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2-5-2013

## State of New York Public Employment Relations Board Decisions from February 5, 2013

New York State Public Employment Relations Board

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## State of New York Public Employment Relations Board Decisions from February 5, 2013

### 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

**UNITED FOOD AND COMMERCIAL WORKERS  
UNION, LOCAL 342,**

Petitioner,

-and-

**CASE NO. CU-6163**

**BRONX BEST CAR WASH, LLC,**

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 State Employment Relations Act and 12 NYCRR ¶2250, et seq., and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested in the Board by the State Employment Relations Act,

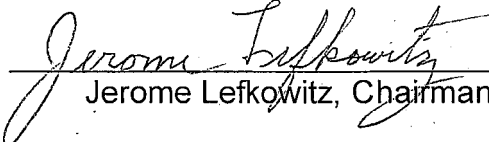
IT IS HEREBY CERTIFIED that the United Food and Commercial Workers Union, Local 342 has been designated and selected by a majority of the employees of the above-named employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective bargain and the settlement of grievances.

Included: All full-time and regular part-time employees employed by the employer at its facility located at 3210 Webster Avenue, Bronx, NY.

Excluded: All managers, owners, office clericals, confidential employees, guards, and professional employees and supervisors.

FURTHER, IT IS ORDERED that the above named public employer shall bargain collectively with the United Food and Commercial Workers Union, Local 342. The duty to bargain 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: February 5, 2013  
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

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

Petitioner,

-and-

CASE NO. C-6078

COUNTY OF WESTCHESTER,

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,

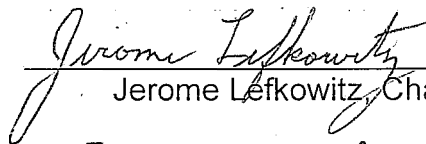
IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit found to be appropriate and described below, as their exclusive representative for the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

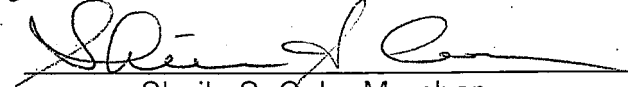
Included: Assistant Games Manager, Facility Manager, Life Guard Captain and Life Guard Lieutenant and Principal Teachers who supervise Teacher Assistants and other County employees.

Excluded: All other employees and Principal Teachers who do not supervise any other County employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 5, 2013  
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

**HELEN E. WEST,**

Charging Party,

**CASE NO. U-30848**

- and -

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

Respondent,

- and -

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

Employer.

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**HELEN E. WEST, *pro se***

**RICHARD E. CASAGRANDE , GENERAL COUNSEL (ORIANA VIGLIOTTI of  
counsel), for Respondent**

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE  
BARGAINING (SETH J. BLAU of counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to the Board on a request, dated January 13, 2013, by Helen E. West (West), requesting an extension of time to file exceptions, pursuant to §213.4 of our Rules of Procedure (Rules), to a decision of an Administrative Law Judge (ALJ) dated May 11, 2012, dismissing an improper practice charge filed by West alleging that the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) violated §§209-a.2(a) and (c) of the Public Employees' Fair Employment Act (Act) concerning its representation of her and its failure to respond to her inquiries.<sup>1</sup> The Board of Education of

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<sup>1</sup> 45 PERB ¶4561 (2012).

the City School District of the City of New York (District) is a statutory party pursuant to §209.3 of the Act.

In support of her request for an extension, West has attached a letter addressed to our agency dated July 30, 2012, requesting a similar extension. That letter states that she did not receive the ALJ's decision until late July 2012, and that she was unsuccessful in contacting UFT and the District by phone because "everyone was on vacation." West has also submitted two other letters dated August 1, 2012, one addressed to UFT and the other to the District, requesting their consent to an extension of time.

The District opposes West's request for an extension on the basis that it is untimely. In addition, it denies receiving West's August 1, 2012 letter and her assertion that she was unable to reach the District because "everyone was on vacation." The District's counsel affirmatively states that he did not receive a voice message from West, and she did not raise her extension request at an August 6, 2012 conference with respect to another charge she filed with our agency. UFT has not responded to West's request.

#### DISCUSSION

Pursuant to §§213.2(a) and 213.4 of the Rules, exceptions must be filed with the Board within 15 working days after the receipt of an ALJ's decision, and requests for an extension must be filed within the same time period. The Board has discretionary authority under §213.4 of the Rules to extend the time to request an extension of time to file exceptions upon a showing of extraordinary circumstances.<sup>2</sup> Extraordinary circumstances

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<sup>2</sup> *Onondaga Comm Coll*, 11 PERB ¶13008 (1978); *CSEA (Abrahams)*, 43 PERB ¶13007 (2010).

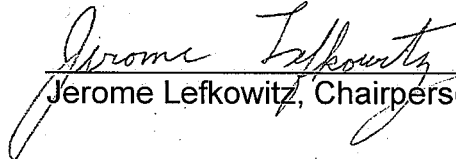



can be established through facts demonstrating that the failure to make a timely request for an extension was not the result of a neglectful error or the burdens of other obligations.<sup>3</sup>

In the present case, our agency did not receive West's purported July 30, 2012 letter until it was submitted along with her January 13, 2013 request for an extension to file exceptions. Similarly, the District denies previously receiving her purported August 1, 2012 letter. In support of her request, West has not articulated any facts to explain her extensive delay in making the request after receiving the ALJ's decision. Therefore, we deny the request because West has failed to demonstrate extraordinary circumstances warranting the grant of additional time to file exceptions pursuant to §213.4 of the Rules.

IT IS, THEREFORE, ORDERED that West's request for an extension of time to file exceptions is hereby denied.

DATED: February 5, 2013  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

<sup>3</sup> Bd of Educ of the City Sch Dist of the City of New York, 42 PERB ¶¶3037 (2009); NYSCOPBA (Hunter), 42 PERB ¶¶3038 (2009).

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

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In the Matter of

**NASSAU COUNTY SHERIFF'S CORRECTION  
OFFICERS BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

-and-

**CASE NO. U-30864**

**COUNTY OF NASSAU,**

Respondent.

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**KOEHLER & ISAACS LLP (LIAM L. CASTRO of counsel), for Charging Party**

**BEE READY FISHBEIN HATTER & DONOVAN, LLP (WILLIAM C. DEWITT of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Nassau County Sheriff's Correction Officers Benevolent Association, Inc. (Association) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge alleging that the County of Nassau (County) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally imposed a restriction on the ability of Association unit members to voluntary exchange shifts by mandating that two mutual exchanges between unit members occur within three months of each other. The ALJ concluded that the County satisfied its duty under the Act to negotiate the at-issue subject based upon the management rights section of the parties' collectively negotiated agreement (agreement).<sup>1</sup>

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<sup>1</sup> 45 PERB ¶4597 (2012).

In its exceptions, the Association asserts that the ALJ erred in concluding that the management rights section reserving to the County the right "to regulate work schedules" satisfied the County's duty to negotiate the unilateral change concerning mutual shift exchanges. Specifically, the Association asserts that the phrase "regulate work schedules" is not reasonably clear on the at-issue subject and that the ALJ erred in failing to consider parol evidence in the record for purposes of discerning the parties' intent. Finally, the Association excepts to the ALJ's reliance upon prior precedent interpreting similar management rights provisions in collectively negotiated agreements between the County and other employee organizations.

Based upon our review of Association's exceptions and the County's response, we reverse the ALJ's decision and find that the County violated §209-a.1(d) of the Act when it unilaterally imposed a new restriction on voluntary exchange shifts between Association unit members.

#### FACTS

The applicable facts are set forth in the ALJ's decision, and are repeated here only as necessary to address the exceptions.

Section 4 of the parties' agreement states:

**MANAGEMENT RIGHTS.** Except as validly limited by this Agreement, the County reserves the right to determine the standards of service; to set the standards of selection for employment; to direct its employees; to regulate work schedules; to take disciplinary action; to relieve its employees from duty because of lack of work or for other legitimate reasons; to maintain the efficiency of governmental operations; to determine the methods, means and personnel by which governmental operations are to be conducted; to determine the content of job classifications; to take all necessary actions to carry out its mission in emergencies; and to exercise complete control and discretion over its organization and the technology of performing its work.

Section 15 of the agreement states, in part:

**SHIFTS**

- 15-1 Each employee shall be entitled to at least twelve (12) hours from work between shifts, except in case of emergency.
- 15-2 No employee shall be required to work a shift which differs from the employee's assigned shift, without two (2) weeks written notice prior to the change, except in case of emergency.
- 15-3 No employee shall have the employee's shift and/or work schedule changed as a form of discipline.

For over two decades, the County has had a written policy permitting the mutual exchange of shifts by Association members, subject to advanced approval by designated supervisors. Although it was modified by the County in 1994, 2004 and 2005,<sup>2</sup> the policy has consistently had certain core elements: the unit employees involved in the exchange had to be of the same rank and work different shifts; the requested exchange had to be submitted on a particular form, which identified the date and shift each employee would work; and each employee in the exchange worked during their regular time off. On or about January 2011, the County unilaterally imposed a new requirement that voluntary shift exchanges between Association unit members take place within three months of each other.

#### DISCUSSION

When parties negotiate a subject to completion and have reached an agreement with respect to that subject, a respondent has satisfied its duty to negotiate and, therefore, cannot be found to have acted unilaterally in violation of §209-a.1(d) of the Act when it takes an action permitted under the terms of their agreement.<sup>3</sup>

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<sup>2</sup> Joint Exhibits 5, 6 and 7.

<sup>3</sup> *Niagara Frontier Transit Metro System, Inc*, 42 PERB ¶13023 (2009); *County of Columbia*, 41 PERB ¶13023 (2008); *County of Nassau (Police Department)*, 31 PERB ¶13064 (1998).

In *County of Nassau (Police Department)*,<sup>4</sup> the Board set forth the fundamental distinction between a duty satisfaction defense and a waiver defense:

We take the opportunity at the outset of our decision to clarify the nature of a defense grounded upon a claim that the subject(s) sought to be bargained pursuant to a charging party's demand have already been negotiated to completion. This Board's decisions have sometimes characterized this defense as duty satisfaction, sometimes waiver by agreement, and sometimes simultaneously both duty satisfaction and waiver. Although the second and third characterizations cannot be considered wholly inaccurate, we believe that the first most accurately describes the true nature of this particular 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 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.<sup>5</sup>  
(footnote omitted)

In support of a duty satisfaction defense, a respondent has the burden of proving that the parties have negotiated terms in an agreement that are reasonably clear on the specific subject at issue.<sup>6</sup> Our determination concerning the duty satisfaction defense necessitates us to interpret the meaning of the parties' agreement by applying standard

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<sup>4</sup> *Supra*, note 3.

<sup>5</sup> 31 PERB ¶3064 at 3142.

<sup>6</sup> NYCTA, 41 PERB ¶3014 (2008).

principles of contract interpretation. If the language of an agreement is reasonably clear but susceptible to more than one interpretation, we will consider extrinsic evidence in determining the intent of the parties.<sup>7</sup>

In the present case, we conclude that the ALJ erred in concluding that the County met its burden of proving its duty satisfaction defense based upon the reservation of rights to "to regulate work schedules" in the management rights section of the agreement. In order to properly interpret that provision, it must be read in conjunction with the negotiated terms in §15 of the agreement concerning shifts. When the management rights and shifts sections of the agreement are read together, it is not reasonably clear that the management rights section was intended to apply to employee shifts or shift exchanges between Association unit employees. To the contrary, the agreement demonstrates that the parties have drawn a clear distinction between the County's right to regulate work schedules and the applicable procedures and rights relating to employee shifts. Furthermore, the shifts section of the agreement is completely silent with respect to employees exchanging shifts.<sup>8</sup>

Based upon the foregoing, we find that the County violated §209-a.1(d) of the Act when it unilaterally imposed a new restriction requiring all voluntary shift exchanges take place within three months of each other.

THEREFORE, IT IS HEREBY ORDERED that the County:

1. Cease and desist from requiring all voluntary shift exchanges to take place within three months of each other;

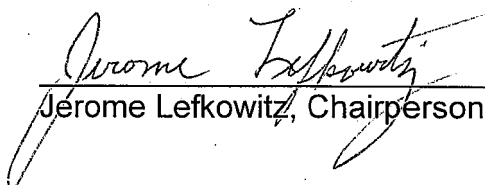
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<sup>7</sup> *Shelter Island Union Free Sch Dist*, 45 PERB ¶13032 (2012).

<sup>8</sup> Our conclusion in the present case is predicated upon our interpretation of the negotiated terms in the County-Association agreement. Prior Board decisions interpreting other contract language is generally not probative to determining a duty satisfaction, contract reversion or waiver defense in a subsequent case involving different parties and contracts.

2. Make Association unit employees whole for any loss of pay or benefits with interest at the maximum legal rate resulting from the County's imposition of a requirement in January 2011 that all voluntary shift exchanges take place within three months of each other;
3. Sign, post and distribute the attached notice in all locations normally used to communicate both in writing and electronically with Association unit employees.

DATED: February 5, 2013  
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 Nassau, in the unit represented by the Nassau County Sheriff's Correction Officers Benevolent Association, Inc., that the County will:

1. not require voluntary shift exchanges between Association unit employees take place within three months of each other.
2. make Association unit employees whole for any loss of pay and benefits with interest at the maximum legal rate resulting from the County's imposition of a requirement in January 2011 that all voluntary shift exchanges between Association unit employees take place within three months of each other.

Dated .....

By .....

On behalf of the County of Nassau

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

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

Charging Party,

-and-

**CASE NO. U-28470**

**STATE OF NEW YORK (DIVISION OF STATE POLICE),**

Respondent.

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**RICHARD MULVANEY, GENERAL COUNSEL (MARIA B. MORRIS  
of counsel), for Charging Party**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY  
J. LODOVICE of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions by the State of New York (Division of State Police) (State) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed the Police Benevolent Association of the New York State Troopers, Inc. (PBA) concluding that the State violated §209-a.1(d) of the Public Employee's Fair Employment Act (Act) when it unilaterally reassigned Association unit members enrolled in a criminal justice master's degree program at the University of Albany (UAlbany) to field assignments during the break between academic semesters.<sup>1</sup>

In its exceptions, the State contends that the ALJ erred in failing to find that the decision to reassign the at-issue Association members during the break between

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<sup>1</sup> 45 PERB ¶4507 (2012).

semesters was a managerial prerogative, and therefore nonmandatory under the Act. Further, the State excepts to the ALJ's rejection of its other defenses. PBA supports the ALJ's decision.

Based upon our review of the record, and the arguments of the parties, we reverse the ALJ's decision and dismiss PBA's charge.

#### FACTS

The relevant facts are fully set forth in the ALJ's decision. They are repeated here only as necessary to address the State's exceptions.

The State and PBA are parties to collectively negotiated agreements, which fund a small number of selected PBA members to attend UAlbany's criminal justice master's degree program. Since 1985, those selected PBA members enrolled in the master's program receive full reimbursement for their tuition, books and supplies, full salary and benefits, free laptops, lodging and tolls, and use of a State-owned vehicle. During their participation in the program, PBA members are specially assigned to the Division of State Police's Employee Relations Office. Prior to the 2008-09 academic year, PBA members in the program retained their special assignment during the winter break between the winter and spring semesters.

In 2007, the Division of State Police established the Division Safety Committee to conduct a review aimed at maximizing the redeployment of law enforcement staff into the field. As part of that continuing initiative, the Deputy Superintendent of Employee Relations (Deputy Superintendent) examined staff deployment and assignments under his command. His examination resulted in various staff being reassigned into the field, including the at-issue PBA members in the master's program, who he decided would be reassigned to the field during the five-week winter break between semesters. The May

2008 announcement identifying the PBA members selected for the program for the 2009-09 academic year stated that they would be returning to the field during the winter break. During the 2008-09 winter break, three of the at-issue PBA unit members were permitted by the State to utilize their leave accruals for the period of the winter break and a fourth utilized his leave accruals for over 50% of the break, and worked the remainder of the period.

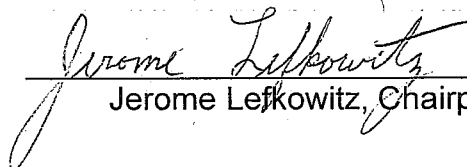
### DISCUSSION

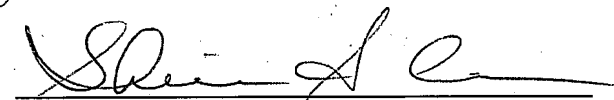
Under the Act, staffing and deployment are nonmandatory subjects of negotiations.<sup>2</sup> In the present case, the evidence reveals that the decision to reassign the at-issue employees to field assignments during the winter break was tied to a department-wide initiative to redeploy law enforcement staff into the field. Therefore, the subject matter is nonmandatory.

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

IT IS THEREFORE ORDERED THAT the charge is dismissed.

DATED: February 5, 2013  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

<sup>2</sup> *Board of Educ of the City Sch Dist of the City of New York*, 45 PERB ¶3004 (2012); *Lake Mohegan Fire Dist*, 41 PERB ¶3001 (2008); *City of Troy*, 10 PERB ¶3015 (1977); *Village of Scarsdale*, 8 PERB ¶3075 (1975).