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4-3-2014

# State of New York Public Employment Relations Board Decisions from April 3, 2014

New York State Public Employment Relations Board

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# State of New York Public Employment Relations Board Decisions from April 3, 2014

**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 PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-6227**

**COPIAGUE UNION FREE SCHOOL DISTRICT,**

Employer,

-and-

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

Intervenor.

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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, and it appearing that a negotiating representative has been selected,

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union 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.

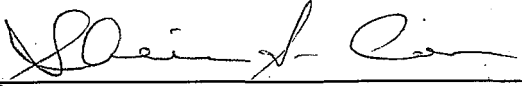
Included: Full-time and part-time cafeteria workers including cook managers, assistant cooks, food service workers, kitchen workers, hourly paid security aides and school security guards, part-time receptionist aides, hallway aides, suspension room aides, cafeteria aides and driver messenger.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. 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: April 3, 2014  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairperson

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

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**MEDINA POLICE BENEVOLENT ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-6230**

**VILLAGE OF MEDINA,**

Employer,

-and-

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

Intervenor:

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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, and it appearing that a negotiating representative has been selected,

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

IT IS HEREBY CERTIFIED that the Medina Police Benevolent 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: full-time police officers, part-time police officers and sergeants employed by the Village of Medina.

Excluded: chief of police, assistant chief of police and lieutenant.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Medina Police Benevolent 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: April 3, 2014  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
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-6235**

**SCHENECTADY CITY 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, and it appearing that a negotiating representative has been selected,

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

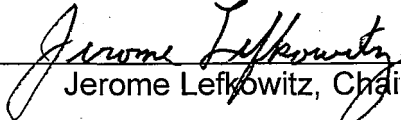
IT IS HEREBY CERTIFIED that Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the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

Included: All employees of the Schenectady City School District in the ATLAS program titles of ATLAS Tutor – part-time and ATLAS Tutor – per diem.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with 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: April 3, 2014  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairperson

  
\_\_\_\_\_  
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-6240**

**TOWN OF HAVERSTRAW,**

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, and it appearing that a negotiating representative has been selected,

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

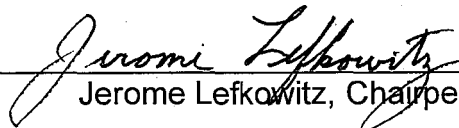
IT IS HEREBY CERTIFIED that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for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

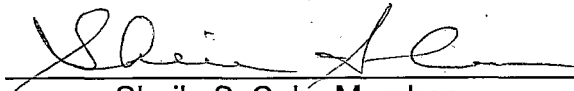
Included: FT/PT Dispatchers.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with 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: April 3, 2014  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairperson

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

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

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In the Matter of

**DONNA SCARPINATI DE OLIVEIRA,**

Charging Party,

-and-

**CASE NO. U-30028**

**CAIRO-DURHAM TEACHERS ASSOCIATION,**

Respondent,

-and-

**CAIRO-DURHAM CENTRAL SCHOOL DISTRICT,**

Employer.

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**MARTIN, SHUDT, WALLACE, DILORENZO & JOHNSON (CARLO A. C. DE OLIVEIRA of counsel), for Charging Party**

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (ROBERT T. REILLY and LAURA R. HALLAR of counsel), for Respondent**

**GIRVIN & FERLAZZO (JEFFREY D. HONEYWELL and RYAN MULLAHY of counsel), for Employer**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by Donna Scarpinati de Oliveira to a decision of an Administrative Law Judge ("ALJ") that dismissed an improper practice charge that de Oliveira filed against her union, Cairo-Durham Teachers Association ("Association").<sup>1</sup> The ALJ held that de Oliveira did not prove that the Association violated §§ 209-a.2 (a) and (c) of the Public Employees' fair Employment Act ("Act") by failing to adequately investigate and grieve her claim that her employer, Cairo-Durham

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<sup>1</sup> 46 PERB ¶ 4579 (2013).

Central School District ("District"), improperly laid her off based on an incorrect calculation of her relative seniority and in retaliation for her use of Family and Medical Leave Act benefits. The District was named as a "statutory party" pursuant to § 209-a.3 of the Act.

### EXCEPTIONS

De Oliveira argues that the ALJ erred in dismissing her charge. She contends, *inter alia*, that the record establishes that the Association unlawfully agreed with the District to exclude two elementary school teachers with less seniority than she from the list of teachers slated to be laid off. She further argues that the Association unlawfully failed to adequately investigate and process a grievance concerning her claim that the District improperly calculated her seniority by excluding time during which she was absent from work pursuant to the Family and Medical Leave Act. Finally, she argues that the Association breached its duty of fair representation by telling her that it would obtain the advice of an attorney, when it obtained the advice of a non-attorney labor relations specialist employed by the New York State United Teachers ("NYSUT").

The Association and the District filed responses in support of the ALJ's decision.

### FACTS

As reflected in the August 3, 2007 minutes of the District's Board of Education, de Oliveira was hired by the District, for a three-year probationary position as an elementary school teacher, effective September 1, 2007 through August 30, 2010. At that time de Oliveira held provisional certification in Pre-Kindergarten, Kindergarten and grades 1-6.

At the same meeting, the District hired Peter Goodwin to a similar three year probationary position as a 6<sup>th</sup> grade math teacher, also effective September 1, 2007

through August 30, 2010. At that time, Goodwin held initial certification as a math teacher for grades 5-9.

As reflected in the Board of Education's September 20, 2007 minutes, the District hired Erin Murphy for a three year probationary position as a 6<sup>th</sup> grade English teacher, effective October 1, 2007 through September 30, 2010. At that time, Murphy held initial certification as an English teacher for grades 5-12.

Although each position was probationary, each was a "tenure track" position.

In July, 2009, de Oliveira gave birth to a daughter and, rather than returning to work at the beginning of the 2009 school year, took a leave of absence pursuant to the Family and Medical Leave Act (FMLA). She returned to work on October 13, 2009, after 23 school days of FMLA leave.

On May 4, 2010, de Oliveira met with Scott Richards, the District's elementary school principal, to discuss "budget updates." Also in attendance was Sally Sharkey, the District's Superintendent. Sharkey told de Oliveira that she was going to be laid off at the end of the school year for budgetary reasons. Sharkey explained that de Oliveira's relative seniority was adversely affected by the 23 days of FMLA leave that she had used at the beginning of the year, during which time she did not accrue seniority. Because she did not accrue seniority during her absence, her relative seniority dropped to a point where she was on the layoff list. To de Oliveira, Sharkey's explanation sounded like she was being unlawfully laid off because she used FLMA leave – not because of her relative seniority.

Soon after the meeting with Richards and Sharkey, de Oliveira contacted Justin Karker, the Association's president, and requested that he forward her written concerns about her layoff to "our NYSUT representative," whom she also referred to as "our

Union counsel.” Indeed, de Oliveira testified that Karker told her that he would be speaking with a NYSUT “attorney.”

De Oliveira’s written concerns, dated March 6, 2010, asked whether the District could use her FLMA leave “to justify [her] termination.” If not, she opined that she has “a very strong case.” Likewise, she inquired whether the District could factor her FMLA leave into calculating her seniority for purposes of the layoff. She thought it unfair that she was not accruing seniority while on FMLA. Here, again, she opined that she did not believe that the District could use her FMLA absence against her. She asked that her questions and concerns be forwarded to our “Union counsel” as soon as possible.

About one week later, de Oliveira met with Karker to discuss her March 6 letter. Karker told her that he would send her packet to the New York State United Teachers (NYSUT) to try to get some answers. Karker forwarded the letter to NYSUT Labor Relations Representative Peter Stelling, whom he considered his advisor in matters of this nature. Stelling is not an attorney.

During their conversation, Karker and de Oliveira also discussed, without resolution, the relative seniority of Goodwin and Murphy, who had potentially less seniority than de Oliveira, but who were not on the layoff list.

At its meeting of March 25, 2010, the Board of Education resolved to eliminate four positions in “*the Elementary Education tenure area*” [emphasis added], effective June 30, 2010. Consistent with what she had already been told, de Oliveira’s position was among the four that the District decided to abolish. Indeed, according to Karker, in fashioning a list of employees to be laid off, the District and the Association agreed that Murphy and Goodwin should not be included because they were not in “the Elementary Education tenure area.” They reasoned that their teacher certifications were for upper

grades – not elementary level grades.

By letter dated March 31, 2010, Sharkey formally notified de Oliveira that she would be laid off, effective June 30, 2010.

De Oliveira met with Karker again on or about April 20, 2010, after Karker received the results of NYSUT's review of de Oliveira's March 6 letter. During the course of the meeting, Karker told de Oliveira that the Association disagreed with her position about the impact of her FMLA leave on her seniority. In support, he showed her a portion of an American Federation of Teachers publication entitled "A Guide to the Family & Medical Leave Act," which stated that seniority does not automatically accrue while on such leave. He also explained that Goodwin and Murphy were not on the layoff list because their certifications were not in the "elementary education tenure area."

By letter to Karker, dated May 3, 2010, de Oliveira, by her attorney, accused the Association of breaching its duty of fair representation by permitting the District to use her FMLA leave against her in calculating her seniority for purposes of the layoff. Similarly, the letter accused the Association of breaching its duty of fair representation by "choosing" to exclude a less senior teacher from the seniority list [Murphy] by agreement with Sharkey. Finally, the letter accused the Association of allowing the District to engage in sex-based discrimination against another teacher who was laid off while on maternity leave.

Karker responded to de Oliveira's attorney by letter dated May 6. Karker explained that the Association does not represent employees in sex discrimination matters before the Division of Human Rights. Similarly, he said that if de Oliveira believed that there had been a violation of the FMLA, she could file a complaint with the

Department of Labor Wage and Hour Division or in District Court. Karker also explained that if de Oliveira believes that a contract violation had occurred, she should tell Karker the section of the agreement that could be grieved in order for the Association to pursue the matter. Finally, Karker described the steps he took to determine de Oliveira's relative seniority.

On May 7, de Oliveira filed a grievance alleging various contract violations associated with her layoff. The grievance was denied at each stage of the contractual procedure, including step-3 – the Board of Education – on June 21. Meanwhile, de Oliveira commenced proceedings before the Division of Human Rights and the Commissioner of Education, each complaining of the District's decision to include her on the layoff list.

By letter dated September 24, 2010, the District offered de Oliveira, the most senior person on the eligibility list of laid off teachers, reinstatement to an elementary school teaching position. She did not accept the offer.

Subsequently, by decision dated September 18, 2012, the Commissioner of Education held that the District erred in excluding Goodwin and Murphy from the seniority list, but that de Oliveira was still properly laid off. According to the Commissioner, she had 23 days less seniority than Goodwin and, at least three days less than Murphy because she was not entitled to accrue seniority while she was on FMLA leave.

#### DISCUSSION

The settled test to determine a breach of the duty of fair representation under the Act was articulated by the Appellate Division *in Matter of Civil Service Employees Assn*



*Local 1000 v New York State Public Employment Relations Board and Diaz.*<sup>2</sup> There, the Court held [citations omitted]:

In order to establish a claim for breach of the duty of fair representation against a union, there must be a showing that the activity, or lack thereof, which formed the basis of the charges against the union was deliberately invidious, arbitrary or founded in bad faith. Accordingly, and in any event, we reject the standard applied by PERB that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.

Here, de Oliveira argues that the test to establish a breach of the Association's duty of fair representation is satisfied by evidence that it declined to adequately investigate and to process a grievance concerning her placement on the layoff list. She also argues that the test was satisfied by the Association's agreement with the District that Goodwin and Murphy should be removed from the list of elementary school teachers slated for layoff.

We disagree.

The Association investigated her grievance by examining the District's seniority list and by submitting de Oliveira's specific "concerns" to NYSUT for review. Although the NYSUT representative who examined her submission is not an attorney, he is the Labor Relations Specialist assigned to the unit. In that regard, we note that there is no requirement under the Taylor Law that such advice must come from attorneys.

However, it appears that Karker may have told de Oliveira that her concerns would be

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<sup>2</sup> 132 AD 2d 430, 432, 20 PERB ¶ 7024, at 7039 (3d Dept 1987), *aff'd on other grounds* 73 NY2d 796, 21 PERB ¶ 7017 (1988).

reviewed by a NYSUT attorney. While we agree with de Oliveira that such a representation could be misleading, on the facts of this case we see no material effect of the misstatement. Indeed, there is no evidence that Karker's representation as to who would review her concerns was deliberately intended to mislead her regarding the merits of her dispute with the District.

Likewise, that the District excluded Goodwin and Murphy from the list of elementary school teachers to be laid off does not mean that the Association's agreement with that position breached its duty of fair representation. While the decision of the Commissioner of Education shows that both were wrong in their assessment of the appropriate treatment of Goodwin and Murphy, the Association's incorrect assessment is merely mistaken. There is, for example, no evidence that its assessment was based on antipathy toward de Oliveira or favoritism toward Goodwin and Murphy as might show discriminatory intent or bad faith. As the Appellate Division observed in *CSEA v PERB, supra*, "An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union."

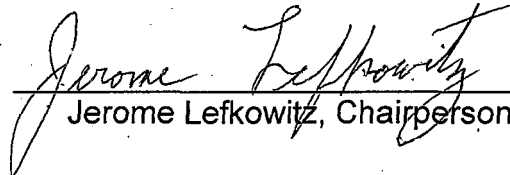
Finally, the Association's refusal to file a grievance on de Oliveira's behalf or to take the one she filed to arbitration does not establish a breach of the duty of fair representation. The Association's determination was based upon its good faith understanding that she lacked a contractual basis to contest her placement on the list of employees to be laid off. Simply put, the Association reasonably believed that she had less relative seniority than the employees who were excluded from the list. In fact, the Association's assessment proved to be true, as reflected in the decision of the


Commissioner of Education.

We have considered the balance of de Oliveira's arguments and find them to be without merit. De Oliveira lacks standing to allege a breach of the Association's duty of fair representation toward others, and the Association has no Taylor Law duty to pursue her complaints with the Division of Human Rights or the Department of Labor.

THEREFORE, the decision of the ALJ is affirmed and the charge is dismissed in its entirety.

DATED: April 3, 2014  
Albany, New York

  
Jerome Lefkowitz, Chairperson

  
Sheila S. Cole, Member

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

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In the Matter of

**HUDSON VALLEY COMMUNITY COLLEGE  
NON-INSTRUCTIONAL EMPLOYEES UNION,**

Charging Party,

**CASE NO. U-30395**

- and -

**HUDSON VALLEY COMMUNITY COLLEGE and  
COUNTY OF RENSSELAER,**

Respondent.

---

**HINMAN STRAUB P.C. (JOHN R. SACCOCIO, of counsel), for  
Charging Party**

**MARTIN, SHUDT, WALLACE, DiLORENZO & JOHNSON (CARLO C. DE  
OLIVEIRA and DAVID T. GARVEY of counsel), for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by Hudson Valley Community College and the County of Rensselaer (together, "College") to a decision of an Administrative Law Judge ("ALJ").<sup>1</sup> The ALJ held that the College violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act ("Act") when it ceased to hire full-time employees represented by the Hudson Valley Community College Non-Instructional Employees Union ("NIEU") to perform "second jobs" for the College in retaliation for NIEU's advocating that the employees be paid overtime for such work.

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<sup>1</sup> 46 PERB ¶ 4565 (2013).

### EXCEPTIONS

The College argues that NIEU's advocacy for overtime for unit members who work "second jobs" is not protected activity because NIEU's position lacks merit. It further argues that the ALJ erred in finding that NIEU met its burden of proof to establish the requisite nexus between NIEU's activities and its decision to cease offering "second jobs" to unit employees. Finally, the College argues that its decision to cease offering "second jobs" to NIEU's members was motivated by legitimate business reasons – not NIEU's protected activities.

NIEU filed a response in support of the ALJ's determination.

Having carefully reviewed the record and the parties' arguments, we conclude that the College violated §§ 209-a.1 (a) and (c) of the Act, and we adopt the ALJ's recommended remedial order.

### FACTS

The facts are accurately recited by the ALJ.

The parties' collective bargaining agreement contains a provision addressing overtime (time and a half). Employees who are scheduled to work 37½ hours per week are to receive overtime for work performed in excess of 37½ hours. Employees who are scheduled to work 40 hours per week are to be paid overtime for work performed in excess of 40 hours. All other employees are to receive overtime for work performed in excess of 40 hours per week.

In May 2004, the College and NIEU entered into an agreement regarding compensation for "second jobs." As confirmed in a March 26, 2004 letter from the College's attorney to NIEU's attorney

Based upon information obtained during the negotiations for the recent NIEU collective bargaining agreement, the College reviewed its position concerning certain full-time members who volunteered for and performed work at second jobs. The College will pay those individuals time and one half of their full-time rate for work done in excess of forty hours in a week.

In February 2010, two unit members, Mary Anne Rebel and Barry Foster worked for a few hours at a College sponsored student orientation event. Rebel was paid overtime but Foster was not. The College then requested Rebel to repay the overtime.

Soon after, a series of communications were exchanged between representatives of NIEU and the College regarding the Rebel overpayment issue. On February 10, 2010, the College's Assistant Director of Human Resources, Deborah Richey, sent an e-mail to Luke Shea, NIEU's president, stating:

We were told that the work done [by] Mary Ann [Rebel] and Barry [Foster] was not related in any way to mail room activities but that they were at a table at student orientation "checking students." Since this was not their primary function at HVCC, and a rate had yet to be established, Sue Smith offered them the work at straight rate.

We do have specific rates for incidental functions like:

- Retention Calling (\$12)
- Graduation Usher
- Exam Proctors (\$15)
- Some New Student Orientation functions

All work outside the regular job description that is considered secondary and incidental is not paid at someone's overtime rate, but rather at an established rate for that "function." I don't remember exact dates, but this was hashed out back in summer 2004 – there might have been an MOA, but I don't have them all.

Similarly, by letter to Rebel dated February 22, 2010, Payroll Supervisor Christine Lasch, explained:

As discussed, you were overpaid on the February 12, 2010 payroll for the 2 hours you worked at the New Student Orientation. We paid you at your overtime rate and according [to] the payroll authorization, you should have been paid at your regular hourly rate for these hours. I know you were disputing this overpayment, but we received notification from the Office of Human Resources today that confirmed you were overpaid.

Shea testified that the parties then attempted to resolve the issue at Labor Management meetings, but were unsuccessful.

On March 2, 2010, NIEU's attorney sent an e-mail to the College's attorney, asking that he look into the Rebel overtime issue. In response, the College's attorney forwarded an e-mail that he had received from the College's Director of Human Resources, John Tibbetts, in which Tibbetts stated:

The issue is one of incidental assistance with a college function. What happened was that Joel for the first time this year put aside some money to pay for assistance at new student orientation. Assistance in the past has been unpaid volunteer. Sue Smith asked if anyone wanted to help just to sit at a desk and give direction. Two NIEU members said yes although it was not unit work and was open to anyone who wished to help. Sue told them it was not OT and would be at their usual rate. This was truly volunteer and incidental – no unit's work, just help with a college function from anyone who wished to help.

Payroll paid it at time and half without thinking and didn't do what the payroll authorization stated. One member did not yet have the check so another was issued for straight rate. One member got the check and is refusing to pay back the half overpay.

We never agreed to pay time and a half for anything a unit member did for the college and in fact have NIEU doing retention calling at a fixed rate regularly. I've told Sue we will need to establish a rate for future events for anyone who wishes to assist.

On May 12, 2010, Tibbetts issued a memorandum to the "Supervisors of Classified Staff" regarding second jobs. The memorandum stated, in relevant part:

Because of the intransigence of NIEU leadership, the College can no longer hire current classified staff members for any secondary functions, no matter how brief or infrequent, as this results in a demand for "overtime" payment for any work beyond normal schedule. This prohibition includes ANY work beyond 37.5 hours per week or 40 hours per week depending on the employee's regular schedule, even if in a totally different capacity from an employee's primary function. We will no longer be able to offer additional earnings opportunities even where an employee is entirely satisfied with an established rate if it is less than time-and-a-half that employee's regular rate. Regrettably, we will no longer be able to offer such earning opportunities even where both parties are entirely satisfied with the work performed.

The current average wage of an NIEU member is \$16.44 per hour for an OT wage of \$24.6733 per hour. It clearly makes little sense to have basic ancillary functions performed for such a rate. For grant functions where a benefit fraction must be included, the resultant hourly cost becomes absurd.

This prohibition does not, of course, apply to normal overtime situations in which an employee must spend extra hours to complete his or her own regular function.

We are left with a need to recruit and hire part-time assistance rather than utilize our current classified staff for



many "extra" functions including part-time grant work, events and ad hoc or special initiatives. For grants in preparation, the appropriate contractual rate for the function should be included and an external search contemplated. An academic department secretary will no longer be able to earn time-and-a-half on a departmental grant for extra work and we will hire new part-time assistance instead. For special events, we will hire through FSA where possible. For special initiatives, we will recruit on a spot or pool basis and deploy as needed. The bill rate for a temporary agency staffer will almost always be considerably cheaper than the OT rate of a current staff member.

Unless overtime is a function of an employee's primary duties ie (sic) an extension of his/her normal job in order to address a backlog or cover additional hours of operation, a recruitment effort will be necessary and full-time classified staff will not be eligible for the function.

The College does not find it necessary to pay exorbitant hourly rates or to defend its actions in administrative hearings in order to accomplish its mission, and will engage in whatever search efforts are warranted by staffing needs as they become apparent.

Shea testified that, as a result of Tibbetts' directive, no unit employees have been offered or permitted to work any "second jobs."

Tibbetts testified that second jobs are "any function performed by an employee...in addition to or in excess of their primary job obligation," and that regularly scheduled second jobs are "routine functions," as opposed to second jobs that are "sporadic or incidental." He further testified that the agreement between NIEU and the College regarding overtime for second jobs did not apply to occasional and sporadic second jobs, which continued to be paid at the applicable established rates.

Regarding the issue with Rebel and Foster, Tibbetts testified that the payroll department, in error, paid Rebel at an overtime rate and that Rebel was

asked to return the excess. He further acknowledged that a series of Labor Management meetings were held in an attempt to resolve the issue. Tibbetts testified, in relevant part:

The eventual discussion was about the issue of payment of overtime for any hours beyond 37.5 for a unit member, in opposition to what we felt had been our practice and understanding up until that time.

...we would pay beyond 40, but we would pay the prevailing hourly rate between 37.5 and 40. Both sides appeared fairly entrenched in their understandings, and it became evident to me the posture of NIEU was going to be any work done by one of their members, whether it be regularly scheduled or occasional, even if it wasn't unit work, we were going to be expected to pay time and a half their regular rate for those functions.

Tibbetts testified that the College was unwilling to adopt NIEU's broad interpretation of "second jobs." According to Tibbetts, the College informed NIEU that "it's not something we are willing to do, and as long as this persists, we're simply going to eliminate the problem by not having those jobs available."

Regarding his use of the word "intransigence" in his memorandum to the supervisory staff, Tibbetts testified:

It was certainly my intent to respond to what I thought was a new practice being demanded by the bargaining unit. The reason we used the term "intransigence" is our supervisory staff has a habit of blaming Administration for causing them problems, and I wanted to make sure they knew it wasn't our intransigence causing the issue.

Tibbetts stated that he costed out what NIEU was looking for, and that "it became evident that were we to implement increased earnings from 37.5 to 40 and pay overtime for incidental functions, it would become prohibitively

expensive." Using the test proctoring as an example, Tibbetts stated that an NIEU member earning an hourly rate of \$20 would cost the College more in overtime than a faculty member earning \$29.61 per hour. However, on cross-examination, Tibbetts admitted that, if a faculty member's rate of pay for proctoring an exam is higher than an NIEU member's straight or overtime rate, the College would still use the faculty member per his memorandum directing that NIEU members no longer work second jobs.

Finally, Tibbetts testified that his decision to cease utilizing NIEU members for second jobs was implemented several months later, at the beginning of the following academic year, because the College did not want to "yank the rug out from under people who were counting on the money."

#### DISCUSSION

Underlying the parties' dispute is their disagreement over the meaning of "second job" for which unit employees are entitled to overtime pay. Despite NIEU's advocacy, the College applies a narrower meaning to the term than NIEU would have it. The merits of that disagreement must be resolved through collective negotiations or in the appropriate dispute resolution forum. We express no opinion regarding the merits of that dispute.

The question before us is not whether the College must pay overtime in any specific context, but whether the College ceased to offer unit employees any second jobs at all in retaliation for NIEU's persistent assertion that they should be paid overtime for such work. The applicable test to determine such a violation is well settled:

When an improper practice charge alleges unlawfully motivated interference or discrimination in violation of §§209-a.1 (a) and (c) of the Act, a charging party has the burden of demonstrating three elements by a preponderance of evidence: a) the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity.<sup>2</sup>

Contrary to the College's argument to us, we find that NIEU's advocacy in support of its position that the term "second job" for which employees are entitled to overtime should be more broadly read than the College would have it, is protected activity under the Act. The protected status of that advocacy is not diminished because the College disagrees with NIEU's position or that NIEU's position is incorrect. In this regard, we note that while the initial disagreement was over the payments to Rebel and Foster, it quickly became a disagreement that covered all employees in the bargaining unit.

As for the second element of proof necessary to establish a violation of §§ 209-a.1 (a) and (c) of the Act – that the person(s) responsible for the at-issue conduct knew of the protected activities – the record fully establishes that Tibbetts, who was responsible for the decision to cease offering "second jobs" to unit employees, was well aware of NIEU's advocacy on behalf of the unit that such employees were entitled to overtime pay for the work.

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<sup>2</sup> *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021, at p. 3039-40 (2013). See also, *UFT, Local 2, AFT, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008)(subsequent history omitted); *County of Wyoming*, 34 PERB ¶ 3042 (2001); *Stockbridge Valley Cent Sch Dist*, 26 PERB ¶ 3007 (1993); *County of Orleans*, 25 PERB ¶ 3010 (1992); *Town of Independence*, 23 PERB ¶ 3020 (1990); *City of Salamanca*, 18 PERB ¶ 3012 (1985).

Regarding the third necessary element of proof – “but for” the exercise of protected rights the at-issue conduct would not have occurred – we agree with the College’s argument that the ALJ applied a less stringent standard; i.e., that the College’s decision not to offer second jobs to unit employees was “at least partially motivated by” NIEU’s advocacy on behalf of the unit. Indeed, we find that the record shows that the ALJ understated the nexus between Tibbetts’ decision and NIEU’s protected activities.

Tibbetts’ May 12, 2010 announcement unambiguously stated that his decision to cease offering “second jobs to unit employees was “*because of the intransigence of NIEU leadership,*” emphasizing that whenever such work is performed, it “*results in a demand for ‘overtime’ payment for any work beyond normal schedule*” [emphasis added]. After describing myriad costs and inconveniences to the College and lost earning opportunities for the unit employees, Tibbetts’ announcement explained that “[t]he College does not find it necessary to pay exorbitant hourly rates *or to defend its actions in administrative hearings in order to accomplish its mission*” [emphasis added].

The nexus between NIEU’s protected activity – its advocacy on behalf of the unit – and Tibbetts’ decision not to offer second job opportunities to unit employees is further supported by Tibbetts’ description of the labor management meetings at which the overtime pay issue was discussed:

Both sides appeared fairly entrenched in their understandings, and it became evident to me the posture of NIEU was going to be any work done by one of their members, whether it be regularly scheduled or occasional, even if it wasn’t unit work,

we were going to be expected to pay time and a half their regular rate for those functions.

Accordingly, the record establishes that, "but for" NIEU's advocating that unit employees be paid overtime for second jobs in excess of their regularly scheduled hours of work, Tibbetts would not have stopped offering them second jobs.

We reject the College's argument that its decision was motivated by legitimate business reasons. The record shows that Tibbetts was motivated by NIEU's advocacy – not the College's disputed duty to pay overtime. Put another way, we find that Tibbetts' motivation was to avoid NIEU's persistent efforts to obtain overtime pay for the second jobs. Indeed, as Tibbetts' announcement reveals, the College is significantly inconvenienced by Tibbetts' decision not to use unit employees for the work: His illustration of the fiscal savings the College could obtain by hiring a straight time faculty member to perform a second job at \$30.00 per hour compared to assigning the work to a unit member whose straight time pay is \$20.00 per hour yields virtually no savings to the College by not paying the unit employee overtime (\$30.00 per hour). Moreover, accepting Tibbetts' representation that "[t]he current average wage of an NIEU member is \$16.44 per hour," the average overtime pay for a second job would be less than \$25.00 per hour, yielding a savings to the College of \$5.00 per hour by assigning the work to a unit employee rather than a faculty member. In any event, Tibbetts testified that he would not assign the second job to a unit employee pursuant to his directive, even if such a savings could be obtained. Therefore, based on Tibbetts' own assessment of the relative cost of using faculty to perform second jobs rather than

using unit employees, the College obtains no fiscal savings by not offering the work to unit employees – even at an overtime rate.

Finally, whether unit employees are entitled to overtime for work characterized as “incidental” or “secondary” in Richey’s February 10, 2010 letter to Shea is a matter about which we express no opinion. As we previously noted, the issue before us is not how much the College must pay unit employees to perform “second jobs” or what work constitutes “second jobs.” The issue here is whether the College’s decision not to assign any “second jobs” to unit employees was in retaliation for NIEU’s persistent efforts to obtain overtime pay for all such work, no matter how that work is defined. We find that it was.

Indeed, as Tibbetts anticipates, it is possible that if the College were to pay unit employees the scheduled pay for work described in Richey’s February 10, 2008 letter, rather than overtime pay, NIEU might demand that the employees be paid overtime. While such a demand does not mean that the College has a duty to pay the overtime, the College may not retaliate against unit employees for NIEU’s advocacy on behalf of the unit. That advocacy is a protected activity, even if NIEU’s position is wrong. In effect, it is not the pay about which Tibbetts complains; it is NIEU’s anticipated demand for the overtime pay that triggered his decision not to offer or permit unit employees to work any second jobs, including sporadic and incidental jobs, irrespective of whether they are entitled to overtime pay for the work.

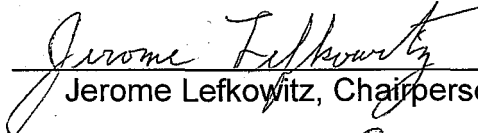
By reason of the foregoing, we find that the College violated §§ 209-a.1 (a) and (c) of the Act by refusing to offer second jobs to employees represented by

NIEU in retaliation for NIEU's advocacy on behalf of unit employees that they be paid overtime for such work.

THEREFORE, IT IS ORDERED THAT Hudson Valley Community College and the County of Rensselaer will:

1. Immediately rescind the memorandum dated May 12, 2010 and allow full-time NIEU unit members to continue to work second jobs at the College;
2. Restore full-time NIEU unit members to the second jobs they previously held;
3. Make those individuals whole for wages and benefits lost resulting from the May 12, 2010 memorandum, plus interest at the maximum legal rate; and
4. Sign and post the attached notice at all physical and electronic locations normally used to post notices of information to NIEU unit members.

DATED: April 3, 2014.  
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 Hudson Valley Community College and the County of Rensselaer (College), in the unit represented by the Hudson Valley Community College Non-Instructional Employees Union (NIEU), that the College will:**

1. Immediately rescind the memorandum dated May 12, 2010 and allow full-time NIEU unit members to continue to work second jobs at the College;
2. Restore full-time NIEU unit members to the second jobs they previously held; and
3. Make those individuals whole for wages and benefits lost resulting from the May 12, 2010 memorandum, plus interest at the maximum legal rate.

**Dated** .....

**By** .....  
on behalf of Hudson Valley Community College  
and County of Rensselaer

*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.*