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12-19-2012

## State of New York Public Employment Relations Board Decisions from December 19, 2012

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from December 19, 2012

### Keywords

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

### Comments

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STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TOWN OF OYSTER BAY LIFEGUARDS ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-6154**

**TOWN OF OYSTER BAY,**

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 Town of Oyster Bay Lifeguards Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

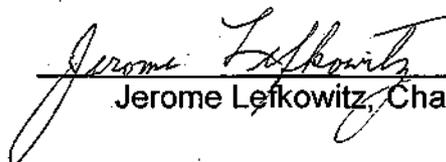
Included: All seasonal lifeguards that hold a Grade III certification issued by

the Nassau County Department of Health, whose job responsibilities require Grade III certification.

Excluded: All other employees.

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

DATED: December 19, 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

**MARION ADMINISTRATORS ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-6166**

**MARION CENTRAL SCHOOL DISTRICT,**

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

Included: Jr.- Sr. High School Principal, Director of Educational Services,

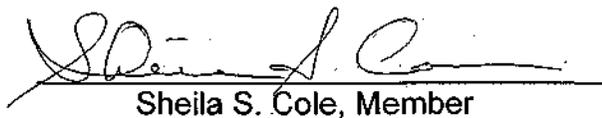
Director of Food Service, Director of Facilities, Elementary School Principal, Assistant Principal and Director of Transportation.

Excluded: All other titles.

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

DATED: December 19, 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

UFT, LOCAL 2, AFT,

Petitioner,

- and -

**CASE NO. CU-6150**

AL-NOOR SCHOOL,

Employer.

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**BOARD DECISION AND ORDER**

On July 16, 2012, the UFT, Local 2, AFT (petitioner) filed, in accordance with the State Employment Relations Act, a timely petition seeking certification as the exclusive representative of certain employees of the Al-Noor School (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: Teachers, Guidance Counselors, Teacher Assistants, Secretaries, Accountants, Security Guards & Personnel, Custodians, Food Service & Kitchen Workers, Day Care Workers, Janitors and Office Assistants.

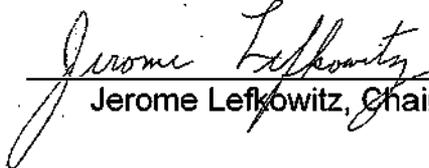
Excluded: Managerial, confidential and supervisory employees.

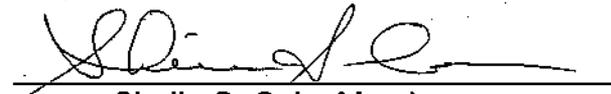
Pursuant to that agreement, a secret-ballot election was held on November 16, 2012, at which a majority of ballots were cast against representation by the petitioner.

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: December 19, 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 NURSES ASSOCIATION,**

Charging Party,

-and-

**CASE NO. U-30698**

**COUNTY OF WESTCHESTER,**

Respondent.

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**SPIVAK LIPTON LLP (THOMAS M. FEELEY, JR. of counsel), for Charging Party**

**ROBERT F. MEEHAN, COUNTY ATTORNEY (JAMES J. WENZEL of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the County of Westchester (County) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the New York State Nurses Association (NYSNA) concluding that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred medical assessment duties performed by NYSNA-represented nurses to nonunit employees.<sup>1</sup>

The County's exceptions are limited to challenging certain ALJ factual conclusions, and the proposed remedial order, on the ground that they are unsupported by the record. NYSNA supports the ALJ's decision. Based upon our review of the

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<sup>1</sup> 45 PERB ¶4586 (2012).

record and the parties' arguments, we affirm the ALJ's decision and remedial order, as modified.

### FACTS

The following facts are not in dispute. They are based upon various stipulations of fact reached during the hearing before the ALJ, the testimony of a NYSNA witness, and two joint exhibits.<sup>2</sup>

NYSNA is the recognized collective bargaining representative of a unit of County nurses, including those employed in the titles of Public Health Nurse and Supervising Public Health Nurse, in the Department of Health (DOH) and the Department of Social Services (DSS). DSS runs a Personal Care Program that provides, *inter alia*, medical assessments for clientele in their homes. Consistent with a County policy and an interdepartmental plan, Public Health Nurses and Supervising Public Health Nurses have performed those services exclusively for over a decade.<sup>3</sup>

In the summer of 2010, four of the nine Public Health Nurses in the County's program accepted an early retirement buy-out.<sup>4</sup> On or around September 22, 2010, the County announced that beginning January 1, 2011, it would be subcontracting the medical assessment duties to a private contractor.<sup>5</sup> Effective January 1, 2011, the

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<sup>2</sup> In construing the facts, we draw negative inferences against the County, which chose to rest at the close of NYSNA's case without making an opening statement or calling any witnesses. *Adirondack Cent Sch Dist*, 44 PERB ¶13044 (2011).

<sup>3</sup> Joint Exhibit 2; Transcript, pp. 8-10, 12-13.

<sup>4</sup> Transcript, pp. 5-6.

<sup>5</sup> Transcript, p. 6.

Visiting Nurses Service in Westchester began performing those duties, which are substantially similar to the duties previously performed by NYSNA-represented nurses.<sup>6</sup>

#### DISCUSSION

As noted, the County's exceptions are limited to challenging certain factual findings made by the ALJ, and the proposed remedial order. Upon our review of the record, we find that the alleged factual errors to be *de minimis* and do not affect the soundness of the ALJ's legal conclusion that the County violated §209-a.1(d) of the Act when it transferred the at-issue unit work to a private contractor.<sup>7</sup>

We also affirm the ALJ's proposed remedial order, as modified. The purpose of a remedial order under §205.5(d) of the Act is to make a party whole for the violation sustained by placing it in the position it would have been in had the improper practice not been committed.<sup>8</sup> Upon our review, we conclude that the ALJ's proposed order is consistent with that remedial purpose. We have, however, modified its wording based upon the facts in the record.

IT IS, THEREFORE, ORDERED that the exceptions are denied and that the

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<sup>6</sup> Transcript, pp. 21-22.

<sup>7</sup> See, *Niagara Frontier Transp Auth*, 18 PERB ¶3083 (1985); *Town of Riverhead*, 42 PERB ¶3032 (2009); *Inc Vill of Rockville Centre*, 43 PERB ¶3030 (2010).

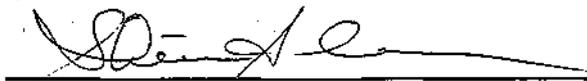
<sup>8</sup> *Dansville Support Staff Assn (Johnson)*, 45 PERB ¶3012 (2012). Any disputes regarding the proper application of the order to NYSNA-represented employees can be addressed during a compliance proceeding following judicial enforcement. *County of Erie*, 43 PERB ¶3016 (2010).

County:

1. Cease and desist from unilaterally assigning the medical assessment duties of NYSNA-represented unit employees in the titles of Public Health Nurses and Supervising Public Health Nurses in the Personal Care Program to nonunit employees and forthwith restore that work to the bargaining unit represented by NYSNA;
2. Offer reinstatement and make whole all NYSNA-represented unit employees adversely affected by the subcontracting of the medical assessment duties previously performed by Public Health Nurses and Supervising Public Health Nurses for any loss of wages, including overtime pay and benefits, suffered by reason of the transfer of said unit work, with interest at the maximum legal rate;
3. Restore to the NYSNA-represented unit the medical assistant duties performed by the Public Health Nurses and Supervising Public Health Nurses; and
4. Sign and post the attached notice at all physical and electronic locations normally used for communication with unit employees.

DATED: December 19, 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 County of Westchester (County) in the unit represented by New York State Nurses Association (NYSNA) that the County:

1. Will not unilaterally transfer to nonunit personnel or entities the medical assessment duties in the Personal Care Program previously performed by NYSNA-represented employees in the titles of Public Health Nurses and Supervising Public Health Nurses;
2. Will restore to the NYSNA-represented unit the medical assessment duties previously performed exclusively by Public Health Nurses and Supervising Public Health Nurses;
3. Will reinstate and make whole all NYSNA-represented unit employees affected by the transfer of the Personal Care Program medical assessment duties previously performed by Public Health Nurses and Supervising Public Health Nurses for any loss of wages, including overtime pay and benefits, suffered by reason of the subcontracting of said unit work, with interest at the maximum legal rate.

Dated .....

By .....  
on behalf of the COUNTY OF WESTCHESTER

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**TEAMSTERS LOCAL 264, INTERNATIONAL  
BROTHERHOOD OF TEAMSTERS,**

Charging Party,

CASE NO. U-29239

- and -

**COUNTY OF ERIE and SHERIFF OF ERIE COUNTY,**

Respondent.

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**REDEN & O'DONNELL, LLP (ROBERT J. REDEN and TERRY M. SUGRUE of  
counsel), for Charging Party**

**GOLDBERG SEGALLA LLP (SEAN P. BEITER and MELANIE J.  
BEARDSLEY of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the County of Erie and the Sheriff of Erie County (Joint Employer) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge, as amended, filed by the Teamsters Local 264, International Brotherhood of Teamsters (Teamsters), finding that the Joint Employer violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally reassigned Registered Nurse (RN) duties exclusively performed by Teamsters-represented employees at the Erie County Holding Center (Holding Center) to nonunit employees.<sup>1</sup>

In its exceptions, the Joint Employer claims that the ALJ erred in defining the at-issue unit work, in finding a discernable boundary around the unit work performed by Teamsters-represented employees at the Holding Center, in concluding that the

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<sup>1</sup> 44 PERB ¶1501 (2011)

Teamsters-represented unit has exclusivity over the at-issue unit work at the Holding Center, and in rejecting its mission-related arguments. The Teamsters supports the ALJ's decision.

Based upon our review of the record, we affirm the ALJ's decision, as modified.

### DISCUSSION

We begin with the Joint Employer's mission-related arguments premised upon the Court of Appeals' decision in *County of Erie and Erie County Sheriff v State of New York Public Employment Relations Board*.<sup>2</sup> In that decision, the Court held that the statutory and regulatory mandate for the implementation of a formal and objective classification system for inmate housing assignments preempted the Joint Employer's obligation under the Act to negotiate the transfer of correctional work at the Holding Center to nonunit employees. The Court based its decision on the fact that the unilateral transfer was the consequence of a policy decision directly related to the Joint Employer's core mission: implementing a single inmate classification system that commingled sentenced and unsentenced inmates, as required by the New York State Commission of Correction (COC) because of overcrowding at the Holding Center in contrast to the inmate vacancies at the Erie County Correctional Facility (Correctional Facility).

More recently, in *New York City Transit Authority v New York State Public Employment Relations Board*,<sup>3</sup> the Court rejected the employer's argument that it had a unilateral right under the Act to modify a mandatory subject of negotiations in order to meet its core mission of providing a safe system of public transit. In reaching its

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<sup>2</sup> 12 NY3d 72, 42 PERB ¶7002 (2009).

<sup>3</sup> 19 NY3d 876, 45 PERB ¶7007 (2012).

decision, the Court found that the employer failed to demonstrate that the unilateral change was necessary to further its core mission of public safety:

Moreover, the NYCTA did not explain why it chose to impose the more restrictive dual employment standards on certain safety-sensitive employees – train conductors, train operators and tower operators – while exempting others – bus operators and train dispatchers – who share similar job functions. Simply put, on the limited record before us, there is an insufficient basis to disturb PERB's determination.<sup>4</sup>

In the present case, we conclude that the Joint Employer failed to meet its evidentiary burden of demonstrating that the unilateral transfer of RN duties at the Holding Center was inherently and fundamentally a policy decision necessary to accomplish its primary mission as a public employer.<sup>5</sup>

During the hearing before the ALJ, the Joint Employer did not offer into evidence any written reports, findings or correspondence from COC to support the assertion, made during the Joint Employer's opening statement, that the COC had "ordered the Sheriff to increase staffing levels, specifically nurses, at the Holding Center."<sup>6</sup> The only document in the record referencing the purported COC "order" is a 2008 memorandum from the Erie County Sheriff's Department to the County Legislature in support of a proposed legislative resolution to unilaterally increase the RN pay scale for Teamster-represented employees, which was never acted upon by the County Legislature.<sup>7</sup>

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<sup>4</sup> *Supra*, note 3, 19 NY3d at 880, 45 PERB at 7028.

<sup>5</sup> See, *Board of Educ of City Sch Dist of City of New York v New York State Pub Empl Rel Bd*, 75 NY2d 660, 23 PERB ¶7012 (1990); *West Irondequoit Teachers Assn v Helsby*, 35 NY2d 46, 7 PERB ¶7014 (1974).

<sup>6</sup> Transcript, p.18.

<sup>7</sup> Respondent Exhibit 8, Transcript, pp. 344-349.

While COC apparently did conduct a survey of nursing care at the Holding Center and the Correctional Facility, its conclusions seem to have been focused upon the need "to supply nurses on three shifts over at the Erie County Correctional Facility."<sup>8</sup> Based upon the record before us, we reject the contention that the result of the COC survey empowered the Joint Employer to disregard its obligations under the Act to negotiate the transfer of unit work at the Holding Center from the Teamsters-represented unit.

We also reject the Joint Employer's contention that it had a right to unilaterally transfer the unit work because of the impact of its recruitment problems upon its mission at the Holding Center. The existence of recruitment difficulties does not nullify the legal obligation of a public employer to engage in good faith negotiations under the Act. The shortage of available nursing staff is not unique to the Joint Employer or western New York, where the Holding Center is located.<sup>9</sup> Indeed, Labor Law §167 was enacted as a remedial measure aimed at responding to the impact of that shortage.<sup>10</sup> Governor David Paterson, in approving the legislation, stated:

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<sup>8</sup> Transcript, pp. 138-39. It is unclear from the record when the COC conducted its survey and what specific recommendations or directives it issued, if any, with respect to the Holding Center. As the ALJ correctly states in her decision, COC was primarily concerned about the use of Licensed Practicing Nurses (LPNs) performing RN duties on the three shifts at the Correctional Facility. *Supra*, note 1, 44 PERB at 4601. See, Transcript, pp. 138-9. There is no credible evidence in the record to conclude that COC directed the Joint Employer to increase RN staffing at the Holding Center. Therefore, we modify the ALJ's decision to the extent it can be read as finding that such a directive was issued.

<sup>9</sup> See, *County of Erie and Erie County Medical Center Corp*, 43 PERB ¶13008 (2010); see also, *Chao v Gotham Registry, Inc*, 514 F3d 280, 283 (2d Cir 2008) ("Today, things are different, particularly in the nursing profession where there are not enough nurses to meet the demand for their services. This shortage and the frequent resort to overtime to compensate for it precipitated the instant action.")

<sup>10</sup> Labor Law §167.4.

The State is committed to reinvigorating its ongoing efforts to attract more nurses to New York's health care facilities, both public and private, and this bill will aid in those endeavors by encouraging more nurses to enter and remain in settings involving direct patient care.<sup>11</sup>

In seeking to remedy the problems associated with the nursing shortage, Labor Law §167.4 mandates that its provisions "shall not be construed to diminish or waive any rights of any nurse pursuant to any other law, regulation, or collective bargaining agreement." This provision constitutes a clear public policy statement that the remedial legislation cannot form the legal basis for narrowing or suspending the obligation of a public employer under the Act to negotiate over terms and conditions of employment. Therefore, the fact that the Joint Employer has received notices of Labor Law §167 violations from the New York State Department of Labor is not relevant to determining whether the Joint Employer had a duty to negotiate with the Teamsters pursuant to §209-a.1(d) of the Act.<sup>12</sup> In fact, the statute does not prohibit the creation and implementation of a voluntary overtime system for Teamster-represented employees at the Holding Center.<sup>13</sup>

We also find no merit in the Joint Employer's argument that it was legally justified in unilaterally transferring the RN unit work to employees represented by another employee organization because the level of salary and benefits it negotiated with the Teamsters was insufficient. In 2007, the Teamsters agreed with the Joint Employer to modify their expired 2000-2003 collectively negotiated agreement by increasing the RN

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<sup>11</sup> Approval Statement of Governor David Paterson, Bill Jacket, p. 3, L 2008, c 493.

<sup>12</sup> Respondent Exhibits 4, 5 and 6.

<sup>13</sup> Labor Law §167.2(b).

starting salaries aimed at remedying the recruitment problems.<sup>14</sup> While the Joint Employer asserts that the 2007 modification did not solve its recruitment difficulties, the evidence reveals that it failed to successfully negotiate with the Teamsters for additional increases in salary and benefits for nurses during the subsequent negotiations for a successor agreement.<sup>15</sup>

The record evidence also demonstrates that the recruitment problems at the Holding Center stemmed from multiple sources other than the rate of salary and benefits for Teamster-represented nurses at the Holding Center.<sup>16</sup> In fact, one of the primary reasons for the recruitment difficulties was that nursing applicants did not want to work in a correctional environment.<sup>17</sup> The evidence also reveals that, between 2007 and 2009, the Joint Employer placed only two advertisements in the Buffalo News for nursing vacancies at the Holding Center before it unilaterally transferred the RN work to nonunit employees. In contrast, after the unilateral transfer of the at-issue work in 2009, the Joint Employer placed five advertisements in that regional newspaper to fill vacant RN positions.<sup>18</sup> The record also reveals that the Joint Employer chose to summarily reject many applicants who met the minimum qualifications for the position.<sup>19</sup>

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<sup>14</sup> Transcript, pp. 102-3, 373.

<sup>15</sup> Transcript, pp. 108, 116, 122, 378-379.

<sup>16</sup> According to the Erie County Superintendent of the Jail Management Division, less than a dozen RN applicants in 2007 and 2008 stated that they declined the position due to the salary scale. Transcript, pp. 352-3.

<sup>17</sup> Transcript, pp. 270-71, 317-18.

<sup>18</sup> Transcript, pp 352-3.

<sup>19</sup> Transcript, pp 197-98.

While the setting of qualifications for a position is a managerial prerogative,<sup>20</sup> the Joint Employer cannot legitimately rely upon recruitment problems that were exacerbated by its own decisions and actions.

Finally, the Joint Employer has not filed an exception asserting that it had a unilateral right to transfer the at-issue unit work under *Wappingers Central School District*,<sup>21</sup> (*Wappingers*) and its progeny.<sup>22</sup> As a result, the defense is waived.<sup>23</sup> Even if the *Wappingers* defense had been raised in the exceptions, however, we would find that the Joint Employer failed to prove the necessary elements of that defense.

Under *Wappingers*, an employer can successfully defend against an alleged violation of §209-a.1(d) of the Act for a unilateral change in terms and conditions of employment by demonstrating that: a) it had a compelling need to act unilaterally at the time that it did; (b) it negotiated the change in good faith to the point where negotiations were at an impasse; and (c) it is willing to continue negotiating with respect to that change.<sup>24</sup>

In the present case, the Joint Employer did not have a compelling reason to unilaterally act when it did because it had less intrusive means to ensure adequate

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<sup>20</sup> *Police Benevolent Assn of Hempstead*, 11 PERB ¶3072 (1978).

<sup>21</sup> 5 PERB ¶3074 (1972).

<sup>22</sup> See, *Cohoes City Sch Dist*, 12 PERB ¶3113 (1979); *Wyandanch Union Free Sch Dist*, 15 PERB ¶3069 (1982); *Addison Cent Sch Dist*, 16 PERB ¶3099 (1983); *County of Chautauqua*, 22 PERB ¶3016 (1989). *Clarkstown Cent Sch Dist*, 24 PERB ¶3047 (1991); See also, *County of Erie and Erie County Medical Center Corp*, *supra*, note 9.

<sup>23</sup> Section 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).

<sup>24</sup> *Supra*, note 21.

nursing staffing at the Holding Center including: successfully negotiating increases in RN salaries and benefits; taking a more aggressive approach to recruitment; offering employment to a larger pool of applicants who met the minimum qualifications; and utilizing the tools permissible under Labor Law §167.<sup>25</sup> Furthermore, the Joint Employer has not demonstrated that it negotiated to impasse with the Teamsters over the transfer of unit work at the Holding Center while expressing a willingness to continue negotiating with the Teamsters over that subject. Therefore, a *Wappingers* defense is meritless in the present case.

We next examine the Joint Employer's exceptions concerning the definition of the at-issue unit work, discernable boundary and exclusivity. To determine those related issues in transfer of unit work cases, we examine whether an enforceable past practice exists by applying the following test: whether the "practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."<sup>26</sup> Among the criteria we consider in determining whether a past practice has been established in a transfer of unit work case are: (a) the nature and frequency of the work, (b) the geographic location of the work, (c) the employer's explicit or implicit rationale for the practice, and (d) other facts establishing that the at-issue work has

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<sup>25</sup> See, *Wappingers Cent Sch Dist*, 19 PERB ¶3037 (1986); *Sackets Harbor Cent Sch Dist*, 13 PERB ¶3058 (1980).

<sup>26</sup> *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 at 3024 (2008), *confirmed and mod, in part, Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd*, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶3016 (2009); *Chenango Forks Cent Sch Dist*, 40 PERB ¶3012, at 3046-3047 (2007) [quoting from *County of Nassau*, 24 PERB ¶3029 at 3058 (1991)](subsequent history omitted).

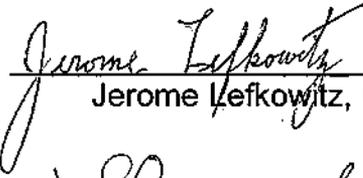
been treated differently.<sup>27</sup> Following our review of the record, we affirm the ALJ's factual findings and legal conclusions with respect to the at-issue work, discernible boundary and exclusivity.

Based upon the foregoing, we find that the Joint Employer violated §209-a.1(d) of the Act by unilaterally transferring the nursing duties performed by Teamsters-represented unit employees to nonunit employees.

THEREFORE, WE HEREBY ORDER that the Joint Employer:

1. Cease and desist from unilaterally transferring nursing work performed by the Teamsters-represented employees at the Holding Center to nonunit employees;
2. Make Teamsters-represented unit members whole for wages and benefits, if any, lost as a result of its unilateral transfer of unit work to nonunit employees, with interest at the maximum legal rate;
3. Restore to the Teamsters-represented unit employees the nursing work performed at the Holding Center; and
4. Sign and post a notice in the form attached at all physical and electronic locations normally used to communicate with unit employees.

DATED: December 19, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

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<sup>27</sup> *Manhasset Union Free Sch Dist, supra*, note 26.

# NOTICE TO ALL EMPLOYEES

PURSUANT TO  
THE DECISION AND ORDER OF THE

NEW YORK STATE  
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE  
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

**we hereby notify all employees of the County of Erie and Sheriff of Erie County in the unit represented by the Teamsters Local 264, International Brotherhood of Teamsters (Teamsters), that the County of Erie and Sheriff of Erie County:**

1. Cease and desist from unilaterally transferring the nursing work performed by the Teamsters-represented employees at the Holding Center to nonunit employees;
2. Make Teamsters-represented unit members whole for wages and benefits, if any, lost as a result of its unilateral transfer of unit work to nonunit employees, with interest at the maximum legal rate;
3. Restore to the Teamsters-represented unit the nursing work performed at the Holding Center.

Dated .....

By .....  
on behalf of **County of Erie and Sheriff of Erie  
County**

*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

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

Charging Party,

**CASE NO. U-29965**

- and -

**COUNTY OF ULSTER and ULSTER COUNTY  
SHERIFF,**

Respondent.

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

**ROEMER WALLENS GOLD & MINEAUX LLP (DIONNE A. WHEATLEY  
of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Ulster County Deputy Sheriff's Police Benevolent Association, Inc. (PBA) and a cross-exception by the County of Ulster and Ulster County Sheriff (Joint Employer) to a decision of an Administrative Law Judge (ALJ) dismissing PBA's charge, filed on April 14, 2010, alleging that the Joint Employer violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by refusing to extend to employees in a PBA-represented Superior Officers Unit the salary and longevity increases granted to unrepresented employees pursuant to a County legislative resolution, dated September 10, 2008, which made the increases effective January 1, 2008.<sup>1</sup>

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<sup>1</sup> 45 PERB ¶4601 (2012).

For its exceptions, PBA asserts that the ALJ erred in concluding that it failed to demonstrate that a compensation system of salary and longevity increases existed prior to the grant of the increases to the unrepresented employees. The Joint Employer in its cross-exception claims that the charge should have been dismissed because it is untimely pursuant to §204.1(a)(1) of the Rules of Procedure (Rules).

### DISCUSSION

We begin with the Joint Employer's contention that the charge is untimely. Pursuant to §204.1(a)(1) of the Rules, an improper practice charge must be filed within four months from the time when a charging party has actual or constructive knowledge of the act or acts that form the basis for the charge.<sup>2</sup>

There is no record evidence demonstrating that, prior to March 2010, PBA had actual or constructive knowledge of the September 10, 2008 county legislative resolution granting salary and longevity increases to unrepresented management and supervisory employees. The credible evidence demonstrates that PBA became aware of the resolution in March 2010 when a Superior Officer Unit member learned of it fortuitously, and notified PBA.

Between April 9, 2008, when PBA was granted voluntary recognition to represent the Superior Officers Unit, and March 2010, there were no specific collective negotiations held between the Joint Employer and PBA concerning that bargaining unit. Although there were negotiating sessions held regarding a separate unit of rank and file

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<sup>2</sup> *New York State Thruway Auth*, 40 PERB ¶¶3014 (2007); *City of Oswego*, 23 PERB ¶¶3007 (1990); *City of Binghamton*, 31 PERB ¶¶3088 (1998).

officers represented by PBA, there is no evidence that the increases for the unrepresented management and supervisory employees were discussed. Contrary to the Joint Employer's argument, the fact that the September 10, 2008 resolution was posted on the internet, and was subject to a newspaper article, does not demonstrate that PBA had actual or constructive knowledge of the resolution.

Based upon the foregoing, we deny the Joint Employer's cross-exception.

Next, we turn to PBA's exceptions challenging the ALJ's conclusion that PBA failed to meet its evidentiary burden of demonstrating that the Joint Employer violated §209-a.1(d) of the Act by not maintaining the *status quo* following the grant of voluntary recognition on April 9, 2008.

It is well-settled that an employer violates §§209-a.1(a) and (c) of the Act when it fails to maintain the *status quo* after it is presented with a *bona fide* question of representation. This obligation under the Act continues until a negotiated agreement with respect to wages and benefits is reached with the newly recognized or certified employee organization.<sup>3</sup> Failure to maintain the *status quo* inherently chills the protected right of employees to seek representation through an employee organization of their own choosing, influences the choice of bargaining representative, and distorts any collective negotiations resulting from the certification or recognition of an employee organization.<sup>4</sup>

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<sup>3</sup> *Onondaga-Cortland-Madison BOCES*, 25 PERB ¶13044 (1992)(subsequent history omitted); *Village of Suffern*, 38 PERB ¶13020 (2005).

<sup>4</sup> *Genesee-Livingston-Steuben-Wyoming BOCES*, 29 PERB ¶13065 (1996) confirmed, *Genesee-Livingston-Steuben-Wyoming BOCES v Kinsella*, 30 PERB ¶17009 (Sup Ct Livingston County 1997).

The issue presented in the present case is whether the Joint Employer failed to maintain the *status quo* by not extending to PBA-represented Superior Officers Unit members the salary and longevity increases granted to unrepresented employees effective January 1, 2008. To resolve that question, we must determine whether the Joint Employer's failure to extend the increases constitutes a variation of a pre-existing compensation system.

In support of its exceptions, PBA contends that the compensation system in the present case is "one under which employees' wages and benefits are increased from time to time as the employer's legislative body deems appropriate."<sup>5</sup> We find no evidence in the record to support PBA's contention.

PBA relies upon the terms of the Personnel Policy Manual for Ulster County (PPM), which was adopted in 1982 and revised multiple times through County resolutions. While the PPM is silent concerning a wage structure for unrepresented managerial and supervisory personnel, PBA finds significance in the PPM Statement of Principle:

The Ulster County Legislature recognizes that Department Heads, Managerial Staff, Legislative Employees and Board of Elections Employees as covered by this Policy Statement are valued employees. The Legislature therefore acknowledges that these individuals will not receive less, in terms and salary and benefits, than other employees of Ulster County who are covered by a Collective Bargaining Unit.

Contrary to PBA's construction, however, the PPM Statement of Principle does not make it "strictly necessary" for the County Legislature to increase wages and benefits

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<sup>5</sup> Brief in Support of Exceptions, p. 2.

for covered employees. All that the Statement of Principle requires is that unrepresented managerial and supervisory employees not receive salary and benefits that are less than represented employees. This principle does not demonstrate a *status quo* consisting of periodic increases in the salary and benefits for unrepresented managers and supervisors because the principle can be accomplished and continued by other means.<sup>6</sup> The PPM principle also does not demonstrate a *status quo* of periodic equal changes in salary and benefits among unrepresented managerial and supervisory employees. While the PPM does include specified amounts of longevity payments for unrepresented managers and supervisors effective January 1, 2006, there is no evidence in the record demonstrating that the Joint Employer maintained a compensatory system of periodic increases in longevity payment amounts.

During the hearing, PBA's sole witness testified that "[f]rom time to time salary and/or benefits were changed by resolution of the Ulster County Legislature"<sup>7</sup> without describing the nature of those changes. The fact that there have been periodic changes in salaries and benefits does not demonstrate a compensatory system of regular increases that constitutes the *status quo*. Finally, PBA did not offer into evidence prior County resolutions aimed at demonstrating the existence of a purported compensation system, which the Joint Employer failed to abide by when it did not grant Superior Officers Unit members the salary and longevity increases extended to unrepresented employees effective January 1, 2008.

Based upon the foregoing, we affirm the decision of the ALJ and dismiss the

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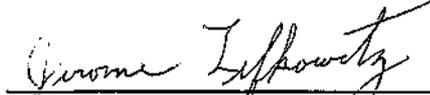
<sup>6</sup> Compare, *Village of Belmont*, 34 PERB ¶13008 (2001), *affg* 33 PERB ¶14604 (2000).

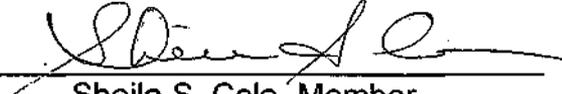
<sup>7</sup> Transcript, pp. 18, 50.

charge.

IT IS THEREFORE ORDERED that PBA's charge is dismissed.

DATED: December 19, 2012  
Albany, New York

  
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Jerome Lefkowitz, Chairperson

  
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Sheila S. Cole, Member

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

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In the Matter of

**NICHOLAS J. HIRSCH,**

Charging Party,

-and-

**CASE NO. U-29886**

**ROCHESTER TEACHERS ASSOCIATION,**

Respondent.

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**NICHOLAS J. HIRSCH, *pro se***

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (HAROLD EISENSTEIN,  
of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to the Board on a pleading filed by Nicholas J. Hirsch (Hirsch) concerning the failure of an Administrative Law Judge (ALJ) to issue a written decision with respect to his improper practice charge against the Rochester Teachers Federation (Federation) alleging that the Federation violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act).

In his pleading to the Board, Hirsch objects to the ALJ's failure to issue a written decision following an oral decision from the bench, during a hearing on November 9, 2012, dismissing the charge. According to Hirsch, the ALJ's failure to issue a written decision is prejudicial and demonstrates bias by the ALJ. Although his pleading is not labeled as a motion for leave to file exceptions pursuant to §212.4(h) of the Rules of Procedure (Rules), we will treat it as a motion for that relief.<sup>1</sup> Alternatively, Hirsch seeks

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<sup>1</sup> *UFT (Grassel)*, 43 PERB ¶3045 (2010).

additional time to file exceptions.

Exceptions to an ALJ's written decision must be filed with the Board within 15 working days after the receipt of the decision pursuant to §213.2(a) of the Rules and requests for an extension must be filed within the same time period under §213.4 of the Rules.<sup>2</sup> A motion for leave to file interlocutory exceptions to the Board from a non-final ruling or decision will be granted pursuant to §212.4(h) of the Rules when a moving party demonstrates extraordinary circumstances.<sup>3</sup>

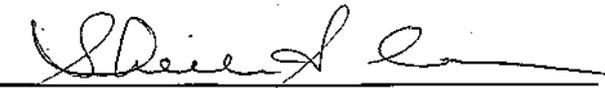
Based upon the facts set forth in Hirsch's pleading, there is no basis for finding extraordinary circumstances warranting the grant of leave to file exceptions. Hirsch has not articulated any factual allegations that even remotely suggests bias by the ALJ or demonstrates that the short period between the ALJ's bench decision and his motion to the Board has prejudiced him. Therefore, the motion for leave to file exceptions is denied.

Finally, based upon the fact that the ALJ has not yet issued a written decision, Hirsch's request for an extension of time to file exceptions is premature.

NOW, THEREFORE, Hirsch's motion and request for an extension are denied.

DATED: December 19, 2012  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

<sup>2</sup> *State of New York (State University of New York)(Scourakis)*, 44 PERB ¶3037 (2011).

<sup>3</sup> *State of New York (Division of Parole)*, 40 PERB ¶3007 (2007).