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6-12-2012

# State of New York Public Employment Relations Board Decisions from June 12, 2012

New York State Public Employment Relations Board

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# State of New York Public Employment Relations Board Decisions from June 12, 2012

**Keywords**

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

**Comments**

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In the Matter of

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

Petitioner,

-and-

**CASE NO. C-6026C**

**COUNTY OF SUFFOLK and SUFFOLK COUNTY  
COMMUNITY COLLEGE,**

Joint Employer,

-and-

**SUFFOLK COUNTY ASSOCIATION OF MUNICIPAL  
EMPLOYEES, INC.,**

Intervenor/Incumbent.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

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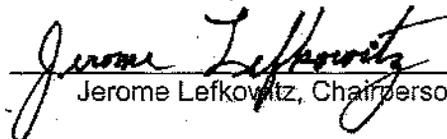
IT IS HEREBY CERTIFIED that the Suffolk County Association of Municipal Employees, Inc., has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of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

Included: All College Aides who are jointly employed for Taylor Law purposes by Suffolk County and Suffolk County Community College.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Suffolk County Association of Municipal Employees, 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: June 12, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson



STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**INTERNATIONAL BROTHERHOOD OF TEAMSTERS,  
LOCAL 529,**

Petitioner,

-and-

CASE NO. C-6027

**TOWN OF CAMPBELL,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

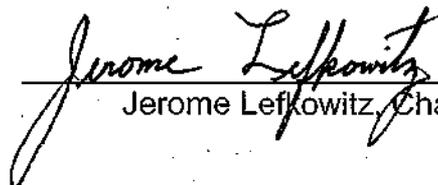
IT IS HEREBY CERTIFIED that the International Brotherhood of Teamsters, Local 529 has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

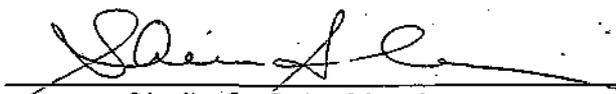
Included: All full-time and part-time employees of the Town of Campbell highway department, including deputy highway superintendent, heavy motor equipment operators, motor equipment operators and laborers.

Excluded: All elected and managerial or confidential employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the International Brotherhood of Teamsters, Local 529. 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: June 12, 2012  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairman

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

In the Matter of

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

Petitioner,

-and-

CASE NO. C-6030

**SISULU-WALKER CHARTER SCHOOL OF HARLEM,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Federation of Teachers, Local 2, AFT, AFL-CIO 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.<sup>1</sup>

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<sup>1</sup> On May 8, 2012, the Director of Public Employment Practices and Representation (Director) rendered a determination pursuant to §201.9(g)(1) of PERB's Rules of Procedure (Rules), concluding that petitioner satisfied the requirements for a certification without an election. Respondent waived its right to administratively challenge the Director's determination by failing to file written objections to the certification with the Board in accordance with §201.9(g)(1) of the Rules after it received the Director's determination.

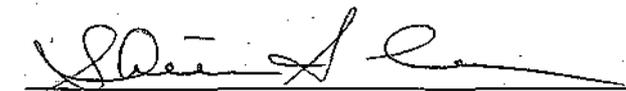
Included: Teacher, Co-Teacher, Resident Teacher, Guidance Counselor, Teacher Assistant, Social Worker, Title 1 Teacher, ELL Intervention Specialist, Special Education Teacher, Chorus Coordinator/Director and Recreational Coordinator.

Excluded: All other employees.

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

DATED: June 12, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Sheila S. Cole, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TEAMSTERS LOCAL 182,**

Petitioner,

-and-

CASE NO. C-6121

**VILLAGE OF WHITESBORO,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

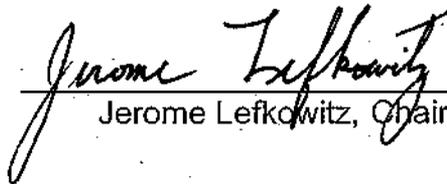
IT IS HEREBY CERTIFIED that the Teamsters Local 182 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and regular part-time Motor Equipment Operators.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 182. 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: June 12, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Sheila S. Cole, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Petitioner,

-and-

CASE NO. C-6125

**CORNING COMMUNITY COLLEGE,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

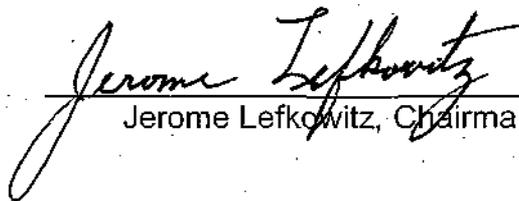
IT IS HEREBY CERTIFIED that the New York State Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All permanent, provisional and probationary full-time and part-time employees employed in the civil service classification College Security Guard; and

Excluded: All college students registered for six or more credit hours who do not hold a civil service position in the title College Security Guard, and all other titles.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the New York State Law Enforcement Officers Union, Council 82, 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: June 12, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Sheila S. Cole, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TEAMSTERS LOCAL 294,**

Petitioner,

-and-

CASE NO. C-6126

**TOWN OF HOOSICK,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local 294 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.

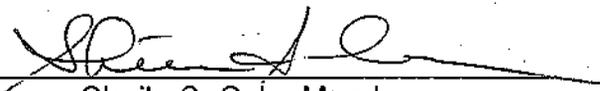
Included: Employees of the highway department.

Excluded: Superintendent of the highway department.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 12, 2012  
Albany, New York

  
\_\_\_\_\_  
Jerome Leikowitz, Chairman

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

- and -

**CASE NO. C-6117**

**MASSAPEQUA PUBLIC SCHOOLS,**

Employer,

- and -

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

Intervenor/Incumbent.

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**RICHARD M. GREENSPAN, PC (MATHEW ROCCO, ESQ, of counsel), for  
Petitioner**

**GUERCIO & GUERCIO LLP (GREGORY GILLEN, ESQ., of counsel), for  
Employer**

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, CO-COUNSELS (MIGUEL  
ORTIZ, ESQ., of counsel), for Intervenor**

**BOARD DECISION AND ORDER**

On February 28, 2012, the United Public Service Employees Union (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Massapequa Public Schools (employer).

Thereafter, the parties executed a consent agreement in which they stipulated

that the following negotiating unit was appropriate:

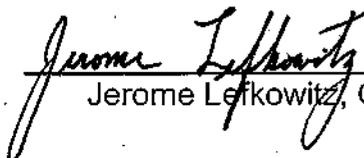
Included: Head Custodian III, Head Custodian II, Head Custodian I, Maintenance Supervisor II, Maintenance Supervisor I, Grounds Supervisor, Assistant Head Custodian, Senior Maintainer, Maintainer, Maintenance Helper, Custodian, Groundskeeper, Cleaner, Provisional Custodian, Bus Driver, Attendant and Bus Dispatcher.

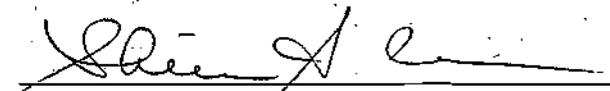
Excluded: All other employees.

Pursuant to that agreement, a secret-ballot election was held on May 22, 2012, at which a majority of ballots were cast against representation by the petitioner.

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

DATED: June 12, 2012  
Albany, New York

  
\_\_\_\_\_  
Jerome Leikowitz, Chairman

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**MICHAEL A. DAVITT,**

Charging Party,

**CASE NO. U-28642**

- and -

**CIVIL SERVICE EMPLOYEES ASSOCIATION,  
INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 844,**

Respondent,

- and -

**COUNTY OF ROCKLAND,**

Employer.

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**MICHAEL A. DAVITT, *pro se***

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, CO-COUNSELS (ELLEN  
M. MITCHELL of counsel), for Respondent**

**JEFFREY J. FORTUNATO, ACTING COUNTY ATTORNEY, for Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by Michael A. Davitt (Davitt) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge, as amended, alleging that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 844 (CSEA) violated §§209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) when it failed to provide him with representation at a scheduled hearing pursuant to Civil Service Law §72 concerning whether he is mentally fit to continue performing the duties of his position with the

County of Rockland (County).<sup>1</sup>

After granting all reasonable inferences to the content of Davitt's testimony during the first day of hearing and his subsequent offer of proof, the ALJ dismissed the charge on the ground that the facts alleged by Davitt are insufficient to demonstrate a *prima facie* case of a violation of §§209-a.2(a) and (c) of the Act. Specifically, the ALJ concluded that Davitt could not prove an essential element to his claim: that CSEA has successfully provided representation to other unit members in statutory proceedings under Civil Service Law §72.

In his exceptions, Davitt alleges that he was deprived of due process and subjected to bias on the following grounds: his requests for issuance of subpoenas were denied by the ALJ; his efforts to have the County attorney excluded from the pre-hearing conference and hearing were denied; he was denied an opportunity to review the hearing transcript by the ALJ; he was required to make multiple written submissions, he received misinformation and was subject to mistreatment by unspecified PERB staff.

Following our review of Davitt's exceptions, we affirm the decision of the ALJ.

#### DISCUSSION

In *United Steelworkers, Local 9434-00 (Buchalski)*,<sup>2</sup> we rearticulated the applicable standard for demonstrating a breach of the duty of fair representation concerning the failure of an employee organization to provide representation to a unit member with respect to a statutory claim:

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<sup>1</sup> 45 PERB ¶14523 (2012).

<sup>2</sup> 43 PERB ¶13002 at 3008 (2010).

In general, the duty of fair representation does not include an obligation by an employee organization to pursue litigation on behalf of a unit member. However, if an employee organization has represented other unit members in similar litigation that was successful, and the evidence demonstrates that the denial of representation to the charging party was arbitrary, discriminatory or in bad faith, a violation of §209-a.2(c) of the Act can be established. (Footnote omitted)

In the present case, granting all reasonable inferences to the content of Davitt's pleadings, offer of proof and testimony, he has not set forth any facts that, if proven, would demonstrate a necessary element of his claim: that CSEA has provided legal representation and successfully litigated issues on behalf of other unit members in a Civil Service Law §72 hearing. While Davitt's exceptions cite purported factual omissions in the ALJ's decision, they are not relevant to proving this missing element of his case. Therefore, the ALJ's decision to dismiss his charge should be affirmed unless the record supports Davitt's claims that he was deprived of due process and subjected to bias during the processing of his charge.

Following a careful review of Davitt's exceptions, we find no basis for his assertion that he was deprived of due process and an unbiased adjudicatory procedure.

The ALJ provided Davitt with a full and fair opportunity to testify during the first day of hearing and to articulate supplemental facts he intended to prove through an offer of proof.<sup>3</sup> Although informed that he had the burden of proving that other unit members were successfully represented by CSEA in a Civil Service Law §72 hearing, he failed to identify any facts to support that necessary element of his claim. The

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<sup>3</sup> Transcript, pp. 12-21.

dismissal of his charge, based upon his pleading, offer of proof and testimony was well within an ALJ's discretion and does not constitute objective evidence of partiality.<sup>4</sup> Nor is it a denial of due process to dismiss a charge without completing the hearing when a party is unable to set forth sufficient facts in an offer of proof that would demonstrate a violation under the Act. The primary purpose of requiring an offer of proof is to provide a party with an opportunity to clarify the relevant facts in dispute, if any.<sup>5</sup>

Contrary to Davitt's assertions, the ALJ's denials of his subpoena requests do not constitute a denial of his due process rights or demonstrate partiality. Notably, he does not claim that issuance and service of the requested subpoenas would have resulted in the production of evidence germane to the missing element of his case. Pursuant to §211.1 of the Rules of Procedure (Rules), an ALJ has the discretion to grant or deny a request for the issuance of subpoenas. Following a review of the record, we conclude that the ALJ did not abuse her discretion in denying his subpoena requests.

The ALJ's denial of Davitt's requests to have the County's attorney excluded from the pre-hearing conference and hearing does not violate due process principles nor does it demonstrate bias. Under our procedures, the County has the right to select the attorney to represent it before our agency. The fact that the attorney may have been previously involved with other related matters is not a basis for his exclusion.

Following our review of the record, we find no evidence to support Davitt's claim

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<sup>4</sup> *Board of Educ of the City Sch Dist of the City of New York*, 43 PERB ¶3010 (2010).

<sup>5</sup> *Niagara Frontier Transit Metro System, Inc.* 42 PERB ¶3023 (2009).

that he attempted and was denied an opportunity to review the hearing transcript.<sup>6</sup> In fact, Davitt did not request to review the transcript after the ALJ advised the parties that the transcript had been received.

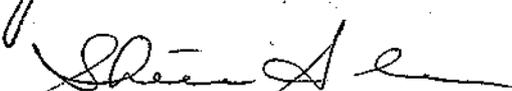
Finally, Davitt failed to comply with §213.2(b)(2) of the Rules by not providing specificity regarding the remainder of his exceptions. Based upon their conclusory nature, we are unable to discern from the record the basis for those exceptions.

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

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

DATED: June 12, 2012  
Albany, New York

  
\_\_\_\_\_  
Jerome Lerkowitz, Chairperson

  
\_\_\_\_\_  
Sheila Cole, Member

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<sup>6</sup> Consistent with PERB practice, a party may purchase a copy of the transcript directly from the contract stenographic service or request an opportunity to review the transcript at our offices.

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**JULIO CESAR ROJAS,**

Charging Party,

-and-

**CASE NO. U-30500**

**LOCAL 456, INTERNATIONAL BROTHERHOOD  
OF TEAMSTERS,**

Respondent,

-and-

**BOARD OF COOPERATIVE EDUCATIONAL  
SERVICES SOLE SUPERVISORY DISTRICT OF  
WESTCHESTER,**

Employer.

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**JULIO CESAR ROJAS, *pro se***

**BARNES, IACCARINO & SHEPHERD, LLP (HEIDI MAHER of counsel) for  
Respondent**

**KEANE & BEANE, P.C. (RONALD A. LONGO of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by Julio Cesar Rojas (Rojas) to a decision of an Administrative Law Judge (ALJ) dismissing, as untimely, his improper practice charge filed on October 28, 2010 alleging that Local 456, International Brotherhood of Teamsters (Local 456) violated §209-a.2(c) of the Public Employees' Fair

Employment Act (Act). Rojas also excepts to the ALJ's denial of his cross-motion to amend the charge.<sup>1</sup>

In his charge, Rojas alleges that Local 456 violated §209-a.2(c) of the Act when: a) it refused to assist him in filing and processing an October 2009 grievance; b) it did not communicate with him concerning a March 2010 grievance following an April 6, 2010 meeting with his employer, Board of Cooperative Educational Services Sole Supervisory District of Westchester (BOCES); and c) it did not contact him concerning his July 15, 2010 termination, and it did not file a contract claim and/or a statutory claim on his behalf challenging the discharge. BOCES is a statutory party to the charge pursuant to §209-a.3 of the Act.<sup>2</sup> Local 456 and BOCES each filed an answer.

During the processing of the charge, Rojas filed an offer of proof dated May 17, 2011, setting forth facts he intended to prove at hearing.<sup>3</sup> Thereafter, Local 456 moved to dismiss the charge asserting that Rojas's claims concerning his grievances are time-barred and that the allegations with respect to his termination fail to state a *prima facie* case of a breach of the duty of fair representation. In response, Rojas filed an "Answer in Opposition to Motion to Dismiss and Cross-Motion to Dismiss Local 456's Pleading."

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<sup>1</sup> 44 PERB ¶4612 (2011).

<sup>2</sup> Rojas's claim that BOCES violated §209-a1(e) of the Act by terminating him on July 15, 2010, and by violating other provisions of the expired BOCES-Local 456 collectively negotiated agreement (agreement) was not processed by the Director of Public Employment Practices and Representation (Director) on the ground that Rojas lacks standing. Rojas has not filed an exception to the Director's determination; therefore, it is waived pursuant to §213.2(b)(4) of the Rules of Procedure (Rules). Even if Rojas had filed an exception, we would have affirmed the Director because a unit member does not have standing to pursue a charge under §209-a.1(e) of the Act. See, *Bd of Educ of the City Sch Dist of the City of New York*, 28 PERB ¶3017 (1995).

<sup>3</sup> ALJ Exhibit 13.

dated July 20, 2011.<sup>4</sup> After BOCES filed an affirmation in support of Local 456's motion and in response to Rojas's July 20, 2011 pleading, Rojas filed a "Reply to the BOCES Affirmation and Cross-Motion to Amend the Charge," dated August 29, 2011, which contains 165 numbered paragraphs of allegations and 25 attached exhibits.<sup>5</sup> In his cross-motion, Rojas sought to amend his charge to allege that BOCES violated §209-a.1(a) of the Act by failing to render a decision concerning his March 2010 grievance, and it violated §§209-a.1(a) and (c) of the Act when it terminated him on July 15, 2010.<sup>6</sup>

### EXCEPTIONS

In his exceptions, Rojas asserts that his allegations concerning Local 456's conduct regarding the March 2010 contract grievance are timely because he did not reasonably know that Local 456 would not further process the grievance until after he was terminated.<sup>7</sup> He also contends that his charge against Local 456 is timely because it alleges that Local 456 did not contact him or process a claim on his behalf following his discharge. Finally, Rojas excepts to the ALJ's denial of his cross-motion to amend his

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<sup>4</sup> ALJ Exhibit 15.

<sup>5</sup> ALJ Exhibit 20.

<sup>6</sup> ALJ Exhibit 20, ¶¶116, 149-150.

<sup>7</sup> We reject Rojas's exception challenging the ALJ's consideration of his offer of proof in determining Local 456's motion to dismiss. During the processing of a charge, an ALJ has the discretion to require a party to file an offer of proof for purposes of narrowing the issues in dispute and ascertaining whether a hearing is necessary. *Board of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶13010 (2010). In the present case, after Rojas voluntarily submitted his offer of proof during the pre-hearing conference, it became a pleading that may be considered by the ALJ. In addition, any purported procedural infirmity associated with Rojas's offer was cured by his filing of two supplemental pleadings clarifying the factual and legal bases for his charge.

charge to allege that BOCES violated §§209-a.1(a) of the Act when it failed to issue a Step 2 decision concerning his March 2010 grievance, and BOCES violated §209-a.1(a) and (c) when it terminated him. Local 456 and BOCES support the ALJ's decision.

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

### FACTS

For purposes of determining the exceptions filed by Rojas, we assume the truth of the allegations in his charge, as clarified by his offer of proof and his supplemental pleadings, dated July 20, 2011 and August 29, 2011.<sup>8</sup>

Rojas was hired by BOCES as an hourly Bus Driver-Custodian, effective September 1, 2009. The position is classified as a salary grade B-5 position under the terms of the expired BOCES-Local 456 agreement. His appointment was subject to a maximum fifty-two week probationary period pursuant to the applicable civil service rule. Under the agreement, employees working in the position of Bus Driver with C.D.L. License are in salary grade B-6. When he was hired, Rojas possessed a Class A commercial driver's license, which permits him to drive large school buses.

At a Local 456 meeting in October 2009, Local 456 Labor Relations Consultant John Henry (Henry) reacted angrily to Rojas's criticism of Henry's efforts during negotiations with BOCES. On or about October 20, 2009, Henry ordered Rojas to leave

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<sup>8</sup> *County of Livingston*, 43 PERB ¶13018 (2010); *Bd of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶13010 (2010); *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶13023 (2009).

Henry's office in Local 456's union hall after Rojas requested a grievance form.

According to Rojas, Henry was violent and rude when ordering him to leave the office.

On October 29, 2009, Rojas filed a grievance with BOCES asserting that he had been misclassified in salary grade B-5 because he had a commercial driver's license. On the same day, he submitted a separate document to Local 456 accusing it of violating §209-a.2(c) of the Act by negotiating with BOCES to continue the salary classification provisions of the expired agreement.<sup>9</sup>

The contract grievance was denied at step 1 on the grounds that it was untimely and because Rojas was assigned to drive a vehicle that does not require a Class A commercial driver's license. On November 5, 2009, Rojas attempted to meet with Henry concerning the grievance. Four days later, Henry sent two letters to Rojas. The first letter stated that Local 456 had decided not to pursue his contract grievance following an evaluation of its merits. In the second letter, Henry rejected Rojas's assertion that Local 456's negotiation posture violates the Act. In a letter to Henry dated November 15, 2009, Rojas reiterated his claim that Local 456 was violating §209-a.2(c) of the Act by negotiating a successor agreement that would deprive equal pay for equal work for new employees.

In a second grievance dated March 4, 2010, Rojas alleged that BOCES violated the agreement by refusing to place him on the seniority list applicable to salary grade B-6 drivers for non-scheduled driving assignments including field and shopping trips. On March 12, 2010, the second grievance was denied at step 1 on the ground that Rojas was

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<sup>9</sup> Although Rojas labeled this document to Local 456 as a "grievance," it alleges a violation of the Act, and not a violation of the BOCES-Local 456 expired agreement.

employed in a salary grade B-5 driver position, and therefore, he was properly on the seniority list applicable to that position.

Following Rojas's request that Local 456 pursue his grievance to arbitration, Local 456's counsel sent a letter to BOCES requesting that the grievance be processed to Step 2. The letter also sought information from BOCES relating to the grievance. After receiving a copy of Local 456's counsel's letter to BOCES, Rojas faxed a letter to Local 456's counsel stating that she is not his attorney and she is not authorized to request that the grievance be heard at Step 2. Local 456's counsel responded to Rojas's fax with a letter stating that she was authorized to represent the union and its members within the context of the agreement, and that if Rojas did not want Local 456's representation, he must submit a signed written notification. In addition, Henry sent a letter to BOCES stating that it should not discuss the grievance directly with Rojas without the presence of Local 456's counsel or another designated union representative.

On March 23, 2010, Local 456's counsel sent a letter to Rojas informing him that BOCES wanted to schedule a meeting concerning his second grievance on April 6 or 7, 2010. In addition, she reiterated that he had to submit a signed written notification if he did not want continued Local 456 representation concerning the grievance. In response, Rojas faxed a letter to her stating that he would accept her representation on two conditions: she meet with him to prepare for the meeting with BOCES, and that they mutually agree upon the issues and remedies associated with his grievance.<sup>10</sup>

Rojas sent another letter to Local 456's counsel dated March 29, 2010, outlining his interpretations of the agreement, the grievance procedure, the Act, and the ethical

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<sup>10</sup> There is no evidence in the record demonstrating that Local 456's counsel agreed to Rojas's conditions.

obligations of union counsel to a grievant. With respect to the latter issue, Rojas stated that Local 456's counsel could not represent him without his express consent because of the potential for a conflict of interest between him and Local 456.

On April 1, 2010, Rojas met with Local 456's counsel and other representatives, including Henry, to discuss the grievance and to prepare for the meeting with BOCES. During the meeting, Local 456's counsel and Henry expressed their opinion that Rojas's grievance lacked merit.

Representatives of BOCES and Local 456, along with Rojas, met on April 6, 2010 to discuss the pending grievance. During the meeting, a BOCES representative mentioned the possibility of promoting Rojas to a B-6 salary grade position as a means of settling the grievance. This idea generated a discussion regarding back wages and the respective rights of other B-5 salary grade drivers with greater seniority than Rojas. Ultimately, a BOCES representative stated that she would need an additional week to render a Step 2 decision. Between the April 6, 2010 meeting and the filing of the charge, Rojas did not receive a Step 2 decision from BOCES, nor was he contacted by Local 456's counsel or other representatives concerning the status of his grievance.

Unbeknownst to Rojas, on or about April 20, 2010, Local 456's counsel spoke with a BOCES representative about resolving the grievance in the context of the parties' continued negotiations for a successor agreement. During a bargaining session one week later, BOCES and Local 456 discussed a proposal to promote all B-5 salary grade drivers to the B-6 salary grade. In addition, it was agreed that the grievance would be placed on hold. Rojas did not learn of the discussions at negotiations until he received

Local 456's counsel's affirmation dated July 13, 2011 in support of Local 456's motion to dismiss the charge.

On June 4, 2010, Rojas was questioned by a BOCES representative concerning his conduct during an incident that day. During the questioning, Rojas was represented by a Local 456 representative because Rojas was a potential subject of disciplinary action. Later that day, Rojas was suspended without pay pending completion of the disciplinary investigation. While under suspension, Rojas received a letter informing him that the BOCES Board would be considering a recommendation that he be discharged prior to the expiration of his probationary period under the applicable civil service rule. Rojas was terminated by BOCES, effective July 15, 2010. Prior to filing his charge, Rojas did not request representation by Local 456 to challenge his discharge. Although Local 456 received copies of letters concerning the discharge it did not contact him or file a grievance or legal claim on his behalf.

#### DISCUSSION

Pursuant to §204.1(a)(1) of the Rules, the four-month time period for filing a charge commences when a charging party had actual or constructive knowledge of the act or acts that form the basis for the charge<sup>11</sup> or the date that such conduct could have

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<sup>11</sup> *Solvay Union Free Sch Dist*, 45 PERB ¶13023 (2012); *Nanuet Union Free Sch Dist*, 45 PERB ¶13007 (2012); *New York State Thruway Auth*, 40 PERB ¶13014 (2007); *City of Binghamton*, 31 PERB ¶13088 (1998); *City of Oswego*, 23 PERB ¶13007 (1990).

reasonably been discovered.<sup>12</sup> We strictly apply the timeliness requirement, and it is not tolled by the pendency of a grievance or other related matters.<sup>13</sup>

In the present case, we affirm the ALJ's dismissal of Rojas's allegations concerning the processing of his March 2010 grievance as untimely under §204.1(a)(1) of the Rules. Rojas's allegations are untimely because the charge was filed on October 28, 2010, more than four months after he knew or should have known of Local 456's conduct. Contrary to Rojas's contention, his allegations with respect to the handling of his grievance did not accrue on July 15, 2010, the date of his termination.

As early as October and November 2009, Rojas accused Local 456 of violating §209-a.2(c) of the Act. By April 6, 2010, he knew the following: Local 456 had refused to pursue his first contract grievance because it lacked merit; Local 456's counsel and Henry had informed him that his March 2010 grievance was meritless; Local 456 had not processed that grievance to arbitration as he had demanded; and BOCES and Local 456 were in the midst of negotiating a successor agreement. He later knew that BOCES did not issue a Step 2 decision within a week of the April 6, 2010 meeting, as promised.

The fact that Rojas's second grievance was placed on hold in April 2010, pending negotiations, could have been discovered by his simply asking Local 456. Following the April 6, 2010 meeting, however, Rojas did not ask Local 456 about the status of the grievance, even while being represented on June 4, 2011.

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<sup>12</sup> *State of New York (GOER)*, 22 PERB ¶3009 (1989); *Bd of Edu of the City Sch Dist of the City of New York (Chamberlin)*, 15 PERB ¶3050 (1982).

<sup>13</sup> *State of New York (Insurance Department Liquidation Bureau)(Smulyan)*, 45 PERB 3008 (2012); *TWU (Edwards)*, 45 PERB ¶3014 (2012); *New York State Thruway Auth, supra*, note 11.

While an employee organization is obligated to respond to reasonable inquiries by a unit member concerning his or her grievance, the duty of fair representation does not require it to provide the unit member with periodic status reports concerning a grievance<sup>14</sup> Furthermore, placing a grievance on hold pending the outcome of negotiations is well within the wide range of reasonable discretion granted an employee organization under the Act in the processing of a grievance.<sup>15</sup>

Although Rojas's allegations against Local 456 concerning his discharge are timely, he has failed to allege sufficient facts which, if proven, would demonstrate a violation of §209-a.2(c) of the Act. In general, an employee organization does not have an affirmative obligation under the Act to initiate contact with a unit member about filing a contract grievance or legal action in response to an adverse employment action, and it is not obligated to pursue such claims without a unit member's request.<sup>16</sup> Furthermore, an employee organization is not required under the Act to pursue a non-contractual legal claim on behalf of a unit member unless it has successfully pursued similar claims on behalf of other unit members.<sup>17</sup>

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<sup>14</sup> *United Transportation Union, Local 1140 (Wactor)*, 30 PERB ¶3071 (1997).

<sup>15</sup> *Nassau Comm Coll Fed of Teachers (Staskowski)*, 42 PERB ¶3007 (2009).

<sup>16</sup> In the present case, Local 456's failure to unilaterally act on Rojas's behalf is consistent with his assertion to Local 456's counsel that he could not be represented by Local 456 without his express consent. We note that under other facts and circumstances, an employee organization might be required to unilaterally act on behalf of a unit member based upon the terms of a collectively negotiated agreement or a particular practice of that employee organization.

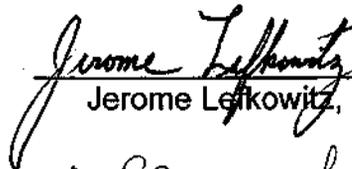
<sup>17</sup> *UFT (Morrell)*, 44 PERB ¶3030 (2011); *United Steelworkers, Local 9434-00 (Buchalski)*, 43 PERB ¶3002 (2010).

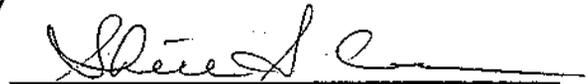
In his charge and supplemental pleadings, Rojas does not allege that he contacted Local 456 and that it refused to provide him with representation to challenge his discharge. Nor does he allege any facts that would demonstrate that Local 456 was discriminatory, arbitrary or acted in bad faith by not initiating contact with him, or pursuing a contract or legal claim on his behalf, with regard to his discharge. Based upon the foregoing, we affirm the dismissal of Rojas's claim against Local 456 concerning his discharge.

Finally, we affirm the ALJ's denial of Rojas's cross-motion to amend his charge to allege that BOCES violated §209-a.1(a) and (c) of the Act. Consistent with §204.1(d) of the Rules, an ALJ has considerable discretion to grant or deny a request to amend a charge so long as the decision is consistent with due process.<sup>18</sup> In the present case, the cross-motion seeks to add untimely claims against BOCES that do not relate back to his statutory claims against Local 456.

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

DATED: June 12, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila Cole, Member

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<sup>18</sup> *Board of Educ of the City Sch Dist of the City of New York (Grassel)*, 41 PERB ¶3024 (2008); *UFT (Ayazi)*, 32 PERB ¶3069 (1999); *Village of Johnson City*, 12 PERB ¶3020 (1979).

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**MIDDLETOWN PROFESSIONAL FIREFIGHTERS  
ASSOCIATION, INC., LOCAL 1027, IAFF, AFL-CIO,**

Charging Party,

**CASE NO. U-30598**

- and -

**CITY OF MIDDLETOWN,**

Respondent.

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**MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (RICHARD S. CORENTHAL,  
of counsel), for Charging Party**

**RICHARD GUERTIN, CORPORATION COUNSEL (ALEX SMITH, of counsel), for  
Respondent**

**BOARD DECISION AND ORDER**

Based upon our review of the exceptions filed by the City of Middletown (City) to the decision of an Administrative Law Judge (ALJ),<sup>1</sup> and the response filed by the Middletown Professional Firefighters Association Local 1027, IAFF, AFL-CIO (Association), we affirm the ALJ's decision finding that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused the Association's

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<sup>1</sup> 45 PERB ¶4548 (2012).

demand to negotiate the impact of the City's decision to replace a tiller truck staffed by two Association unit members with a ladder truck staffed by one unit member in the City's fire department. The case was submitted to the ALJ on a stipulated record, which aided in an expedited final resolution of the issues raised by the charge.

### FACTS

After the City unilaterally decided to replace a two-person tiller truck with a one-person ladder truck in the fire department, the Association demanded that the City negotiate the impact of the City's decision.<sup>2</sup> Ten days later, the City rejected the Association's demand for impact negotiations on the ground that the decision "to purchase or replace fire trucks is both a managerial prerogative under the contract and pursuant to the City Charter."<sup>3</sup>

In response to the City's unilateral decision the Association also filed a grievance under the parties' collectively negotiated agreement (agreement). The City successfully pursued a special proceeding to stay arbitration of that grievance pursuant to CPLR §7503(c), resulting in a decision and order in New York State Supreme Court.<sup>4</sup> In granting the City's petition, the Court concluded that the City had exclusive authority to purchase firefighting equipment under the City Charter. Additionally, the Court held that the agreement did not reveal an intent by the parties to arbitrate the purchase or replacement of firefighting equipment, concluding that the City's actions did not violate

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<sup>2</sup> Joint Exhibit 1.

<sup>3</sup> Joint Exhibit 2.

<sup>4</sup> Joint Exhibit 3(G).

the past practice or the unsafe conditions clauses of the agreement. With respect to the second contract provision, the Court found that "[n]othing in the record suggests that the City has reduced firehouse staffing or has reduced the number of paid firefighters responding to a call."<sup>5</sup> The Association has filed a notice of appeal from the order staying arbitration.

### DISCUSSION

Although certain employer decisions, such as the staffing assigned to an employer's vehicle are nonmandatory, the impact of those decisions must be negotiated upon demand.<sup>6</sup> The City's managerial prerogative to purchase the new truck and to staff it with one unit member does not eliminate its obligation to negotiate the impact of those decisions, as requested by the Association.<sup>7</sup>

An employer's obligation to negotiate impact does not require an employee organization to first demonstrate to the employer's satisfaction that the employer's action has or will have a material impact upon terms and conditions of employment. Similarly, an employer cannot refuse to negotiate impact based upon its conclusion that no impact exists or because it believes the impact is *de minimus*.<sup>8</sup> Such arguments go

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<sup>5</sup> Joint Exhibit 3(G), p.3.

<sup>6</sup> *County of Erie v State of New York Pub Empl Rel Bd*, 12 NY3d 72, 42 PERB ¶7002 (2009); *West Irondequoit Teachers Assn v New York State Pub Empl Rel Bd*, 35 NY2d 46, 7 PERB ¶7014 (1974); *Lake Mohegan Fire Dist*, 41 PERB ¶3001 (2008); *City Sch Dist of the City of New Rochelle*, 4 PERB ¶3060 (1971).

<sup>7</sup> *County of Nassau*, 27 PERB ¶3054 (1994).

<sup>8</sup> *City of Watertown*, 10 PERB ¶3008 (1977); *Suffolk County BOCES, Second Supervisory Dist.*, 17 PERB ¶3111(1984).

to the merits of the Association's concerns, which should be raised in the context of impact negotiations between the parties.

Finally, we reject the City's argument that the charge is barred by the principles of *res judicata* and collateral estoppel based upon the judicial decision and order staying arbitration. The issue determined by the Court was the arbitrability of the Association's contract grievance challenging the City's decisions under the terms of the agreement; it did not determine whether the City has a duty to engage in good faith impact negotiations under the Act. Pursuant to §205.5(d) of the Act, our agency has the exclusive and nondelegable jurisdiction to determine the latter issue. Through impact negotiations, the Association can seek to persuade the City that an impact does exist, and to accept the Association's proposal to remedy that impact. Nothing in our decision, however, constitutes a collateral attack on the Court's decision and order staying arbitration.

Based upon the foregoing, we deny the City's exceptions and affirm the ALJ's decision that the City violated §209-a.1(d) of the Act by refusing the Association's demand for impact negotiations.

IT IS, THEREFORE, HEREBY ORDERED that the City will:

1. Forthwith respond to the Association's request to schedule impact negotiations;
2. Not refuse to engage in impact negotiations concerning the City's decision to replace the fire department tiller truck staffed by two Association unit members with a ladder truck staffed by one unit member; and
3. Sign, post and distribute the attached notice at all physical and electronic locations

customarily used to post notices to unit employees.

DATED: June 12, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila 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 City of Middletown in the unit represented by the Middletown Professional Firefighters Association, Inc., Local 1027, IAFF, AFL-CIO, that the City of Middletown will:**

1. Forthwith respond to the Association's request to schedule impact negotiations; and
2. Not refuse to engage in impact negotiations concerning the City's decision to replace the fire department tiller truck staffed by two Association unit members with a ladder truck staffed by one unit member.

Dated .....

By .....  
on behalf of CITY OF MIDDLETOWN

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

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

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In the Matter of

**TOWN OF ULSTER POLICEMEN'S  
BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

**CASE NO. U-31103**

- and -

**TOWN OF ULSTER,**

Respondent.

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

**ROEMER, WALLENS, GOLD & MINEAUX LLP (WILLIAM M. WALLENS and  
JONATHAN H. KERR of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Town of Ulster (Town) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Town of Ulster Policemen's Benevolent Association (PBA) finding that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it submitted two demands in response to PBA's petition for interest arbitration, which were first presented at mediation and are not reasonably related to the subject matter of negotiations or discussions during mediation.<sup>1</sup>

The Town's exceptions are limited to its argument that the following proposition in *Village of Wappingers Falls*<sup>2</sup> (*Wappingers Falls*) should be reversed:

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<sup>1</sup> 45 PERB ¶4553 (2012).

<sup>2</sup> 40 PERB ¶3020 (2007).

The submission of a proposal to interest arbitration that is presented for the first time at mediation and is not reasonably related to the subject matter of the negotiations and/or the discussions during mediation, may under the totality of the circumstances, violate §205.6(a)(2) of the Rules.

According to the Town, parties should be permitted to submit to interest arbitration any new proposals presented for the first time at mediation because mediation is a continuation of negotiations. Although PBA supports the ALJ's decision, it seeks to reargue *Wappingers Falls*, claiming that the decision has damaged the Act's collective bargaining procedures by permitting a party to submit a proposal to interest arbitration that satisfies the reasonable relationship test.<sup>3</sup>

In *Village/Town of Mount Kisco*,<sup>4</sup> we reaffirmed our conclusion in *Wappingers Falls* but dismissed the charge noting that the charging party failed to prove, under the totality of the circumstances, that respondent's proposal during mediation was not reasonably related to the subject matter of the negotiations or the parties' discussions during mediation.

Mediation, an essential component of the impasse procedures under the Act, constitutes a continuation of negotiations where parties may continue to exchange proposals and counterproposals.<sup>5</sup> It is not, however, a forum for a party to expand the scope of the impasse to be determined later at interest arbitration or fact-finding. Nor is it a mere speed-bump on the road to final impasse resolution.

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<sup>3</sup> Brief Submitted on Behalf of the Town of Ulster Policemen's Benevolent Association, Inc, p. 4.

<sup>4</sup> 45 PERB ¶13017 (2012).

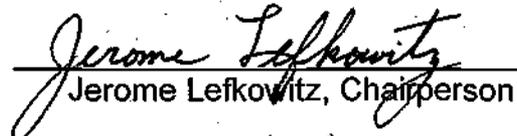
<sup>5</sup> *Board of Educ of the City Sch Dist of the City of New York*, 45 PERB ¶13026 (2012).

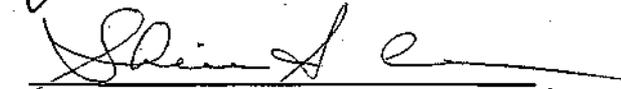
The reasonable relationship test articulated in *Wappingers Falls* is aimed at enhancing the likelihood that the divide between the parties can be narrowed during the course of mediation over the subject matter of their negotiations and/or their discussions at mediation. Whether there is a reasonable relationship is dependent upon the totality of the circumstances as demonstrated from the factual record before us. At the same time, proof of a purposeful delay by a party in making a new proposal at mediation or evidence that a party has refused to participate in efforts at reaching a mediated resolution, may demonstrate a refusal to negotiate in good faith in violation of §§209-a.1(d) or 209-a.2(b) of the Act.

Based upon the foregoing, the Town's exceptions are denied.

IT IS, THEREFORE, ORDERED that the Town withdraw from interest arbitration those portions of Town proposal 7 seeking increases in employee health insurance contributions in 2011 and 2012, and proposals 8 and 9.

DATED: June 12, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila Cole, Member