village contends that the ALJ erred by failing to find that PBA violated §209-a.2(b) of the Act by submitting to arbitration portions of its proposals concerning call-in and call-out procedures and overtime distribution.

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.

DISCUSSION

We begin with PBA's exception challenging the ALJ's conclusion concerning its demand in §7.3 for the continuation of benefits pending an appeal under the proposed GML §207-c light duty assignment procedure, which states:

Section 7. Light Duty Assignments

1. Any Recipient may be examined by a physician chosen by the Village's designated agent(s) to determine the Recipient's ability to perform specified light duty. Any Recipient deemed able to perform specified light duty by the Village's designated agent(s), based upon medical documentation, may be directed by the Chief, in his/her sole discretion, to perform such specified light duty.²

2. A Recipient may contest an order to report for specified light duty by submitting conflicting medical documentation to the Village's designated agent(s) within ten (10) calendar days of receipt of the order to report for specified light duty. The conflicting medical evidence may consist of a note or letter from a medical provider stating that a Recipient is unable to perform the specified light duty. The Village's designated agent(s) shall review the medical documentation, and within ten (10) calendar days of its receipt shall issue to the Chief and Recipient a decision as to whether the order to return to specified light duty should be confirmed, modified or withdrawn. If the Recipient is dissatisfied with the decision, he/she may request, in writing, a hearing to appeal from the decision within ten (10) calendar days after receipt of the Village's designated agent(s)' decision. The Village's designated agent(s) shall arrange for a hearing to be held pursuant to Section 11 of this procedure.

3. *Pending the hearing and determination thereon, the Recipient shall continue to receive his/her Section 207-c benefits set forth in this procedure. (Emphasis added.)*

4. Where a determination by a Hearing Officer has been made pursuant to Section 11 of this procedure that the Recipient can report to and perform the specified light duty, and that individual fails to report to perform the specified light duty, if same is available and offered, that employee's Section 207-c status shall be discontinued and the employee

² PBA has not filed an exception to the ALJ's conclusion that the second sentence in §7.1 is nonmandatory because it seeks to grant to the Chief of Police the sole discretion to direct a unit member to perform light duty. See, *Highland Falls Patrolmen's Benevolent Association, Inc.*, 42 PERB ¶3020 (2009).

shall be placed on sick or other paid leave as set forth in Section 5 of this procedure.

5. No Recipient on specified light duty shall be assigned to perform work, a tour of duty or training that is inconsistent with the injury or illness. In the event there are more light duty Recipient available on one (1) tour of duty, than can effectively utilized, the Chief may change the tour of duty to effectively utilize those on light duty assignment. In the event there are insufficient number of volunteers among those on specified light duty assignment for changed tours of duty, an involuntary assignment shall be done in the inverse order of seniority within rank.

6. A Recipient who is working specified light duty, shall be entitled to all contractual benefits.

7. A Recipient who is working specified light duty and is absent due to the injury or illness shall be granted Section 207-c status for the absence and shall not be charged sick or other paid leave for the absence based upon medical document [sic.] that the absence is due to the injury or illness. A Recipient denied Section 207-c benefits for the absence(s) may request a hearing pursuant to Section 11 herein, within ten (10) calendar days after receipt of notification from the Claims Manager that Section 207-c benefits will not be paid for the absence(s).

8. The Employer shall not be required to establish or maintain any light duty assignment.

In *City of Middletown Police Benevolent Association*,³ we concluded that a proper analysis concerning the negotiability of GML §207-c termination procedures under the Act must include consideration of constitutionally mandated due process requirements with respect to the deprivation of a protected property right. This recognition stems from prior Court of Appeals decisions with respect to GML §§207-a and 207-c procedures.

³ 42 PERB ¶13022, n. 35 (2009), *vacated on other grounds, City of Middletown v City of Middletown PBA*, 43 PERB ¶17002 (Sup Ct Albany County 2010) *affd* 81 AD3d 1238, 44 PERB ¶17003 (3d Dept 2011).

In *Schenectady Police Benevolent Association v New York State Public Employment Relations Board*⁴ a divided Court of Appeals affirmed our conclusion that an employer's decision to direct an employee to perform light duties under GML §207-c is a nonmandatory subject under the Act. At the conclusion of that the decision, however, the Court stated:

Finally, it should be clear that the procedures for implementation of the requirements of General Municipal Law §207-c are not before us. Those procedures may or may not be subject to bargaining. For example, no reason has been shown here why officers should not be permitted the opportunity to obtain and have considered the views of their personal physicians as to surgery.⁵

In *Uniform Firefighters of Cohoes v City of Cohoes*,⁶ the unanimous Court held that the continued receipt of GML §207-a benefits constitutes a property right and that termination of such benefits is, therefore, subject to procedural due process under the Fourteenth Amendment to the United States Constitution. The Court, however, concluded that a due process hearing is not triggered

"unless a firefighter on section §207-a status has brought that [light duty] determination into issue by the submission of a report by a personal physician expressing a contrary opinion. Once evidence of continued total disability has been submitted, we agree with the Appellate Division that the order to report for [light] duty may not be enforced, or

⁴ *City of Schenectady*, 25 PERB ¶3022 (1992), *confirmed sub nom. in part, and modified in part, Schenectady PBA v New York State Pub Empl Rel Bd*, 25 PERB ¶7009 (Sup Ct Albany County 1992), *affd, as modified*, 196 AD2d 171, 27 PERB ¶7001 (3d Dept 1994), *affd*, 85 NY2d 480, 28 PERB ¶7005 (1995).

⁵ *Schenectady PBA v New York State Pub Empl Rel Bd*, *supra*, note 4, 85 NY2d at 487, 28 PERB ¶7005 at 7013.

⁶ 94 NY2d 686 (2000).

benefits terminated, pending resolution of an administrative hearing, which itself is subject to review under CPLR.”⁷

In support of its due process ruling the Court cited the above quoted *dicta* from *Schenectady Police Benevolent Association v New York State Pub Empl Rel Bd* concerning the right of a police officer under GML §207-c to challenge an employer's directive to undergo surgery based upon a contrary medical viewpoint from the officer's personal physician.⁸ More recently, the Court recognized that the same due process protections are applicable to the termination of GML §207-c benefits.⁹

In the present cases, we find that §7.3 of PBA's GML §207-c proposal seeks a contractual codification of a unit member's constitutionally protected property right of continued receipt of GML §207-c benefits after contesting a light duty assignment through the submission of contrary medical evidence. Based upon the foregoing, we reverse the ALJ's conclusion that §7.3 is nonmandatory under the Act.

We, however, affirm the ALJ's finding that the Village's proposal to expand the scope of the anti-discrimination clause of the parties' expired agreement is mandatory. Under the Village's proposal, the anti-discrimination clause would state:

⁷ *Supra*, 94 NY2d at 692.

⁸ Under applicable precedent, there is little doubt that a proposal to replace constitutionally mandated due process procedures with full and binding arbitration concerning the termination of GML §207-c benefits is a mandatory subject of negotiations under the Act. See, *Gilbert v Homar*, 520 US 924 (1997); *Cleveland Bd of Educ v Loudermill*, 470 US 532 (1985); *Prue v Hunt*, 78 NY2d 364, 24 PERB ¶7540 (1991); *Antinore v State*, 49 AD2d 6, 8 PERB ¶7513 (4th Dept 1975), *affd* 40 NY2d 921, 9 PERB ¶7528 (1976); *Chalachan v. City of Binghamton*, 55 NY2d 989, 15 PERB ¶7519 (1982); *City of Watertown v New York Pub Empl Rel Bd*, 95 NY2d 73, 33 PERB ¶7007 (2000). However, this case does not raise the issue because the ALJ found that PBA's narrower proposed GML §207-c hearing procedure is mandatory, and the Village has not filed exceptions to that ruling.

⁹ *Park v Kapica*, 8 NY3d 302 (2007).

2.1 The parties agree not to discriminate against any person because of race, color, creed, national origin, gender, or any other category protected by federal or state law or because of membership or non-membership in the PBA. (Emphasis added)

Contrary to PBA's argument, the demand can not reasonably be interpreted as proposing a waiver of PBA's right to file improper practice charges under the Act or a waiver of the right of PBA and unit members to pursue discrimination and retaliation claims under federal and state laws in forums other than the negotiated grievance/arbitration procedure. Notably, the demand does not propose an election or choice of forums by PBA unit members. Therefore, the United States Supreme Court's holding in *14 Penn Plaza LLC v Pyett*,¹⁰ our holding in *Board of Education of the City School District of the City of Buffalo*¹¹ and our discussion in *City of Cohoes*,¹² concerning the mandatory nature of a proposed statutory waiver of statutory rights are not relevant to the Village's proposal.

It is not necessary for us to address PBA's contention that the proposed new phrase in the expired agreement's anti-discrimination clause is nonmandatory under *Professional Fire Fighters Association Inc, Local 274, I.A.F.F.*¹³ In that decision, we concluded that a proposal seeking to reiterate statutory protections under §§209-a.1(a) and (c) of the Act is nonmandatory. In the present case, the subject of antiunion animus

¹⁰ 556 US 247, 42 PERB ¶7504 (2009).

¹¹ 22 PERB ¶3047 (1989).

¹² 31 PERB ¶3020 (1998), *confirmed sub nom. Uniform Firefighters of Cohoes, Local 2562 v Cuevas*, 32 PERB ¶7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶7019 (3d Dept 2000).

¹³ 10 PERB ¶3043 (1977).

is already contained in the expired anti-discrimination clause, and therefore, to the extent that the subject is nonmandatory, it is converted to mandatory under *City of Cohoes*.¹⁴ In addition, we conclude that the remainder of the at-issue proposal is mandatory as well under *City of Cohoes*,¹⁵ because it proposes to grant additional contractual rights and remedies to PBA unit members concerning a plethora of additional categories of anti-discrimination and anti-retaliation rights emanating from federal and state laws.

Based upon the foregoing, we affirm the dismissal of Case No. U-29481.

Next, we turn to the Village's cross-exception asserting that the following portion of PBA proposal §10.2 concerning call-in or call-out pay is nonmandatory:

In the event the employee completes his/her work or task in less than the minimum herein...he/she shall be entitled to leave, and perform no other work or function, and be paid for the minimum hours set forth herein.

Following our review of the proposal, we reverse the ALJ's conclusion that the demand addresses the mandatory subjects of wages and hours of work. The PBA proposal is nonmandatory because it proposes to abridge the authority of the Village to make work assignments when an employee is at work and on the payroll.¹⁶

Finally, we consider the Village's cross-exception challenging the ALJ's conclusion that the following paragraph in the Special Events Staffing section of PBA proposal §10.8 Overtime Distribution Procedure is a mandatory subject:

¹⁴ *Supra*, note 12. See also, *City of New York*, 40 PERB ¶3017 (2007).

¹⁵ 31 PERB ¶3020 (1998), *confirmed sub nom. Uniform Firefighters of Cohoes, Local 2562 v Cuevas*, 32 PERB ¶7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶7019 (3d Dept 2000).

¹⁶ See, *Buchanan Police Ass'n*, 29 PERB ¶3061 (1996).

In the event there are no or an insufficient number of volunteers ten (10) calendar days prior to the special event, the Chief of Police or designee shall assign an employee(s) as follows:

- (a) An employee who is scheduled to work patrol on that date shall be ordered first (1st); and if there is an insufficient number of employees ordered who were scheduled to work on that date, then,
- (b) An employee on his/her regularly scheduled day(s) off who works patrol shall be ordered next, starting with the least senior employee; and if there is an insufficient number of employees ordered to work who were on their regularly scheduled day(s) off[,] then the School Resource officer(s), then the Detective(s).

According to the Village, this demand is nonmandatory because it would prohibit the Village from assigning employees on approved leave to work the day of a special event. As the Village acknowledges, however, the ALJ ruled that the following paragraph in §10.8, which contains the prohibition is nonmandatory, and directed PBA to withdraw it from arbitration. Accordingly, we affirm the ALJ's conclusion that the above-quoted demand is procedural in nature, and therefore mandatory.

Based upon the foregoing, we grant the Village's cross-exception and affirm the decision of the ALJ, as modified.

IT IS HEREBY ORDERED that: Case No. U-29453 is dismissed and PBA is ordered to withdraw the following portions of its proposals from interest arbitration:

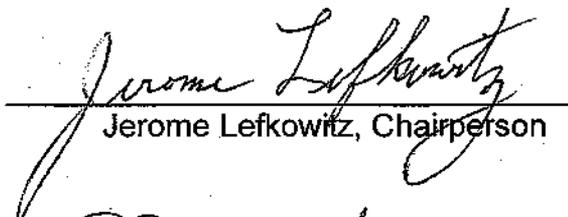
- Proposal 8 - portions of the demand as set forth above and in the ALJ's decision [the sentence in §10.2 regarding call-in or call-out pay; the first sentence of §10.8 Overtime Distribution Procedure; the paragraphs entitled Tour of Duty Shortage(s) – Patrol Unplanned and Tour of Duty Shortage(s) – Patrol Planned; and within Special Events Staffing, the second and third sentences of the first paragraph, and the fifth and sixth paragraphs];

Proposal 19 - §7 Minimum Staffing;

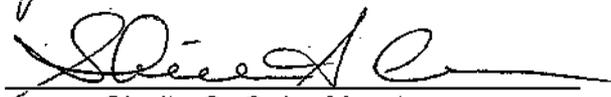
Proposal 21 - §6 Rule, Regulation, Policy and/or Procedure
Change(s);

Proposal 24 -portions of the demand as set forth in the ALJ's
decision [the second sentence of §7.1 (Chief's
authority as to GML §207-c light duty assignments);
and
§7.3 (benefits pending appeal)].

DATED: September 26, 2011
Albany, New York



Jerome Lefkowitz, Chairperson



Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BLOSSOM RANNIE,

Charging Party,

CASE NO. U-31140

- and -

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

Respondent.

BLOSSOM RANNIE, *pro se*

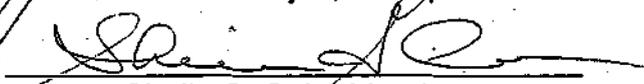
BOARD DECISION AND ORDER

This matter comes to the Board on exceptions by Blossom Rannie (Rannie) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing a charge, as amended, alleging that the Board of Education of the City School District of the City of New York (District) violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act). Following receipt of the exceptions, Rannie was informed that the exceptions were deficient, pursuant §213.2 of the Rules of Procedure, because they were not accompanied by proof of service upon the District. Although granted additional time to do so, Rannie has not submitted such proof.

THEREFORE, the exceptions are denied and the charge is dismissed.

DATED: September 26, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF MADISON and MADISON COUNTY SHERIFF,

Charging Party,

-and-

CASE NO. U-29872

MADISON COUNTY DEPUTY SHERIFF'S POLICE
BENEVOLENT ASSOCIATION, INC.,

Respondent.

MADISON COUNTY DEPUTY SHERIFF'S POLICE
BENEVOLENT ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-29926

COUNTY OF MADISON and MADISON COUNTY SHERIFF,

Respondent.

HANCOCK & ESTABROOK, LLP (JOHN F. CORCORAN of counsel), for
County of Madison and Madison County Sheriff

JOHN M. CROTTY, ESQ., for Madison County Deputy Sheriff's Police
Benevolent Association, Inc.

BOARD DECISION AND ORDER

These cases come to the Board on exceptions filed by the Madison County
Deputy Sheriff's Police Benevolent Association, Inc. (PBA) to a decision of an
Administrative Law Judge (ALJ) finding that PBA violated §209-a.2(b) of the Public
Employees' Fair Employment Act (Act) when it sought compulsory interest arbitration of

PBA's suspension without pay and sick leave proposals and dismissing PBA's claim that the County of Madison and Sheriff of Madison County (Joint Employer) violated §209-a.1(d) of the Act by submitting to interest arbitration a proposal to exclude from entitlement to retroactive pay unit employees not on the payroll at the time of contract ratification.

DISCUSSION

In *Orange County Deputy Sheriff's Police Benevolent Association, Inc.*¹ (*County of Orange*), we reiterated that when 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*² (*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 copayment).³ [Emphasis in original.]

¹ 44 PERB ¶3023 (2011).

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

³ *Supra*, note 2, 30 PERB ¶3013 at 3028 (1997).

In *County of Orange* and in *Tompkins County Deputy Sheriff's Association, Inc.*⁴ (*County of Tompkins*) we reaffirmed the holding in *State Police* that proposals limited to seeking an increase in the amount of accumulated leave without a wage reduction are not directly related to compensation, and are therefore nonarbitrable under §209.4(g) of the Act. Our reaffirmation of that holding stemmed primarily from the indisputable fact that when the Legislature amended §209.4(g) of the Act in 2004,⁵ it utilized the identical phrasing from former §209.4(e) of the Act concerning the arbitrability of subjects which the Board had interpreted in *State Police*.⁶ The historical background of the 2004 amendment to §209.4(g) of the Act demonstrates an intent that the statutory inclusions and exclusions from interest arbitration should be interpreted consistent with the Board's analysis in *State Police*, which was decided seven years before the amendment.

In the present case, PBA's sick leave proposal seeks to increase the accumulation of such leave without a modification in the overall compensation for unit members, and therefore it is nonarbitrable under §209.4(g) of the Act. We reach the same conclusion with respect to PBA's suspension without pay proposal, which states:

Clarify §11.2 – an employee cannot be suspended without pay for a period in excess of 30 calendar days when served with a notice of discipline and files [sic] grievance to contest.

⁴ 44 PERB ¶3024 (2011).

⁵ L 2004, c 63.

⁶ Four years following *State Police*, the Legislature amended §209.4(e) of the Act to delete that phrasing. L 2001, c 587. See, *Town of Walkkill*, 42 PERB ¶3017 (2009), *pet dismissed*, 43 PERB ¶7005 (Sup Ct Albany County 2010).

In its brief, PBA acknowledges that this proposal seeks to ensure that the length of a disciplinary suspension without pay would be the same as that provided for under Civ Serv Law §75 procedures. It asserts, however, that the subject of the proposal is not "disciplinary procedures and actions," and therefore, is subject to compulsory interest arbitration under §209.4(g) of the Act. We find no merit to PBA's argument. While the proposal would change the amount or level of compensation of an employee suspended without pay at the time he or she is served with a notice of discipline, the issue of compensation in the proposal is inextricably intertwined with the contractual disciplinary procedures, a nonarbitrable subject under §209.4(g) of the Act.⁷ It is, therefore, a nonarbitrable demand under §209.4(g) of the Act.

Finally, we deny PBA's exception to the ALJ's conclusion that the Joint Employer's retroactivity proposal is arbitrable under §209.4(g) of the Act. We reject PBA's contention that such a proposal constitutes a prohibited subject for the same reasons set forth in our decision in *County of Tompkins*.⁸

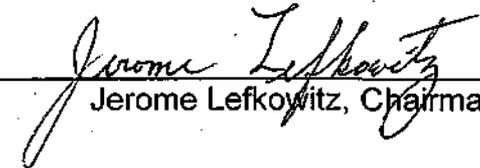
Based upon the foregoing, we deny PBA's exceptions and affirm the ALJ's decision, as modified.

⁷ Based upon our decision in *County of Orange, supra*, note 1, we find merit to PBA's exception that challenges the ALJ's reference to the potentiality of compensation as a constituting a rationale for finding the proposal nonarbitrable. In *County of Orange*, we overruled prior Board precedent, which had held that proposals seeking "potential" compensation were nonarbitrable under §209.4(g) of the Act. Therefore, we modify the ALJ's decision accordingly.

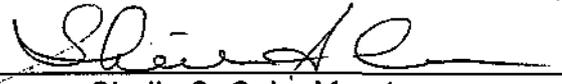
⁸ *Supra*, note 4.

IT IS, THEREFORE, ORDERED that PBA withdraw its suspension without pay and sick leave proposals from interest arbitration, the remainder of Case No. U-29872 is dismissed, and Case No. U-28483 is dismissed in its entirety.

DATED: September 26, 2011
Albany, New York



Jerome Lefkowitz, Chairman



Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COUNTY OF MONROE,

Charging Party,

-and-

CASE NO. U-31129

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

Respondent.

**HARRIS BEACH PLLC (KARLEE S. BOLAÑOS of counsel), for Charging
Party**

**NANCY E. HOFFMAN, GENERAL COUNSEL (PAUL S. BAMBERGER and
KARA L. HILBURGER of counsel), for Respondent**

INTERIM BOARD DECISION AND ORDER

This matter comes to the Board on a motion by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) pursuant to §204.4(a) of the Rules of Procedure (Rules) for an expedited determination of an improper practice charge filed by County of Monroe (County) alleging that CSEA violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by introducing proposals at fact-finding that are substantially different from CSEA's last stated position during the course of negotiations between the parties. CSEA's motion for an expedited determination and the County's opposition to the motion were transferred to the Board by the Director of Public Employment Practices and Representation (Director).

In support of its motion, CSEA asserts that the County's charge concerns

primarily a disagreement over the scope of negotiations. Furthermore, it claims that the parties had engaged in package bargaining, the proposals it submitted to fact-finding were fully encompassed in its prior proposals during negotiations, and that any further delays in completing the impasse process may be harmful to the parties, and their relationship.

The County opposes CSEA's motion on the grounds that the charge does not concern a disagreement over the scope of negotiations as required by §209.4(a) of the Rules. Rather, it contends that its charge alleges that CSEA violated its duty to negotiate in good faith under §209-a.2(b) of the Act by seeking to introduce new and revised proposals at fact-finding, and the County denies that the parties had been engaged in package bargaining.

Following our careful review of the parties' respective submissions, we deny CSEA's motion for an expedited determination. The procedure set forth in §204.4(a) of the Rules was established primarily to create a means for a party to seek an expedited determination concerning whether particular proposals are mandatory, permissive or prohibited.¹

In the present case, we conclude that the factual and legal issues raised by the charge should be fully addressed by the parties before an ALJ prior to the issues being presented to the Board. First, it is not disputed that the County's charge does not seek

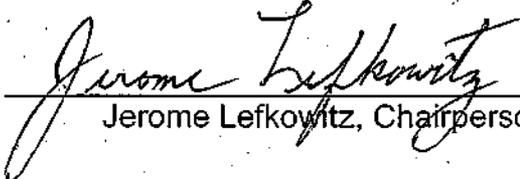
¹ See, *Professional Staff Congress/CUNY*, 7 PERB ¶3028 (1974); *Queensbury Union Free Sch Dist*, 9 PERB ¶3057 (1976); *State of New York (Unified Court System)*, 23 PERB ¶3057 (1990); *Patrolmen's Benevolent Assn*, 37 PERB ¶3033 (2004).

a final determination concerning whether one or more of the proposals submitted by CSEA to fact-finding are nonmandatory or prohibited. In addition, a merits determination with respect to the charge will require a factual hearing concerning whether the parties' engaged in package bargaining and whether CSEA's submission of its proposals to fact-finding violated its duty to negotiate in good faith. An expeditious resolution of those issues might be substantially enhanced through a stipulation of facts, and a stipulated record.

Based upon the foregoing, CSEA's motion is hereby denied, and the matter is remanded to the Director for further processing of the County's charge.

SO ORDERED.

DATED: September 26, 2011
Albany, New York



Jerome Lefkowitz, Chairperson



Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**DEER PARK TEACHERS' ASSOCIATION, NYSUT,
AFT, NEA, AFL-CIO,**

Charging Party,

CASE NO. U-28842

- and -

DEER PARK UNION FREE SCHOOL DISTRICT,

Respondent.

WILLIAM OQUENDO, LABOR RELATIONS SPECIALIST, for Charging Party

**COOPER, SAPIR & COHEN, P.C. (ROBERT E. SAPIR of counsel), for
Respondent**

BOARD DECISION AND ORDER

This matter comes to this Board on exceptions filed by Deer Park Union Free School District (District) to an Administrative Law Judge (ALJ) decision finding that the District violated §209-a.1(e) of the Public Employees' Fair Employment Act (Act) when it failed to grant vertical step increments on September 5, 2008 to unit employees represented by Deer Park Teachers' Association, NYSUT, AFT, NEA, AFL-CIO (Association) pursuant to the terms of the July 1, 2005-June 30, 2008 District-Association collectively negotiated agreement (agreement).¹ The Association's charge was determined upon a stipulated record in lieu of a hearing.

FACTS

Article VII of the parties' agreement states, with respect to vertical steps:

¹ 43 PERB ¶4553 (2010).

Effective July 2, 2005, all eligible teachers shall move one vertical step on the salary schedule;

Effective July 2, 2006, all eligible teachers shall move one vertical step on the salary schedule;

Effective July 1, 2007, all eligible teachers shall move one vertical step on the salary schedule;

This shall not affect the ability of the District to utilize Appendix II Section 2.²

It is undisputed that on August 29, 2008 the parties reached a memorandum of understanding for a successor agreement for the period July 1, 2008 to June 30, 2011. Paragraph 4 of the memorandum stated "Effective July 1, 2008, 2009, 2010 and 2011, each eligible teacher will move up one step in the salary schedule." The Association's membership ratified the memorandum on or about September 4, 2008. On September 5, 2008, the District made salary payments to unit members that did not include any vertical step movement. After the District ratified the memorandum on or about September 9, 2008, all eligible unit members were moved one vertical step on the salary schedule effective July 1, 2008, and they were compensated accordingly.

The Association's central allegation is set forth in paragraph h of its details of charge:

h) That on September 5, 2008 the District engaged in an improper practice within the meaning of Section 209-a.1(e) of the Public Employee's Fair Employment Act when the district

² In her decision, the ALJ cites the following sentence in Appendix II, §2 in the parties' 1974-76 agreement: "Board of Education may with the recommendation of the District Principal, withhold all automatic increments or hold any teacher on step, or both, within the provisions of the Law of New York State." Based upon our conclusion that the Association failed, a matter of fact, to prove that the District violated §209-a.1(e) of the Act, it is not necessary for us to determine the import, if any, of this provision.

knowingly and intentionally refused to advance all eligible members of the Association the step increments as provided for under the collective bargaining agreement. (Emphasis added)

DISCUSSION

Section 209-a.1(e) of the Act makes it an improper practice for an employer

to refuse to continue all the terms of *an expired agreement* until a new agreement is negotiated, unless the employee organization which is a party to such agreement has, during such negotiations or prior to such resolution of such negotiations, engaged in conduct violative of subdivision one of section two hundred ten of this article. (Emphasis supplied)

Based upon our review of the stipulated record, we find no evidence demonstrating that the expired agreement imposed upon the District a contractual obligation to advance unit members a vertical step or make payment for such advancement on September 5, 2008. The only relevant dates in the expired agreement are the three effective dates for vertical advancements: July 1, 2005, 2006 and 2007. In light of the failure of the Association to prove that the expired agreement obligated the District to advance eligible employees on September 5, 2008 or was obligated to make payment for advancement on a specific date, we dismiss the Association's charge.

If the Association had demonstrated a past practice of the District making vertical step payments on July 1 or another specific date, that might have evidenced a statutory obligation of the District under §209-a.1(e) of the Act to continue the timing of those payments. Alternatively, an enforceable past practice of providing vertical step payments on a specific date or an ascertainable time might have evidenced a violation

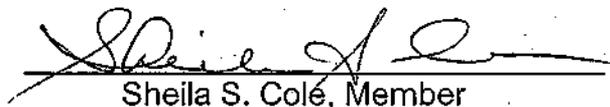
of §209-a.1(d) of the Act under the *Triborough* doctrine.³ However, neither alternative theory was plead nor proven by the Association. In fact, the ALJ specifically found that the parties' practice regarding the date of payment of the vertical step increment is equivocal.

For the reasons set forth above, the ALJ's decision is reversed and the charge is dismissed.

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

DATED: September 26, 2011
Albany, New York


Jerome Letkowitz, Chairman


Sheila S. Cole, Member

³ *Triborough Bridge and Tunnel Authority*, 5 PERB ¶13037, *aff'g* 5 PERB ¶14505 (1972).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RENEE MORRELL,

Charging Party,

CASE NOS. U-30015
& U-30016

- and -

**UNITED FEDERATION OF TEACHERS, LOCAL 2,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO,**

Respondent,

- and -

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

Employer.

RENEE MORRELL, *pro se*

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (ANTONIO M.
CAVALLARO of counsel), for Respondent**

**DAVID BRODSKY, DIRECTOR OF LABOR REALTIONS AND COLLECTIVE
BARGAINING (ALLISON SARA BILLER of counsel), for Employer**

BOARD DECISION AND ORDER

These cases comes to the Board on exceptions filed by Renee Morrell (Morrell) to a decision by an Administrative Law Judge (ALJ)¹ on two improper practice charges filed by her against the United Federation of Teachers, Local 2, American Federation of

¹ 44 PERB ¶4538 (2011).

Teachers, AFL-CIO (UFT). The Board of Education of the City School District of the City of New York (District) is a statutory party pursuant to §209-a.3 of the Public Employees' Fair Employment Act (Act).

In Case No. U-30015, Morrell alleges that UFT violated §209-a.2(c) of the Act by its failure to timely respond to her letters and by its handling of a grievance challenging the failure of a Education Law §3020-a disciplinary arbitrator to issue a decision within the timeframe set forth in the District-UFT collectively negotiated agreement (agreement). In Case No. U-30016, Morrell claims that UFT violated §209-a.2(c) of the Act by its failure to respond to subsequent communications and by its handling of her grievance challenging the District's failure to provide her with a probable cause hearing as part of the disciplinary process.

The charges were consolidated for hearing before an ALJ. Following that hearing, the ALJ issued a decision dismissing both charges, concluding that Morrell failed to demonstrate that UFT breached its duty of fair representation.

EXCEPTIONS

In her exceptions, Morrell contends that the ALJ erred in concluding that UFT did not breach its duty of fair representation by its delay in responding to her letters, by its delay in filing a grievance challenging the disciplinary arbitrator's failure to issue a timely decision, and its subsequent decision not to further process the grievance on the basis of mootness. In addition, Morrell argues the ALJ erred when she found that the grievance filed by UFT encompassed her age discrimination claim in addition to her other claims and that UFT had no duty to pursue a claim on her behalf under the Age

Discrimination in Employment Act (ADEA).² Finally, Morrell asserts that the ALJ erred in determining that UFT did not violate its duty of fair representation when it refused to process a second grievance challenging the lack of a probable cause hearing during the disciplinary process.

Based upon our review of the record, and after consideration of the parties' arguments, we deny Morrell's exceptions and affirm the ALJ's decision dismissing both charges.

FACTS

Morrell was hired as a teacher by the District in 1993. In July 2006, she was involved in an alleged incident which resulted in the District issuing Education Law §3020-a disciplinary charges seeking her termination. During the pendency of the charges, Morrell was reassigned from her teaching duties and placed in the District's Reassignment Center in Manhattan, without any change in salary.

Under the agreement, an employee may be suspended without pay for a period not to exceed two months pending the outcome of the disciplinary process if the District demonstrates to an arbitrator that there is probable cause to believe that the employee engaged in serious misconduct. In the present case, it is undisputed that a probable cause hearing was not held, and the District did not suspend Morrell without pay. The agreement also requires that a final written arbitral decision and award concerning the disciplinary charges be issued within 30 days after the final hearing date.

The disciplinary hearing concluded on February 5, 2010. On April 1, 2010, Morrell sent a letter, labeled "Grievance," to Howard Solomon (Solomon), UFT's

² 29 USC §§621-34.

Grievance Department Director. The letter listed Zenia Burton-Myrick (Burton-Myrick), UFT's representative for members reporting to the Reassignment Center, and other UFT representatives as additional recipients. In her letter, Morrell complained that the disciplinary arbitrator had not issued a decision within thirty days as required by the agreement, and that the arbitrator's tardiness constituted a violation of the ADEA.

Although Morrell's letter to UFT was labeled as a grievance, contract grievances under the agreement must be filed with the District and not UFT. A UFT member must file the grievance with his or her building principal or in the alternative with the Chancellor's Office. Mary Atkinson (Atkinson) is the UFT representative responsible to provide assistance in the filing of grievances with the District for unit members who work in schools located in Manhattan.

On April 17, 2010, Morrell sent a letter addressed to Mark Collins (Collins) as director of UFT's Advisory Committee complaining that Solomon had not responded to her April 1, 2010 letter and asserting the same issues contained in that letter. Like her earlier letter, Morrell's letter to Collins was labeled a grievance. The Advisory Committee is a UFT body that determines appeals by UFT members to decisions not to proceed with a grievance. In her letter, Morrell requested a meeting with the Advisory Committee to discuss her complaints. It is undisputed that Collins is not the Director or a member of the Advisory Committee, but has sat on the Committee in the past. On April 27, 2010, Morrell sent a third letter, designated as a grievance, to Solomon, which reiterated her claims that the arbitrator's failure to issue a timely decision violated the agreement and constituted unlawful discrimination. At the conclusion of the letter, Morrell complained that she had not received a response from UFT concerning her prior

letters. However, during the hearing before the ALJ, Morrell acknowledged that Burton-Myrick spoke with her and repeatedly requested copies of the grievances.

On May 1, 2010, Morrell sent Solomon a fourth letter stating that she was filing an additional grievance alleging that the District violated the agreement by denying her a probable cause hearing. On May 4, 2010, Morrell emailed Collins requesting an emergency Advisory Committee meeting to examine her pending grievances.

The disciplinary arbitrator issued his decision and award on May 2, 2010 sustaining the disciplinary charges against Morrell and the penalty of dismissal. On May 4, 2010, Burton-Myrick sent Morrell's May 1, 2010 letter to UFT representative Atkinson requesting that Atkinson assist Morrell in the filing of her grievances. Thereafter, Atkinson contacted Solomon and obtained Morrell's April 1, 2010 letter.

On May 5, 2010, Atkinson filed two step 1 grievances with the District on behalf of Morrell. The first alleged violations of the agreement based upon the failure of the arbitrator to issue a timely decision and award. The grievance also asserted that the arbitrator's failure to issue a timely decision and award constituted age discrimination. The second grievance alleged that Morrell was improperly denied a probable cause hearing. On the same day that the grievances were filed, UFT sent letters to Morrell informing her of the filings.

On May 12, 2010, UFT requested the scheduling of a step 2 conference with the District regarding her first grievance. UFT, however, did not request a conference concerning the second grievance after it determined that the grievance lacked merit because Morrell had not been suspended without pay. This merits-based determination was made following consultation with a UFT attorney. UFT sent Morrell a letter

informing her of its decision and detailing how she could appeal it. Morrell, however, claims that she never received the UFT letter.

At the May 25, 2010 step 2 conference concerning the first grievance, Morrell's UFT special representative determined that the grievance was moot because the arbitrator had issued his decision and award. Therefore, the grievance was not further processed by UFT.

DISCUSSION

In order to prove that UFT breached its duty of fair representation, Morrell was required to present sufficient evidence to demonstrate that UFT's conduct was discriminatory, arbitrary, or in bad faith.³ The ALJ found that Morrell failed to meet her burden. We agree.

The ALJ concluded that UFT's relatively short delay in responding to Morrell's letters, and its related delay in filing the first grievance with the District were not based upon arbitrary, discriminatory or bad faith conduct by UFT representatives. Rather, the ALJ determined that the delays were the direct result of confusion caused by Morrell's letters and that the delays constituted a mere error. The record supports this factual finding.

Instead of filing step 1 grievances with the District through the established grievance procedure, Morrell chose to create a procedure of her own by sending letters designated as grievances to UFT representatives who are not generally involved in the initial processing of grievances. The record demonstrates that UFT representative Burton-Myrick made repeated contact with Morrell to clarify the status of those

³ *CSEA v PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dep't 1987), *affirmed on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

"grievances." Thereafter, Burton-Myrick referred the matter to Atkinson who promptly filed the step 1 grievances on Morrell's behalf. Under the facts and circumstances of the present cases, we conclude that UFT responded to Morrell's 2010 letters and filed her grievances within a reasonable period of time and therefore did not breach its duty of fair representation.⁴

We reach a similar conclusion regarding UFT's processing of Morrell's grievances. Under the Act, UFT is entitled to a broad range of reasonable discretion in the processing of grievances, and we will not substitute our judgment concerning the merits of a grievance to an employee organization's reasonable interpretation of the agreement.⁵

The record reveals that UFT discontinued pursuing Morrell's first grievance at the step 2 conference after concluding that issuance of the arbitrator's decision and award rendered the grievance moot under the agreement. We find this determination was well within UFT's discretion under the Act.

Contrary to Morrell's contention, UFT did not violate its duty of fair representation in its handling of her claim that the arbitrator's delay in issuing a decision and award was motivated by age discrimination. While the grievance did not allege that the

⁴ 1199 SEIU United Healthcare Workers East (Rowe), 42 PERB ¶3010 (2009); DC 37 (Maltsev), 41 PERB ¶3022 (2008); Nassau Educ Chapter of Syosset Cent Sch Dist Unit, CSEA, Inc (Marinoff), 11 PERB ¶3010 (1978).

⁵ UFT, Local 2 and Bd of Educ of the City Sch Dist of the City of New York (Jenkins), 41 PERB ¶3007 (2008), confirmed sub nom. Jenkins v New York State Pub Empl Rel Bd, 41 PERB ¶7007 (Sup Ct NY County 2008), affd, 67 AD3d 567, 42 PERB ¶7008 (1st Dept 2009) mot for lv to app den, 43 PERB ¶7003 (1st Dept 2010); DC 37 (Maltsev), supra note 4; CSEA (Owens), 27 PERB ¶3004 (1994); Hauppauge Sch Office Staff Assn (Haffner), 18 PERB ¶3029 (1985).

arbitrator breached Morrell's statutory rights under the ADEA, the nondiscrimination article of the UFT-District agreement does not provide for the grieving of statutory discrimination claims, and the article is inapplicable to the conduct of an arbitrator.⁶ In addition, there is no record evidence that Morrell presented UFT with facts that would support even a *prima facie* case that the arbitrator's delay was motivated by age discrimination.⁷ Finally, Morrell has not demonstrated that UFT has successfully pursued similar claims of alleged unlawful discrimination by an arbitrator on behalf of other unit members.⁸ Therefore, we find that the withdrawal of the age discrimination component of the grievance did not breach UFT's duty of fair representation.

With respect to Morrell's second grievance; the evidence demonstrates UFT made a merits-based determination, after consultation with a UFT attorney, not to process the grievance beyond step 1 because she was not suspended without pay, and therefore was not entitled to a probable cause hearing under the agreement.⁹ UFT sent Morrell a letter on May 12, 2010 informing her of its decision and detailing its internal appeal process. Contrary to Morrell's arguments, the record does not provide any support for her claimed contractual right to a probable cause hearing or her assertion that UFT had knowledge that she did not receive the May 12, 2010 letter.

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

⁶ Transcript, pp. 123-124.

⁷ See, *Hazen Paper Co v Biggins*, 507 US 604 (1993).

⁸ *United Steelworkers, Local 9434-00 (Buchalski)*, 43 PERB ¶3002 (2010).

⁹ *DC 37 (Maltsev)*, *supra* note 4.

IT IS, THEREFORE, ORDERED that the charges must be, and are hereby dismissed.

DATED: September 26, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member