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State of New York Public Employment Relations Board Decisions from August 20, 2014

New York State Public Employment Relations Board

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

WATERTOWN PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 191, IAFF-NYSFFA,

Charging Party,

-and-

CASE NO. U-30590

CITY OF WATERTOWN,

Respondent.

BLITMAN & KING, LLP (NATHANIEL G. LAMBRIGHT of counsel), for Charging Party

SLYE & BURROWS, ESQS. (ROBERT J. SLYE of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the City of Watertown (City) to a decision of an Administrative Law Judge (ALJ) in an improper practice proceeding.[1] The ALJ held that the City violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when, on November 4, 2010, it unilaterally terminated a 22 year practice of permitting battalion chiefs represented by the Watertown Professional Firefighters Association, Local 191, IAFF-NYSFFA (Association) to select their vacations on or before the 15th day of each month for a vacation to be taken during the following month. In place of the practice, the City directed battalion chiefs to select their

[1] 46 PERB ¶ 4580 (2013).

vacations all at once and it limited the number of their vacations to three per year.

In reaching her conclusion, the ALJ rejected the City's arguments that the practice was not mandatorily negotiable because it did not affect the entire bargaining unit and that it had the right to unilaterally terminate the practice and revert to the terms of Article 6, §§ 1(b) and 1(h), of the parties' 2009-2011 collective bargaining agreement.

EXCEPTIONS

The City's exceptions reiterate its arguments to the ALJ. The Association filed a response in support of the ALJ's determination. For the reasons that follow, we affirm the ALJ, in part on different grounds, and we adopt her remedial order.

FACTS

The material facts are not in dispute and are accurately recounted by the ALJ.[2] The City's fire department consists of firefighters, fire captains, battalion chiefs, a deputy chief and a fire chief. Firefighters, fire captains and battalion chiefs are members of the bargaining unit represented by the Association. The department's work schedule is divided into four platoons, each headed by a battalion chief. A fifth battalion chief is in charge of training and is not permanently assigned to a platoon. Pursuant to Article 5 of the parties' collective bargaining agreement, members of each platoon work a "10 and 14" schedule, meaning that they work three consecutive days from 8:00 a.m. to 6:00 p.m., followed by three days off, followed by three nights from 6:00 p.m. to 8:00 a.m. Unit employees accrue a certain number of vacation days each year, depending on years of service with the department.

Article 6 of each of four collective bargaining agreements from 1990 to 2011 sets

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[2] For the sake of brevity, we do not recite the ALJ's record references.

forth the procedure by which unit employees are allowed to choose when they take their vacations. Each contains identical language in subsection (b):

> The City will schedule annual leave so as to allow a maximum number of six (6) line personnel, *excluding Battalion Chief* to be off during any one period. The selection of Fire Captains and Fire Fighters to be off shall be governed solely by seniority. [Emphasis added.]

Employees who choose not to take their vacations in a single period are permitted to split their allotted vacation time into shorter periods. Prior to the parties' 2000 – 2003 collective bargaining agreement, the process by which split vacations were selected was pursuant to Article 6 (i):

> *Members of the Watertown Fire Department* shall be allowed to split their vacations. When a member elects to split his vacation, he shall be given his first choice according to his standing on an updated seniority list. He shall not make a second selection until all other members of the Fire Department have made their first selection. [Emphasis added.]

Under this "round robin" selection process, there was no limit to the number of split vacations that could be taken.

Although Article 6 (i) was applicable to "[m]embers of the Watertown Fire Department," because battalion chiefs were excluded from the seniority-based system of selecting vacations under Article 6 (b), they were also excluded from the seniority based "round robin" selection process set forth in Article 6 (i). Instead, battalion chiefs selected their vacations pursuant to a non-contractual practice.

Unlike firefighters and captains, who select their vacations once each year, battalion chiefs submitted their vacation selections to the scheduling chief (a nonunit deputy chief) on or before the 15th day of the month prior to the month in which the

vacation was to be taken. There is no dispute that the practice permitted battalion chiefs to take one vacation each month and two during one month, provided, also, that they had to take one nine-day vacation each year. Upon the battalion chiefs' notice of their intent to take a vacation during the following month, the scheduling chief placed their selection on the monthly vacation schedule.

During negotiations for the parties' 1999 – 2003 contract, the City proposed to eliminate the exclusion of battalion chiefs from the seniority based vacation selection process specified in Article 6 (b). The Association rejected the proposal and it went no further. However, in a Memorandum of Understanding that concluded their negotiations, the parties agreed to "limit the number of [vacation] picks for all employees to three per year." Accordingly, the parties' 1999–2003 contract replaced Article 6 (i), quoted above, with a new subsection (h) that stated:

> *Members of the Watertown Fire Department* shall be allowed to split their vacations *and shall be limited to (3) picks.* When a member elects to split his vacation, he shall be given his first choice according to his standing on an updated seniority list. He shall not make a second or third selection until all other members of the Fire Department have made their first or, if relevant, second selection. [Emphasis added.]

Nevertheless, as before, battalion chiefs were excluded from the "round robin" selection process in Article 6 (h) pursuant to the parties' construction of Article 6 (b), which remained unchanged. Battalion chiefs continued to select their vacations on or before the 15th day of each month for a vacation to be taken during the following month.

The dual system of selecting split vacations continued unabated until November 4, 2010, when, in response to a complaint by a firefighter, the City announced that the 2011 vacation picks for battalion chiefs would be made pursuant to Article 6 (b) and (h),

quoted above. The announcement stated, in relevant part: "As the Battalion Chiefs are excluded from selecting vacations by seniority, they are limited to three picks. . . [which] need to be submitted to the Deputy Fire Chief prior to December 10, 2010 for inclusion on the master vacation schedule. . . ." Thus, the announcement reduced the number of vacation periods that the battalion chiefs could take, and it eliminated their right to select their vacations during each month prior to taking them.

DISCUSSION

First, we reject the City's argument that a negotiable practice must apply to all members of the relevant bargaining unit in order to be cognizable under the Act. Only once did the Board squarely advance that notion, and its decision was annulled by the Appellate Division, Third Department, because the Board did not explain the basis for its departure from the opposite well established rule.[3] Just as an employer must negotiate with a union concerning benefits that are designed to address unique circumstances of one or more individual unit members, so too must an employer satisfy its bargaining obligations before terminating mandatorily negotiable practices that are uniquely applicable to unit individuals or groups of individuals.[4]

Second, we reject the City's argument that it had the right to terminate the at-issue 22 year old practice by "reverting" to the terms of its collective bargaining agreement with the Association – Article 6 (b) and (h). In *Springs Union Free School District*, we recently observed:

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[3] *See, State of New York (Dept of Correctional Servs)*, 35 PERB ¶ 3030 (2002), *annulled sub nom. New York State Correctional Officers and Police Benevolent Assn. v Pub Empl Relations Bd*, 309 AD2d 1118, 36 PERB ¶ 7017 (3rd Dept 2003).

[4] *See, e.g., County of Nassau,* 37 PERB ¶ 3014 (2004).

> When "parties have reached an agreement with respect to a specific subject following negotiations, a party may unilaterally end a past practice without violating the Act by reverting to the terms of a specifically negotiated provision of the agreement." The burden, however, rests with the respondent to prove a contract reversion defense through negotiated terms that are reasonably clear on the specific subject at issue. If an "agreement is reasonably clear but susceptible to more than one interpretation, extrinsic evidence, such as negotiation history and/or a past practice, is admissible to determine the intent of the parties."[5]

Here, Article 6 (i) – later 6 (h) – has not changed since 1990, except that, beginning in 2000, the provision limited the number of "round robin" picks to three. However, as the parties agree, Article 6 (b) has consistently excluded battalion chiefs from the "round robin" system of picking vacations under Article 6 (i) and (h), creating an ambiguity as to the applicability of those provisions to battalion chiefs. The parties' own long-standing practice resolves this ambiguity. They have consistently understood that the three-vacation limitation under Article 6 (i) – now (h) – does not apply to battalion chiefs. Thus, the reference to "members of the Watertown Fire Department" in Article 6 (i) and (h) has never applied to battalion chiefs. That finding is supported by the negotiations history of Article 6 (h), which shows that the City unsuccessfully attempted to include battalion chiefs in the "round robin" system of picking vacations by eliminating the language in Article 6 (b), which excluded them from seniority based picks. Indeed, the notice terminating the at-issue practice acknowledges that battalion chiefs are not subject to seniority based vacation selections. In effect, the record shows that while the seniority based selection process may go around only three times for firefighters and captains, the round robin system does not apply to battalion chiefs. Rather, their

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[5] 45 PERB ¶ 3040 (2012), at 3102 (2012) (footnotes omitted).

system of picking vacations has always been based on the at-issue non-contractual practice. Accordingly, we find that the City has not met its burden of proof to establish that its decision to terminate the at-issue practice was a permissible reversion to the terms of the parties' collective bargaining agreement.

Therefore, we affirm the ALJ's rejection of both of the City's defenses.

We now turn to the negotiability of the practice; i.e., whether the City had a bargaining obligation concerning its termination.

In order to establish a mandatorily negotiable past practice, the charging party must show that the practice was unequivocal and continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue.[6] However, the threshold inquiry is always whether the practice concerns a mandatorily negotiable term or condition of employment.[7]

Although the ALJ held that the elements of a practice cognizable under the Act were established on the record, she made no finding as to the negotiability of the subject – procedures by which employees select their vacations. Indeed, the parties

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[6] *Town of Islip v Pub Empl Relations Bd*, __ NY3d __ (June 14, 2014), 2014 WL 2515720; 47 PERB ¶ 7001 (2014); *Chenango Forks Cent School Dist*, 40 PERB ¶3012 (2007), *confirmed sub nom. Chenango Forks Cent Sch Dist v Pub Empl Relations Bd*, 95 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affirmed* 21 NY3d 255, 46 PERB ¶ 7008 (2013); *Manhasset UFSD*, 41 PERB ¶ 3005 (2008), *confirmed and mod in part sub nom. Manhasset UFSD v Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remand* 42 PERB ¶ 3016 (2009); *Fashion Inst of Tech*, 41 PERB ¶ 3010 (2008), *confirmed sub nom. Fashion Inst of Tech v Pub Empl Relations Bd*, 68 AD3d 605, 42 PERB ¶ 7011 (1st Dept 2009).

[7] *State of New York (Department of Correctional Services)*, 38 PERB ¶ 3018 (2005); *Town of Carmel*, 31 PERB ¶ 3006 (1998), *confirmed sub nom. Town of Carmel PBA v Pub Empl Relations Bd*, 267 AD2d 858, 32 PERB ¶ 7028 (3d Dep't 1999).

offered no arguments regarding that issue. Ordinarily, we would consider remanding that issue to the ALJ for further analysis. But, given our discussion below, we deem it more expeditious to address the issue ourselves.

In *Town of Carmel*,[8] the Board held that a procedure that provided for the pre-approval of vacations was not mandatorily negotiable because the pre-approved absences necessarily impaired the employer's staffing prerogatives at the time the vacations were taken. There, vacations were selected in December of each year, and the procedure allowed two or more employees to be on vacation at any given time, so long as there was a predetermined number of employees on duty on any particular shift. In the spring of each year a second round of vacation selections was permitted, again, so long as the employer's pre-determined minimum staffing requirements were satisfied. All such selections were based on seniority.

The Board held that the employer had no bargaining obligation with the union before it terminated the "early pick" procedure. Although the employer's predetermined minimum staffing requirements were unaffected, the Board reasoned that it was the employer's staffing *prerogatives* that were impaired. For example, an employee who selects a vacation in December, to be taken in July, will be off duty at that time, necessarily reducing the number of employees who will be available to work. This, according to the Board, made the early pick procedure nonmandatory, because it impaired the employer's ability to make adjustments to its minimum staffing requirements when the vacations are taken; i.e., its staffing *prerogatives*. That the early

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[8] 31 PERB ¶ 3006 (1998), *confirmed sub nom. Town of Carmel PBA v Pub Empl Relations Bd*, 267 AD2d 858, 32 PERB ¶ 7028 (3d Dep't 1999).

pick procedure did not affect the employer's actual predetermined staffing requirements was immaterial to the impact it had on the employer's prerogatives.

Similarly, in *State of New York (Department of Correctional Services)* (hereafter, *State DOCS*),[9] relying on *Carmel*, the Board held that a practice of pre-approving sick leave requests in increments of four hours or less to attend elective medical appointments was nonmandatory. The Board held: "[a]s was the case in *Carmel*, pre-approval necessarily constrains an employer's right to set staffing levels, a nonmandatory subject of negotiation."[10]

Arguably, under the *Carmel* and *State DOCS* analysis, the practice at issue in this matter would not be mandatorily negotiable because it impairs the City's staffing prerogatives when the vacations are taken. However, having carefully reviewed the negotiability analysis in those decisions, we now believe them to be inconsistent with the statutory duty to negotiate concerning terms and conditions of employment and our long-standing precedents, including *City of Yonkers* (hereafter, *Yonkers*)[11] on which *Carmel* was based, and *City of White Plains* (hereafter, *White Plains*),[12] on which *Yonkers* was based.

In *White Plains*, the Board held that an employer had the right to determine the number of employees it must have on duty to fulfill its mission. However, it further observed that the employer was obligated to negotiate over methods of meeting its

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[9] 38 PERB ¶ 3018 (2005).

[10] *Id.,* at p. 3064.

[11] 10 PERB ¶ 3056 (1977).

[12] 5 PERB ¶ 3008 (1972).

staffing requirements – there, the start and end times and duration of the employees' tours of duty. The Board held that the former is a nonmandatory management prerogative (staffing), while the latter are mandatorily negotiable terms and conditions of employment (hours of work).

In *Yonkers*, relying on *White Plains*, the Board held that an employer had no bargaining obligation concerning the distribution of vacation slots over the course of the year. In that case, the employer unilaterally terminated a practice of permitting a disproportionate number of employees to take their vacations during desirable months. The employer, instead, unilaterally redistributed available vacations slots throughout the year, thereby reducing the number of employees who could be on vacation at any given time, but maintaining a more consistent staffing level throughout the year. While recognizing that some employees would not be able to take their vacations during the prime vacation months, the Board held:

> [The City] may determine the number of unit employees that it must have on duty during each of the vacation periods. Within that framework, it is obligated to negotiate over the order in which vacation preferences may be granted.[13]

Because the employer did not alter the procedure by which the available vacations slots were selected, the Board dismissed the charge complaining of the unilateral redistribution of the number of available slots during the prime months.

Similarly, in *Fairview Professional Firefighters Association*,[14] relying on *Yonkers*, the Board reiterated the proposition that while an employer need not negotiate over the

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[13] *City of Yonkers*, 10 PERB ¶ 3056 at p. 3099 (1977).

[14] 12 PERB ¶ 3118 (1979).

number of employees it requires to be on duty, it has a bargaining obligation concerning the method by which employees bid for available vacation times. The Board rejected the employer's argument that the proposed vacation procedure impaired its staffing prerogatives.

Under *White Plains*, *Yonkers* and *Fairview Prof Firefighters*, an employer's right to determine the number of employees it requires to deliver its services (minimum staffing) is nonmandatory, while the procedures by which employees select when to work (shifts and tours) or when not to work (vacations) are mandatory, provided that the employers' pre-determined minimum staffing levels are not impaired.[15]

The nature of these competing interests is illustrated by *City of Newburgh*,[16] where the Board considered the negotiability of a police union's bargaining proposal concerning the use of personal leave. The proposal at issue there provided for 8 days of personal leave to be taken at the discretion of the unit police officers without regard to the employer's staffing requirements. The Board held:

> In the typically sensitive area of the performance of police functions, [the demand] would eliminate entirely management participation in the decision as to whether a particular employee could be spared from duty at the time sought for personal leave, and it would also eliminate all management control over the number of employees on personal leave at any one time.[17]

In effect, under the *Newburgh* proposal the employer forfeited all control over how many

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[15] *See also, Town of Blooming Grove*, 21 PERB ¶ 3032 (1988).

[16] 18 PERB ¶ 3065 (1985) *petition for review dismissed*, 19 PERB ¶ 7005 (Sup. Ct. Albany County 1986).

[17] *Id.*, at p. 3138.

employees could be off duty on personal leave – necessarily impairing its established staffing requirements.

Together, *White Plains*, *Yonkers*, *Fairview Prof Firefighters* and *Newburgh* reveal our efforts to balance the interests of employers in ensuring an adequate number of staff on duty to provide public services against the interests of the employees in negotiating their hours of work, including when they may collect the time off that they have earned. Under those decisions, both sides must forego unfettered discretion.

In contrast to the earlier decisions regarding paid leave, which served to balance the employer's articulated minimum manning requirements against the employees' negotiable interests in determining when and how they may receive their earned time off, *Carmel* and *State DOCS* skewed the balance in favor of the employers' mercurial staffing *prerogatives*. Arguably, under *Carmel* and *State DOCS*, an employer could, on a moment's notice, unilaterally declare that now is the time for all employees to take their paid leave, because it would be least intrusive on its staffing requirements. However, such a directive has been found to be mandatorily negotiable.[18]

We believe the better approach is to focus on the employers' right, indeed, its responsibility, to determine and maintain staffing levels that can fulfill its mission and still accommodate reasonably foreseeable employee absences occasioned by vacations, medical appointments, illnesses or other non-contractual or negotiated circumstances. Within that framework, an employer may insist upon negotiations with the appropriate employee organization concerning the right to recall employees from planned absences,

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[18] *See, State of New York (SUNY at Albany)*; 16 PERB ¶ 3050 (1983), *confd sub nom. CSEA, Inc. v Newman*, 61 NY2d 1001, 17 PERB ¶ 7007 (1984) (unilateral directive that employees take the day after Thanksgiving as paid leave held mandatorily negotiable).

or condition such paid time off on the absence of unforeseen emergencies.[19] Given the availability of such negotiable options to further the employer's managerial staffing rights, we conclude that negotiations concerning procedures for pre-approval of paid time off are mandatorily negotiable.

Indeed, procedures associated with the implementation of nonmandatory, managerial rights are generally mandatorily negotiable. For example, while residency requirements pursuant to Public Officers Law § 30.4 (d) are not mandatorily negotiable,[20] the procedures by which such residency requirements are implemented are.[21] Similarly, procedures associated with an employer's implementation of nonmandatory rights under General Municipal Law § 207-c are mandatorily negotiable.[22] An employer's decision to reduce its workforce through layoffs is nonmandatory,[23] but the procedures by which such layoffs are implemented are mandatory.[24] In fact, procedures surrounding an employer's rights over prohibited subjects are mandatorily negotiable.[25] The rationale underlying each of these

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[19] *See, e.g., Town of Blooming Grove*, *supra* note 15.

[20] *See, City of Mount Vernon*, 18 PERB ¶ 3020 (1985); *Salamanca Police Unit, CSEA*, 12 PERB ¶ 3079 (1979).

[21] *City of Niagara Falls*, 43 PERB § 3005 (2010), citing with approval *City of Schenectady*, 25 PERB ¶ 4527 (1989).

[22] *See, City of Watertown v Pub Empl Relations Bd*, 95 N.Y.2d 73, 33 PERB ¶ 7007 (2000).

[23] *City of New Rochelle,* 4 PERB ¶ 3060 (1971).

[24] *Hudson Valley Comm Col*, 12 PERB ¶ 3030 (1979).

[25] *Cohoes City Sch Dist v Cohoes Tchrs Assn*, 40 NY2d 774, 9 PERB ¶ 7529 (1976).

negotiability decisions is the strong and sweeping policy favoring collective bargaining under the Act concerning employees' terms and conditions of employment; a policy that creates a presumption in favor of negotiability.[26]

Accordingly, we shall no longer follow *Carmel* and *State DOCS* to the extent that they hold that all procedures by which employees may obtain pre-approved time off are not mandatorily negotiable. Rather, we hold that such procedures are mandatorily negotiable, provided that they do not interfere with the employer's predetermined staffing requirements. Our decision here is not intended to set aside any other Board precedents concerning the negotiability of such procedures.

Because we find that procedures by which employees may obtain pre-approval for paid time off are mandatorily negotiable, and having denied the City's defenses, we now turn to the elements necessary to establish an enforceable past practice.

The record fully supports the ALJ's determination that for over two decades, battalion chiefs have been permitted to select their vacations by notifying the scheduling chief on the 15th day of the month preceding the vacation. The practice was sufficiently unequivocal and continuous to give rise to a reasonable expectation among the affected employees that it would continue, subject to negotiations to the contrary. And the City was well aware of its existence, as shown by its earlier effort to negotiate for its termination as well as the posting of the monthly vacation schedules. Therefore, we find that the elements of a negotiable past practice have been shown on this record.

By reason of the foregoing, we find, as did the ALJ, that the City violated § 209-a.1 (d) of the Act by unilaterally terminating the practice by which battalion chiefs

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[26] *City of Watertown v Pub Empl Relations Bd*, 95 N.Y.2d 73, 33 PERB ¶ 7007 (2000).

selected their vacations, and we adopt the ALJ's recommended remedial order.

THEREFORE, the City of Watertown is directed to forthwith:

1. Rescind its November 4, 2010 directive limiting battalion chiefs to three vacation picks per year;
2. Restore the vacation selection system in place for battalion chiefs prior to November 4, 2010;
3. Make whole any employee serving as a battalion chief between November 4, 2010 and the date this order is put into effect who sustained any loss of salary or benefits resulting from the implementation of the November 4, 2010 directive, together with interest at the maximum legal rate; and
4. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: August 20, 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 the City of Watertown in the unit represented by the Watertown Professional Firefighters Association, Local 191, TAFF-NYSSFFA, that the City will:

1. Rescind its November 4, 2010 directive limiting battalion chiefs to three vacation picks per year;

2. Restore the vacation selection system in place for battalion chiefs prior to November 4, 2010; and

3. Make whole any employee serving as a battalion chief between November 4, 2010 and the date of this order who sustained any loss of salary or benefits resulting from the implementation of the November 4, 2010 directive, together with interest at the maximum legal rate.

Dated . . . . . **By** . . . . . .

. . . . . .
on behalf of the City of Watertown

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.