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State of New York Public Employment Relations Board Decisions from September 20, 2012

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from September 20, 2012

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 294,

Petitioner,

-and-

CASE NO. C-6127

TOWN OF CAIRO,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local 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: All full-time and part-time EMTs, Intermediates and Drivers assigned to the Town Ambulance Squad.

Excluded: Ambulance Administrator and all other employees.

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: September 20, 2012
Albany, New York


Jerome Lerkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SHELDON LAMAR HUNT,

Charging Party,

-and-

**CASE NOS. U-29667, U-29791,
U-29831, U-29880 & U-30226**

**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.

SHELDON LAMAR HUNT, *pro se*

CHARLES D. MAURER, ESQ., for Respondent

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE
BARGAINING (KELLIE TERESE WALKER of counsel), for Employer**

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by Sheldon Lamar Hunt (Hunt) to a decision by an Administrative Law Judge (ALJ) dismissing five improper practice charges, as amended, against the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) for alleged violations of §209-a.2(c) of the Public Employees' Fair Employment Act (Act).¹ 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 Act.

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The first four of Hunt's amended charges allege that UFT violated §209-a.2(c) of the Act in its handling and treatment of various grievances. In Case No. U-29667, Hunt alleges that UFT breached its duty of fair representation when it failed to process his grievance challenging the District's use of a counseling memorandum in Education Law §3020-a disciplinary charges and the District's utilization of the memorandum in an unsatisfactory rating issued to him. In Case No. U-29791, Hunt alleges that UFT violated its duty of fair representation by failing to arbitrate a grievance challenging the District's placement of a letter in his personnel file alleging that he engaged in academic grade fraud. Similarly, in Case No. U-29831, Hunt alleges that UFT violated its duty to fairly represent him with respect to a grievance challenging the District's placement of a letter in his personnel file alleging that he engaged in sexual misconduct toward a female student. In Case No. U-29880, Hunt alleges that UFT violated §209-a.2(c) of the Act by failing to arbitrate a grievance challenging a District letter alleging insubordination, which was placed in his personnel file.

Finally, Hunt alleges in Case No. U-30226 that UFT violated §209-a.2(c) of the Act when the Office of General Counsel of the New York State United Teachers (NYSUT) withdrew as his legal representative in a pending Education Law §3020-a disciplinary proceeding.

Following a consolidated hearing with respect to the charges, the ALJ issued a decision dismissing all five charges.

EXCEPTIONS

In his exceptions, Hunt contends that the ALJ erred in dismissing his charges because her decision is inconsistent with the provisions of the District-UFT collective bargaining agreement (agreement) and Education Law §3020-a. UFT and the District support the ALJ's decision.

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

DISCUSSION

The relevant facts concerning each of Hunt's charges are fully set forth in the ALJ's decision, and need not be repeated here.

To demonstrate a breach of the duty of fair representation, a charging party must prove that an employee organization acted in a manner that was arbitrary, discriminatory or in bad faith.² Under the Act, an employee organization is afforded a broad range of reasonable discretion in determining which grievances to pursue and to what level of the negotiated grievance procedure.³ A mere disagreement with the contract interpretation or tactics of an employee organization is insufficient to

² *Nassau Comm Coll Federation of Teachers, Local 3150 (Staskowski)*, 42 PERB ¶3007 (2009).

³ See, *Rochester Teachers Assn (Falso)*, 45 PERB ¶3033 (2012); *District Council 37 (Blowe and Watson)*, 42 PERB ¶3008 (2009); *Rochester Teachers Assn (Danna)*, 41 PERB ¶3003 (2008). See also, *Symanski v East Ramapo Cent Sch Dist*, 117 AD2d 18, 19 PERB ¶7516 (2d Dept 1986).

demonstrate a breach of the duty of fair representation.⁴ We will not substitute our judgment concerning the merits of a grievance for an employee organization's reasonable interpretation of its negotiated agreement with the employer.⁵ Finally, an employee organization is not obligated to pursue a claim it believes, in good faith, to lack merit.⁶

In the present case, Hunt's exceptions fail to set forth any bases for disturbing the ALJ's conclusions that UFT did not breach its duty of fair representation as alleged in the five amended charges.

The record fully supports the ALJ's conclusions in Case Nos. U-29667, U-29791 and U-29880, that UFT reached good faith conclusions that the grievances lacked sufficient merit to warrant further processing, it communicated its analyses to Hunt and advised him that he could pursue remedial relief in the context of an Education Law §3020-a hearing. Hunt's continued disagreement with UFT's conclusions, analyses and advice regarding the three grievances do not demonstrate a violation of §209-a.2(c) of the Act.

In Case No. U-29831, the ALJ dismissed the charge on the ground that it is facially deficient because it fails to allege sufficient facts which, if proven, would demonstrate a breach of the duty of fair representation. Hunt has not filed an exception

⁴ *Amalgamated Transit Union, Local 1056 (Lefevre)*, 43 PERB ¶3027 (2010); *TWU (Brockington)*, 37 PERB ¶3002 (2004).

⁵ *UFT (Morrell)*, 44 PERB ¶3030 (2011).

⁶ *Law Enforcement Officers Union Council 82, AFSCME, AFL-CIO (Gardner)*, 31 PERB ¶3002 (2000).

Case No. U-1007, U-1014, U-1037, U-1055 & U-10223 -3-

to that portion of the ALJ's decision dismissing the charge; therefore that issue is waived by Hunt.⁷ Instead, Hunt challenges the ALJ's rejection of his post-hearing claim, which is not pled in his charge, that UFT violated its duty by failing to process the grievance to arbitration. The record, however, reveals that Hunt's argument is premised solely on his disagreement with UFT's reasonable interpretation of the agreement, which was communicated to him by a UFT representative. Therefore, the ALJ properly rejected Hunt's post-hearing argument.

Finally, we consider Hunt's exceptions in Case No. U-30226, which alleges UFT violated §209-a.2(c) of the Act when NYSUT withdrew legal representation in a pending Education Law §3020-a disciplinary hearing. In his exceptions, Hunt does not challenge the ALJ's conclusion that the withdrawal was precipitated by Hunt's insistence that the NYSUT attorney comply with the following contradictory instructions: a) plead "no contest" to the disciplinary charges; b) object to proposed District amendments to the charges; and c) pursue a defense at the disciplinary hearing predicated on the anti-discrimination provision in the Uniformed Service Employment and Reemployment Rights Act of 1994⁸ (USERRA).

The record reveals that the withdrawal of representation took place only after Hunt rejected legal advice from the NYSUT attorney, who explained that the proposed strategy to plead "no contest" to the substance of the disciplinary charges would result

⁷Section 213.2(b)(4) of the Rules of Procedure; *Town of Orangetown*, 40 PERB ¶3008 (2007), *confirmed*, *Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶7008 (Sup Ct Albany County 2007).

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

CASE NO. U-30168

- and -

SPRINGS UNION FREE SCHOOL DISTRICT,

Respondent.

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, DEPUTY CO-COUNSEL
(PAUL S. BAMBERGER of counsel), for Charging Party**

INGERMAN SMITH, L.L.P (NEIL M. BLOCK of counsel), for Respondent

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (ROBERT T. REILLY,
ESQ and LAURA R. HALLAR, ESQ, of counsel), for Amicus Curiae New
York State United Teachers**

**JAY WORONA, ESQ., and AILEEN ABRAMS, ESQ., for Amicus Curiae New
York State School Boards Association**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) dismissing a charge alleging that the Springs Union Free School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally transferring certain duties in the prekindergarten program exclusively performed by CSEA unit employees to a private contractor, and by unilaterally ending a past practice of permitting unit employees, who do not attend an

without utilizing leave accruals.¹

CSEA seeks reversal of the ALJ's decision finding that the reassignment of prekindergarten program duties of teaching assistants to nonunit employees is nonmandatory pursuant to Education Law §3602-e. Secondly, CSEA challenges the ALJ's sustainment of the District's contract reversion defense concerning the discontinuance of the past practice permitting unit employees to leave work early if they do not attend the annual staff luncheon. The District supports the ALJ's decision.

The New York State United Teachers (NYSUT) and the New York State School Boards Association (NYSSBA) have each filed an amicus curiae brief limited to the first issue raised in CSEA's exceptions. NYSUT contends that Education Law §3602-e does not render the at-issue subject nonmandatory under the Act, while NYSSBA supports the ALJ's finding that the Legislature intended to remove the decision to reassign prekindergarten program work from the subjects that are mandatorily negotiable under the Act.

FACTS

The following facts are based on the parties' stipulation of facts and accompanying exhibits. By stipulating to the facts and exhibits, the parties have aided in the expedited processing of the charge.

CSEA represents a unit of District employees, including those employed in the title of teacher assistant. Article V(A) of the parties' expired July 1, 2005-June 30, 2010 collectively negotiated agreement (agreement) states:

shall be determined by the days in the Springs Teachers Association calendar. The workday shall be 8:20 AM to 3:10 PM with thirty (30) minutes for lunch. For those working the early morning schedule, the workday shall be 7:30 a.m. to 2:20 p.m. Employees shall be entitled to two (2) fifteen minute breaks each work day and thirty (30) minutes for lunch with the exception of the school nurse who shall have a forty-five (45) minute lunch break. The scheduling of the breaks shall be at the discretion of the Superintendent.

Article VI of the agreement sets forth the applicable provisions for excused absences including sick leave, personal leave, bereavement leave, and child care leave.

For at least five consecutive years prior to 2010, CSEA unit employees have been invited to attend an annual staff luncheon on the last day of school, which is organized by another employee organization representing other District employees. The District released any CSEA unit employee who chose not to attend the luncheon at 10:30 am, and paid that employee for the full workday without the employee charging leave accruals.

In a memorandum dated May 3, 2010, the District notified all staff that if an employee did not attend the annual luncheon on June 25, 2010, the last day of the school year, she or he was obligated to remain on-duty until dismissal. It is undisputed that the District did not negotiate with CSEA regarding the elimination of the practice of early release time for CSEA-represented employees who did not attend the luncheon.

Starting with the 2003-04 school year, the District has offered a prekindergarten program. Teaching assistant duties in that program were performed exclusively by CSEA unit employees until the end of the 2009-10 school year.

The New York State Education Department (SED) issues grants to school districts for the operation of prekindergarten programs as long as all four-year old

Education Law §3602-e. Such programs are known as "universal prekindergarten programs."

For the 2007-08 through 2010-11 school years, the District received approval and grant funding from SED to operate a universal prekindergarten program as defined in Education Law §3602-e. The District's purpose in applying for and receiving SED grant funding for the universal prekindergarten program was to decrease its own costs and accept all eligible applicants. The District continues to receive SED funding, which it uses to partially fund the universal prekindergarten program.

For the 2010-11 school year, the District issued a request for proposals for eligible agencies to operate its universal prekindergarten program. SCOPE Educational Services (SCOPE), a not-for-profit private organization permanently chartered by the New York State Board of Regents (Board of Regents) to provide services to school districts, including early childhood programs, filed a proposal with the District dated February 25, 2010, along with a proposed agreement to provide a universal prekindergarten program in the 2010-11 school year. The District accepted SCOPE's proposal and entered into an agreement with SCOPE dated July 30, 2010, for SCOPE to operate the District's universal prekindergarten program in the 2010-11 school year.

SCOPE began staffing the District's universal prekindergarten program in the 2010-11 school year with four SCOPE employees, including two teaching assistants who are not in the CSEA-represented unit. The duties of SCOPE teaching assistants in the morning and afternoon sessions are similar to those previously performed by CSEA-represented teaching assistants in the District-operated prekindergarten program.

SCOPE employees without negotiations with CSEA.

DISCUSSION

In order for another state law to overcome New York's strong and sweeping public policy under the Act mandating negotiations between employers and employee organizations over terms and conditions of employment in the public sector, the statute must plainly and clearly manifest a legislative intent for the at-issue subject to be nonmandatory. The Legislature's intent may be explicit or it may be implied from the particular wording utilized in the statute.²

Once the Legislature has established "the public policy choices for the State, it is not within the authority of PERB or the courts to interfere with or reject those choices."³ We recognize, however, that our statutory interpretation is subject to different degrees of deference by the courts, depending upon whether it involves an interpretation of a statutory term of art under the Act and related labor relations provisions codified in other statutes, or involves discerning legislative intent.⁴

² See, *Webster Cent Sch Dist v New York State Pub Empl Rel Bd*, 75 NY2d 619, 23 PERB ¶7013 (1990); *Bd of Educ of the City Sch Dist of the City of New York v New York Pub Empl Rel Bd*, 75 NY2d 660, 23 PERB ¶7012 (1990); *State of New York- Unified Court System*, 28 PERB ¶3044 (1995).

³ *Brooklyn Excelsior Charter Sch and Buffalo United Charter Sch*, 44 PERB ¶3001 at 3009 (2011), *confirmed in part sub nom, Buffalo United Charter Sch, Brooklyn Excelsior Charter Sch and National Heritage Academies, Inc v New York State Pub Empl Rel Bd*, ___Misc3d___, 45 PERB ¶7005 (Sup Ct Erie County 2012).

⁴ *Town of Wallkill*, 42 PERB ¶3017 (2009), *pet dismissed, Town of Wallkill v New York State Pub Empl Rel Bd*, 43 PERB ¶7005 (Sup Ct Albany County 2010)(appeal pending); *KIPP Academy Charter Sch (Corcoran)*, 45 PERB ¶3013 (2012); *Webster Cent Sch Dist v. New York State Pub Empl Rel Bd*, *supra*, note 2.

Education Law §3602-e demonstrate a clear legislative intent to supersede the Act by making the transfer of teaching assistant duties in a universal prekindergarten program created under that statute a nonmandatory subject. While the Legislature did not directly address negotiability under the Act in Education Law §3602-e, and the legislative history provides no guidance, we conclude that the structure, wording and purpose of Education Law §3602-e demonstrate a clear and plain legislative intent to permit districts, without mandatory negotiations, to subcontract with a collaborating "eligible agency" for teaching assistant duties. The district's action, however, must be consistent with the adopted prekindergarten program plan, following SED's approval of the grant application and the completion of the mandatory competitive bidding process under Education Law §3602-e.

In reaching this legal conclusion, we emphasize the narrowness of our decision and its limited precedential value for future cases because it is based upon the statutory scheme, unique wording and purpose of Education Law §3602-e.

Education Law §3602-e permits a district to apply to SED on an annual basis for a state grant to establish and implement a universal prekindergarten program. The application must be in the form prescribed by the SED Commissioner and consistent with the rules and regulations promulgated by SED and the Board of Regents.⁵

The application must also be consistent with the prekindergarten program plan adopted by the district's board of education.⁶ Education Law §3602-e.1(d) defines a

⁵ Educ Law §3602-e.5; 8 NYCRR §151-1.5.

effectively serve eligible children directly through the school district or through *collaborative efforts between the school district and an eligible agency or agencies.*"

(Emphasis added)

The phrase "eligible agencies" is defined by Education Law §3602-e.1(b) as:

a provider of child care and early education, a day care provider, early childhood program or center, or community-based organization, including but not limited to approved pre-school special education programs, head start, and nursery schools so long as the standards and qualifications set forth pursuant to subdivision twelve of this section have been met.

The codified definitions set forth in Education Law §§3602-e.1(d) and 3602-e.1(b) demonstrate an explicit intent for districts to be able to collaborate and contract with private sector early childcare providers in designing and implementing universal prekindergarten plans.

Education Law §§3602-e.5(a)-(c) expressly authorize a district to coordinate proposals for prekindergarten program services with an eligible agency or agencies through competitive bidding.⁷ Education Law §3602-e.5(a) states:

If the school district chooses to coordinate proposals for pre-kindergarten program services, it *shall* conduct a competitive process in accordance with the procedures set forth by the commissioner and with the requirements and regulations set forth by the commissioner and with the requirements and regulations set forth in, and pursuant to, subdivisions seven, eight and twelve of this section. (Emphasis added)

⁷ See, 8 NYCRR §151-1.6 (describing the applicable competitive procedure to be followed when a district designs a collaborative prekindergarten program with an eligible agency).

proposals are the staffing patterns and qualifications of an eligible agency.⁸

While Education Law §3602-e.5(a) suggests that a district's decision to collaborate with an eligible agency is discretionary, Education Law §3602-e.5(e) includes a material incentive devised by the Legislature to encourage collaboration with eligible agencies. Education Law §3602-e.5(e) mandates that at least ten percent of a grant awarded to a district must be "set aside for collaborative efforts with eligible agencies" unless the SED Commissioner issues a waiver "based upon documented evidence that the school district was unable to use the set aside to make a collaborative arrangement that would meet all requirements of this subdivision because of unavailability of eligible agencies willing to collaborate or other factors beyond the control of the school district...."

Education Law §3602-e.12 requires that in developing regulations, the Board of Regents "shall consider and recognize the diversity of settings and models available for the delivery of prekindergarten programs operated by eligible agencies in alternative settings, including libraries and community based organizations, that comply with this section." Education Law §3602-e.12(a) requires that those regulations include:

minimum qualifications for personnel providing instructional and other services in prekindergarten programs. In promulgating such regulations, the commissioner and board of regents shall take into account the availability of certified teachers and teaching assistants to provide instruction in prekindergarten programs and shall consider ways to increase the pool of qualified personnel.

⁸ 8 NYCRR §151-1.6(c)(4).

maintain on file with SED a description of the district's competitive process for selecting an eligible agency, a copy of any contracts or agreements with an eligible agency for implementation of a universal prekindergarten program and a list of such agencies with information concerning each site.⁹

Following completion of the statutorily mandated competitive process, Education Law §3602-e.5(d) authorizes a district to enter into a contract with an eligible agency to implement its prekindergarten plan. Education Law §3602-e.5(d) states:

Notwithstanding any other provision of law, the school districts shall be authorized to enter any contractual or other arrangements necessary to implement the district's prekindergarten plan.

In its totality, Education Law §3602-e constitutes a legislative scheme to encourage districts to offer universal prekindergarten programs that maximize student participation and minimize district costs in providing such services through annual grants of state aid and entering into "any contractual or other arrangements" with eligible agencies. The decision to offer a prekindergarten program, however, remains at the discretion of a board of education.¹⁰ To effectuate the educational policy of encouraging the creation and implementation of universal prekindergarten programs, the Legislature included provisions in Education Law §3602-e to promote collaborative relationships between districts and eligible entities in the design and implementation of such program services.

⁹ Stipulation of Facts, Exhibit B, 2009-2010 Application, p. 7; 2010-2011 Application, p. 4.

¹⁰ See, Educ Law §1712.

entity to perform program services connected with the district's prekindergarten program plan and its grant application to SED. Following the competitive process, Education Law §3602-e.5(d) authorizes districts "to enter any contractual or other arrangements necessary to implement the district's prekindergarten plan." (emphasis added) We find that the broad and explicit language of Education Law §3602-e.5(d) demonstrates a clear intent to grant districts the right to contract with eligible agencies for any necessary services for implementation of its prekindergarten plan "*notwithstanding any other provision of law*" including the Act.¹¹

The broad wording of the subsection undermines the narrow construction urged by CSEA and NYSUT. The fact that the Legislature utilized the term "authorize" in the subsection does not demonstrate that it was intended to only supersede precedent prohibiting school districts from contracting with private vendors for instructional services.¹² If the purpose of the subsection was so limited, the Legislature would not have enacted a provision that on its face states that it is aimed at superseding "any other provision of law" and permits districts to enter into "any contractual or other arrangements" to implement prekindergarten program plans.

¹¹ See, *Brooklyn Excelsior Charter Sch and Buffalo United Charter Sch*, *supra*, note 3 (where we held that the wording of Educ Law §2854.1(a) demonstrated a legislative intent that provisions of the Charter Schools Act of 1998 supersede all other inconsistent provisions of New York law including the joint employer doctrine under the Act.).

¹² See, *Appeal of McKenna*, 42 Ed Dept Rep Decision No 14,774 (2002); *Appeal of Woodarek*, 46 Ed Dept Rep Decision No 15,422 (2006).

decision in *Webster Central School District v New York State Public Employment Relations Board* (hereinafter *Webster*),¹³ and our decision in *State of New York-Unified Court System (UCS)*,¹⁴ are distinguishable based upon differences between the laws analyzed in those cases, and the provisions in Education Law §3602-e. In *Webster*, the Court held that a 1984 amendment to Education Law §1950 demonstrated a legislative intent to make a school district decision to transfer certain unit work to be nonmandatory because the statutory scheme included job protection provisions for adversely impacted teachers. In *UCS*, we found that the legislative history and judicial interpretation of a statute allowing for the cost-reducing introduction of mechanical recording equipment within the court system to replace the taking of stenographic minutes demonstrated a legislative intent to remove the subject from mandatory negotiations. While Education Law §3602-e lacks a job protection provision analogous to the one in *Webster*, and a legislative history equivalent to that found in *UCS*, we find those differences to be immaterial to our conclusion based upon the statutory scheme, wording and purpose of Education Law §3602-e. In fact, Education Law §3602-e seeks to reduce the costs for districts to provide prekindergarten program services and encourage districts to collaborate with eligible entities that have sufficient staffing patterns and qualifications.

Finally, the District's prior decision to have CSEA unit employees perform teaching assistant duties in its universal prekindergarten program is not relevant because Education Law §3602-e grants the District the discretion to reassign the work

¹³ *Supra*, note 2.

takes place following SED's approval of the grant application and completion of the mandatory competitive bidding process.

Next, we turn to CSEA's exceptions seeking reversal of that portion of the ALJ's decision that dismissed its charge alleging a violation of §209-a.1(d) of the Act when the District unilaterally discontinued a past practice permitting CSEA unit employees to leave work early if they do not attend the annual staff luncheon.

When "parties have reached an agreement with respect to a specific subject following negotiations, a party may unilaterally end a past practice without violating the Act by reverting to the terms of a specifically negotiated provision of the agreement."¹⁵ The burden, however, rests with the respondent to prove a contract reversion defense through negotiated terms that are reasonably clear on the specific subject at issue.¹⁶ If an "agreement is reasonably clear but susceptible to more than one interpretation, extrinsic evidence, such as negotiation history and/or a past practice, is admissible to determine the intent of the parties."¹⁷

In the present case, Article V(A) of the parties' agreement is reasonably clear and it is not susceptible to alternative interpretations regarding work hours and breaks for CSEA unit employees. This interpretation is confirmed when Article V(A) is read in conjunction with Article VI of the agreement. Therefore, we find that the District had the

¹⁵ *City of Albany*, 41 PERB ¶¶3019 at 3090 (2008); *New York City Transit Auth*, 41 PERB ¶¶30.14 (2008); *Village of Mt Kisco*, 43 PERB ¶¶3029 (2010).

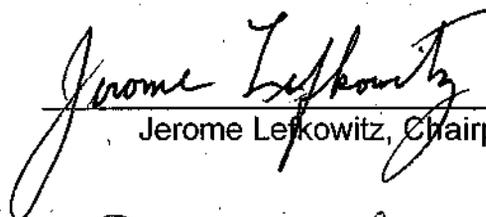
¹⁶ *Village of Mt Kisco*, *supra*, note 15; *New York City Transit Auth*, 20 PERB ¶¶3037 (1987), *confirmed*, *NYCTA v New York State Pub Empl Rel Bd*, 147 AD2d 574, 22 PERB ¶¶7001 (2d Dept 1989); *Town of Shawangunk*, 32 PERB ¶¶3042 (1999).

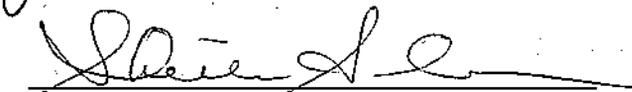
employees leaving work early on the last day school without charging their accruals if they chose not to attend the staff luncheon.¹⁸

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

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

DATED: September 20, 2012
Albany, New York.


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, WESTCHESTER
LOCAL 860, YONKERS CITY SCHOOL DISTRICT
NON-TEACHING UNIT 9169,**

Charging Party,

-and-

CASE NO. U-30302

YONKERS CITY SCHOOL DISTRICT,

Respondent.

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, DEPUTY CO-COUNSEL
(LESLIE C. PERRIN of counsel), for Charging Party**

**DONOGHUE, THOMAS, AUSLANDER AND DROHAN, LLP (LAWRENCE W.
THOMAS and ANA I. GONZALEZ of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Yonkers City School District (District) to a decision of an Administrative Law Judge (ALJ) finding that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued a past practice of providing fully-paid health insurance upon retirement to employees in a unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester Local 860, Yonkers City School District Non-Teaching Unit 9169 (CSEA).¹

The District seeks reversal of the ALJ's decision and dismissal of the charge on various grounds including: a) the District has a unilateral right to alter a past practice

concerning the level of health benefits it provides to retired former employees; b) the terms of the 2007-2011 District-CSEA collectively negotiated agreement (agreement) extinguished any reasonable expectation of CSEA unit members that the District's three decade-old past practice of providing fully paid health insurance upon their retirement would continue; c) the subject matter of the charge is prohibited pursuant to §201.4 of the Act; d) the ALJ erred in failing to distinguish the decision in *Lynbrook Police Benevolent Association*² (hereinafter *Lynbrook*); and e) the subject of the charge is nonmandatory pursuant to a state law limiting the prerogative of a school district to unilaterally diminish health insurance benefits or contributions of retired employees. In addition, it challenges the ALJ's proposed remedial order. CSEA supports the ALJ's decision.

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

FACTS

The relevant facts are not in dispute. The record is comprised of testimony from two CSEA witnesses and a copy of the District-CSEA agreement.

Prior to July 1, 2010, the District had a three decade-old past practice of providing fully-paid health insurance to CSEA unit members upon their retirement. The practice was known to CSEA and unit members. The current and prior agreements between the parties are silent concerning retiree health insurance. Section 9.1 of the parties' agreement states that, effective "July 1, 2010, all employees will make

² 10 PERB ¶3067 (1977), *reversed in part sub nom. Inc Vill of Lynbrook v New York State Pub Empl Rel Bd*, 64 AD2d 902, 11 PERB ¶7012 (2nd Dept 1978), *reinstated*, 48 NY2d 398, 12 PERB ¶7021 (1979).

contributions to their health insurance premiums through regular payroll deductions....”

On or about July 1, 2010, the District notified CSEA unit employees that upon their retirement they would be required to make the same health insurance premium contributions that active employees have to make under the agreement. Thereafter, the District implemented its policy and required unit employees who retired after July 1, 2010 to make the same contributions applicable to active unit employees pursuant to the agreement.

DISCUSSION

Under the Act, a demand for health insurance benefits for former employees who have already retired is nonmandatory.³ In contrast, the subject of health insurance benefits for current employees upon their retirement constitutes a form of deferred compensation and is mandatorily negotiable.⁴ Therefore, a unilateral change of an enforceable past practice concerning health care benefits for current employees upon

³ See, e.g., *Lynbrook PBA*, *supra*, note 2; *Troy Uniformed Firefighters Assn, Local 2304, IAFF*, 10 PERB ¶3015 (1977). An exception to this general rule, however, may result if the supplemental theory of negotiability, which converts nonmandatory subjects in an agreement into mandatory subjects, is applicable. See, *City of New York*, 40 PERB ¶3017 (2007); *City of Cohoes*, 31 PERB ¶3020 (1998), *confirmed sub nom, Uniform Firefighters of Cohoes, Local 2562 v Cuevas*, 32 PERB ¶7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶7019 (3d Dept 2000), *lv denied* 96 NY2d 711, 34 PERB ¶7018 (2001).

⁴ *Cohoes Police Benevolent and Protective Assn*, 27 PERB ¶3058 (1994); *Bridge and Tunnel Officers Benevolent Assn*, 29 PERB ¶3012 (1996); *Town of Shawangunk*, 32 PERB ¶3042 (1999). See also, *Aeneas McDonald PBA v City of Geneva*, 92 NY2d 326, 31 PERB ¶7503 (1998).

their retirement violates §209-a.1(d) of the Act.⁵

The at-issue subject in the present case is fully paid health insurance for current CSEA unit employees upon their retirement. The subject is not, as argued by the District, health insurance contributions for retirees. As a result, we reject the District's claim that it had a right to unilaterally change the past practice of providing fully paid health insurance to current unit employees upon their retirement.

Contrary to the District's contention, §9.1 of the parties's agreement does not constitute a basis for reversing the ALJ's finding that CSEA and the unit employees had a reasonable expectation that the past practice would continue. As we recognized in *Town of Shawangunk*,⁶ there is substantive difference between a contract clause for health benefits while employed, and a provision for benefits upon retirement:

The health insurance benefits to be extended to employees while they are employed are a form of current wages for services then being rendered by them. The health insurance benefits extended to an individual upon that individual's retirement from employment are a form of deferred compensation representing a payment in the future for the services a former employee has rendered in the past. The parties' agreement to a form of current compensation for active employees does not represent an agreement to any form of deferred compensation for former employees, including health insurance continuation after retirement. An agreement to the former simply does not satisfy any duty to negotiate as to the latter because the subjects of current and deferred compensation are fundamentally different.⁷

⁵ See, *County of St. Lawrence*, 44 PERB ¶4518 (2011), *affd*, 45 PERB ¶3001 (2012)(appeal pending); *Chenango Forks Cent Sch Dist*, 40 PERB ¶3012 (2007), *on remand*, 42 PERB ¶4527 (2009), *affd*, 43 PERB ¶3017 (2010), *confirmed sub nom Chenango Forks Cent Sch Dist v New York State Public Empl Rel Bd*, 95 AD3d 1479, 45 PERB ¶7006 (3d Dept 2012) (appeal pending).

⁶ 32 PERB ¶3042 (1999).

Section 9.1 of the agreement requires health insurance premium contributions by current employees through regular payroll deductions while they are employed by the District. The provision is silent with respect to the level of benefits for current unit employees upon their retirement, and it is not disputed that that distinct subject has never been the topic of negotiations between the parties. Therefore, §9.1 of the agreement cannot reasonably be construed as extinguishing the reasonable expectation that the District's past practice of providing fully paid health insurance upon retirement would continue.

Furthermore, the mere fact unit employees received notification on or about July 1, 2010 that the District would require them to make contributions for health insurance when they retire did not eliminate, as a matter of law under the Act, the reasonable expectation of CSEA unit employees. Indeed, it was the District's notification to unit employees that precipitated the filing of CSEA's charge.

We next turn to the District's assertions that the subject of the charge is prohibited under §201.4 of the Act, and that the decision in *Lynbrook*⁸ is distinguishable from the present case. Section 201.4 of the Act states:

The term "terms and conditions of employment" means salaries, wages, hours and other terms and conditions of employment provided, however, that such term shall not include any benefits provided by or to be provided by a public retirement system, or payments to a fund or insurer to provide an income for retirees, or payment to retirees or their beneficiaries. No such retirement benefits shall be negotiated pursuant to this article, and any benefits so negotiated shall be void.

⁸ *Supra*, note 2.

In *Lynbrook*, the Court of Appeals affirmed our statutory interpretation that "hospitalization insurance benefits for families of current employees who die after retirement are not prohibited subjects of collective bargaining in the public sector" under §201.4 of the Act.⁹ Like the proposal in *Lynbrook*, which sought a form of deferred compensation payable upon retirement and was unrelated to benefits provided by a retirement system, the subject of CSEA's charge is not a prohibited subject.

We also find meritless, the District's reliance on the state law enacted in 1994,¹⁰ and made permanent in 2009,¹¹ limiting the discretion of a school district to diminish the health insurance benefits of retirees. The statute states:

From on and after June 30, 1994 a school district, board of cooperative educational services, vocational education and extension board or a school district as enumerated in section 1 of chapter 566 of the laws of 1967, as amended, shall be prohibited from diminishing the health insurance benefits provided to retirees and their dependents or the contributions such board or district makes for such health insurance coverage below the level of such benefits or contributions made on behalf of such retirees and their dependents by such district or board unless a corresponding diminution of benefits or contributions is effected from the present level during this period by such district or board from the corresponding group of active employees for such retirees.¹²

By its express terms, "the statute protects retirees from a diminution of health insurance benefits in the absence of a corresponding diminution exacted from active

⁹ *Supra*, note 2, 48 NY2d at 402, 12 PERB at 7040. See also, *Chenango Forks Cent Sch Dist*, *supra*, note 5; *Cohoes Police Benevolent and Protective Assn*, *supra*, note 4.

¹⁰ L 1994, c 729.

¹¹ L 2009, c 504, Part B, §14.

¹² *Supra*, note 4.

employees.”¹³ The statute does not have any impact on the negotiability under the Act of deferred compensation in the form health insurance benefits for current unit employees upon their retirement.

Finally, we deny the District’s exception challenging the proposed remedial order in the ALJ’s decision. Notably, the District does not articulate any specific failings concerning the terms of the proposed make-whole remedial order. As we have stated previously, the purpose of our remedial orders “is to make parties whole for the wrong sustained by placing them as nearly as possible in the position they would have been in had the improper practice not been committed.”¹⁴ The remedial order in the present case satisfies that purpose.

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

THEREFORE, IT IS HEREBY ORDERED that the District:

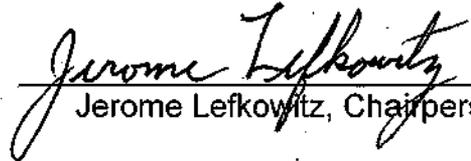
1. Rescind the directive that unit employees who retire on or after July 1, 2010 will be required to pay health insurance contributions during retirement;
2. Not unilaterally change the past practice of paying current unit employees 100 percent of the cost of health insurance premiums upon retirement;

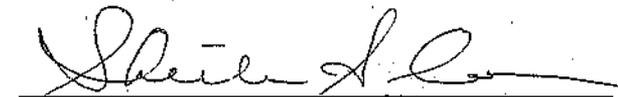
¹³ *Bryant v Board of Educ, Chenango Forks Cent Sch Dist*, 21 AD3d 1134, 1136 (3d Dept 2005) (subsequent history omitted).

¹⁴ *Burnt Hills-Ballston Lake Cent Sch Dist*, 25 PERB ¶3066 at 3139 (1992). See also, *City of Oneonta*, 43 PERB ¶3006 (2010); *State of New York (Department of Correctional Services)*, 43 PERB ¶3039 (2010).

3. Make whole any CSEA unit employees who retired on or after July 1, 2010, and who were required to contribute towards the cost of health insurance premiums during retirement, with interest at the maximum legal rate; and
4. Sign and post the attached notice at all physical and electronic locations normally used for communication with unit employees.

DATED: September 20, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the Yonkers City School District (District) in the unit represented by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Westchester Local 860, Yonkers City School District Non-Teaching Unit 9169 (CSEA) that the District will forthwith:

1. Rescind the directive that CSEA unit employees who retire on or after July 1, 2010 will be required to pay health insurance contributions during retirement;
2. Not unilaterally change the past practice of paying current CSEA unit employees 100 percent of the cost of health insurance premiums upon retirement;
3. Make whole any CSEA unit employees who retired on or after July 1, 2010, and who were required to contribute towards the cost of health insurance premiums during retirement, with interest at the maximum legal rate.

Dated

By
on behalf of the YONKERS CITY SCHOOL DISTRICT

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

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

Charging Party,

CASE NO. U-29442

- and -

VILLAGE OF BATH,

Respondent.

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, CO-COUNSEL
(PAUL S. BAMBERGER of counsel), for Charging Party**

HARRIS BEACH PLLC (EDWARD A. TREVITT of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by the Village of Bath (Village) to a decision of an Administrative Law Judge (ALJ)¹ finding that the Village violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it refused to execute a collectively negotiated agreement (agreement) for the period June 1, 2009-May 31, 2013, which incorporated terms of a memorandum of agreement (MOA) between the Village and the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA). The Village also excepts to the ALJ's conclusion that it violated §§209-a.1(a) and (d) of the Act through its direct dealing with CSEA-represented unit members by requiring them to sign and return statements concerning their respective wages. Finally, the Village excepts to the ALJ's finding that the

Village's conduct so tainted the Village Board's reserved right to ratify the collective bargaining agreement (agreement) to constitute a waiver of any further right to ratify the agreement

Following our consideration of the parties' arguments, and the record before us, we reverse, in part, and affirm, in part, the decision of the ALJ.

FACTS

The Village and CSEA are parties to a collectively negotiated agreement (agreement), which expired on May 31, 2009. That agreement, which originally covered the period June 1, 2004-May 31, 2008, was later extended an additional year by the parties. The expired agreement included provisions relating to grades, starting salaries, increments, longevity payments and lump-sum payments in the first year of the agreement. Article VI(A) and Schedule A included the starting salaries for all unit positions and five annual step increments for each position. Step increments under the expired agreement were not, however, automatic. Article XII(A) stated that increments would be granted only after the department supervisor or head has certified that the employee "has demonstrated adaptability and proficiency in the work warranting the wages scheduled."

Pursuant to Article VI(B) of the original agreement, a unit employee was entitled to a one-time off step payment of \$500 after she or he reached the maximum step. Article VI(C) of that agreement provided for a retroactive \$1000 lump sum payment for June 1, 2004-May 31, 2005, half of which was added to each employee's base salary. The expired agreement also provided a 3% annual wage increase in each of the four years.

agreement. During the negotiations, the Village was represented by Village Mayor and former Village Attorney David G. Wallace (Wallace) and CSEA was represented by Labor Relations Specialist Kelly Comfort (Comfort). There were approximately six bargaining sessions between the parties. CSEA presented written proposals during the negotiations; the Village did not.

At the first session on February 25, 2009, CSEA presented proposals calling for 4% annual wage increases for each year ending May 31, 2012, increases in the amounts of specific longevity payments, and deletion of existing contractual language in Article VI concerning lump sum payments. Although CSEA's proposals sought deletion of contractual language in Articles VI and XII with respect to increments, the proposals stated that the parties "need to look at reinstating the steps."

During the February 25, 2009 bargaining session, the parties discussed the Village's stated need to increase the starting salaries for apprentice linemen and line workers to aid in the retention of employees in those titles. Village Mayor Wallace testified that employees in line worker titles had recently left Village employment to accept private sector jobs due to the Village's salary structure. CSEA took the position, however, that there should be increases in the starting salaries for all unit positions, which was agreed to by the Village. The parties also discussed raising current employees' salaries in each title to ensure that such salaries were not below the increased starting salaries for newly hired employees.

In a second set of proposals, dated March 31, 2009, CSEA sought increases in starting salaries for all unit employees, and upgrades for the positions of apprentice line worker and meter reader. The proposed increases and upgrades were prefaced with

Starting salaries need to be addressed, not just by the current grade system, but by individual titles. The following are but a few of the examples that CSEA feels need to be addressed: Please keep in mind, that if a starting salary increases, current employees who are already in that position shall have their salaries increase accordingly so that new employees are not making more than they are.

During his testimony, Mayor Wallace admitted that he agreed with CSEA's proposition that the salary of a current employee should not be below the starting salary of a new employee in the same title.

Under CSEA's proposal, an apprentice line worker would have been upgraded to Grade 8 with the starting salary increased from \$24,227 to \$36,000. In addition, the starting salary for an electric line worker would increase from \$38,173 to \$43,000. The account clerk's starting salary would rise from \$26,700 to \$30,000.

On April 29, 2009, CSEA proposed that all unit members receive 3.5% annual increases for each year of a new three-year agreement ending May 31, 2012. This proposal did not include proposed lump sum payments or step increments. It did acknowledge, however, that CSEA's proposal for increases in starting salaries remained unresolved. CSEA representative Comfort testified that during this bargaining session the parties did not discuss unit members receiving annual salary increases in addition to the proposed annual 3.5% annual increases.

At a bargaining session on May 29, 2009, CSEA presented new proposals for a four-year agreement. At that session, CSEA proposed an annual percentage increase of 3.5% in the first year, 4.0% in the three succeeding years, and graduated increases in employee health care contributions over the four-year term of the agreement. CSEA also proposed specific lump sum increases in the starting salary for each unit position,

CSEA's proposals on salary, starting salaries and health insurance contributions

1. Year One
Salary increase: 3.5%
Health Insurance Contribution: 1%
Starting Salary by Title Increases: Account Clerk (1) \$2,000
Apprentice Lineworker (2) \$6,000
Asst Overhead Line Supv (1) \$6,000
Lineworker (2) \$5,000

2. Year Two
Salary increase: 4.0%
Health Insurance Contribution: 2.0%
Starting Salary by Title Increases: Utility Svc Worker (3) \$2,000
Maintenance Person (5) \$2,000
Asst. Utility Maint Supv (1) \$6,000
Automotive Mechanic (1) \$2,000

3. Year Three
Salary increase: 4.0%
Health Insurance Contribution: 3.0%
Starting Salary by Title Increases: Meter Reader (2) \$2,000
Service Desk Operator (3) \$2,000
Consumer Srv Clerk (3) \$2,000
Asst. Utility Svc Supv (1) \$6,000
Senior Clerk (1) \$2,000

4. Year Four
Salary increase: 4.0%
Health Insurance Contribution: 4.0%
Starting Salary by Title Increases: Clerk (0) \$2,000
Laborer (0) \$2,000
WWTP Trainee (0) \$2,000
Electric Ground Worker (0) \$2,000
Cashier (0) \$2,000
Senior Account Clerk (0) \$2,000
Utility Draftsperson (1) \$2,000
Accountant (2) \$2,000
WWTP operator (1) \$6,000

During that negotiating session, CSEA representative Comfort described the Village's per annum costs of the proposed increases, which were handwritten on

CSEA's proposals was intended to reference the base salary for each current employee. Further, she testified that CSEA proposed staggering the implementation of the increases to accommodate the Village's cost concerns.

A separate spreadsheet utilized by Comfort to explain CSEA's proposals during the negotiating session listed the impact of the proposals in the first two years of the proposed agreement. In the last column of the spreadsheet, there were lump sum amounts listed for over a dozen specifically identified Village employees. For the first year, the spreadsheet calculated the base salaries for all current employees with a 3.5% increase. The last column of the spreadsheet for that year lists the figures of \$2,000 for the incumbent account clerk, \$6,000.00 for each of the two current apprentice line workers and the assistant utility line supervisor and \$5,000.00 for each of the two current line workers. The spreadsheet, however, does not include those figures in the calculation of the base salaries of the six employees. The spreadsheet concerning the second year lists lump sum amounts for ten additional current employees in a column labeled "Inc Starting Salaries."

Village Mayor Wallace testified that during negotiations the parties never discussed current unit employees receiving lump sum increases or adjustments in addition to annual percentage increases to their salaries. According to Wallace, he thought that the per annum costs discussed by the parties during the May 29, 2009 session were only the "cost[s] to increase the starting salaries of those positions by the proposed numbers." He denied discussing with Comfort the cost of salary adjustments for existing employees in the first year of the successor agreement or spreading such adjustments over the term of the agreement. Wallace admitted agreeing to CSEA's

notation by Comfort at the bottom of CSEA's May 29, 2009 proposal summary: "Agreed 5/29/09." During his testimony, however, Wallace stated that he agreed to "a salary increase of three and a half percent, a health insurance contribution and starting salary by title increases."

On June 1, 2009, Comfort sent an email to Wallace with two attachments: a proposed Schedule A concerning the starting salaries for each job title during the four-year period, along with a proposed memorandum of agreement (MOA). In her email, Comfort stated, in part:

As promised, I have written the [MOA]. Please look carefully at the compensation article. *I have attempted to capture what we had earlier agreed upon regarding the apprentice lineworker's bump in salary in relationship to the "two years" of training and the bonus when NYS puts forth the exam.*

I have also attached the Schedule A for *starting salaries* by year. When I originally gave you last week the proposal, I forgot to add two titles that we currently do not have anyone in: WWTP Worker and Working Supervisor. Thus, I have increased their *starting salaries* in Year Four of the contract. I hope this is ok. (Emphasis added).

Schedule A set forth proposed starting salaries for all titles staggered over the four years of the agreement consistent with the parties' agreement on May 29, 2009.

The proposed MOA stated that it had to be ratified by both parties, and it included the following provisions in the compensation article:

Article VI Compensation

- A. Schedule A (attached) sets forth the grades and starting salaries for all job titles
- B. Wage increases during the term of the agreement are as follows:

June 1, 2009 – May 31, 2010

3.5% wage increase

salary increase above the 3.5% wage increase: Account Clerk \$2,000; Apprentice Lineworker \$6,000; Assistant Overhead Line Supervisor \$6,000; and Lineworker \$5,000.

June 1, 2010 – May 31, 2011 4.0% wage increase
Employees in the following titles will also receive an additional salary increase above the 4.0% wage increase: Utility Service Worker \$2,000; Maintenance Person \$2,000; Assistant Utility Maintenance Supervisor \$6,000; and Automotive Mechanic \$2,000.

June 1, 2011 – May 31, 2012 4.0% wage increase
Employees in the following titles will also receive an additional salary increase above the 4.0% wage increase: Meter Reader \$2,000; Service Desk Operator \$2,000; Consumer Service Clerk \$2,000; Assistant Utility Service Supervisor \$6,000; and Senior Clerk \$2,000.

June 1, 2012 – May 31, 2013 4.0% wage increase
Employees in the following titles will also receive an additional salary increase above the 4.0% wage increase: Clerk \$2,000; Clerk PT \$2,000; Laborer \$2,000; WWTP Trainee \$2,000; Cashier \$2,000; Senior Account Clerk \$2,000; Utility Draftsperson \$2,000; Accountant \$2,000; WWTP Operator \$6,000; WWTP Worker \$2,000; and Working Supervisor \$5,000.

- F. *When an Apprentice Lineworker has satisfactorily completed the "two years of training" (and this could actually take longer than two years) that is necessary in order to be eligible for the Civil Service Lineworker exam, he/she shall receive an increase in base salary of one-half (1/2) the difference between the starting salary of an Apprentice Lineworker and a Lineworker. Upon passing the Civil Service Lineworker exam, the Apprentice Lineworker shall receive an additional \$1,000 on his/her base salary. (Emphasis in the original.)*

On June 4, 2009, Comfort sent Wallace a follow-up email suggesting a slight modification to the compensatory provision concerning the reference of a line worker civil service examination. Comfort also asked Wallace if he had reviewed the MOA and if he had any proposed changes.

Wallace testified that he presented the terms of the MOA to the Village Board for ratification on June 15, 2009, although he had not yet received a hard-copy draft of the

document from Comfort. During his presentation, Wallace described the annual percentage increases, increases in starting salaries, health insurance changes and other provisions of the agreement. He did not explain to the Village Board that if the MOA was ratified certain employees would receive lump sum salary increases in addition to annual percentage increases. Following Wallace's presentation, the Village Board voted to ratify the proposed agreement.

According to Wallace, he received the MOA for the first time on June 17, 2009, when the CSEA unit president delivered a hard copy to him at his office for signature. Although he signed it, he testified that he "didn't read it as carefully obviously as I should have, no." On June 19, 2009, Wallace sent an email to Comfort stating that he did not object to her request to modify the signed MOA to include reference to a civil service apprentice line worker exam instead of a civil service line worker examine as the condition precedent for increasing the base salary of an apprentice lineworker by \$1,000.

CSEA unit employees ratified the MOA on June 25, 2009. Comfort then prepared a successor agreement containing the identical compensation provisions to those set forth in the MOA. Upon receiving the draft successor agreement from Comfort, Wallace notified Comfort that the compensatory provisions were different from what he understood the parties had agreed to and that he had presented to the Village Board. He objected to the inclusion of lump sum increases for current employees because the parties had agreed to increasing starting salaries. As a result, Wallace refused to execute the agreement drafted by Comfort.

After CSEA filed a grievance, the Village and CSEA agreed that the annual

lump sum salary adjustments for current employees would be resolved through the grievance arbitration process. Subsequently, the percentage wage increase, health insurance contribution, and increase in clothing allowance were implemented.

On September 9, 2009, the Village issued a statement to each employee with an itemization of the Village's position regarding the employee's wages and benefits that excluded the disputed lump sum payments. The Village directed each employee to sign and return the statement unless they disagreed with the Village's calculation.

DISCUSSION

It is a well-settled proposition under the Act that a party to a negotiated agreement that is clear on its face cannot reject that agreement based upon a claim that she or he misapprehended its terms.² As a result, the refusal of a party to execute a written agreement, upon request, incorporating the agreement reached by the parties during negotiations constitutes a refusal to bargain in good faith in violation of §209-a.1(d) of the Act.³ However, when there is strong and compelling objective evidence in the record demonstrating that there was no meeting of the minds between the parties with respect to the terms of a signed tentative agreement, we will not find a violation of §§209-a.1(d) or 209-a.2(b) of the Act when a party refuses to execute a collectively negotiated agreement containing the provisions of that tentative agreement.⁴

² *Union Springs Cent Sch Teachers Assn*, 6 PERB ¶13074 (1973); *Sylvan-Verona Beach Common Sch Dist*, 15 PERB ¶13067 (1982), *pet dismissed*, *Sylvan-Verona Beach Common Sch Dist v. New York State Pub Empl Rel Bd*, 16 PERB ¶17004 (Sup Ct Oneida County 1983) *affd*, 97 AD2d 959, 16 PERB ¶17029 (4th Dept 1983); *Port Jervis Teachers Assn*, 19 PERB ¶13039 (1986).

³ *Deer Park Teachers Assn*, 13 PERB ¶13048 (1980).

⁴ See *Union Springs Cent Sch Teachers Assn*, 6 PERB ¶13074 (1973).

Based upon the unique facts and circumstances presented in this record, and the totality of the evidence, we conclude that Article VI(B) of the MOA did not embody the parties' agreement because CSEA and the Village did not have a meeting of the minds about supplementing the agreed-upon annual percentage increases with lump sum increases in the base salaries for all unit employees over the four years of the agreement. Although execution of an MOA is ordinarily presumptive proof of an agreement, the Village rebutted that presumption through the introduction of compelling objective evidence, which CSEA failed to controvert sufficiently. While CSEA and the Village clearly intended to increase the starting salaries for all unit positions, there was no agreement between them to grant equivalent lump sum salary adjustments to all unit employees in addition to an annual percentage increase.

It is undisputed that the Village agreed to three elements that are clearly listed in CSEA's final May 29, 2009 proposals: percentage salary increases for all unit employees, starting salary increases for all unit positions and health insurance contributions. The dispute before us is whether there was a meeting of the minds between the parties concerning a fourth element, which was not expressly included in CSEA's final proposals: increasing the base salaries of all current unit employees by the same amount as the agreed-upon increases in starting salaries.

The evidence in the record belies Comfort's claim that CSEA's final proposal to increase "starting salaries" was understood by both parties to include identical salary adjustments to the base salaries for all current employees. Her assertion is contradicted by the terms of the May 29, 2009 proposals, and CSEA's prior written proposals, which distinguish between percentage salary increases and increases to

email, Comfort stated that she attempted to capture the parties' agreed-upon salary adjustment for apprentice line workers who meet certain conditions, and the agreed-upon starting salaries set forth in Schedule A. Notably absent from Comfort's email is a reference to a purported agreement between the parties for all current unit employees to receive a lump sum adjustment to their base salary.

While Comfort asserts that the parties' understanding was reached during discussions prior to May 29, 2009, CSEA did not offer any documentary evidence demonstrating this purported mutual intent to merge the obvious distinction between increases to starting salaries and current salaries. In fact, the spreadsheet utilized by Comfort to explain CSEA's proposal during the last bargaining session described the listed lump sum increases in the last column as increases in starting salaries and those amounts were not included in her calculation of base salaries for the respective employees along with the annual percentage increase. Finally, Comfort did not explain during her testimony the inclusion in the MOA of additional separate lump sum increases in the "base salary" for apprentice line workers beyond the \$6,000.

Although the record clearly demonstrates that the parties reached a general agreement early in their negotiations that starting salaries for all titles should be increased and that current employee salaries should be adjusted, if necessary, to ensure that they were not below any newly agreed-upon starting salaries, we find that the record does not support the conclusion that both parties intended that all current employees are to receive salary adjustments equivalent to the amount of the increase in starting salaries in addition to annual percentage increases.

Based upon the foregoing, we reverse the ALJ's conclusion that the Village

drafted and sent by CSEA due to a lack of a meeting of the minds between the parties concerning the compensatory terms of the agreement.⁵

We affirm, however, the ALJ's conclusion that the Village violated §§209-a.1(a) and (d) of the Act by sending wage statements to the individual unit employees and directing them to sign and return such statements. Those statements concerned matters in dispute between the Village and CSEA, and addressing such issues directly with unit employees who are not on CSEA's negotiating team violates §§209-a.1(a) and (d) of the Act.

As to the Village's failure to provide agreed-upon longevity payment, we find that this was an inadvertent error, as it was contrary to the Wallace's instructions. Assuming that this oversight has been corrected, we do not address it in our remedial order. If the Village has not furnished the longevity payments to unit employees, we would be disposed to grant a CSEA motion to reopen this matter for the purpose of addressing that issue.

IT IS, THEREFORE, ORDERED that the charge is hereby dismissed to the extent it alleges that the Village violated §209-a.1(d) of the Act by failing to execute the successor agreement proffered by CSEA.

IT IS FURTHER ORDERED that the Village:

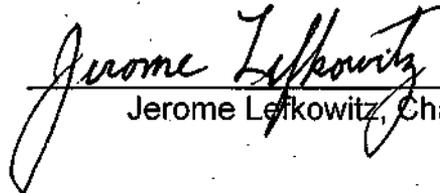
1. rescind the directive to unit employees to sign and return the statement of wages issued to each employee on or about September 4, 2009;
2. immediately destroy any such wage statements returned to the Village by

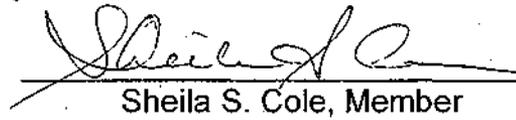
⁵ In light of this conclusion, we need not reach the exception targeting the ALJ's finding that the Village's conduct waived the right of the Village Board to ratify a successor

unit employees, and

3. sign and post the notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: September 20, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Village of Bath in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) that the Village of Bath will:

1. rescind the directive to unit employees to sign and return the statement of wages issued to each employee on or about September 4, 2009; and
2. immediately destroy any such wage statements returned to the Village by unit employees.

Dated

By
on behalf of Village of Bath

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

PUBLIC EMPLOYEES FEDERATION,

Charging Party,

CASE NO. U-17811

- and -

**STATE OF NEW YORK (RACING AND
WAGERING BOARD),**

Respondent.

**LISA M. KING, GENERAL COUNSEL (STEVEN M. KLEIN of counsel),
for Charging Party**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (LYNN
HOMES VANCE of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions by the State of New York (Racing and Wagering Board) (State) and exceptions by the Public Employees Federation (PEF) to a decision of the Assistant Director of Public Employment Practices and Representation (Assistant Director) concluding that the State violated §209-a.1(d) of the Public Employee's Fair Employment Act (Act) when it unilaterally announced a 25 percent reduction in the *per diem* rates of pay for

seasonal track employees at State horse tracks who are in the PEF-represented negotiating unit.¹

PROCEDURAL BACKGROUND

PEF's charge was originally conditionally dismissed, and deferred to the parties' contractual grievance procedure.² Following arbitration of a related PEF contract class action grievance, the arbitrator issued a decision and award concluding that PEF did not have a contractual source of right concerning the *per diem* rate reduction under the compensation provisions in Article 7 of the parties' 1995-1999 collectively negotiated agreement (agreement) or the parties' memorandum of interpretation concerning seasonal employees (Side Letter) in the PEF-represented unit.³ Specifically, the arbitrator concluded that the at-issue employees in the PEF-represented unit were properly designated as seasonal and were, therefore, not covered by Article 7 of the 1995-1999 agreement. In addition, the arbitrator ruled:

Given the appropriateness of the Grievants' designation, it is clear that the State did not violate the Side Letter when it reduced by 25 percent the *per diem* rates for the positions they held in January 1996. Nothing in the Side Letter prevented the State from doing so. As such, there is simply no language therein which could be interpreted so as to support the Union's claim. Thus, this is not a case where in

¹ *State of New York (Racing and Wagering Bd)*, 43 PERB ¶14503 (2010). PEF has filed exceptions limited to the Assistant Director's proposed remedy.

² *State of New York (Racing and Wagering Bd)*, 29 PERB ¶14582 (1996).

³ Exhibit 4 attached to Joint Exhibit 1,

the face of ambiguous language, the equities would justify sustaining the grievance. Instead, this is a case where despite the seeming unfairness of the State's action, there is no contractual basis by which that action can be reversed.

In response to PEF's express concern about the future implications of the State's action if the class action grievance was not sustained, the arbitrator stated:

I note also the Union's claim that by virtue of this decision, the State could reduce per diems the day after a negotiated raise went into effect so as to vitiate the impact of any such increase. Frankly, such an action would be troublesome not merely because it would be "callous," but because it would raise issues of Union animus and abrogation of the Taylor Law duty to bargain in good faith. However, no such evidence exists in the instant dispute. Instead, insofar as this record reveals, the decision to reduce per diems by 25 percent was made without regard to negotiated increases that were due to take effect a number of months thereafter or that had taken effect previously. Consequently, the hypothetical situation posed by the Union might well constitute a violation of law and or the Agreement, while the State's action in this case did not, I find. (Footnote omitted)

The arbitrator concluded his decision with the following:

In sum, I conclude that no provision in the Agreement or in any other statute, rule, etc. cited by the parties precluded the State from reducing per diems of the affected employees by 25 percent in January 1996. Accordingly, and for the foregoing reasons, the grievance must be denied. It is so ordered.

Thereafter, PEF moved to reopen the charge, which was opposed by the State. In the alternative, the State sought an order granting preclusive effect to the arbitrator's decision and award with respect to certain issues.

In a letter decision, the ALJ reopened the charge and granted preclusive effect to four findings of fact made by the arbitrator: a) the at-issue PEF unit members are designated as seasonal employees as that class is ordinarily defined; b) as seasonal employees, they are governed by the Side Letter, which is appended to the parties' agreement; c) the State did not violate the Side Letter when the per diem rates for at the at-issue positions were reduced by 25% in January 1996; and d) no provision in the agreement or in any other statute, rule or regulations cited by the parties precluded the State from reducing per diem rates of the affected employees by 25% in January 1996.

After the charge was reopened, processing was delayed at the request of the parties. The parties engaged in extensive efforts to narrow the disputed factual issues, which resulted in a stipulation of facts and a Joint Exhibit that includes dozens of exhibits. Thereafter, a hearing was held before the Assistant Director concerning disputed issues related to the status of the at-issue seasonal employees and their *per diem* rates of pay. Following issuance of the Assistant Director's decision, both parties sought and were granted extensions by the Board for the filing of their respective exceptions and responses.

FACTS

PEF is the duly certified collective bargaining representative of State employees in the Professional, Scientific and Technical Unit including the at-issue track personnel who hold seasonal positions. Article 7 of the of the 1995-1999 agreement states that the "State and PEF shall prepare, secure introduction and

recommend passage by the Legislature of such legislation as may be appropriate and necessary to provide the benefits" set forth in that article.

Seasonal track personnel are in the exempt class of the classified civil service, and they serve at the pleasure of the Racing and Wagering Board Chairperson (Chairperson). They are employed during a specific track meet, and then must be re-appointed by the Chairperson to work another track meet.

The Side Letter between the parties included a numbered paragraph outlining compensation terms for unit employees in seasonal positions. Subparagraph A provided for lump sum payments in fiscal years 1996-97 and 1997-98 for seasonal employees paid on an hourly, *per diem* or annual basis, who met defined eligibility requirements. Subparagraph B included salary increases for seasonal positions in fiscal years 1997-98 and 1998-99.

The Side Letter's compensation paragraph also contained the following subparagraph placing explicit limitations on the discretionary authority of the State Director of the Budget (State Budget Director) to adjust the rates of compensation for seasonal employees in the PEF-represented unit:

C. Effect of Minimum Wage Level

If during the term of this Agreement the rate of compensation of any employee in a seasonal position is increased at *the discretion of the Director of the Budget* for the purpose of making such rate equal to the Federal minimum wage level, the provisions of [Sub]paragraphs A and B above shall be applied to such seasonal employee in the following manner:

1. The seasonal employee's rate of

compensation shall remain at the *adjusted rate established by the Director of the Budget* from the effective date established by the Director of the Budget until the date of the next general salary increase provided for in [Subp]aragraphs A or B.

2. Effective on the effective date of the next general salary increase provided for in [Subp]aragraphs A or B such employee's rate of compensation shall be either *the adjusted rate established by the Director of the Budget*; or his/her rate prior to the adjustment, increased by the percentage provided for in the applicable paragraph, whichever is higher. (Emphasis added)

Finally, the Side Letter states that the compensatory provisions and the provision concerning the State Budget Director's adjustment to the rate of compensation are applicable to those seasonal employees paid on a *per diem* basis:

D. Hourly and Per Diem

All of the above provisions shall apply on a pro rata basis to seasonal employees paid on an hourly or per diem basis or on any basis other than at an annual rate, or to seasonal employees paid on a part-time basis. The above provisions shall not apply to seasonal employees paid on a fee schedule.

The at-issue seasonal track positions have never been allocated to a statutory salary grade, although the Department of Civil Service's Director of Classification and Compensation Division has the statutory authority to do so.⁴

All positions not allocated to a statutory salary grade are administratively

⁴ See, Civ Ser Law §118.1(b); Transcript, pp. 122-123, 126.

designated as non-statutory or "NS." The Department of Civil Service defines "NS" as an "administrative designation for salaries established by the Division of the Budget pursuant to Section 44 of the State Finance Law for positions not allocated to a statutory salary grade."⁵ Wages for NS positions are not set by statute and are subject to a distinct procedure under State Finance Law §§44 and 49.

Prior to each year's meet, the Chairperson submits a request to the Division of the Budget for approval of the number of seasonal employees to work the meet and the suggested rates of pay. If approved, the Division of the Budget issues a certificate of approval along with a schedule of positions setting forth the approved salary rates for that meet. According to the testimony of the State Division of the Budget's Chief Budget Examiner and the Department of Civil Service's Director of Classification and Compensation Division, seasonal positions expire at the end of each racing season, and staffing levels and deployment vary from season to season.

Following a review of operations at the Racing and Wagering Board in the fall of 1995, the State Budget Director utilized his statutory discretion and approved a 25 percent reduction in the *per diem* rates for seasonal track personnel commencing with the January 1996 meet, as a means of cutting agency costs. Following the action of the State Budget Director, on January 2,

⁵ New York State Department of Civil Service, Glossary of Terms available at <http://www.cs.ny.gov/pio/merit-guide/glossary.cfm/>

1996, the Chairperson issued a memorandum announcing the per diem reduction from the previous year's rates for seasonal appointments effective January 1, 1996. The reduction applied to all seasonal personnel in the PEF-represented unit working for that agency. It is not disputed that the salary reduction was unrelated to any changes in job duties or qualifications.

DISCUSSION

Among its many exceptions, the State contests the Assistant Director's rejection of its waiver defense, which is premised upon the terms of the Side Letter for seasonal employees and the provisions of the legislation implementing the negotiated benefits in the parties' 1995-1999 agreement as well as legislation implementing their prior agreements.

In *County of Nassau (Police Department)*,⁶ we clarified the proper labeling of a defense to a charge alleging a unilateral change in violation §209-a.1(d) of the Act based upon the fact the subject of the change has already been negotiated to completion by the parties. As part of that clarification, we distinguished between a waiver defense and a duty satisfaction defense:

Waiver concepts suggest that a charging party has surrendered something. Although waiver may accurately describe a loss of right, such as one relinquished by silence, inaction, or certain other types of conduct the defense as described is not one under which a respondent is claiming that the charging party has suffered or should be made to suffer a loss of right. Under this particular defense, a

⁶ 31 PERB ¶3064 (1998).

respondent is claiming affirmatively that it and the charging party have already negotiated the subject(s) at issue and have reached an agreement as to how the subject(s) is to be treated, at least for the duration of the parties' agreement. By expressing this particular defense as duty satisfaction, we give a better recognition to the factual circumstances actually giving rise to it and expect to avoid the confusion and imprecision in analysis which have sometimes been caused by the other noted characterizations of this defense.⁷ (Footnote omitted)

In the present case, the State's waiver defense is based primarily upon the Side Letter, and that defense is comprised of two components. The State claims that PEF waived its right to negotiate and also claims that the State satisfied its duty to negotiate the subject of the charge. While the State's defense conflates the distinction we have carefully drawn between a waiver defense and a duty satisfaction defense, we find merit to the State's argument that it satisfied its duty to negotiate under the Act.

In order to demonstrate its duty satisfaction defense, the State must present "record evidence of facts establishing that the parties negotiated an agreement upon terms which are reasonably clear on the subject presented to us for decision."⁸ A determination concerning whether the parties negotiated the at-issue subject to completion, requires an interpretation of the Side Letter through our application of standard principles of contract interpretation. We will consider

⁷ *Supra*, note 6, 31 PERB at 3142.

⁸ *NYCTA*, 41 PERB ¶3014 at 3076 (2008).

extrinsic evidence only if the Side Letter is reasonably clear but susceptible to more than one interpretation.⁹

We conclude that the negotiated terms of the Side Letter contains limitations on the statutory authority and power of the State Budget Director to approve the unilateral adjustment of compensatory rates for seasonal employees, and it defines how that discretion will be applied concerning certain unilateral adjustments. While the Side Letter did not explicitly address the State Budget Director's authorizing a decrease in the *per diem* rates for seasonal employees at the commencement of each meet, the Side Letter is reasonably clear that both parties intended the Side Letter to act as a negotiated limitation upon the State Budget Director's discretion with respect to unilateral adjustments in the rates of compensation for seasonal positions in the unit.

In interpreting the Side Letter, we have considered the legal authority of the State Budget Director and the Department of Civil Service under applicable state law. The Department of Civil Service's Director of Classification and Compensation Division has the discretion to treat the at-issue *per diem* track positions as "NS" positions by not allocating those positions to a salary grade, which means that the applicable wage level for those positions are subject to the procedures of State Finance Law §§44 and 49. Consistent with State Finance Law §§44.1 and 49, the State Budget Director has the discretion to approve or disapprove adjustments to the salary for those NS positions prior to the

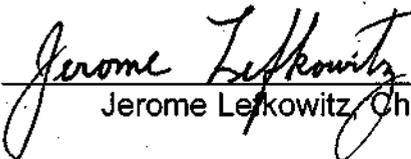
⁹ *Shelter Island Union Free Sch Dist*, 45 PERB ¶3032 (2012).

commencement of each racing season. The terms of the Side Letter reveal recognition by the parties of the State Budget Director's discretionary authority to approve unilateral rate adjustments for *per diem* employees in the PEF-represented unit and that the application of such discretion is subject to negotiations under the Act.

Based upon the foregoing, we find that the State did not violate §209-a.1(d) of the Act because it satisfied its duty to negotiate with PEF concerning the State Budget Director's discretion to make unilateral rate adjustments for *per diem* track employees in the PEF-represented unit. Therefore, it is unnecessary for us to address the State's other exceptions or the exceptions filed by PEF.

NOW, THEREFORE, the charge herein is dismissed.

DATED: September 20, 2012
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member