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State of New York Public Employment Relations Board Decisions from December 29, 2014

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from December 29, 2014

Keywords

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Comments

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LABORERS INTERNATIONAL UNION OF
NORTH AMERICA LOCAL 17,

Petitioner,

-and-

CASE NO. C-6274

TOWN OF LUMBERLAND,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, 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 Laborers International Union of North America Local 17 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: Any and all full-time and part-time employees of the Town Highway Department, including but not limited to the following titles: Motor Equipment Operator (MEO), Working Supervisor, Mechanic, and Laborer.

Excluded: Highway Superintendent.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Laborers International Union of North America Local 17. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 29, 2014
Albany, New York



Jerome Lefkowitz, Chairperson



Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 294,

Petitioner,

-and-

CASE NO. C-6276

TOWN OF FRANKFORT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

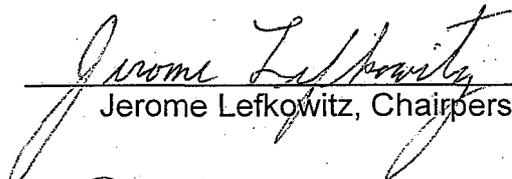
IT IS HEREBY CERTIFIED that the Teamsters Local 294 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Working Foreman, Heavy Equipment Operator and Mechanic.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 29, 2014
Albany, New York



Jerome Lefkowitz, Chairperson



Sheila S. Cole, Member

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

In the Matter of

**UNITED TEACHERS OF SEAFORD, NYSUT, AFT,
NEA, AFL-CIO,**

Charging Party,

CASE NO. U-31184

-and-

SEAFORD UNION FREE SCHOOL DISTRICT,

Respondent,

-and-

SEAFORD ADMINISTRATORS ASSOCIATION,

Intervenor.

PATRICK J. TERKOSKI, LRS, for Charging Party

INGERMAN SMITH (CHRISTOPHER VENATOR of counsel), for Respondent

MICHAEL A. STARVAGGI, ESQ., for Intervenor

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Seaford Union Free School District (District) to a decision of an Administrative Law Judge (ALJ).¹ The ALJ held that the District violated §209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when, in July 2011, it unilaterally transferred duties that had been exclusively performed by department chairpersons at the District's high school represented by the United Teachers of Seaford, NYSUT, AFT, NEA, AFL-CIO, (UTS) to nonunit administrators

¹ 46 PERB ¶ 4566 (2013).

represented by the Seaford Administrators Association (SAA).

The ALJ's decision was grounded on an exhaustive account of the duties performed by the department chairpersons at the District's high school based on unrefuted documentary and testimonial evidence. She held that those duties were exclusively performed by the chairpersons, as each of the UTS's witnesses testified, notwithstanding largely unrefuted documentary and testimonial evidence that the District adduced to show that those duties were shared by the nonunit administrators.

According to the ALJ, however, the administrators' duties were directed to building-wide or District-wide operations, while the duties performed by the department chairpersons focused on departmental operations. Accordingly, she held that the duties performed by the administrators did not defeat the UTS's claim of exclusivity over the departmental work.

She also distinguished the work of department chairpersons at the District's high school from similar tasks that were not exclusively performed by department chairpersons at the District's elementary and middle schools, emphasizing the different nature and complexity of the work at the high school as compared to the work performed for the District's lower schools. Therefore, the ALJ held that the UTS's lack of exclusivity over the work at the lower schools did not defeat its claim of exclusivity over the departmental work at the high school.

Finally, there being no dispute that the District unilaterally transferred the work of department chairpersons at the high school to nonunit administrators for economic reasons, the ALJ held that the District violated § 209-a.1 (d) of the Act and she directed

the District to undertake certain remedial measures. However, the ALJ dismissed the UTS's charge insofar as it alleged that the District violated the Act by transferring the work of department chairpersons at the lower schools to nonunit personnel.

EXCEPTIONS

The District does not dispute the ALJ's 21 page account of the duties performed by the department chairpersons at the high school. Rather, the District's exceptions allege, *inter alia*, that the ALJ erred in concluding that the work performed by department chairpersons at the high school was exclusively performed by them. It argues that nonunit administrators have performed substantially similar work, thereby defeating the UTS's claim of exclusivity. It also argues that the ALJ erred in distinguishing the non-exclusive work at the District's lower schools from the work performed by department chairpersons at the high school. It argues that the non-exclusive work at the District's lower schools defeats the UTS's claim of exclusivity over the work at the high school. Finally, the District argues that the work of department chairpersons is not a "core component" of the overall administrative tasks performed by nonunit administrators in which the department chairpersons play an allegedly "incidental" role. In effect, it argues that the core components of the department chairpersons' work are performed by nonunit administrators.²

The UTS filed a response to the District's exceptions supporting the ALJ's

² The District also alleges that the ALJ erred by declining to follow another ALJ's decision in *Riverhead Cent. Sch Dist*, 41 PERB ¶ 4576 (2008). Although the ALJ was not required to follow *Riverhead*, she distinguished the facts in that case from the instant facts. In any event, we are not bound by the ALJ's decision in *Riverhead*, and we express no opinion regarding its merits.

conclusion that the District violated the Act by transferring the chairpersons' work at the high school to nonunit personnel. It took no exceptions to the ALJ's dismissal of its charge concerning the transfer of the chairpersons' tasks at the elementary and middle schools. SAA filed neither exceptions nor a response.

For the reasons that follow, we affirm the decision of the ALJ and adopt her recommended remedial order.

FACTS

Because the District does not contest the ALJ's account of the department chairpersons' duties, we do not reiterate them here. Indeed, we have carefully reviewed the record and compared it to the ALJ's account of those duties and find that her account is thorough and accurate. Accordingly, we recite the duties described by the ALJ only briefly and insofar as they are necessary for us to address the District's claim that nonunit administrators performed substantially similar duties, thereby defeating the UTS's claim of exclusivity over the work.

The UTS represents a collective bargaining unit that includes teachers and department chairpersons. SAA represents a unit of principals, assistant principals and directors. The District's superintendent and assistant superintendents are unrepresented.

The District operates two elementary schools, one middle school, and one high school. It has employed department chairpersons for more than fifteen years. Each has responsibilities over his or her own department. In order to enable them to perform their departmental tasks, the District reduced their teaching load from five to four

classes per day and relieved them of their daily duty periods. Moreover, the District paid them a contractually negotiated stipend above their normal teaching salary for their work as department chairpersons.

During the 2010-2011 school year, the District employed fifteen chairpersons who were assigned to the following departments: mathematics, science, social studies, English, reading, technology/family/consumer science, art, foreign language and English as a second language (ESL), music, library, business and computers, sixth grade, special education, physical and health education, and high school guidance.

At the end of the 2010-2011 school year, the District decided, for budgetary reasons, to eliminate twelve of the fifteen chairperson positions for the 2011-2012 school year. It retained department chairpersons to supervise only the departments of special education, physical and health education, and high school guidance. In September 2011, those who no longer served as department chairpersons resumed their full-time teaching duties and lost their stipend for serving as chairpersons. All of their chairperson tasks were assigned to District principals, assistant principals, and other administrators. There is no dispute that the District unilaterally transferred the work to the nonunit employees.

In addition to documentary evidence, the record consists of the testimony of five witnesses. The UTS called as its witnesses three teachers who, until June 2011, worked as department chairpersons; Donna Manning, the Art Department chairperson from 1995 to June 2011, Linda Schwartz, the English Department chairperson from 2008 to July 2011, and Sonia Zervakos, the Foreign Language and ESL chairperson

from 2007 to 2011. The District called Brian Conboy, who became the superintendent of schools on August 1, 2010 and who served as the assistant superintendent for curriculum, instruction and personnel (ASCIP) from July 2004 until July 2010. The SAA called as its witness Michael Ragon, the District's high school principal since 2001.

The job description for the position of chairperson sets forth four primary areas of responsibility: curriculum, budget, personnel, and departmental organization. The job description also contains numerous subcategories of duties for each of the main areas of responsibility.

Department chairpersons conducted monthly meetings with teachers in their departments in association with their responsibility to oversee pedagogical operations within their departments. During these meetings, the chairpersons and teachers deliberated upon and developed plans and recommendations concerning the selection and purchase of supplies within budgeted allocations, requests for professional development activities, plans for field trips, and the selection of textbooks. They also wrote course descriptions, scheduled teachers for classes, developed curricula, prepared departmental budgets, and selected from the first-round pool of candidates for teaching positions within their departments.

Where the department chairpersons' decisions affected building-wide operations, such as the creation of master schedules for classes and scheduling field trips, their plans and recommendations were subject to approval by the building principal or assistant principals. Where their decisions and recommendations affected District-wide operations, such as their budgets, selections from the initial pool of teacher candidates

to be hired by the District, and the addition or deletion of courses and alterations in curricula, their recommendations were subject to approval by the building principal and then higher level administrators and, ultimately, by the board of education. There is no evidence that nonunit principals or other administrators engage in similar departmental meetings at which departmental plans are discussed, developed, determined or recommended.

In contrast to the departmental oversight provided by the department chairpersons, Brian Conboy, the superintendent of schools since August 2010, testified regarding the building-wide and district-wide responsibilities of principals and higher level administrators. He illustrated such activities as the initiation of a full day kindergarten, the rearranging of the high school science program, the development of a special education curriculum that continues throughout a student's progression in school, and an Academic Intervention Service Plan that helps students in need of assistance. He also testified that department chairpersons meet on a regular basis with District administrators to discuss district-wide concerns and educational matters that he characterized as "global." Thus, for example, at such meetings he would distribute literature concerning trends in education that he obtains from various educational associations in which he is a member. Other matters presented at these meetings include changes in state mandated programs and regulatory issues.

The record contains very little evidence regarding the responsibilities of department chairpersons at the elementary and middle school levels. It does, however, as the ALJ found, indicate that building principals and assistant principals had a greater

involvement in departmental decisions at those levels than at the high school. Indeed, Conboy distinguished the work of department chairpersons at the high school by describing the work there as more complex, requiring greater oversight by the department chairpersons, who work at the high school.

DISCUSSION

First, we reject the District's argument that it was permitted to unilaterally transfer the department chairpersons' tasks to nonunit administrators because that work was "incidental" to the "core components" of the administrators' final decision making process.³ In *Manhasset Union Free Sch Dist* (hereafter, "*Manhasset*"),⁴ as expressly confirmed by the Appellate Division, we abandoned the "core components" analysis in assessing the negotiability of the transfer of bargaining unit work to nonunit personnel. There, applying a past practice analysis, we held that the unilateral transfer of exclusive bargaining unit work to nonunit personnel – even incidental tasks – violated the Act. Therefore, the District's reliance on the "core components" analysis is unavailing.

Second, we find that the ALJ properly distinguished the work performed by nonunit principals and other administrators at the District's elementary and middle schools from that performed by department chairpersons at the high school. Under

³ The District relies on *County of Westchester*, 31 PERB ¶¶ 3034 and 3035 (1997). See also, *City of Rome*, 32 PERB ¶ 3058 (1999).

⁴ 41 PERB ¶ 3005 (2008) *confd sub nom. Manhasset Union Free Sch Dist v New York State Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009); *on remitter*, 42 PERB ¶ 3016 (2009). There, we expressly reversed *County of Westchester*, *supra*. Indeed, under *Manhasset*, the "incidental" performance of exclusive bargaining unit work by nonunit personnel does not necessarily defeat a claim of exclusivity over the work.

Manhasset, when discernible boundaries are defined by past practices, they are revealed in the nature of the work performed, its frequency, its geographic location, the employer's explicit or implicit rationale for the practice, and other factors that establish that the at-issue work was treated differently from similar work performed by nonunit personnel. As with other practices, a practice establishing a discernible boundary will be found where "the practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."⁵

Here, although the record is scant regarding the duties of department chairpersons at the District's lower schools, Conboy's testimony shows that, for its own reasons, the District determined that it was appropriate to assign the department chairpersons' tasks at the lower schools to nonunit employees, notwithstanding that it was paying department chairpersons to do the work. Conboy's testimony indicates that the distinction was a function of the more complex tasks that were required of department chairpersons at the high school, where the department chairpersons work. Therefore, we find that the ALJ correctly concluded that there was a District-created discernible boundary that distinguished the work of department chairpersons at the high school from similar work performed by nonunit administrators at the lower schools. Indeed, the simple location of the work is sufficient to establish a discernible boundary.⁶

⁵ *County of Nassau*, 24 PERB ¶ 3029 at 3058 (1991).

⁶ See e.g., *City of Rochester*, 21 PERB 3040 (1988), *confd sub nom. City of Rochester v New York State Pub Empl Relations Bd*, 155 AD2d 1003 (4th Dept 1989).

Finally, we agree with the ALJ's conclusion that the work of department chairpersons at the District's high school was exclusive bargaining unit work.

The record shows that the District has created a layered system of making various operational decisions. For example, department chairpersons prepare departmental budgets in consultation with departmental teachers. Each departmental budget is submitted to the high school principal who reviews, compiles, and approves or modifies them as necessary. The consolidated high school budget is then submitted to higher level administrators along with the budgets for the other schools for further review, approval, and modifications for submission to the District's board of education. Contrary to the District's argument, the layers of review, modifications, and approvals do not diminish the department chairpersons' role in creating the preliminary departmental budgets or defeat the UTS's claim of exclusivity over that work.

Similar layering governs the department chairpersons' decisions regarding pedagogical issues such as the creation or deletion of classes and curricula, the selection of textbooks, approval of field trips, and scheduling classes and exams. As with the development of departmental budgets, that the department chairpersons' decisions are subject to review and approval by higher level administrators does not diminish or defeat the UTS's claim of exclusivity over the tasks associated with making the preliminary departmental decisions and recommendations. Likewise, department chairpersons have exclusively performed the preliminary review of candidates to be hired by the District as teachers, and they provided recommendations for those whom they deem fit to higher level administrators for further consideration.

There is no evidence that nonunit administrators have had any material role in the departmental deliberations by which departmental decisions and recommendations are developed. While Conboy's testimony on which the District relies shows that nonunit administrators had a role in making departmental decisions at the District's lower schools, that testimony does not reveal a similar role in departmental deliberations at the high school. In that regard, we agree with the ALJ's conclusion that Ragon's generalized testimony regarding his involvement in curriculum development and other pedagogical matters at the high school does not establish that those duties supplanted the preliminary decisions made by department chairpersons such as to defeat the UTS's claim of exclusivity over that work.

We conclude that, when read as a whole, the record shows that department chairpersons exclusively performed the preliminary stages of the District's layered administrative processes, while higher level administrators performed further review and adoption of the at-issue administrative decisions. The chairpersons' tasks were assigned as a discrete departmental function apart from the review and oversight provided by the nonunit administrators. Indeed, the District itself created the position, assigned the departmental work, facilitated its performance by reducing the teachers' work load, and paid the unit employees a separately negotiated wage to perform the duties. Simply put, the District created the discernible boundary that distinguishes the chairpersons' departmental tasks from the building--wide and District--wide final decision-making process.

Accordingly, the ALJ's conclusion that the District violated § 209-a.1 (d) of the

Act by unilaterally transferring the department chairpersons' work at the District's high school to nonunit administrators, and we adopt her recommended remedial order.

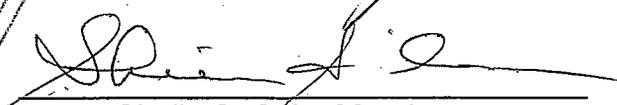
IT IS THEREFORE ORDERED that the District:

1. Cease and desist from unilaterally transferring to nonunit personnel the academic department work previously performed exclusively by chairpersons;
2. Restore the work previously performed exclusively by chairpersons to employees in the unit represented by the UTS;
3. Make whole all unit employees affected by the transfer of academic department work previously performed exclusively by chairpersons for any loss of wages, including overtime pay and benefits, suffered by reason of the transfer of unit work, with interest at the maximum legal rate; and
4. Sign and post the attached notice to employees at all physical and electronic locations customarily used to communicate with unit employees.

DATED: December 29, 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 Seaford Union Free School (District) in the unit represented by the United Teachers of Seaford, NYSUT, AFT, NEA, AFL-CIO (UTS) that the District will:

1. Not unilaterally transfer to nonunit personnel the academic department work previously performed exclusively by chairpersons;
2. Restore the work previously performed exclusively by chairpersons to employees in the unit represented by the UTS; and
3. Make whole all unit employees affected by the transfer of academic department work previously performed exclusively by chairpersons for any loss of wages, including overtime pay and benefits, suffered by reason of the transfer of unit work, with interest at the maximum legal rate.

Dated

By
(Representative)

SEAFORD UNION FREE SCHOOL
DISTRICT

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

-and-

CASE NO. U-30815

**STATE OF NEW YORK (DEPARTMENT OF
ENVIRONMENTAL CONSERVATION),**

Respondent.

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, GENERAL COUNSELS
(MIGUEL G. ORTIZ of counsel), for Charging Party**

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

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) in an improper practice proceeding.¹ The ALJ held that the State of New York (Department of Environmental Conservation) (DEC or State) did not violate §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when, effective January 1, 2011, DEC unilaterally eliminated 42 full-time permanent CSEA-represented positions at Belleayre Ski Center and then re-hired many of the laid off employees as part-time "long term seasonal employees," also represented by CSEA, despite a concomitant reduction in their hours of work and a loss of benefits.

¹ 46 PERB ¶ 4592 (2013).

EXCEPTIONS

CSEA's exceptions allege that the ALJ erred in concluding that the State was permitted to unilaterally "convert" the 42 full-time positions into "long term seasonal" positions with fewer work hours and benefits, absent evidence of a corresponding reduction in the level of services provided by the at-issue employees.

The State filed a response supporting the ALJ's decision.

As discussed herein, we affirm the decision of the ALJ.

FACTS

Belleayre Ski Center is a recreational facility run by DEC. Until January 2011, it was staffed by 56 full-time permanent employees and a pool of part-time employees (called "seasonal employees"). While the permanent full-time employees work year round, the part-time seasonals work up to 1,750 hours per year (80% of the full-time employees' annual hours). Some seasonals work only during the winter ski season, others work during the summer season, some both seasons, and still others work the full permissible 1,750 hours. Although the number of seasonal employees on duty during the year varies widely depending on the season, in fiscal year 2007-2008 Belleayre employed an average of 141.5 seasonal employees per pay period. In fiscal year 2008-2009, it employed an average of 97.7 seasonal employees per pay period. In fiscal year 2009-2010 DEC employed an average of 112.3 per pay period, and in fiscal year 2010-2011 the average number of seasonals per pay period was 114.3.

In the autumn of 2010, the State instituted a formal reduction in force. DEC was directed to eliminate 140 permanent positions. According to DEC Director of Management and Budget Services Nancy Lussier, the agency decided that the 140 cuts had to be based on function or task because DEC had experienced a number of

“random” job losses due to employee-driven decisions such as early retirement. Accordingly, DEC decided to reduce its full-time work force at Belleayre by 43 positions, of which 42 were represented by CSEA. The decision to eliminate the 43 positions at Belleayre was based on two factors: Belleayre was not a primary element of DEC’s core mission of protecting environmental quality and natural resources, and cutting permanent items at Belleayre would still allow the ski center to remain open while allowing employees to remain employed, albeit in seasonal positions.

The layoffs were effective on December 31, 2010 and left Belleayre with a full-time staff of 13. While many of the laid off employees “bumped” into or took positions at other State sites or retired, DEC offered the laid off employees the opportunity to take existing open seasonal positions at Belleayre in order to minimize the impact of the layoffs on the affected employees and to maintain experienced staff.

Some of the former full-time employees who accepted DEC’s offer of re-employment as seasonals were hired under the same titles they previously held on a permanent basis, others were given the title Park Recreation Aide. All of the seasonal titles given to the previously permanent employees were in existence as seasonal titles prior to the reduction in force. Due to the reduction in the hours of work, the pay rates for the seasonal positions were generally lower than those of the permanent positions.

As accurately found by the ALJ, the total number of seasonal employees at Belleayre did not significantly increase as a result of offering seasonal positions to formerly permanent employees. In fiscal year 2011-2012, following the reduction in force, the year in issue here, the average number of employees per pay period was 125.5 – 11.2 more than the average number of seasonal employees per pay period during the previous year (114.3), when there was a full complement of 56 full-time

employees. Put another way, the full work force at Belleayre during fiscal year 2010-2011 was an average per pay period of 170.3 (56 full-time plus 114.3 seasonals), while the average work force per pay period during 2011-2012 was 138.5 (13 full-time plus 125.5 seasonals), showing a total average reduction of 31.2 employees per pay period following the December 2010 elimination of 42 full-time CSEA represented employees.

Effective March 30, 2012, at the close of the State's 2011-2012 fiscal year, Belleayre ceased to be a unit of state government. Pursuant to Ch. 60, Part C of the laws of 2012, Belleayre was transferred to the New York State Olympic Regional Development Authority. See, generally, Public Authorities Law, Title 28, § 2600, *et seq.*

DISCUSSION

A public employer's decision to reduce its workforce through layoffs is not a mandatory subject for negotiations,² even where the decision is motivated by fiscal considerations.³ As a rule, the wisdom of an employment-related decision does not affect the negotiability of the subject.⁴ Thus, the State had no duty to negotiate with CSEA concerning its decision to layoff 42 CSEA represented permanent full-time employees at Belleayre Ski Center, although the impact of such a decision might be mandatorily negotiable.⁵

² See, *City of New Rochelle*, 4 PERB ¶ 3060 (1971).

³ See, e.g., *Burnt Hills - Ballston Lake Central School District*, 25 PERB ¶ 3066 (1992).

⁴ See, e.g., *See, e.g., City of Poughkeepsie*, 15 PERB ¶ 3045 (1982), *confd sub nom. City of Poughkeepsie v Newman*, 95 AD2d 101, 16 PERB ¶ 7021 (3d Dep't 1983), *appeal dismissed*, 60 N.Y.2d 859, 16 PERB ¶ 7027 (1983), *lv denied* 62 NY2d 602 (1984); *State of New York (Department of Transportation)*, 27 PERB ¶ 3056 (1994).

⁵ See, *City of New Rochelle*, *supra* note 2. Indeed, an appropriate impact demand might have included a hiring preference for the existing CSEA-represented seasonal positions.

Moreover, on this record, the State had no bargaining obligation with CSEA concerning the assignment of the work previously performed by the full-time permanent CSEA represented employees to its existing pool of CSEA represented seasonal positions. Because the seasonals are in CSEA's bargaining unit, there was no transfer of unit work to nonunit personnel.⁶ And, because the charge does not allege that such assignments concerned work that is not inherently within the sphere of duties properly performed by the seasonals, no violation can be found by that assignment.⁷ Finally, there is no allegation that the workload of the seasonal employees has increased in any material way. Accordingly, it cannot be said that the State violated the Act by increasing the workload of the seasonals.⁸

Therefore, on this record, the State did not violate the Act by simply eliminating the full-time positions and assigning that work to its existing pool of seasonal employees. CSEA argues, however, that the State violated the Act because it offered the part-time seasonal positions to the former full-time employees.

Characterizing the State's conduct as the "conversion" of existing full-time positions into new part-time seasonal positions, CSEA argues that the State violated the Act, absent evidence that there was a corresponding reduction in the level of services; i.e., a reduction in the overall work performed. In support, CSEA relies on our decisions

⁶ Compare, *Manhasset Union Free Sch Dist.*, 41 PERB ¶ 3005 (2008) *confd sub nom. Manhasset Union Free Sch Dist v New York State Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remand*, 42 PERB ¶ 3016 (2009).

⁷ Compare, *City of Rochester*, 17 PERB ¶ 3082 (1984).

⁸ Compare *New Rochelle Housing Auth*, 21 PERB ¶ 3054 (1988).

in *County of Broome*⁹ and *County of Erie*.¹⁰

In *Broome*, the employer unilaterally eliminated existing full-time positions and replaced each with two new part-time positions that, together, worked the same number of hours as the full-time positions and performed the same duties. The Board held:

[A]lthough the County may have the right to curtail service and to layoff employees, and to make a determination to create part-time positions, *it does not follow that it has the right to merely substitute part-time employees for full-time employees where there is no change in the level or nature of services being provided. It is this substitution which is challenged by CSEA and which we find constitutes a mandatory subject of bargaining* (emphasis added).¹¹

Because there was no evidence of a reduction in services in that case, the Board held that the employer's conduct violated the Act.

In *Erie*, an employer eliminated existing vacant 40-hour full-time positions and hired new 39-hour part-time employees to perform the same work. As in *Broome*, there was no evidence of a reduction in services, but the newly created positions earned significantly less negotiated wages and benefits. The Board observed:

[T]he County is reducing the number of hours and benefits of unit employees by converting full-time positions to 39-hour [part-time] positions without it presenting any evidence of a specific determination that the same level of services can be completed in fewer hours or evidence that the County made a good faith reduction in services.¹²

The Board concluded that the employer's conduct amounted to a reduction in the hours

⁹ 22 PERB ¶ 3019 (1989).

¹⁰ 43 PERB ¶ 3016 (2010), *confd sub nom. County of Erie v New York State Pub Empl Relations Bd*, 81 AD3d 1313, 44 PERB ¶ 7002 (4th Dept 2011).

¹¹ *Broome, supra*, note 10 at p. 3052.

¹² *Erie, supra*, note 11, 43 PERB ¶ 3016 (2010), at p. 3063.

of work of the former full-time positions that violated the Act, because "hours" is a mandatorily negotiable term and condition of employment under § 201.4.

Here, CSEA argues that the State failed to establish that its action resulted in a reduction in the level of services, as in *Broome* and *Erie*.

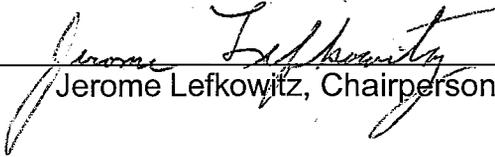
However, CSEA's argument is grounded on an incorrect premise; i.e., the State reduced the hours of work of the full-time permanent employees by "converting" their existing positions into new part-time seasonal positions. As the ALJ correctly held, the State reduced its workforce of full-time permanent employees and assigned their duties to its *existing* pool of part-time seasonal positions. It did not replace existing full-time positions with new part-time positions. That the State offered vacant existing seasonal positions to the laid off full-time employees does not show that it "converted" existing full-time positions into new part-time positions, as was the case in *Broome* and *Erie*.

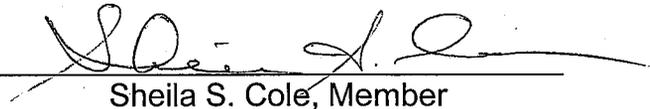
The flaw in CSEA's argument is that in *Broome* and *Erie*, existing identifiable full-time positions were replaced by new equally identifiable part-time positions. In other words, the record in each case established a direct relationship between the eliminated and new positions. Here, CSEA attempts to show that relationship by emphasizing the identity of the persons holding the seasonal positions. It contends that the necessary conversion is shown by the fact that many of the same employees who now hold the seasonal positions formerly held the eliminated full-time positions. However, the identity of the employees simply means that they accepted the State's offer of employment within the existing pool of seasonals. It does not establish that the State converted existing full-time positions into new part-time positions, as was the case in *Broome* and

*Erie.*¹³

Accordingly, the ALJ's decision is affirmed, CSEA's exceptions are denied, and the charge is hereby dismissed.

DATED: December 29, 2014
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

¹³ Absent evidence of a direct substitution or conversion of existing full-time positions into new part-time positions, it is immaterial whether the State reduced its level of services in association with its nonmandatory reduction in its full-time work force or its permissible assignment of the duties to existing CSEA represented part-time seasonal positions.

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

In the Matter of

CHARLES K. ASAMOAH,

Charging Party,

CASE NO. U-31327

- and -

TRANSPORT WORKERS UNION, LOCAL 100,

Respondent,

- and -

**MANHATTAN and BRONX SURFACE TRANSIT
OPERATING AUTHORITY,**

Employer.

FRANKLIN N. MEYER, ESQ., for Charging Party

EDWARD PICHARDO, ESQ., for Respondent

**MARTIN B. SCHNABEL, ESQ., GENERAL COUNSEL (MARIEL A.
THOMPSON of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an administrative law judge, finding that the Transport Workers Union, Local 100 (TWU) violated § 209-a.2(a) of the Public Employees' Fair Employment Act (Act) when, pursuant to an internal membership rule, it altered Charles Asamoah's seniority standing for the nonpayment of dues.¹ The ALJ dismissed the remainder of the charge.

EXCEPTIONS

The TWU excepts to the ALJ's finding that the TWU violated the Act by enacting an internal union rule altering the seniority of members in arrears in their dues, on the

¹ 47 PERB ¶ 4508 (2014).

grounds that we lack jurisdiction over internal union matters, and that the imposition of such a rule constitutes a *per se* violation of the Act, even in the absence of harm to the penalized member. The TWU further excepts to the ALJ's order directing the TWU to restore Asamoah to his proper placement on the seniority list, to not alter his seniority ranking for failure to pay union dues, and to post the ordered notice.

No response was filed to the exceptions.

FACTS

The relevant facts are stated in the ALJ's decision, and are repeated here only as necessary to address the exceptions before us. Asamoah has been an employee of The Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA) since 1991, and works at the Zerega facility in the Bronx as a chassis maintainer on the 2 p.m. to the 10 p.m. shift (mid-shift). It is undisputed that overtime work is identified by management and assigned by TWU vice chairperson Scott Steinberg, based upon seniority as recorded in a roster maintained by the TWU. Steinberg testified that, according to the TWU's rules, an employee whose dues payment is in arrears is considered to be "not a member in good standing," and, as such, is placed at the bottom of the seniority list for the purposes of being offered overtime and having vacation requests considered.² Asamoah and co-worker Steven Franciosi testified that a member not in good standing would not be afforded any overtime.

Steinberg testified that he distributes overtime after receiving a list of management's overtime needs and comparing that list to the TWU's list of employees, ordered by seniority, who are next to be offered the work with the nature of the work to be done and employee qualifications. Steinberg also refers to a list of employees who

² Transcript, at pp. 301-302, 321-322; 305-306.

have indicated an interest in overtime assignments, which is posted outside the TWU office at the facility each Thursday. The names of eligible employees are called over the loud speaker twice before Steinberg moves to the next name on the list. Employees who do not respond when called are "charged," that is treated as if they worked the overtime, so their names go to the bottom of the list. Employees are not charged if the employee was not called as not qualified for the assignment, is on leave or the assignment is scheduled prior to the employee's tour, or was declined as out-of-title work.

Steinberg testified that, although Asamoah was placed at the bottom of the seniority list for nonpayment of dues, he was still offered overtime work on several occasions from June through September 2011. Asamoah rejected the overtime work he was offered because it either was not the type of work he wanted to do or was available only on the day shift.

Steinberg maintained that he did not categorically deny Asamoah overtime work and that Asamoah never told him he felt he was being prevented from working overtime. Steinberg's testimony was consistent with a series of lists showing available overtime, available employees to work it, those who worked, and those who rejected it.³ The lists show that Asamoah was offered and refused overtime, or failed to respond to being called, on June 27, July 12, 20, August 1, 10, 11, 15, 16, 22, 24, and September 6. The documents also demonstrate that overtime was available on other dates when Asamoah's name was next on the list for the opportunity, but that he was neither offered the work nor charged with a refusal on the basis that he was not qualified for those

³ MaBSTOA's Exhibit 1 (A-C).

assignments.

DISCUSSION

In its exceptions, the TWU raises essentially two distinct issues. The TWU argues first that its rule or practice that members who are not in good standing for failure to pay dues be placed at the bottom of the seniority list which the TWU maintains for the employer is an internal union affair outside of our jurisdiction. Second, the TWU argues that even if the application of this rule or practice falls within our purview, the ALJ erred in finding the practice a *per se* violation, and not dismissing the charge in view of the evidence that Asamoah rejected proffered opportunities to work overtime.

We "have repeatedly refused to entertain complaints about internal union discipline or other internal affairs which neither affect an employee's terms and conditions of employment nor violate any fundamental purposes of the Act."⁴ However, we have also long acknowledged the

distinction between actions taken by an employee organization to discipline a member, and action taken against that member as an employee which would have an adverse effect upon the terms and conditions of his employment or upon the nature of the representation afforded him.⁵

Although the TWU did not include legal argument in its exceptions, it argued before the ALJ that our decisions in *Captains Endowment Association (Mallory)*⁶ and *Council of Supervisors and Administrators (Marston)*⁷ establish that "[r]equiring members

⁴ *Civil Service Empl Assn (Liebler)*, 17 PERB ¶ 3072, at 3110 (1984).

⁵ *Civil Service Empl Assn (Bogack)*, 9 PERB ¶ 3064, at 3110 (1976).

⁶ 15 PERB ¶ 3019 (1982).

⁷ 17 PERB ¶ 3002 (1984).

to pay back dues is not itself a violation of the Act.”⁸ In *Marston*, although we acknowledged that “the enforcement of *dues* obligations is an internal union matter that is not subject to” our jurisdiction, we also found that where such enforcement “conflicts with the clear provision of the Taylor Law,” an improper practice claim may be made out.⁹ Likewise, in *Mallory*, we found that an employee organization’s conditioning an employee’s return to membership on his paying a fine for his earlier resignation from membership constituted an improper penalty for the exercise of the right, protected by § 202 of the Act, to “refrain from joining, or participating in, any employee organization.” In both cases, we ordered the employee organization to cease from imposing unlawful conditions on the return to good standing membership. In sum, our holdings in *Mallory* and *Marston* establish that denial of good standing membership status can, under certain circumstances, constitute an improper practice subject to our jurisdiction.

Employee seniority is in itself a term and condition of employment, as are the procedures to offer overtime and select vacation.¹⁰ Here, the TWU determined on behalf of MaBSTOA the order in which employees would be offered opportunities to work overtime and the order in which they would select vacation, based on seniority. Therefore, the TWU’s reduction of Asamoah’s seniority affected his terms and conditions of employment, and conditioning his seniority on payment of union dues violated the Act. The lack of credible evidence to establish any pecuniary loss resulting

⁸ Post-Hearing Brief, at 6.

⁹ 17 PERB ¶ 3002, at 3004 (emphasis in original).

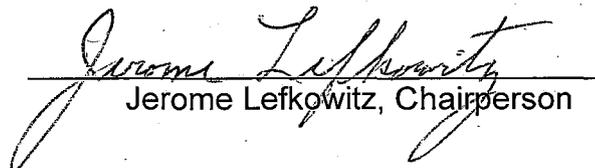
¹⁰ See, e.g., *City of New York v Patrolmen's Benev Assn of City of New York, Inc.*, 231 AD2d 422, 423, 29 PERB ¶ 7015 (1st Dept 1996) (seniority); *City of Peekskill*, 35 PERB ¶ 3016 (2002) (overtime assignment procedures); *City of Watertown*, 47 PERB ¶ 3015 (2014) (vacation selection procedures).

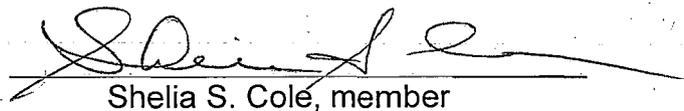
from the violation goes to the remedy to be ordered, and does not establish that no violation occurred.¹¹ Accordingly, we find that TWU violated §209-a.2 (a) of the Act when it altered Asamoah's seniority standing for nonpayment of dues.

IT IS, THEREFORE, ORDERED that the TWU:

1. forthwith restore Charles Asamoah to his proper placement on the seniority list;
2. not alter Charles Asamoah's placement on the seniority list for nonpayment of membership dues; and
3. sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: December 29, 2014
Albany, New York


Jerome Lefkowitz, Chairperson


Shelia S. Cole, member

¹¹ Because no cross-exceptions were filed, we leave undisturbed the ALJ's finding that there was no credible evidence that Asamoah was actually denied overtime work due to the TWU's action, and her determination that no monetary "make whole" remedy was appropriate on the record before her.

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 in the unit represented by the TWU that it will:

1. Forthwith restore Charles Asamoah to his proper placement on the seniority list; and
2. Not alter Charles Asamoah's placement on the seniority list for nonpayment of membership dues.

Dated

By

On behalf of the Transport Workers Union

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

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

In the Matter of

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

Charging Party,

CASE NO. U-30589

- and -

NEW YORK STATE THRUWAY AUTHORITY,

Respondent.

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

CARLOS MILLAN, DIRECTOR OF LABOR RELATIONS, for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Thruway Authority (Authority) to a decision of an administrative law judge (ALJ), finding that the Authority violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act).¹ The ALJ found that the Authority failed to satisfy its duty to negotiate with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) by unilaterally altering the long-standing procedures by which CSEA-represented employees accounted for their use of Authority-assigned vehicles when such usage included both work and commuting to and from work. In its view, the ALJ ordered the Authority to refrain from implementing the new work rule, to destroy any logs or records

¹ 47 PERB ¶ 4502 (2014).

created pursuant to it, and to expunge any reference in personnel files and/or any other employer files regarding any lack of compliance with the new work rule. The ALJ also ordered make whole relief, and the posting of a notice.

EXCEPTIONS

The Authority excepts to the ALJ's decision on four grounds. First, the Authority contends that the ALJ erred in finding that the change was not *de minimis*, and in not "giving greater weight to the Authority's "legitimate business need," that is, its need "to attempt to account for the use of public resources."²

Second, the Authority asserts that the ALJ erred in finding that, under the past practice, the employees did not provide their vehicle mile usage. Conceding that "in many instances, the calculated mile usage was not specifically reported," it nonetheless claims that "the facts underlying a mileage calculation have been provided."³ In view of this, the Authority contends that the imposition of the "minimal additional task of writing down the vehicle odometer reading" should not constitute an improper practice "when balanced against the legitimate managerial obligation to account for the public's equipment."⁴

Third, the Authority contends that the ALJ did not give sufficient weight to the employee's obligation to report the value of the benefit of an employer-provided car, and IRS advice that employees with such a benefit maintain a log distinguishing the personal from the professional use. The ALJ improperly disregarded the fact that the

² Exceptions, at p. 2.

³ *Id.*

⁴ Exceptions, at p. 5.

Authority's change in policy was for legitimate business purposes.

Finally, the Authority objects to the ALJ's ordering the expunging and destruction of already submitted monthly logs, which constitute a public record appropriately maintained for tax purposes.⁵

CSEA filed a response supporting the ALJ's decision, in particular noting that the third exception was not based on facts or legal contentions raised before the ALJ, and that it was therefore not properly before the Board.

FACTS

The relevant facts are not disputed, and are fully set forth in the ALJ's decision. In sum, the record establishes that, for approximately fifteen years, employees who were assigned an Authority-owned vehicle for commuting purposes were not required to provide any account of their usage of the vehicle other than a tax form that allowed an employee to estimate the value of the total economic benefit of their personal use of the vehicle. In 2010, the Authority unilaterally promulgated a new policy requiring that employees provide the employer with a monthly log recording each business and personal use of the vehicle, providing for each use the specific odometer readings at

⁵ The Authority also excepted "to each unfavorable ruling on evidence and to each and every part of the [ALJ's] Decision finding that [the Authority] has violated section 209-a.1 (d) of the Civil Service Law." Exceptions, at p. 1. We have previously held that "such blunderbuss exceptions do not comport with the Rules [of Procedure]," and do not preserve arguments not expressly made in the exceptions. *UFT (Pinkard)*, 47 PERB ¶¶ 3020, at 3061 (2014). Failure to raise specific claims with references to the ALJ's decisions results in the waiver of such claims. *Village of Endicott*, 47 PERB ¶ 3017, at 3052, n. 5 (2014) (citing § 213.2(b)(4) PERB Rules of Procedure; *City of Schenectady*, 46 PERB ¶ 3025, at 3056, n. 8 (2013), *confirmed sub nom. Matter of City of Schenectady v New York State Pub Empl Relations Bd*, Index No. 4090/2011 (Sup Ct Albany Co July 9, 2014); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confirmed sub nom. Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009)).

the start and end, the start and end times, and the destination and purpose.

The parties stipulated that, out of approximately 600 CSEA unit employees, between 100 and 130 are assigned Authority vehicles that they use for work and for commuting to and from work. Four witnesses for CSEA testified that, since approximately 1994, employees who were assigned a car for commuting purposes had not been required to record their specific mileage and vehicle use. The only record required of their vehicle usage was an annual tax form entitled "Statement of Taxable Use of Authority/Corporation Provided Vehicles."⁶ On this form, employees were given an option, called "Method A," which consisted of simply multiplying the "number of commuting days" by \$3.00 per day for a "total commuting value."⁷ Pursuant to the form, this method is allowed if the "daily number of round trip miles (rounded to the nearest mile) commuting in an Authority/Corporation vehicle to your official workstation is equal to or greater than 6 miles" for the annual reporting period.⁸ The evidence before the ALJ established that the employees were not required to record the mileage of the vehicle from their various departures and arrivals, nor to record their times of departure and arrival.⁹

In the fall of 2010, the Authority required employees to submit a revised vehicle usage form with more detailed information, pursuant to Administrative Services Bulletin

⁶ Transcript, at p. 23; 30; Joint Exhibit 1.

⁷ *Id.*

⁸ Joint Exhibit 1.

⁹ Transcript, at p. 24.

2010-6, "Vehicle Usage and Mileage Logging."¹⁰ Specifically, employees with Authority-assigned vehicles were now required to submit a monthly log recording daily business use, as well as personal or incidental use, consisting of date, destination and purpose, corresponding odometer readings, and trip start/return times.¹¹

The Authority produced evidence that toll plaza managers, who are in CSEA's unit, fill out a daily "tour of duty report," which documents "what they're doing for the day, when they are going to the toll stations and what they did."¹² Toll plaza managers are assigned vehicles for work purposes. They pick up their vehicles at their first assigned work station, and return them to the same location at the end of the day. Toll plaza managers are not assigned Authority vehicles for commuting purposes. The "tour of duty" reports do not list specific mileage.

The Authority also adduced evidence that all Authority supervisors fill out a daily "labor card," or time card, upon which they record their activities, with corresponding codes and hours spent on each activity.¹³ The data from the labor cards and the "daily work plan," which the maintenance supervisors produce, are then compiled into the "Maintenance Management System Daily Work Report."¹⁴ These reports, also compiled by maintenance supervisors, identify employees and their corresponding

¹⁰ Transcript, at p. 25; Joint Exhibit 2.

¹¹ Joint Exhibit 2.

¹² Transcript, at p. 47; Respondent's Exhibit 7.

¹³ Transcript, at p. 53; Respondent's Exhibit 2.

¹⁴ Respondent's Exhibit 8.

activities, with number of hours spent on each activity.¹⁵ However, these reports do not indicate use of Authority vehicles or mileage.

DISCUSSION

In *Chenango Forks Central School District*, we reaffirmed what we described as:

our most authoritative statement regarding the applicable test for the establishment of a binding past practice: the practice was unequivocal and was 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.¹⁶

Here, the evidence established that the practice was unequivocal and continuously in effect such that employees who were assigned cars for commutation purposes had a reasonable expectation that the practice would continue. No exception was made by the Authority to this finding. Rather, the Authority contends that under the circumstances presented we should find the subject of the change—the reporting procedures—to be non-mandatory or, in the alternative, *de minimis*. We find neither argument persuasive.

Over twenty years ago, we noted that “it is well settled that the unilateral delegation to unit employees of the responsibility for employer recordkeeping violates

¹⁵ *Id.*

¹⁶ *Chenango Forks Cent Sch Dist*, 40 PERB ¶¶3012 (2007), *remanded*, 42 PERB ¶¶4527 (2009), *affd*, 43 PERB ¶¶3017 (2010), *confirmed sub nom. Chenango Forks Cent Sch Dist v New York State Pub Emp Rel Bd*, 95 AD3d 1479, 45 PERB ¶¶7006 (3d Dept 2012), *affd*, 21 NY3d 255, 46 PERB ¶¶7008 (2013) (discussing and quoting *County of Nassau*, 24 PERB ¶¶ 3029, at 3058 (1991); quotation and editing marks omitted).

the Act.”¹⁷ Such remains the case today.¹⁸ The Authority’s primary contention that the subject should be deemed non-mandatory is that the “the legitimate managerial obligation to account for the public’s equipment” should be deemed non-mandatory when balanced against the “minimal additional task of writing down the vehicle odometer reading.” However, this claim incorrectly assumes that because that management’s goal is motivated by a legitimate business reason, the subject is somehow removed from the duty under the Act to negotiate “over all ‘terms and conditions of employment.’”¹⁹ Rather, while the “desire to save money or increase managerial efficiency are legitimate business motives,” such motives “are not relevant to the issue of negotiability.”²⁰

¹⁷ *City of Schenectady*, 26 PERB ¶ 3025, at 3041 (1993) (citing *Newburgh Enlarged City School Dist*, 20 PERB ¶ 3053 (1987); *Spencerport Cent School Dist*, 16 PERB ¶ 3074 (1983); *BOCES I, Suffolk County*, 15 PERB ¶ 4622 (1982); *County of Nassau*, 13 PERB ¶ 4612 (1980), *exceptions dismissed*, 14 PERB ¶ 3014 (1981), *affd*, *County of Nassau v PERB*, 14 PERB ¶ 7023 (Sup Ct Nassau Co 1981); *Hampton Bays School Dist.*, 10 PERB ¶ 4596 (1977)).

¹⁸ See, e.g., *City of Syracuse*, 44 PERB ¶ 3017, at 3065-3066 (2011).

¹⁹ *New York City Transit Authority v Pub Empl Relations Bd*, 19 NY3d 876, 879 (rejecting claim that Transit Authority’s implementation of more stringent dual employment standards to ensure employees were receiving adequate rest periods standards was mission-related and, therefore, not subject to collective bargaining); see also *City of New York v Bd of Collective Bargaining*, 1107 AD3d 612, 612-613 (1st Dept 2013) (upholding administrative finding that employer’s unilateral requirement of a doctor’s “fit for duty” statement following an employee’s absence from service on ferry for three or more days violated duty to negotiate despite claim that change was motivated to enhance safety).

²⁰ *City of Poughkeepsie v Newman*, 95 AD2d 101, 16 PERB ¶ 7021 (3d Dept), *app dismissed*, 60 NY2d 859, 16 PERB ¶ 7027 (1983), *leave denied*, 62 NY2d 608, 17 PERB ¶ 7009 (1984) (negotiability of transfer of unit work); see also *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3021 (2008), *affd as modified as to remedy*, 61 AD2d 1231, 42 PERB ¶ 7004 (3d Dept 2009) (history on remand omitted) (same).

In *Newburgh Enlarged City School District*, the “change from once-a-day recording of attendance to the recording of arrival and departure, and, for those employees affected, arrival and departure at lunch time” was found to be a mandatory subject.²¹ In so finding, we acknowledged that, as a function of the employer’s “accountability for the expenditure of public funds and for the acts of its employees,” the maintenance of a record of attendance and presence of its employees “is beyond the scope of mandatory negotiations.”²² We also made clear that “[a]n employer may not, however, without agreement of the employees’ negotiating representative, require its employees to participate in the recording process.”²³ We also rejected the employer’s claim that “the interests of the employer warrant permitting it to impose unilaterally additional recordkeeping responsibilities because there is already some employee participation in the recording process.”²⁴ Following *Newburgh*, and our decisions to the same effect, we find that the subject is mandatory.²⁵

²¹ *Newburgh Enlarged City Sch Dist*, *supra* note 17, 20 PERB ¶¶ 3053, at 3116-3117.

²² *Id.*, at 3117.

²³ *Id.*

²⁴ *Id.*; see also *City of Syracuse*, *supra* note 18, 44 PERB ¶¶ 3107, at 3066; *City of Schenectady*, *supra* note 17, 26 PERB ¶¶ 3025, at 3042.

²⁵ The Authority’s argument that the value of the personal use of an Authority vehicle must be reported by the employees for tax purposes, and Internal Revenue Service guidance recommends the keeping of a log, is not properly before us, as our review is limited by § 213.2 of the Rules to the record before the ALJ. *Rochester Teachers Assn (Hirsch)*, 46 PERB ¶¶ 3035 (2013). Moreover, even if properly before us, the argument is unavailing. The negotiability of a unilateral imposition by the employer of a recordkeeping requirement upon employees for the use and benefit of *the employer* is entirely separate from the desirability of the employees maintaining such a record for their own use.

Nor do we find the change to be *de minimis*. The fact that the employer by its own efforts could extrapolate a rough calculation of the information sought by cross-referencing and comparing the data provided by the employees in different reports does not render the new requirement *de minimis*. By requiring employees to provide additional information by taking new steps not previously required, the Authority has made a "substantial change to their terms and conditions of employment."²⁶

Finally, we deny the Authority's exception to the ALJ's proposed remedial order. Pursuant to § 205.5 (d) of the Act, we have "broad remedial authority to order make-whole relief including ordering a party to cease and desist from engaging in an improper practice, and to order such affirmative relief that will effectuate the policies of the Act."²⁷

Here, we find that the destruction of any logs submitted pursuant to Administrative Services Bulletin 2010-6 by employees who are assigned Authority vehicles for work and commutation purposes is necessary to restore the *status quo ante*, and thereby provide full relief.²⁸

Based upon the foregoing, we find that the ALJ properly found on the record before her that the Authority violated § 209-a.1 (d) of the Act when it unilaterally required unit employees assigned Authority vehicles for both work and commuting purposes to submit the new monthly log pursuant to Administrative Services Bulletin 2010-6, "Vehicle Usage and Mileage Logging."

²⁶ *City of Syracuse*, supra note 18, 44 PERB ¶ 3017, at 3066; *Newburgh*, supra note 17, 20 PERB ¶ 3053, at 3117; *Spencerport Central Sch Dist*, supra note 17, 16 PERB ¶ 3074, at 3124-3125 (1983).

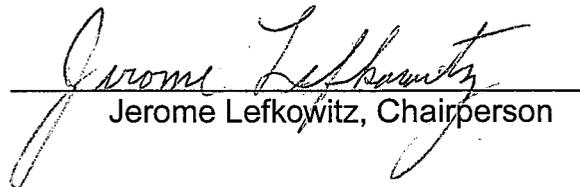
²⁷ *City of Syracuse*, supra note 18, at 3066.

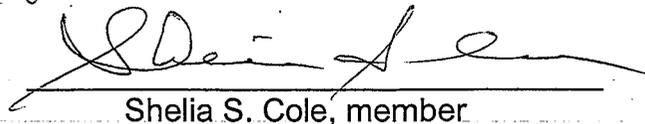
²⁸ See, e.g., *City University of New York*, 38 PERB ¶ 3011 (2005).

Accordingly, the Authority is hereby ordered to:

1. Not enforce or implement Administrative Services Bulletin 2010-6, "Vehicle Usage and Mileage Logging," as to unit employees assigned Authority vehicles for purposes of work and commutation;
2. Immediately remove and destroy all monthly logs previously submitted by such unit employees pursuant to Administrative Services Bulletin 2010-6, "Vehicle Usage and Mileage Logging";
3. Expunge from such unit employees' personnel files and/or any other employer files any reference to or reprimand relating to noncompliance with the "Vehicle Usage and Mileage Logging" requirement;
4. Make such unit employees whole for wages and benefits lost, if any, as a result of the "Vehicle Usage and Mileage Logging" requirement, with interest at the maximum legal rate; and
5. Sign and post the attached notice at all locations used to communicate with unit employees, both physically and electronically.

DATED: December 29, 2014
Albany, New York


Jerome Lefkowitz, Chairperson


Shelia S. Cole, member

take out

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 New York State Thruway Authority (Authority) in the bargaining unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the Authority will:

1. Not enforce or implement Administrative Services Bulletin 2010-6, "Vehicle Usage and Mileage Logging," as to unit employees assigned Authority vehicles for both work and commutation purposes ("affected unit employees");
2. Immediately remove and destroy all monthly logs previously submitted by affected unit employees pursuant to Administrative Services Bulletin 2010-6, "Vehicle Usage and Mileage Logging";
3. Expunge from affected unit employees' personnel files and/or any other employer files any reference to or reprimand relating to noncompliance with the "Vehicle Usage and Mileage Logging" requirement; and
4. Make affected unit employees whole for wages and benefits lost, if any, as a result of the "Vehicle Usage and Mileage Logging" requirement, with interest at the maximum legal rate.

Dated

By

on behalf of NYS Thruway Authority

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

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

In the Matter of

**TOWN OF ULSTER POLICEMEN'S
BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

-and-

CASE NO. U-32585

TOWN OF ULSTER,

Respondent.

MARILYN BERSON, ESQ., for Charging Party

**ROEMER, WALLENS, GOLD & MINEAUX (ANNA E. REMET of counsel), for
Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Ulster (Town) and cross-exceptions filed by the Town of Ulster Policemen's Benevolent Association, Inc. (PBA) to a decision of an administrative law judge (ALJ), finding that the Town violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by unilaterally recording the disciplinary interview of a civilian dispatcher represented by the PBA.¹

The ALJ ordered that the Town rescind the directive that the disciplinary interview of the dispatcher be recorded and any subsequent directives that interviews of unit members be recorded. The ALJ further ordered that any references to such interviews be

¹ 47 PERB ¶ 4504 (2014).

expunged from the Town's records, and that any affected unit employees be made whole, and a notice be posted.

EXCEPTIONS

The Town excepts to the ALJ's decision on four grounds. First, it contends that the ALJ erred in refusing to distinguish between the "formal" and "informal" disciplinary stages, which, under the parties' collective bargaining agreement and the Town's General Operations Manual, are distinct stages carrying separate penalty provisions. Second, the Town asserts that the ALJ erred in declining to find that police discipline is a prohibited subject of negotiations in the absence of a local law enacted pursuant to Town Law § 155. Third, the Town argues that the ALJ erred in finding that taping of the disciplinary interview constituted a unilateral change, as the taping did not affect the delivery of services by the dispatcher, or require increased participation by her. Finally, the Town contends that the ALJ erred in awarding rescission, expungement, and make whole relief, as no improper practice could be found on the record before her.

In its cross-exceptions, the PBA asserts that the ALJ erred in finding that the record did not indicate whether the dispatcher was a civilian. The PBA contends that the record established that she was a civilian, and, therefore, the public policy prohibition of negotiating police discipline found within Town Law § 155 could not apply to her. The PBA maintains that the ALJ's decision was otherwise correctly reasoned.

In response to the cross-exceptions, the Town argues that the dispatcher's status as a civilian or uniformed employee is irrelevant as both fit within the term "members of such police department" used in the Town Law. However, the Town acknowledged stipulating in another pending improper practice proceeding "that dispatchers are civilian

employees of the Town's Police Department" and that "a review of the Record in the instant proceeding illustrates that [the dispatcher] is a civilian employee."²

FACTS

On February 13, 2013, Chief of Police Anthony Cruise notified Dispatcher Stacey Hommel that a week later, on February 20, she would be interviewed on a matter involving the potential for discipline. On February 20, 2013, Hommel appeared as ordered for the interview, accompanied by PBA-provided counsel appearing as its and Hommel's representative. Chief Cruise appeared at the beginning of the interview, informed Hommel that the interview would be tape-recorded and directed her to submit to the recorded disciplinary interview. Over her counsel's objection, Hommel complied. The Town's counsel then conducted the interview.³

It is undisputed that prior to the recording of Hommel's interview, the Town had never recorded a PBA member's disciplinary interview. The parties' collective bargaining agreement describes formal and informal disciplinary stages within the Police Department.⁴ Chief Cruise testified that in the 20 years he had been with the Town's Police Department, there had never been an interview at the "formal stage" of discipline.

In May 2013, approximately two months after the Association filed its charge in this case, the Town enacted Local Law No. 2, which codified the Town's procedures for

² Response to Cross-Exceptions, at 7, n. 9.

³ Respondent's Exhibit 3.

⁴ Respondent's Exhibit 1. The Town presented testimony on the difference between them.

police discipline.⁵ Cruise testified that Local Law No. 2 did not change the investigative procedures in effect prior to its enactment. The new local law does not explicitly address the recording of disciplinary interviews.

DISCUSSION

We affirm the ALJ's ultimate disposition of the case, but for reasons different from those upon which she relied. As a threshold matter, we need not resolve the exceptions to the ALJ's conclusion that "[i]n the absence of a local law enacted pursuant to Town Law §155 prior to Hommel's interview, police discipline remained a mandatory subject of bargaining."⁶ In *Town of Walkkill v Civil Service Employees Association, Inc.*, the Court of Appeals stated that:

Town Law § 155, a general law enacted prior to Civil Service Law §§ 75 and 76, commits to the Town "the power and authority to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police department." Accordingly, the subject of police discipline resides with the Town Board and is a prohibited subject of collective bargaining between the Town and Walkkill PBA.⁷

While the ALJ's reasoning is based on a very real factual distinction between the instant case and *Walkkill*, the language employed by the Court is, at a minimum, in tension with her finding on this point. However, we need not determine authoritatively whether the ALJ erred on this point, as, even assuming the Town is correct in this exception, we nonetheless find that the prohibition against bargaining over police

⁵ Respondent's Exhibit 8.

⁶ 47 PERB ¶ 4504, at 4513.

⁷ 19 NY3d 1066, 1069 (2012).

discipline in Town Law § 155 does not encompass civilian employees, such as Hommel.

The first section of Article Ten of the Town Law, Town Law § 150.1, which provides for the establishment of town police departments, authorizes the appointment of “a chief of police and such officers and patrolmen as may be needed...”⁸ Similarly, § 151 states that “no person shall be eligible for appointment or reappointment to such police department, nor continue as a member thereof” who is not a citizen, not literate in English, and not a resident of New York State and of the county wherein the employing town is situated. Section 151 explicitly refers back to § 150 in its use of “such police department,” and therefore the power of appointment at issue is that defined in § 150, and the scope of “members” is limited to those appointed pursuant to § 150, that is, to “officers and patrolmen.”⁹

Section 152 further narrows the scope of the term “members” to uniformed employees, by allowing for “promotions of officers and members of such police departments on the basis of seniority, meritorious police service and superior capacity as shown by competitive examination.” Section 152 also provides that “[i]ndividual acts of personal bravery may be treated as an element of meritorious police service,” and that the town board “shall keep a complete service record of each member of such police department” for transmittal to the appropriate civil service commission prior to the examination. As used in this section, the phrase “member of such police department”

⁸ Section 150.2 also provides for the creation of police commissioners.

⁹ Statutes § 97; see *Albany Law School v New York State Office of Mental Retardation and Developmental Disabilities*, 19 N.Y.3d 106, 120 (2012).

clearly denotes police officers appointed pursuant to § 150.¹⁰

Against this backdrop, the use in § 155 of the phrase “any member or members of such police department” must be understood to be limited to “officers and patrolmen”—that is, to police officers appointed pursuant to Town Law § 150. This understanding is, in fact, borne out by the legislative history of § 155.

In 1934, a statute amending § 155 to replace the word “punishment” with “conviction” described its purpose as amending the Town Law “in relation to discipline and charges against policemen,” a usage consistent with the memoranda in support of the amendment.¹¹ Two of the memoranda in support, one submitted on behalf of a police union, and another on behalf of the Association of Towns, refer to the employees at issue interchangeably as “a member of the Police Department” and as a “policeman.”¹²

Likewise, when § 155 was again amended in 1935 to require the town board to prefer charges within 60 days of becoming aware of the alleged misconduct, the amending bill was captioned as a law “in relation to discipline and charges against town

¹⁰ While not dispositive, we note that the usage in the Act is consistent with these statutes. The term “members” of police departments, as used in §§ 209.2 and 4 to delineate the set of employees who are entitled to invoke compulsory interest arbitration, has been found to exclude civilian employees. See *Village of Southampton*, 16 PERB ¶¶ 3048, 3074 *affd sub nom Southampton Village Police Radio Operators Assn, Inc. v State of New York Pub Empl Relations Bd* 16 PERB ¶¶ 7026, 7037-7038 (Sup Ct Alb Co 1983) (radio operators not “officers or members” of village police force, and thus not entitled to invoke interest arbitration procedures under the Act); *Village of Potsdam*, 16 PERB ¶¶ 3032, 3050 (1983) (same).

¹¹ 1934 NY Laws Ch 664.

¹² Memorandum of Support, Policeman’s Benevolent Assn of Westchester Co., Bill Jacket, L 1934, ch 664, at 3; Memorandum of Support, Towns Assn, Bill Jacket, L 1934, ch 664, at 6.

policemen."¹³ Once again, all the memoranda in support of the bill use the term "member" to denote "policemen" or "police officers."¹⁴ Nothing in the text of the bill or in the supporting memoranda suggests a broader application.¹⁵

Indeed, nothing in Article Ten explicitly contemplates the employment of civilian employees, although an informal Attorney General opinion has concluded that "a town police department may employ as dispatchers persons who are not police officers of the police department."¹⁶ In an earlier opinion, the Attorney General, without precluding "the employment of non-police personnel for routine duties," stated that "a town may not employ non-members of its police department to perform desk duty with the police department."¹⁷ The opinion used the term "members" to denote uniformed employees

¹³ 1935 NY Laws Ch 889.

¹⁴ Memorandum of Support, Towns Assn, Bill Jacket, L 1935, ch 889, at 3; Memorandum of Support, Policeman's Benevolent Assn of Westchester Co., Bill Jacket, L 1934, ch 889, at 5-6; Memorandum of Support, NYS Dept of Civil Service, Bill Jacket, L 1934, ch 889, at 7.

¹⁵ Similarly, the use of the term "members" in the substantially similar provisions governing town police departments in counties with a population of 700,000-1,000,000 (Unconsolidated Laws, ch. 11) and 160,000-190,000 (*Id.*, ch 12), is limited to uniformed personnel. See, e.g., § 5812 ("such other officers and such number of policemen" described as "such members of such police force," who, upon appointment are deemed to "be peace officers and . . . have all the powers and be subject to all the liabilities of town constables and peace officers. . . ." The canon of construction that, "[e]ven if the words occur in different statutes, if the acts are similar in intent and character, the same meaning may be attached to them," the term "is understood as having been used in the same sense," applies to reinforce the specific meaning of the term. Statutes § 236; see also *Albany Law School v New York State Office of Mental Retardation and Developmental Disabilities*, 19 N.Y.3d at 120-121.

¹⁶ 1985 N.Y. Op. Atty. Gen. (Inf.) 138.

¹⁷ 1970 N.Y. Op. Atty Gen. (Inf.) 120.

and "civilian employees" as excluded from that term.¹⁸

Against these arguments, the Town has adduced only a dictionary definition of member, as "a distinct part of a whole" and a "person belonging to a group or organization."¹⁹ While resort to dictionaries "may be useful as guide posts in determining the sense with which a word was used, where the word or term is not defined in the statute and legislative history throws no light on the question of legislative intent,"²⁰ such is not the case here. The references in subsequent sections to the specific employees comprised within Article Ten of the Town Law in § 150, the explicit parallel provisions in substantially similar or related statutes, and the legislative history, as well as the consistent construction of the term over time, do not create the kind of record in which resort to a dictionary is warranted. Rather, these factors establish that "member of a police department" is a term of art with a specific meaning that excludes civilian employees.

Our construction is informed by and consistent with the Court of Appeals' opinion in *Town of Wallkill*, in which the Court had before it the question of whether two police officers, clearly "members of such police department," were precluded from asserting collectively bargained disciplinary rights. The Court found that they were, because "the subject of police discipline resides with the Town Board."²¹ Throughout the Court's

¹⁸ *Id.*

¹⁹ Response to Cross-Exceptions at 8, quoting *Webster's II New Riverside Dictionary, Revised Ed.* (1996).

²⁰ Statutes § 236.

²¹ 19 NY3d at 1069.

decisions in this regard, it has only found "police discipline" to be precluded where "the legislation discloses a legislative intent and public policy to leave the disciplining of *police officers* to the discretion of the Police Commissioner," and has, in so doing, "emphasized the quasi-military nature of a police force."²² Neither the legislative intent, nor the special nature of police officers' work at issue in those cases is at issue here, and therefore we find that the public policy exclusion of police discipline from collective bargaining does not apply to civilian employees working in town police departments in non-police officer functions.

Having found that the subject of taping the interview was not prohibited, we now consider whether it is mandatory as to civilian employees working in town police officers and performing non-police officer functions. We find that the taping of the interview was a change in procedure, and was mandatorily bargainable. There is no dispute that the disciplinary interview of Hommel was the first such interview to be recorded, and so no claim can be made that it did not constitute a unilateral change. Rather, the Town contends that the taping did not affect terms and conditions of employment relating to a mandatory subject of bargaining. We do not find this contention persuasive.

We have long held that "employer procedures requiring an employee to participate in an investigatory meeting from which the employee is subject to discipline are unquestionably mandatory subjects of negotiation."²³ The negotiability

²² *Patrolmen's Benevolent Assn of the City of NY, Inc. v NYS Pub Empl Relation Bd*, 6 NY3d 563, 575-576 (2006) (emphasis added).

²³ *Patchogue-Medford Union Free Sch Dist*, 30 PERB ¶ 3041, at 3094 (1997) (citing *Auburn Police Local 195 v Helsby*, 46 NY2d 1034, 12 PERB ¶ 7006 (1979)); see also *Amherst Police Club*, 12 PERB ¶ 3071, at 3127-3128 (1979); *City of Schenectady*, 22 PERB ¶ 3018 (1989) (*affg*, 21 PERB ¶ 4605 (1988)).

of such procedures has been found specifically to encompass the demands concerning recording "of any interrogation" of an employee for a disciplinary violation, "either mechanically or by a stenographer."²⁴

The Town contends that the recording of the interview did not constitute a change, or was *de minimis*, as the equivalent of an employer representative taking notes. This argument does not comport with our holding in *Amherst Police Club*, or in *Nanuet Union Free School District*, in which we explained that audio or video recording implicates employee interests in a manner that, among other effects, effectively increases their participation in the creation of the record.²⁵

Based upon the foregoing, we find that the ALJ properly found on the record before her that the Town violated § 209-a.1 (d) of the Act by unilaterally recording the disciplinary interviews of a civilian dispatcher represented by the PBA.

Accordingly, the Town is hereby ordered to:

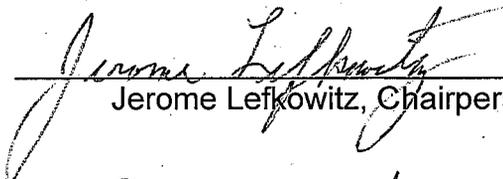
1. Rescind forthwith the directive that the February 20, 2013 disciplinary interview of Stacey Hommel be tape-recorded and, to the extent that said directive applied to any subsequent disciplinary interviews of unit employees, that such directive be rescinded as to those interviews also;
2. Remove from all records within the Town's control, references to and/or evidence of the tape-recording of such interviews;

²⁴ *Amherst Police Club*, 12 PERB ¶ 3071 at 3127. This conclusion is consistent with our holding in *Town of Orangetown*, 40 PERB ¶ 3008, *affd sub nom Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007), that video or audio taping of a medical examination pursuant to General Municipal Law § 207-c was a mandatory subject of bargaining.

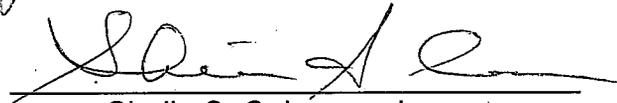
²⁵ 45 PERB ¶ 3007, at 3013 (2012).

3. Make whole Hommel and any other unit employees affected by the directive for any loss of wages or benefits caused by the use of said tape-recordings, with interest at the maximum legal rate; and
4. Post notice in the form attached at all locations, physical and electronic, used by the Town to communicate with unit employees.

DATED: December 29, 2014
Albany, New York



Jerome Lefkowitz, Chairperson



Shelia 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 Town of Ulster (Town) in the bargaining unit represented by the Town of Ulster Policemen's Benevolent Association, Inc. (PBA) that the Town will:

1. Rescind the directive that the February 20, 2013 disciplinary interview of Stacey Hommel be tape-recorded and, to the extent that said directive applied to any subsequent disciplinary interviews of unit employees, that such directive will be rescinded as to those interviews also;
2. Immediately remove and destroy all references to and/or evidence of the tape-recording of such interviews from all records within the Town's control;
3. Make whole Hommel and any other unit employees affected by the directive for any loss of wages or benefits caused by the use of said tape-recordings, with interest at the maximum legal rate.

Dated

By
on behalf of Town of Ulster

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

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

In the Matter of

**ORCHARD PARK SCHOOL RELATED
PROFESSIONALS ASSOCIATION, NYSUT, AFT/NEA,**

Charging Party,

CASE NO. U-32864

- and -

ORCHARD PARK CENTRAL SCHOOL DISTRICT,

Respondent.

ELIZABETH VIGNAUX, for Charging Party

**HODGSON RUSS, LLP (JEFFREY F. SWIATEK of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Orchard Park School Related Professionals Association, NYSUT, AFT-NEA (Association) to a decision by an administrative law judge (ALJ).¹ In her decision, the ALJ dismissed the Association's claim that the Orchard Park Central School District (District) violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally altered the scheduled workweek of custodial employees. The ALJ found that the District satisfied its duty to bargain the change, and, accordingly, she dismissed the charge.

EXCEPTIONS

The Association excepts to the ALJ's finding that § 2.1 of the parties' collective bargaining agreement (Agreement) establishes with reasonable clarity that the District satisfied its duty to bargain the changes in the custodial employees' schedule. The

¹ 47 PERB ¶ 4533 (2014).

Association contends that the overly broad language of § 2:1 is far too general to be read as being reasonably clear on the specific term of the employees' workweek. Accordingly, the Association asserts that the ALJ erred in dismissing the charge.

The District filed a response supporting the ALJ's decision.

FACTS

The relevant facts are undisputed. Custodial employees, including laborers represented by the Association, have historically worked a Monday through Friday schedule. Any work performed on Saturday or Sunday would be assigned as needed, and paid as overtime. On April 25, 2013, the District's director of buildings and grounds informed a laborer that his scheduled workweek would, from that time on, be Tuesday through Saturday.

The Agreement, which covers the term July 1, 2010 through June 30, 2013, does not contain any language pertaining to the establishment or alteration of employees' schedules.

As relied upon by the parties, the Agreement provides:

Article 1. PERTAINING TO THIS AGREEMENT

Section 1.3 It is the intent of the parties that a term or condition of employment expressed in a provision of this Agreement shall prevail unless there is an applicable constitution or statute which explicitly and definitively prohibits agreement on such a provision. If any provision of this Agreement shall be finally determined by a court of competent jurisdiction to be explicitly and definitively prohibited by an applicable constitution or statute, then such provision shall not be deemed valid and subsisting except to the extent permitted by law, but all other provisions will continue in full force and effect.

Section 1.4 This Agreement is the complete record of all commitments between the parties. No other commitment is binding between the parties unless it is: (a) dated after the execution date of this Agreement and (b) is signed by duly authorized representatives of each party.

Section 1.5 This Agreement may not be waived or amended by implication or by any means other than a written and dated amendment signed by duly authorized representatives of each party.

Article 2. MANAGEMENT'S RIGHTS

Section 2.1 Agreement Restrictions – Except as otherwise specifically set forth in this Agreement, the District, Board of Education, Superintendent, and his/her designated supervisory officials shall be solely responsible for the operation and control of the District and its personnel and to take whatever action is necessary to carry out the mission of the school district providing it does not conflict with or violate the term of this Agreement. All terms and conditions of employment not covered by this Agreement shall continue to be subject to the discretion and control of the District.

Section 2.2 Determination of Mission – It is the right of the District to determine the standards or service to be offered to the students and the community. The District has the sole right to determine its mission, purposes, objectives and policies. It has the right and responsibility to determine the content of curriculum, the programs and methods and means and number of personnel to conduct the programs and provide support services.

Section 2.3 Reserved Rights – Selection, recruitment, hiring, appraisal, evaluation, training, retention, discipline, promotion, assignment, and transfer as well as the direction, deployment and utilization of staff are rights reserved to management.

DISCUSSION

Contrary to the Association's claims, the District pleaded the affirmative defenses of both duty satisfaction and waiver.² The ALJ found the former defense to have been established, and therefore did not address the latter. We affirm her dismissal of the charge, but for different reasons.

Although they are sometimes confused with one another, the affirmative defenses of waiver and duty satisfaction are analytically distinct:

² Answer, ¶¶ 20-30.

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.³

In order to successfully plead the "distinct affirmative defense of duty satisfaction, the burden rests with the respondent to plead and prove through negotiated terms that are reasonably clear that it satisfied its duty to negotiate a particular subject."⁴

Duty satisfaction occurs when a specific subject has been negotiated to fruition and may be established by contractual terms that either expressly or implicitly demonstrate that the parties had reached accord on that specific subject. In *State of New York (Racing and Wagering Board)*, we applied "standard principles of contractual interpretation" to find that the agreement demonstrated that the parties had reached an accord as to the extent to which the State Budget Director's statutory discretion over wages would be constrained under specific circumstances, with the clear implication that absent those circumstances, the Budget Director could set the wages as he

³ *Dutchess Cmty College*, 46 PERB ¶ 3009, 3016 (2013) (quoting *County of Nassau*, 31 PERB ¶ 3064, 3142 (1998)).

⁴ *Id.*, citing *Shelter Island Union Free Sch Dist*, 45 PERB ¶ 3032 (2012); *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶ 3023 (2009); *County of Greene and Sheriff of Greene County*, 42 PERB ¶ 3031 (2009); *NYCTA*, 41 PERB ¶ 3014 (2008).

deemed appropriate.⁵

In contrast to duty satisfaction, waiver involves either the express relinquishment of specified rights or the use of language that establishes “a clear, intentional, and unmistakable relinquishment of the right to negotiate the particular subject at issue”⁶ by relieving the other party of the duty to negotiate on that subject.

In short, duty satisfaction is found when the duty to negotiate the specific subject at issue has been in fact satisfied, while waiver relieves the beneficiary of the specified statutory duties, including the duty to negotiate under the Taylor Law.⁷

We agree with the Association that the language at issue here does not prove through negotiated terms that are reasonably clear that the District satisfied its duty to negotiate the particular subject of employee work schedules. In the absence of any language in the Agreement relating to schedules, or any evidence at all that scheduling was discussed in the negotiation process, we cannot find that the record before us establishes the defense of duty satisfaction on the subject.⁸ Rather, we find that the provisions relied upon establish a knowing and intentional relinquishment of the right to

⁵ 45 PERB ¶ 3041 (2012), *affd sub nom Kent v. Lefkowitz*, 46 PERB ¶ 7006 (Sup Ct Albany County 2013), *revd other grounds*, 119 A.D.3d 1208, 47 PERB 7003 (3d Dept 2013). *Compare Buff v Village of Manlius*, 115 AD3d 1156 (4th Dept 2014) (represented employees allowed to sue employer directly when the contract “either expressly allows such suits or implicitly does so by excluding the dispute at issue from, or not covering it within, the ambit of the contractual dispute resolution procedures”).

⁶ *Dutchess Cmty College*, *supra* n. 3, 46 PERB ¶ 3009, at 3016.

⁷ *City of Cohoes*, 31 PERB ¶ 3020, 3043-3044 (1998), *affd sub nom. Uniformed Firefighters of Cohoes v Cuevas*, 32 PERB ¶ 7026 (Sup Ct Albany County 1999), *affd* 276 AD2d 184, 33 PERB ¶ 7019 (3d Dept 2000), *leave to appeal denied* 96 NY2d 711, 34 PERB ¶ 7018 (2001).

⁸ See *County of Erie*, 43 PERB ¶ 3016, at 3064 (2010) (citing *State of New York-Unified Court System*, 28 PERB ¶ 3014, at 3039 (1995)).

negotiate over a specified set of otherwise mandatory subjects for the duration of the Agreement. In other words, the Agreement's provisions establish that the Association waived its right to negotiate those subjects not covered by the Agreement.

In *Sachem Central School District*, we had before us a management rights clause that, in almost identical language to the one at issue here, provided that:

All terms and conditions of employment not covered by this agreement shall continue to be subject to the Board's control and discretion and shall not be the subject of negotiations until the commencement of the negotiations for a successor contract to this agreement.⁹

In finding this language to constitute an "intentional relinquishment of both a known right with both knowledge of its existence and intention to relinquish it," we explained:

In most instances in which a waiver is found, it is found on the basis of a determination that the specific issue now being unilaterally changed by the employer was considered and waived as a subject of negotiations by the employee organization. However, if an employee organization has the authority to waive its Taylor Law right to bargain concerning a specific term and condition of employment, it follows that it must also have the authority to waive the right to bargain concerning any and all terms and conditions of employment not addressed in the collective bargaining agreement. It is our determination that the language at issue in the instant case does exactly this.¹⁰

Moreover, our reading of similar language as effectuating a waiver was affirmed by the Court of Appeals in *Professional Staff Congress-City University of New York v NYS Public Employment Relations Board*, in which the Court found that, "[b]ecause the provision at issue explicitly refers to 'terms and conditions of employment' and is not

⁹ 21 PERB ¶ 3021, 3041 (1988).

¹⁰ *Id.* at 3042 (citations and quotation marks omitted).

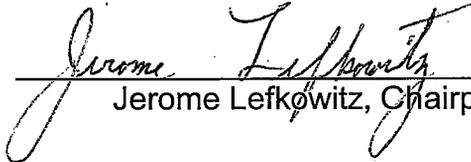
confined to management prerogatives, it is evident that the clause is more than a boilerplate management rights clause.”¹¹ For just this reason, as we explained in *Sachem*,

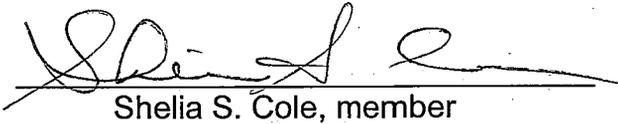
[w]e distinguish those cases in which general management rights and zipper clauses have been found not to give rise to a waiver of the right to negotiate a specific term or condition of employment on the ground that the language in this case, unlike those, evidences an intention to waive the statutory right to bargain mid-contract term.¹²

Based upon the foregoing, we dismiss the Association’s charge and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: December 29, 2014
Albany, New York


Jerome Lefkowitz, Chairperson


Shelia S. Cole, member

¹¹ 7 NY3d 458, 466, 39 PERB ¶ 7010, at 7021 (2006) (*affg*, 37 PERB ¶ 3006 (2004)); *id.* at 7022 (citing *Sachem* with approval).

¹² *Supra* note 6, 21 PERB ¶ 3021, at 3042.

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

In the Matter of

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

Charging Party,

CASE NO. U- 32647

- and -

CITY OF LOCKPORT,

Respondent.

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, GENERAL COUNSEL
(AARON E. KAPLAN, of counsel), for Charging Party**

**JOHN J. OTTAVIANO, CORPORATION COUNSEL (DAVID E. BLACKLEY, of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Lockport (City) to a decision of an administrative law judge (ALJ), finding that the City violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by unilaterally transferring to a private company the work of ambulance billing that had been exclusively performed by members of Civil Service Employees Association, Inc., Local 100, AFSCME-CIO (CSEA).¹ The ALJ ordered the City to immediately cease and desist from assigning the work to nonunit personnel and restore it to the CSEA-represented bargaining unit. The ALJ also ordered make whole relief, and the posting of a notice.

EXCEPTIONS

The City excepts to the ALJ's refusal to adjourn the case for another day for the City to produce an unnamed witness who would testify that the current unit member

¹ 47 PERB ¶ 4517 (2014).

performing the work was endangering the City's ability to comply with Medicare and Medicaid billing requirements. The City further excepted to the ALJ's commenting on the record that "I think that [the employee performing the work] indicated, by a shake of her head, that she hadn't been in discussions" with the contractor. The City characterized this comment as taking unsworn testimony from a non-witness.

FACTS

The parties stipulated that, from at least 1999 through June 2013, CSEA unit members performed duties associated with billing for ambulance services provided by the City.² These duties included but were not limited to inputting New York State Incident Reports, Pre-Hospital Care Reports, and HIPAA³ release forms into the City computer system; obtaining insurance verifications from hospitals; preparing billing and health insurance claim forms; mailing out health insurance claim forms; following up on denials of payment by health insurance companies; filing appeals of denials of payment by health insurance companies; receiving payments for services from health insurance companies or individuals; establishing payment plans for individuals; and sending accounts to collections.

Unit member Barbara Parker, administrative assistant, performed all of the duties listed above for the period 1999 to 2009. During that time, Parker shared these duties with at least one other CSEA unit member. From 2009 to June 2013, Parker was the only person performing the duties associated with billing for City ambulance services.

² The City declined to stipulate that the work was exclusive to CSEA's bargaining unit; however, it did not dispute that unit members had performed the work, and did not claim in its answer or at the hearing that any nonunit personnel performed the work. The City did not plead that the contracting out of the work represented a change in the level of service or that there was a change in qualifications.

³ Health Insurance Portability and Accountability Act, Pub. L. 104-101 (1996).

On April 15, 2013, the City executed an Ambulance Billing Services Agreement with MultiMed Billing Services, Inc. (MultiMed), for the performance of ambulance billing and collection services for the City. MultiMed began performing ambulance billing and collection services for the City on June 5, 2013. On that same day, the City relieved Parker of various duties relating to billing, insurance claims, and collections. The City now requires Parker to send information from New York State Incident Reports, Pre-Hospital Care Reports, and HIPAA release forms to MultiMed.

Victoria Haenle, CSEA unit president, testified on behalf of CSEA and explained that toward the end of March 2013, she and unit vice president Dave Miller met with Mayor Michael W. Tucker, and were told that he intended to contract for ambulance service billing with MultiMed in an effort to obtain increased revenues for the City. Haenle testified that she told the Mayor that his decision would have to be negotiated. Neither Haenle nor the Mayor considered this meeting, or a follow up conversation after the City Council approved the contract with MultiMed, to constitute negotiations.

Tucker testified on behalf of the City. Tucker asserted that he had concerns about the ambulance billing, specifically, that "the City was just leaving a lot of revenue on the table."⁴ In addition, Tucker was concerned about compliance issues but they were, according to Tucker, secondary to the revenue concerns. Tucker also testified that he was concerned that Parker was not performing the job adequately, although he also testified that he never counseled or disciplined Parker or caused some other City administrator to counsel or discipline her.

CSEA objected on the grounds of relevance to Tucker's testimony that

⁴Transcript, at p. 31.

MultiMed's audit of the City's billing had brought up compliance issues regarding Medicare and Medicaid billing. In overruling the objection, the ALJ stated, "[w]ell, I'll hear it. But I assume you're going to call Barb [Parker]."⁵ As counsel stated that he would do so if necessary, the ALJ then added, "I think Barb indicated, by a shake of her head, that she hadn't been in discussions with MultiMed."⁶ CSEA did not call Parker as a rebuttal witness.

Following Tucker's testimony, counsel for the City asked to call a witness to testify telephonically. The ALJ declined to allow for telephonic testimony on the basis that her ability to assess credibility would be impaired. Instead, she allowed counsel to make an offer of proof. Pursuant to the offer of proof, the witness would testify as to the Medicaid and Medicare compliance issues. Ruling that such evidence was not relevant, the ALJ declined to adjourn the hearing to allow for the calling of the witness.

DISCUSSION

In assessing the negotiability of the transfer of work to nonunit personnel, it is well established that:

Two essential questions must be determined when deciding whether the transfer of unit work violates §209-a.1(d) of the Act: a) was the work at-issue exclusively performed by unit employees for a sufficient period of time to have become binding; and b) was the work assigned to non-unit personnel substantially similar to that exclusive unit work. If both these questions are answered in the affirmative, we will find a violation of §209-a.1(d) of the Act unless there is a significant change in job qualifications. When there is a significant change in job qualifications, however, we must balance the respective interests of the public employer and the unit employees to determine whether §209-a.1(d) of the Act has been

⁵ Transcript, at p. 38.

⁶ *Id.*

violated.⁷

The City did not except to the findings that the work had been exclusive to the unit prior to the transfer to MultiMed, that no change in job qualifications or in the level of services provided had been made, and that the informal discussions between the City and CSEA did not constitute bargaining.⁸ Instead, the City excepts to the ALJ's refusal to adjourn the hearing to another date to allow it to call testimony relating to the desirability of the transfer of unit work to MultiMed. However, we have long held, and reaffirmed, that "the fiscal or operational wisdom of a decision to subcontract unit work is immaterial to the negotiability of the subject."⁹ The ALJ correctly ruled that this testimony was not relevant to the inquiry before her, and the City's exception provides no basis for a finding that it constituted error, let alone grounds for reversal.

Likewise, the ALJ's comment regarding Parker's shaking her head did not factor

⁷ *County of Suffolk*, 47 PERB ¶ 3024 at 3069 (2014) quoting *Town of Riverhead*, 42 PERB ¶ 3032, at 3119 (2009) (editing marks omitted); see generally *Niagara Frontier Transp Auth*, 18 PERB ¶ 3083 (1985).

⁸ Nor did the exceptions include any claim that, other than the evidentiary rulings excepted to, the ALJ erred in determining the legal standard to be applied, or in applying that standard to the facts as she found them to be. As the Union did not specifically urge any exception to these portions of the ALJ's decision, any such claims have been waived, and are not before us. *Village of Endicott*, 47 PERB ¶ 3017, at 3052, n. 5 (2014) (citing § 213.2(b)(4) PERB Rules of Procedure; *City of Schenectady*, 46 PERB ¶ 3025, at 3056, n. 8 (2013), confirmed sub nom. *Matter of City of Schenectady v New York State Pub Empl Relations Bd*, Index No. 4090/2011 (Sup Ct Albany Co July 9, 2014); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), confirmed sub nom. *Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009)).

⁹ *City of Niagara Falls*, 31 PERB ¶ 3085, at 3188 (1998) (citing *City of Poughkeepsie v Newman*, 95 AD2d 101, 16 PERB ¶ 7021 (3d Dept), app dismissed, 60 NY2d 859, 16 PERB ¶ 7027 (1983), leave denied, 62 NY2d 608, 17 PERB ¶ 7009 (1984)); *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3021 (2008), affd as modified as to remedy, 61 AD2d 1231, 42 PERB ¶ 7004 (3d Dept 2009) (history on remand omitted) (same).

in her decision, and addressed only whether Parker would be called as a rebuttal witness. As the ALJ's decision rests upon the undisputed facts establishing the elements of the charge, we find no basis for reversal in her seeking to clarify whether a witness would be called on rebuttal.

Based upon the foregoing, we find that the ALJ properly found on the record before her that the City violated § 209-a.1 (d) of the Act by assigning the work of ambulance service billing to nonunit employees.

Accordingly, the City is hereby ordered to:

1. Immediately cease and desist from assigning the work of billing for City ambulance services to nonunit employees and restore that work to CSEA's bargaining unit;
2. Make whole any employees who were affected by the transfer of said work for any loss of wages and benefits suffered as a result of such transfer, with interest at the prevailing maximum legal rate; and
3. Sign and post the attached notice at all locations used to communicate with unit employees, both physically and electronically.

DATED: December 29, 2014
Albany, New York


Jerome Lefkowitz, Chairperson


Shelia 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 Lockport in the unit represented by Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the City of Lockport:

1. Will not assign the exclusive unit work of ambulance billing to nonunit employees; and
2. Will make whole any employees who were affected by the transfer of ambulance billing duties, for any loss of wages and benefits suffered as a result of such transfer, with interest at the prevailing maximum rate.

Dated

By

on behalf of
City of Lockport

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered,

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LORRAINE MUNROE,

Charging Party,

CASE NO. U-32534

- and -

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

Respondent.

LORRAINE MUNROE, *pro se*

**STEVEN A. CRAIN and DAREN J. RYLEWICZ, GENERAL COUNSEL
(MIGUEL G. ORTIZ of counsel), for Respondent**

BOARD DECISION AND ORDER

These consolidated cases come to us on exceptions filed by Lorraine Munroe to a decision of an administrative law judge (ALJ) dismissing after a hearing Munroe's amended charge alleging that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) in its representation of her.¹ The ALJ found that the credible evidence did not establish that CSEA's representation of Munroe at her November 20, 2012 disciplinary arbitration hearing violated the duty of fair representation by failing to raise a claim under § 75 of the Civil Service Law that the discipline was in retaliation for Munroe's filing grievances. Likewise, the ALJ found that the credible evidence did not

¹ 46 PERB ¶ 4529 (2013).

support a finding that CSEA's representation of Munroe at her January 31, 2013 disciplinary charges violated the duty of fair representation on similar grounds.

EXCEPTIONS

Munroe excepts to the ALJ's decision on several grounds. First, she contends that the ALJ's decision denied Munroe's constitutional right to equal protection of the law. She further alleges that the union representing a named Corrections Officer was able to vacate an adverse arbitration decision on behalf of that Corrections Officer. Munroe's second claim is that CSEA breached its duty of fair representation by not raising the anti-retaliation provisions of Civil Service Law § 75-b as a defense to the two sets of disciplinary charges against her. She further asserts that the ALJ erred in accepting CSEA's framing of her claim as one of discrimination based on her having filed litigation against the State, when in fact she was discriminated against for reporting unlawful conduct to the commissioner of the New York State Department of Corrections and Community Supervision (DOCCS). Munroe contends that CSEA "admit[s] I was being retaliated against and still let the arbitrators suspend me twice."

Additionally, Munroe claims that the ALJ erred because CSEA and DOCCS conspired to breach the collective bargaining agreement provision entitling Munroe to a bonus vacation day upon her attaining seven years of employment with the State. Finally, Munroe contends that CSEA failed to redress her complaint that sick days were improperly subtracted from her bank.

CSEA and the State filed replies supporting the ALJ's decision.

FACTS

The facts are fully set out in the ALJ's decision, and are repeated here only as

necessary to address the exceptions before us. Munroe was employed by DOCCS in the title clerk II from May 2007 until her resignation on May 6, 2013. On September 10, 2010, she transferred to the Lincoln Correctional Facility (Lincoln Facility).

In May and June 2011, Munroe reported to the Commissioner of DOCCS that, in 2008, 64 hours of vacation time and 24 hours of sick time had been improperly subtracted from her accumulated time balance. Munroe testified that she had filed a grievance against the Inspector General of DOCCS for not investigating these allegations and that she also instituted lawsuits against the State of New York arising out of the same transactions.

On June 17 and August 11, 2011, DOCCS brought disciplinary charges against Munroe alleging, among other infractions, a failure to communicate in a professional manner with supervisors and a failure to follow instructions. DOCCS sought a total three month suspension without pay on these charges. After a hearing on November 20, 2012, the designated arbitrator issued an opinion and award dated November 23, 2012, finding Munroe culpable on some of the charges and imposing a penalty of a three week unpaid suspension.

Munroe was represented during the November 20, 2012 arbitration by CSEA Labor Relations Specialist Marcia Schiowitz. Munroe testified that, during that hearing, Schiowitz stated that it is evident that DOCCS does not want Munroe working for it and that the notices of discipline against Munroe are excessive.² Schiowitz testified that Munroe repeatedly claimed that the notices of discipline had been brought in retaliation

² Transcript, at pp 22, 36.

for her "lawsuit" and then refused to provide documentation regarding the lawsuit.³ Linda Boyd, CSEA's local grievance representative, testified to the same effect as Schiowitz.⁴ Boyd testified that Munroe had never claimed that her grievances had precipitated the allegedly retaliatory discipline.⁵

On January 31, 2012, DOCCS issued another notice of discipline against Munroe, alleging that she had failed to communicate in a professional manner with her supervisor and in addition charging her with insubordination. DOCCS sought termination as a penalty. After an arbitration hearing, at which an attorney retained by CSEA, Brandi Hawkins, represented Munroe, the arbitrator issued an opinion and award dated February 5, 2013, in which he found Munroe culpable of the charges and imposed as a penalty suspension without pay for three months.

In preparing for the arbitration hearing, Hawkins requested Munroe to meet with her, and Munroe refused. When CSEA informed her that failure to cooperate with Hawkins would lead to CSEA's withdrawing representation, Munroe faxed Hawkins a letter stating that she did not believe a meeting was necessary. In that letter, Munroe also stated that DOCCS was retaliating against her because she "exposed corruption and started a lawsuit because DOCCS did nothing to correct my falsified time and attendance record."⁶ Munroe again refused to provide documentation about the lawsuit, and Hawkins warned her that without the information about the lawsuit,

³ Transcript, at pp 54-56, 60-61; CSEA Exhibit 10.

⁴ Transcript, at pp 72-74, 75-78.

⁵ Transcript, at p 80.

⁶ CSEA Exhibit 12(b).

Hawkins could not argue it as a basis for retaliation.⁷

Lisa McNeil, CSEA's legal assistance program administrator, testified that she had communicated with both Hawkins and Munroe during the pendency of the charges, and that Hawkins had told her that Munroe had maintained that "the NOD was retaliation for the lawsuit she filed."⁸ Asked on cross-examination why Munroe's letter to Hawkins identifying exposure of corruption as a basis for retaliation had not led CSEA to assert that as a defense, McNeil replied, "[b]ut you only make a statement. You don't actually give her any proof of it, whether it is a lawsuit or anything."⁹ She reiterated, "You just gave her a statement, but you gave her no proof."¹⁰

DISCUSSION

To establish a breach of the duty of fair representation under the Act, a charging party "has the burden of proof to demonstrate that an employee organization's conduct or actions are arbitrary, discriminatory or founded in bad faith."¹¹ As we recently pointed out, the courts have:

reject[ed] the standard . . . 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

⁷ CSEA Exhibit 16.

⁸ Transcript, at p 101. Hawkins, who had moved to Florida, was not called by either party to testify. *Id.* at 100.

⁹ Transcript, at p 106.

¹⁰ Transcript, at pp 106-107.

¹¹ *Bienko (CSEA)*, 47 PERB ¶ 3027, 3082-3083 (2014), quoting *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, at 3119 (2008).

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.¹²

No evidence of bias, bad faith or discrimination has been adduced to support the charge. Indeed, CSEA represented Munroe in two arbitration proceedings, arising out of three notices of discipline, and in both instances secured for her results that were significantly better than the outcome sought by DOCCS.

Munroe's sole factual predicate for her claim of unequal treatment is her identification of a Corrections Officer whose union successfully sought to vacate an arbitrator's award. However, the record is devoid of any information concerning the basis for the vacatur or the underlying facts of that matter. Moreover, as Munroe does not even assert that CSEA represented that employee, the allegation has no probative value as to any disparate treatment by CSEA of Munroe.¹³

We have long held that "[i]t is well-settled that an employee organization is

¹² *Cairo-Durham Teachers Assn*, 47 PERB ¶¶ 3008, 3026 (2014) (quoting *Civ Serv Empl Assn, Local 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD 2d 430, 432, 20 PERB ¶¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).

¹³ Although Munroe names the Corrections Officer at issue as "Kawalski," she appears to be referring to Court of Appeals' decision in *Kowaleski v NY State Dept of Correctional Svcs*, 16 NY3d 85, 89 (2010). In that case, the Court vacated a disciplinary arbitration sustaining charges against a Correction Officer who had "reported a fellow officer's misconduct," as to whom "the arbitrator observed that Kowaleski was "the object of animosity and/or harassment" by some of her fellow officers, and that the harassment may have originated when CO Kowaleski informed her supervisor of the 2002 incident." *Id.*, at 89, n. 1. *Kowaleski* is not an apt comparator here. In that matter, the misconduct reported was "an alleged incident of inmate abuse" on an inmate. See *In re Kowaleski (NYS Dept of Corr Svcs)*, 30 Misc3d 1228(A), 926 NYS2d 344 (Sup Ct Alb Co 2007), *affd*, 61 A D3d 108 (3d Dept 2009), *revd* 16 NY3d 85. Moreover, as the Court of Appeals expressly noted, the record was sufficiently developed that the arbitrator found that the reporting of misconduct had in fact led to harassment. 16 NY3d at 89, n. 1.

entitled to a wide range of reasonable discretion in the processing of grievances under the Act.”¹⁴ In particular, “an employee’s mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.”¹⁵ Thus, Munroe’s charge is deficient to the extent it rests upon her claim that CSEA “let the arbitrators suspend me twice,” or otherwise assumes that the mere fact that CSEA did not obtain the best possible result for her establishes of its own weight that it breached its duty of fair representation. Nor does the conclusory allegation of collusion without any factual predicate suffice to state a claim.¹⁶

Munroe’s more specific exceptions do not warrant a different result. Munroe’s claim that CSEA erred in seeking to argue that the charges against her were brought in retaliation for her filing a lawsuit against the State does not establish that CSEA breached the duty of fair representation. At most, the claim states good faith error or negligence, which is insufficient to breach the duty of fair representation.¹⁷

Moreover, the ALJ credited CSEA’s testimony that Munroe herself persistently claimed the charges were precipitated by the lawsuit she filed. Credibility determinations by an ALJ are generally entitled to “great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly

¹⁴ *Amalg Transit Union, Local 1056 (Lefevre)*, 43 PERB ¶¶ 3027, 3104 (2010).

¹⁵ *Transport Workers Union, Local 100 (Brockington)*, 37 PERB ¶¶ 3002, 3006 (2004) (quotation marks omitted); *Civ Serv Empl Assn (Smulyan)*, 45 PERB ¶¶ 3008, 3017 (2012).

¹⁶ See, e.g., *PEF (Goonewardena)*, 27 PERB ¶ 3006 (1994).

¹⁷ *Cairo-Durham Teachers Assn, supra* n. 12, 47 PERB ¶ 3008 at 3026.

incorrect.”¹⁸ Here, as the ALJ correctly pointed out, the only objective evidence is an e-mail from Munroe expressly complaining that CSEA might be complicit in “trying to have me terminated from State service just because I exercised my right to file a lawsuit.”¹⁹ In sum, not only does the record before us support the ALJ’s finding, but it supports CSEA’s defense that it reasonably sought to advance the claim Munroe had herself identified.

Likewise, Munroe has not established that CSEA’s failure to fully articulate a defense to the charges based on Civil Service Law § 75-b breached its duty of fair representation. As we pointed out in our prior decision in this matter, “[t]he Court of Appeals has ruled that the failure of an employee organization to present a meritorious Civil Service Law § 75-b defense on behalf of a unit member during a disciplinary arbitration can form the basis for a duty of fair representation claim.”²⁰ The record does not support that CSEA failed to do so here.

An “employee organization is not obligated under the Act to pursue a self-destructive strategy regarding employment urged by a unit member or to pursue a defense in a disciplinary matter, which is devoid of any merit.”²¹ The record before us establishes that Munroe did not provide any evidentiary basis upon which CSEA could

¹⁸ *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014) (quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3019 (2008)); see also *County of Tioga*, 44 PERB ¶ 3016, 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); see also, *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain’s Endowment Assn*, 10 PERB ¶ 3034 (1977).

¹⁹ CSEA Exhibit 4.

²⁰ *CSEA (Munroe)*, 46 PERB ¶ 3013, 3029 (2013).

²¹ *UFT (Hunt)*, 45 PERB ¶ 3038, 3094 (2012).

causally link the disciplinary charges brought against her to her complaints that her time records had been altered. Indeed, no such basis was provided by Munroe even before the ALJ. On cross-examination, McNeil expressly pointed out the conclusory nature of the claim as a basis upon which CSEA chose not to predicate the retaliation claim on the exposure of corruption. Rather, CSEA raised retaliation in the primary context Munroe asserted it to CSEA, in the context of a lawsuit. Thus, even if evidence of a meritorious defense had been presented, Munroe would have at most asserted "[a]n honest mistake resulting from misunderstanding,"²² insufficient to constitute a breach of the duty of fair representation.

Based upon the foregoing, we deny Munroe's charge and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: December 29, 2014
Albany, New York


Jerome Lefkowitz, Chairperson


Shelia S. Cole, member

²² *Cairo-Durham Teachers Assn*, supra n. 12, 47 PERB ¶ 3008 at 3026; see also *CSEA (Kandel)*, 13 PERB ¶ 3049 (1980).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

- and -

CASE NO. U-32833

IMAGINE ME CHARTER SCHOOL,

Respondent.

**RICHARD E. CASAGRANDE, ESQ. (JENNIFER A. HOGAN of counsel), and
STROOK & STROOK & LAVAN, LLP (ALAN M. KLINGER of counsel), for
Charging Party**

VEDDER PRICE (LYLE S. ZUCKERMAN of counsel), for Respondent

In the Matter of

**RIVERHEAD CHARTER SCHOOL EMPLOYEES'
ASSOCIATION, NYSUT, NEA, AFL-CIO, NYSUT
LOCAL #22170,**

Charging Party,

- and -

CASE NOS. U-33299 & U-33432

RIVERHEAD CHARTER SCHOOL,

Respondent.

PETER L. VERDON, for Charging Party

**LAMB & BARNOSKY, LLP (RICHARD K. ZUCKERMAN of counsel), for
Respondent**

In the Matter of

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

Charging Party,

- and -

CASE NO. C-6275

CENTRAL QUEENS ACADEMY CHARTER SCHOOL,
Respondent.

**RICHARD E. CASAGRANDE, ESQ. (BRIE KLUYTENAAR of counsel), for
Charging Party**

In the Matter of

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

Charging Party,

- and -

CASE NO. U-33631

HYDE LEADERSHIP CHARTER SCHOOL BROOKLYN,
Respondent.

**RICHARD E. CASAGRANDE, ESQ. (JENNIFER A. HOGAN of counsel), and
STROOK & STROOK & LAVAN, LLP (ALAN M. KLINGER of counsel), for
Charging Party**

JACKSON LEWIS PC (THOMAS V. WALSH of counsel), for Respondent

In the Matter of

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

Charging Party,

- and -

CASE NO. U-33669

IMAGINE ME CHARTER SCHOOL,

Respondent.

**RICHARD E. CASAGRANDE, ESQ. (MICHAEL J. DELPIANO of counsel), and
STROOK & STROOK & LAVAN, LLP (ALAN M. KLINGER of counsel), for
Charging Party**

**BOND SCHOENECK & KING (RICHARD G. KASS of counsel), for
Respondent**

In the Matter of

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

Charging Party,

- and -

CASE NO. C-6249

NEW DAWN CHARTER SCHOOL,

Respondent.

**RICHARD E. CASAGRANDE, ESQ. (MICHAEL J. DELPIANO of counsel), and
STROOK & STROOK & LAVAN, LLP (ALAN M. KLINGER of counsel), for
Charging Party**

**BOND SCHOENECK & KING (RICHARD G. KASS of counsel), for
Respondent**

In the Matter of

**RIVERHEAD CHARTER SCHOOL EMPLOYEE'S
ASSOCIATION, NYSUT, AFT, NEA, AFL-CIO,
NYSUT LOCAL #22170,**

Charging Party,

- and -

CASE NO. U-33722

RIVERHEAD CHARTER SCHOOL,
Respondent.

TAMMY MAYS, for Charging Party

**LAMB & BARNOSKY, LLP (RICHARD K. ZUCKERMAN of counsel), for
Respondent**

BOARD DECISION AND ORDER

These cases come to us on motions pursuant to §§ 213.2 (b) and 212.4 (h) of our Rules of Procedure (Rules) for leave to file exceptions to the Board challenging pre-hearing rulings of the Director of Public Employment Practices and Representation (Director) and of ^A administrative law ^{L J} judges (ALJs), conditionally dismissing the above-captioned proceedings. For the reasons given in our recent decision in *New Visions Charter High School for the Humanities*,¹ we grant the motions, deny the exceptions, and affirm the conditional dismissal of these matters, with leave to re-open the cases upon further administrative or judicial decisions resolving the issue of our jurisdiction over the employers at issue.

¹ 47 PERB ¶ 3023 (2014).

As we explained in *New Visions*:

On May 28, 2014, a regional director of the NLRB found that a charter school created pursuant to the Charter Schools Act was “not exempt as a ‘political subdivision’ within the meaning of” the NLRA, and that “the NLRB has jurisdiction over the Employer in this case.”² In so ruling, the Regional Director opined that “[t]he Board would find it ‘not controlling’ at best and ‘immaterial’ at worst, that the New York legislature intended charter schools to be public schools in many respects, including specifically being subject to the state’s Public Employees’ Fair Employment Act.”³ On August 6, 2014, the NLRB granted review of the Regional Director’s decision.

However, as we noted in *Brooklyn Excelsior Charter School*, and consistent with the Appellate Division’s finding in *Buffalo United Charter School*, the “NLRB and the federal courts have ultimate authority over issues of preemption.”⁴

As of the present writing, the NLRB has not yet decided the issue in *Hyde Leadership Charter School-Brooklyn*. Accordingly, “[a]s the NLRB is in the process of exercising its primary jurisdiction to determine the question of preemption, we find that the [Director and ALJs] did not err in conditionally dismissing the instant petition subject to the outcome of such determination.”⁵

² *Hyde Leadership Charter School-Brooklyn*, 47 PERB ¶ 8004, at 8010 (2014).

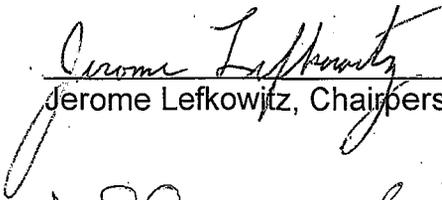
³ *Id.* at 8009 (quoting *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (2012); *The Pennsylvania Cyber Charter School* (Case 06-RC-120811, 2014 WL 1390806 (April 9, 2014)(unpublished opinion denying review)).

⁴ *New Visions*, *supra* note 1, 47 PERB ¶ 3023, at 3067 (citing *Brooklyn Excelsior Charter School*, 44 PERB ¶ 3001, at 3019 (2011) (subsequent history omitted), and *Buffalo United Charter School v NYS Pub Empl Relations Bd*, 107 AD3d 1437, 1437-1438, 46 PERB ¶ 7009 (4th Dept 2013), *lv denied*, 22 NY3d 1082, 47 PERB ¶ 7001 (2014) (citations omitted)).

⁵ *Id.*

IT IS, THEREFORE, ORDERED that the above-captioned proceedings must be, and hereby are, conditionally dismissed, with leave to re-open the cases upon further administrative or judicial decisions resolving the issue of our jurisdiction over the employers at issue.

DATED: December 29, 2014
Albany, New York



Jerome Lefkowitz, Chairperson



Shelia S. Cole, member