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State of New York Public Employment Relations Board Decisions from May 27, 2011

New York State Public Employment Relations Board

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State of New York Public Employment Relations Board Decisions from May 27, 2011

Keywords

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Comments

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

In the Matter of

BRONXVILLE FACILITIES SUPPORT STAFF,

Petitioner,

-and-

CASE NO. C-6043

BRONXVILLE UNION FREE SCHOOL DISTRICT,

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 of the Board, and it appearing that a negotiating representative has been selected,¹

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

IT IS HEREBY CERTIFIED that the Bronxville Facilities Support Staff 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

¹During the process of the petition, the incumbent employee organization, the Bronxville Teachers Association, Facilities Unit, NYSUT, AFT, disclaimed any interest in continuing to represent the petitioned-for unit.

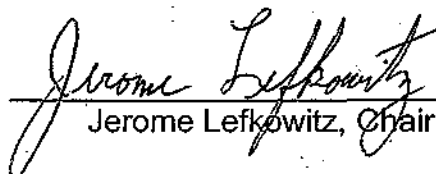
representative for the purpose of collective negotiations and the settlement of grievances.

Included: All employees in the positions of Custodian, Head Cleaner, Messenger and Watch People/Security.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Bronxville Facilities Support Staff. 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: May 27, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNIONDALE PUBLIC LIBRARY STAFF
ASSOCIATION,

Petitioner,

-and-

CASE NO. C-6052

UNIONDALE PUBLIC LIBRARY,

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 of the Board, and it appearing that a negotiating representative has been selected,

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

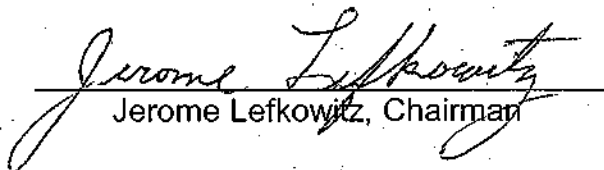
IT IS HEREBY CERTIFIED that the Uniondale Public Library Staff Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations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

Included: All regular full-time and part-time employees in the titles of Librarian III, Librarian II, Librarian I, Senior Typist Clerk, Typist Clerk, Senior Library Clerk, Clerk, Clerk Bi-Lingual, Page and Cleaner.

Excluded: The Library Director, Senior Account Clerk, Senior Typist Clerk who works directly for the Library Director, Guard, part-time substitute Clerk and part-time substitute Librarian I and all other employees.

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

DATED: May 27, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

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

In the Matter of

**PATROLMAN'S BENEVOLENT ASSOCIATION
OF SOUTHAMPTON TOWN, INC.,**

Petitioner,

CASE NO. CP-1168

- and -

TOWN OF SOUTHAMPTON,

Employer.

**GREENBERG BURZICHELLI GREENBERG P.C. (SETH H. GREENBERG &
GENEVIEVE E. PEEPLES of counsel), for Petitioner**

**LAW OFFICE OF VINCENT TOOMEY (VINCENT TOOMEY & JAMIEE L.
POCCHIARI of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Patrolmen's Benevolent Association of Southampton Town, Inc. (PBA) and cross-exceptions filed by the Town of Southampton (Town) to a decision of an Administrative Law Judge (ALJ).¹ The ALJ's decision dismissed a PBA petition seeking to place the position of part-time/seasonal police officer (PSPO) into a unit of full-time police officers of the Town already represented by PBA based upon a conflict of interests caused by some full-time police officers supervising the PSPOs.

In the decision, the ALJ rejected other bases raised by the Town for dismissing

¹ 43 PERB ¶4001 (2010).

the petition including the undisputed fact that PBA's constitution and bylaws exclude PSPOs from membership. The ALJ reasoned that it could not be presumed "that the PBA will not fairly represent the PSPOs or that a potential conflict of interest exists solely based upon their exclusion from membership."² The ALJ also rejected the Town's argument that: "a conflict of interest exists between the PSPOs and unit employees because of the PBA's longstanding efforts to limit the Town's employment of PSPO's, [determining that:] those actions occurred when the PSPOs were not in the PBA's unit and the PBA had no duty to represent them."³ The Town filed cross-exceptions to the two above-quoted conclusions of the ALJ.

FACTS

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

Since the mid-1980's, PBA has engaged in one lawsuit, filed several grievances and negotiated provisions in the collective bargaining agreement (CBA) with the Town, which placed restrictions on the terms and conditions of employment of PSPOs. In addition, during negotiations following the filing of the PBA's petition, its spokesman advised the Town that it could save a substantial amount of money by "getting rid of" the PSPOs.

PBA's constitution and bylaws declare PSPOs to be ineligible for membership. PBA president Aube testified that if PBA's petition is granted, the PBA membership

² *Supra*, note 1, 43 PERB ¶4001 at p. 4008.

³ *Supra*, note 2.

would "go ahead and change the by-laws so that the language in it reflects the admittance of them." However, he acknowledged that such a change would require a favorable two-thirds vote by the PBA members at its annual meeting in April or by a favorable three-quarters vote by mail, and that he could not predict the outcome. He also acknowledged that during the pendency of its petition, PBA members voted on amendments to the constitution and by-laws but a change in PBA membership eligibility was not one of the proposals presented.

DISCUSSION

We reject the ALJ's conclusion that the categorical exclusion of PSPOs from membership in PBA is not a sufficient reason for dismissing PBA's petition. In *City School District of the City of White Plains*,⁴ we held:

No employee organization may be certified to represent a unit if it refuses to admit some of the employees within such unit to membership.

Later, after the Act was amended to grant the Board improper practice jurisdiction, we found that it was not improper for a recognized or certified employee organization to revoke an individual employee's membership in that organization for cause, such as supporting a rival organization, because the "Board is not the forum to regulate the internal affairs of an employee organization."⁵ That proposition is not inconsistent with our uniting decision in *City School District of the City of White Plains*,⁶ where we

⁴ 2 PERB ¶3009 at p. 3271 (1969).

⁵ CSEA (*Bogack*), 9 PERB ¶3064 at p. 3110 (1976).


⁶ *Supra*, note 4.

concluded that a categorical exclusion of a class of employees from membership in an employee organization is sufficient reason to dismiss that employee organization's petition to accrete those employees to the organization.

Having found that PBA's current prohibition against PSPOs becoming PBA members is a sufficient reason for denying PBA's petition, we need not consider whether the 20-year history of PBA's adversarial position regarding PSPO's, standing alone, is a sufficient reason for us to find a conflict of interest warranting dismissal of the petition. We also need not consider PBA's exceptions to the ALJ's finding that the supervision exercised by PBA unit employees over PSPOs is sufficient to constitute a conflict of interests, given the fragmentation of supervisory officers from the PBA unit.⁷

IT IS, THEREFORE, ORDERED that the petition must be, and hereby, is dismissed.

DATED: May 27, 2011
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

⁷ *Town of Southampton*, 42 PERB ¶4018 (2008), 43 PERB ¶3000.15 (2010).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**LOCAL 237, INTERNATIONAL BROTHERHOOD OF
TEAMSTERS,**

Charging Party,

CASE NO. U-28429

- and -

TOWN OF ISLIP,

Respondent.

**MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (BARRY J. PEEK & RANDI M.
MELNICK of counsel), for Charging Party**

**BOND, SCHOENECK & KING, PLLC (ERNEST R. STOLZER & AMY M. CULVER
of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Town of Islip (Town) and cross-exceptions by Local 237, International Brotherhood of Teamsters (Local 237) to a decision¹ by an Administrative Law Judge (ALJ) on a charge, as amended, by Local 237 alleging that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it revoked the assignment of vehicles to employees in the Local 237-represented unit.

The ALJ found that the Town's action violated §209-a.1(d) of the Act because it constitutes a unilateral change of an 18-year old past practice of assigning vehicles on a

¹ 43 PERB ¶4514 (2010).

permanent basis to unit employees represented by Local 237. The ALJ, however, dismissed that portion of Local 237's amended charge that alleged that the Town had refused to negotiate the impact of the unilateral change.

The Town's Exceptions

The Nature of the Past Practice

The Town asserts that it had authorized the use of Town vehicles by unit employees subject to certain conditions precedent: the employee is on call 24/7 or is assigned to multiple sites; and that such assignments were approved by the Town Supervisor. As to the last of these, PERB has held that "the extended period of the practice...constituted circumstantial evidence sufficient to establish a *prima facie* proof of the employer's knowledge, thereby imposing upon the [Town] the burden of proof of demonstrating that...it did not have actual or constructive knowledge of the past practice."² Inasmuch as the Town introduced no evidence to demonstrate that the Town Supervisor lacked actual or constructive knowledge, we conclude that he, and his predecessors, if any, over an 18-year period, knew of the practice and, by their silence, condoned it.

As to the two other conditions precedent, the vehicles were afforded to approximately 45 unit employees for limited personal use, commuting to and from work, but not for other personal uses such as transporting family members. The Town argues that it has the managerial prerogative to revoke the personal vehicle use by employees because its responsibility to maximize fiscal efficiencies outweighs the interests of those

² *Chenango Forks Cent Sch Dist*, 40 PERB ¶3012 at 3047 (2007)(subsequent history omitted). See also, *City of Oswego*, 41 PERB ¶3011 (2008).

unit employees whose past use of Town vehicles was terminated.

The Town's argument misconstrues the applicable law. The Appellate Division, Fourth Department sustained a prior PERB holding that economic benefits, including employee use of an employer's vehicle, are the quintessence of mandatory subjects of negotiations, stating: "PERB's determination that employee use of an employer-owned car for personal purposes is an economic benefit and a term and condition of employment which cannot be unilaterally withdrawn is reasonable and supported by substantial evidence."³ Two years later, the Appellate Division, Second Department sustained another PERB decision that reached the same conclusion.⁴

The Town Code and Administrative Procedure Act

The Town claims that it has a statutory right to revoke the 18-year old past practice. Its argument is premised upon a 1968 Town Code provision, which was supplemented by a Town Vehicle Policy adopted by the Town unilaterally on April 29, 2008 and put into effect on June 9, 2008. In addition, it relies upon its 1990 Administrative Procedure Manual provision dealing with Town vehicle usage. We reject this argument.

The 1968 Town Code provision states:

§14-12. Use of Town-owned equipment or property.

No officer or employees shall request or permit the use of Town-owned vehicles, equipment, material or property for

³ *County of Onondaga*, 12 PERB ¶3035 (1979), *confd County of Onondaga v New York State Pub Empl Rel Bd*, 77 AD2d 783, 783-4, 13 PERB ¶7011 at 7022 (4th Dept 1980).

⁴ *County of Nassau*, 13 PERB ¶3095 (1980), *confd County of Nassau v New York State Pub Empl Rel Bd*, 14 PERB ¶7017 (Sup Ct Nassau County 1981) *affd*, 87 AD2d 1006, 15 PERB ¶7012 (2d Dept 1982), *app denied* 57 NY2d 601, 15 PERB ¶7015 (1982).

personal convenience or profit, except when such services are available to the public generally or are provided as municipal policy for the use of such officer or employee in the conduct of official business.

Whether the Town Code provision has any applicability, it is clearly not an authorization for the Town's unilateral action in the present case. A local law is invalid to the extent that it precludes collective negotiations that are mandated by the Act,⁵ and a unilateral change to a mandatory subject by an employer is a violation of its duty to negotiate in good faith, actions by its legislative body notwithstanding.⁶ In addition, when an enforceable practice is inconsistent with an employer's preexisting rule, the employer can no longer rely upon that policy to unilaterally end or modify the practice without violating §209-a.1(d) of the Act.⁷ *A fortiori*, the Town's reliance on its Administrative Procedure Manual provisions is unavailing.

Conditions for Use of Town Vehicles to Commute to Work

The Town Code and Administrative Manual set forth conditions limiting the authorization of unit employees using Town vehicles to commute to work. Inasmuch as the use of Town vehicles to commute is an economic benefit, it is a mandatory subject despite those conditions. The Town, therefore, cannot change the past practice absent an agreement with Local 237. Here, the Town did not even seek such an agreement, which

⁵ *Doyle v. City of Troy*, 51 AD2d 845, 9 PERB ¶7510 (3d Dept 1976).

⁶ *Saratoga Springs Cent Sch Dist*, 11 PERB ¶3037 (1978) *confirmed sub nom Saratoga Springs Cent Sch Dist v New York State Pub Empl Rel Bd*, 68 AD2d 202, 12 PERB ¶7008 (3d Dept 1979), *lv denied*, 47 NY2d 711, 12 PERB ¶7012 (1979).

⁷ *Village of Catskill*, 43 PERB ¶3001 (2010).

is a condition precedent under the Act for making a change involving a mandatory subject.

Town Equipment

The Town asserts that just as PERB has held that it is a management prerogative for a public employer to restrict its police officers from carrying weapons while working, we should also hold it to be an employer's prerogative to reallocate vehicles. The Town reasons that they are both equipment. That is a faulty analogy. The basis of our decision regarding weapons was that such equipment relates directly to the manner and means by which police services are provided to its constituency. The allocation of vehicles for employees personal use does not.⁸

Accordingly, we deny the Town's exceptions.

Local 237's Cross-Exceptions

Impact Negotiations

Local 237's first exception states that the ALJ erred in finding that it failed to establish that it made a demand to bargain the impact of the Town's unilateral discontinuation of a past practice. That is a misreading of the ALJ's decision, which states: "Local 237's proof fails to establish that it made a demand to bargain impact *and that that was rejected.*"⁹ (emphasis added) Indeed, the ALJ correctly found that the Town

⁸ The Town cites to an ALJ decision, which held that the provision of bullet proof vests to police officers is a non-mandatory subject of negotiation. However, when the subject came before the Board for the first time in *City of New York*, 40 PERB ¶3017 (2007), we determined that the subject is mandatorily negotiable.

⁹ *Supra*, note 1, 43 PERB ¶4514 at 4561.

offered to negotiate the impact in a June 6, 2008 letter to Local 237.¹⁰ On June 9, 2008, Local 237 responded with a letter to the Town demanding impact negotiations. The record evidence demonstrates that following this exchange of letters, neither party raised the issue again. Based upon these facts and circumstances, we conclude that Local 237 has failed to prove that the Town refused to bargain the impact of its decision.

Withdrawal of Town's Negotiation Proposal

Local 237 excepts to the ALJ's conclusion that it failed to present sufficient evidence to find that the Town engaged in bad faith bargaining when it withdrew its vehicle use proposal during the course of collective negotiations. Although the Town's unilateral change in its vehicle policy violates §209-a.1(d) of the Act, we find that the facts presented in this record do not demonstrate that the Town's withdrawal of its proposal constitutes a separate and distinct violation of §209-a.1(d). The evidence reveals that the Town withdrew its proposal based upon an erroneous belief that the change was a managerial prerogative.

Accordingly, we deny Local 237's cross-exceptions.

Based upon the foregoing, we affirm the ALJ's decision finding that the Town violated §209-a.1(d) of the Act.

THEREFORE, IT IS HEREBY ORDERED that the Town shall:

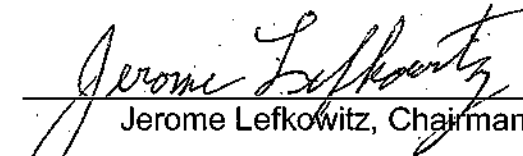
1. Forthwith restore the vehicle assignments for commutation between home and work to those unit members who enjoyed the benefit prior to April 4, 2008;
2. Forthwith make whole unit employees for the extra expenses incurred as a

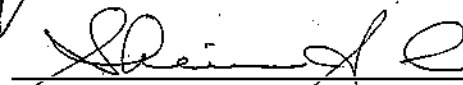
¹⁰ Supra, note 1, 43 PERB ¶4514 at 4563, n. 33.

result of the unilateral withdrawal of the vehicle assignment(s), if any, together with interest at the maximum legal rate; and

3. Sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: May 27, 2011
Albany, New York


Jerome Lefkowitz, Chairman


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 Town of Islip, in the unit represented by Local 237, International Brotherhood of Teamsters, that the Town will forthwith:

1. Restore the vehicle assignments for commutation between home and work, to those unit members who enjoyed the benefit prior to April 4, 2008;
2. Make whole unit employees for the extra expenses incurred as a result of the unilateral withdrawal of the vehicle assignment(s), if any, together with interest at the maximum legal rate.

Dated

By

On behalf of the Town of Islip

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

VILLAGE OF CANTON,

- and -

Charging Party,

CASE NO. U-29658

CANTON POLICE ASSOCIATION,

Respondent.

DANIEL C. McKILLIP, for Charging Party

JOHN M. CROTTY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Canton Police Association (Association) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Village of Canton (Village) alleging that the Association violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) by submitting a proposal with respect to a nonmandatory subject of negotiations to compulsory interest arbitration.

Based upon a stipulated record, the ALJ concluded that the Village's charge was timely filed and that the at-issue proposal was nonmandatory.¹ The Association has filed exceptions to both of these conclusions. The Village supports the ALJ's decision

¹ 43 PERB ¶4597 (2010).

and also asserts that the Association's exceptions are untimely pursuant to §213.2 of the Rules of Procedure (Rules).

FACTS

The Village and the Association are parties to a collectively negotiated agreement (agreement) that expired on May 31, 2008. Article 34 of the expired agreement states:

ARTICLE 34

WORK SCHEDULE

Section 1. The work schedule shall be bid by seniority on an annual basis commencing no earlier than November 1st and completed by November 15th of each year, to be effective January 1st. Thereafter, by seniority, those employees who are scheduled for the "B" and "C" lines shall select (2) twenty-eight (28) day tours of duty on the "A" Line (or "D" line if staffed) for that calendar year. The employees on the "A" line (or "D" line if staffed) at that time, may switch with that employee coming to the "A" line (or "D" line if staffed) as set herein. The Department shall make its best effort to ensure that the affected employees(s) shall not be required to work sixteen (16) consecutive hours in making the tour of duty switch. To avoid having an employee work sixteen (16) consecutive hours, the Chief of Police may elect to waive an eight (8) hour tour, that the employee will make up on a later date at the Chief of Police's discretion. The work schedule shall be posted no later than December 21st of each year, and remain unaltered for the entire calendar year (January through December) except as may be set forth below and shall consist of the following tours of duty:

"A" Line - 11:00 p.m. to 7:00 a.m.

"B" Line - 7:00 a.m. to 3:00 p.m.

"C" Line - 3:00 p.m. to 11:00 p.m.

"D" Line - 7:00 p.m. to 3:00 a.m.

The "A", "B" and "C" lines shall be staffed first. The "D" line is an optional tour of duty and shall be staffed and bid, as set forth above, after the "A", "B" and "C" lines have been staffed. The "D" line may be used pursuant to Section 2 herein.

Section 2. All employees shall remain on their bidded annual work schedule and shall not be removed to avoid the payment of overtime, except due to an emergency as defined by statute, time off for vacation, Holiday, patrol coverage or training, with notice being provided to the employee at least twenty-eight (28) calendar days prior to the change by the Chief of Police or designee. There shall

not be more than a total of fifty (50) tour of duty changes for the entire unit each calendar year (January through December). All personal leave or sick leave use shall be covered through overtime.

An employee requesting time off who provides twenty-eight (28) calendar days notice or more shall not be unreasonably denied and the Chief of Police or designee shall make their best effort to grant the request. In the event a request is less than twenty-eight (28) calendar days, the Chief of Police or designee may deny such request. In that event, the employee may "switch" or "swap" his/her tour of duty with another employee, as set forth in Section 5 herein.

Section 3. In the event a vacancy in title occurs, the Village shall fill that vacancy within a reasonable time thereafter.

Section 4. Employee schedules can be changed with notice if the purpose is to give another employee time off for vacation, Holiday or optional training time. Requests for time off for personal leave, mandatory training or sick time will be paid through overtime.

Section 5. Each employee retains the right to "switch" or "swap" his/her tour of duty with another employee, without restriction, subject to the approval of the Chief of Police, which shall not be unreasonably denied.

On November 17, 2009, the Association filed and served a petition seeking to have the parties' impasse referred to compulsory interest arbitration. Among the Association's proposals in the petition for compulsory interest arbitration were the deletion of sections 2, 3, 4 and 5 and the addition of a new section 6 in Article 34 of the expired agreement:

New Section 6 – Two (2) employees shall be scheduled and working between the hours of 7:00 p.m. to 3:00 a.m. every Tuesday and Saturday.

On November 19, 2009, the Village received the Association's petition. On the same day, the Village was notified by our Office of Conciliation that the Village's response to the petition was due on or before December 4, 2009. The Village served and filed on December 2, 2009, its response to the petition and an improper practice charge alleging that the Association violated §209-a.2(b) of the Act by submitting the

new Section 6 proposal to interest arbitration. The Village, however, withdrew its initial response to the petition and served and filed a different response on December 4, 2009.

The Association filed an answer to the charge asserting as an affirmative defense that the charge is untimely because it was not filed within ten working days of receipt of the petition and it was not filed simultaneously with the Village's response to the petition.

DISCUSSION

We begin with the Village's contention that the Association's exceptions to the ALJ's decision are untimely. Pursuant to §213.2(a) of the Rules, exceptions must be filed within 15 working days after receipt of an ALJ's decision. In the present case, the Association received the ALJ's decision on October 22, 2010, and filed its exceptions on November 12, 2010. Excluding the date that the decision was received by the Association, as we must, the exceptions are timely and therefore properly before us.²

Next, we turn to the Association's procedural argument that the Village's charge is untimely pursuant to §205.6(b) of the Rules because it was not filed simultaneously with the Village's response.

In rejecting the Association's timeliness defense, the ALJ correctly cited *City of Elmira*³ (*Elmira*), where the Board stated clearly and unequivocally that:

In relevant respect, §§205.5(a) and 205.6(b) of our Rules together require an improper practice charge raising a [sic.] objection to the arbitrability of a demand to be filed at or before the time the response to the petition for interest

² *New York City Bd of Educ and UFT (Jenkins)*, 28 PERB ¶13058 (1995).

³ 25 PERB ¶13072 (1992).

arbitration is filed.⁴

Our interpretation of §205.6(b) of the Rules in *Elmira* is fully consistent with the explicit terms of the Rule, which states that a charge by a respondent "may not be filed *after* the date of the filing of the response." (emphasis added)

Nevertheless, the Association's brief in support of its exceptions does not reference the wording of §206.5(b) of the Rules or cite and distinguish *Elmira*. Instead, the Association's entire argument is premised upon the thin reed of an obvious misstatement contained in the following footnote in *South Nyack/Grand View Joint Police Administration Board*:⁵

Notwithstanding the Assistant Directors [sic] determination, §205.6(c) of our Rules requires that a petition for declaratory ruling may not be filed after the date of the filing of the response to the petition for interest arbitration. The Police Board's January 9, 2002 filing of the declaratory ruling petition on PERB's form was not, therefore, timely as it was not filed *simultaneously* with its response to the PBA's petition.⁶ (emphasis added)

Based upon the explicit terms of the applicable Rule and our decision in *Elmira*, the Association's reliance on this footnote is without any merit.

In the present case, the charge is timely because it was filed on December 2, 2010, two days prior to the date when the Village was obligated to file its response. The Village's withdrawal of its initial response and the filing of a different response on December 4, 2010, did not affect the timeliness of the charge under §206.5(b) of the Rules.

⁴ *Supra*, note 3, 25 PERB ¶3072 at 3148.

⁵ 35 PERB ¶3007 (2002).

⁶ *Supra*, note 5, 35 PERB ¶3007 at 3015, n. 3.

Finally, we examine the Association's assertion that the at-issue demand should be treated as a mandatory subject based upon the conversion theory of negotiability first adopted in *City of Cohoes*⁷ (*Cohoes*). Under *Cohoes*, a nonmandatory subject contained in a collectively negotiated agreement is converted into a mandatory subject between the parties to that agreement.

In *Town of Fishkill Police Fraternity, Inc.*,⁸ (*Fishkill*) we applied the *Cohoes* conversion theory in finding that a proposal seeking to establish minimum staffing for each tour of duty was mandatory because it sought to modify a nonmandatory provision in an agreement, which granted the employer the sole discretion to designate "tours of duty, and the number of officers per tour."⁹

In *City of New York*,¹⁰ we expressly rejected the argument, however, that a nonmandatory proposal is converted into a mandatory one merely because it seeks to modify a mandatory term in an expired agreement:

We are not persuaded that there is any rationale under the Act for the expansion of the *Cohoes* conversion theory that would transform nonmandatory subjects not already contained in an agreement into mandatory subjects. Unlike the negotiating disparity that the Board sought to remedy in *Cohoes*, no structural imbalance exists between the parties with respect to the negotiability of nonmandatory subjects outside of an agreement. Neither an employer nor an employee organization is obligated to negotiate such a subject and they are mutually impacted when a nonmandatory subject is incorporated into an

⁷ 31 PERB ¶3020 (1998) (subsequent history omitted).

⁸ 39 PERB ¶3035 (2006).

⁹ 39 PERB ¶3035 at 3115.

¹⁰ 40 PERB ¶3017 (2007) (subsequently history omitted).

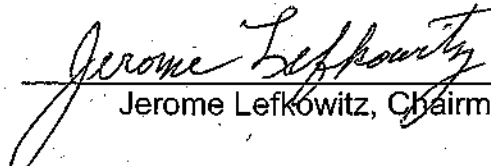
agreement: it is converted, as a matter of law, into a mandatory subject to subsequent negotiations.¹¹

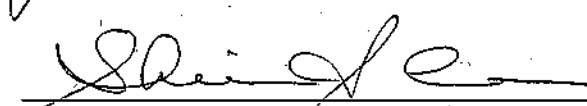
In the present case, the Association asserts that its proposal is mandatory under *Fishkill* because the proposal seeks to modify Article 34, §1 with respect to the Village's discretion to staff the optional "D" line from 7:00 p.m. to 3:00 p.m. We disagree. Unlike the nonmandatory contract provision in *Fishkill*, which granted the employer the discretion to determine the number of officers to work each tour, Article 34, §1 gives the Village the option to schedule a fourth line, a mandatory subject. This section of the parties' present agreement is not a minimum staffing provision or a provision granting the Village the contractual discretion to determine the number of staff members to work a particular shift. Therefore, as the ALJ correctly concluded, the Association's nonmandatory proposal is not sufficiently related to a nonmandatory subject in the parties' agreement, which is subject to conversion under *Cohoes*.

Based upon the foregoing, we deny the Association's exceptions and affirm the ALJ's decision.

IT IS, THEREFORE, ORDERED that the Association withdraw its proposal.

DATED: May 27, 2010
Albany, New York


Jerome Lefkowitz, Chairman


Sheila S. Cole, Member

¹¹ *Supra*, note 10, 40 PERB ¶3017 at 3066.

**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-27431

CITY OF SYRACUSE,

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (TIMOTHY CONNICK of
counsel), for Charging Party**

**JUANITA PEREZ WILLIAMS (NANCY J. LARSON of counsel), for
Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the City of Syracuse (City) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) alleging that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the existing residency requirement by mandating current unit employees to be domiciled in the City and by unilaterally imposing a requirement on employees to submit a residency affidavit setting forth specific information along with the production of documents including tax returns and bank statements.

Following a hearing, the ALJ issued a decision concluding that that the City violated §209-a.1(d) of the Act when it unilaterally imposed the residency affidavit requirement, and dismissed the remainder of the charge. The ALJ's remedial order

directed the City to discontinue the use of the residency affidavit, remove and destroy all reports and other documents emanating from that requirement, reinstate and make whole any unit employees who were terminated as the result of the affidavit requirement, and sign and post a notice.¹

EXCEPTIONS

In its exceptions, the City asserts that the residency affidavit requirement constitutes a prohibited subject of negotiations based upon the terms of the City Charter. In the alternative, the City contends that the new requirement is nonmandatory because residency is a qualification of employment, the affidavit is not a substantial change from its prior practice, and the affidavit is only required when the City is investigating the residency status of unit employees. Finally, the City excepts to the ALJ's proposed remedial order. CSEA supports the decision of the ALJ.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the decision of the ALJ.

FACTS

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

While the City Charter was originally enacted by the Legislature in 1885,² the residency requirement in the current Charter was enacted by the City in 1960. Section 8-112.2 of that Charter states:

Employees of the city shall be at the time of their appointment and continue to be during their continuance in

¹ 43 PERB ¶4565 (2010).

² L 1885, c 26, 423 South Salina Street, Inc. v City of Syracuse, 68 NY2d 474, n. 5 (1986).

the employment of the city, residents of the city of Syracuse except as otherwise provided by law, local rule or ordinance of the council.

Since 1990, the City has actively sought to enforce its residency requirement. Commencing in 1992, the City implemented a residency monitoring program, which mandated each employee to prepare, sign and submit, on a regular basis, a certification form attesting to his or her residence. In 2001, the City modified the monitoring program by changing the certification form to mandate that an employee acknowledge that he or she understands the residency requirement.

Under the monitoring program, a City investigation is commenced when the City Office of Personnel and Labor Relations suspects that an employee is not in compliance with the residency requirement. As part of the City's investigation, an employee is offered three options: submit "acceptable proof" of City residency; obtain a residency waiver; or restore City residency and provide a notice of address change. The forms of "acceptable proof" of residency include documents such as mortgage statements, rental agreements, and utility bills. In addition, at least two unit employees submitted sworn statements from others to demonstrate City residence.

In February 2007, the City began requiring unit members suspected of violating the residency requirement to sign and submit a sworn twelve-paragraph Affidavit of City Residency (residency affidavit). The residency affidavit supplements the certification of residency that all City employees are required to file. The affidavit mandates sworn responses from an employee with respect to his or her residency, voter registration, parentage of school-age children, schools attended by those children, the address where personal mail is received and whether the employee has applied and received a property tax exemption under the STAR program. In addition, the residency affidavit

requires the employee to submit five forms of documentation: proof of a mortgage or a rental; federal and state income tax returns for the prior two years with confidential information redacted; two bank statements with confidential information redacted; and a New York State driver's license and/or a vehicle registration. If an employee is unable to fully satisfy those documentation requirements, he or she must submit a sworn explanation. The employee must also swear that the documents submitted were not obtained under false pretenses or altered. Finally, the residency affidavit requires the employee to swear to the following:

I UNDERSTAND AND AGREE THAT ANY STATEMENT IN THIS AFFIDAVIT MAY BE USED IN AN EMPLOYMENT TERMINATION HEARING OR ANY OTHER PROCEEDING PERTAINING TO MY EMPLOYMENT WITH THE CITY.

DISCUSSION

Contrary to the City's contention, the residency affidavit requirement is not a prohibited subject of negotiations under *Patrolmen's Benevolent Association of the City of New York, Inc. v New York State Public Employment Relations Board*³ (hereinafter, *NYCPBA*). In *NYCPBA*, the Court of Appeals held that a special state police disciplinary law that pre-dates Civ Ser Law §§75 and 76 and grants local officials the power and authority over police discipline preempts the negotiability of police discipline under the Act.⁴ In the present case, the City Charter residency provision was not enacted by the Legislature, it is not a police disciplinary provision subject to Civ Ser Law §76.4 and it is silent with respect to the applicable procedures for enforcing the

³ 6 NY3d 563, 39 PERB ¶7006 (2006).

⁴ *City of Albany*, 42 PERB ¶3005 (2009); *Tarrytown PBA*, 40 PERB ¶3024 (2007).

residency requirement. Furthermore, the City has not identified a state public policy that is strong enough to exclude the residency affidavit from collective negotiations under the Act.⁵ Therefore, we find no merit to the City's prohibition argument.

The City's argument that the residency affidavit is a nonmandatory subject under the Act is equally without merit. The affidavit requirement is applicable to current employees under investigation and cannot be reasonably construed as an employment qualification. In addition, in *City of Schenectady*,⁶ we held that the unilateral imposition of a residency affidavit requirement on unit members constituted a mandatory subject of negotiations because it was a substantial change in their terms and conditions of employment. We reach the same conclusion in the present case.

Although unit members have been required to participate in recordkeeping with respect to residency since 1992, including submitting "acceptable proof" of residency upon the City's request, the new affidavit requirement constitutes a substantial change in the form and substance of recordkeeping delegated by the City to unit members.

Under the new requirement, an employee may be obligated to pay a notary fee to obtain the necessary notarization of the affidavit. Furthermore, the requirement of sworn factual statements may make an employee vulnerable to criminal prosecution under the Penal Law if it is alleged that the affidavit contains a false statement. The affidavit requirement also raises significant personal privacy issues by mandating the disclosure of an employee's parental status, the schools attended by an employee's

⁵ In support of its prohibition argument, the City does rely upon Pub Off Law §30.4(3). Even if that statute was applicable to the City, however, the residency requirement would be nonmandatory, and not prohibited. See, *City of Mount Vernon*, 18 PERB ¶3020 (1985); *Salamanca Police Unit, CSEA*, 12 PERB ¶3079 (1979).

⁶ 26 PERB ¶3025 (1993).

children and the employee's voter registration status. Unlike the City's former practice, each employee suspected of violating the residency requirement is now required to state whether he or she has applied for and received a property tax exemption. Furthermore, each suspect employee must attach a driver's license and/or vehicle registration, bank statements and income tax returns to the affidavit.

Finally, we deny the City's exception to the ALJ's proposed remedial order. Pursuant to §205.5(d) of the Act, PERB has 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. Following a careful review of the record, we affirm the ALJ's proposed remedial order, as modified.⁷

IT IS, THEREFORE, ORDERED that the City:

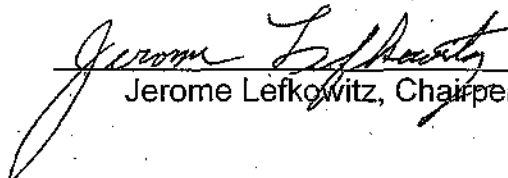
1. rescind and cease enforcement or implementation of the requirement that unit employees complete the "Affidavit of City Residence";
2. remove and destroy all reports or other documents submitted by unit employees or generated by the City or its agents pursuant to its requirement that they complete, swear to, sign and return the "Affidavit of City Residence" from any files kept or maintained by the City or any of its agents;
3. reinstate and make whole, with interest at the maximum legal rate, any unit employees who were terminated based on their failure to complete the

⁷ We have modified the remedial order to the extent of requiring the City to post the attached notice at all physical and electronic locations normally used to communicate with unit employees. See, *State of New York*, 43 PERB ¶3046 (2010); *State of New York (Dept of Correctional Services)*, 43 PERB ¶3035 (2010); *NYCTA*, 43 PERB ¶3038 (2010).

"Affidavit of City Residence" or who were terminated based on the information they provided to the City in that affidavit;

4. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: May 27, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the City of Syracuse in the unit represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO that the City of Syracuse will forthwith:

1. not enforce or implement the requirement that unit employees complete the "Affidavit of City Residence";
2. remove and destroy all reports or other documents submitted by unit employees or generated by the City or its agents pursuant to its requirement that they complete, swear to, sign and return the "Affidavit of City Residence" from any files kept or maintained by the City or any of its agents;
3. reinstate and make whole, with interest at the maximum legal rate, any unit employees who were terminated based on their failure to complete the "Affidavit of City Residence" or who were terminated based on the information they provided to the City in that affidavit.

Dated

By
on behalf of City of Syracuse

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

NIAGARA FALLS POLICE CLUB, INC.,

Charging Party,

- and -

CASE NO. U-29287

CITY OF NIAGARA FALLS,

Respondent.

WILLIAM E. GRANDE, ESQ., for Charging Party

**CRAIG H. JOHNSON, CORPORATION COUNSEL (CHRISTOPHER M.
MAZUR of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the City of Niagara Falls (City) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge, as amended, filed by the Niagara Falls Police Club, Inc. (Police Club) alleging that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally implemented an amendment to its residency rules by eliminating the procedure for reinstatement of a unit employee after reestablishment of residency and the right of reinstatement to the employee's position, if vacant.

On a stipulated record, the ALJ concluded that the subject matters of the amended charge constitute mandatory subjects of negotiations under the Act, and that the City violated the Act by unilaterally implementing the amendment to its residency rules.¹

EXCEPTIONS

The City excepts to the ALJ's conclusion that the subject matters of the charge

¹ 44 PERB 114510 (2011).

are mandatory subjects of negotiations rather than a non-mandatory pre-employment qualifications. In addition, it asserts that the Police Club waived its right to negotiate the subjects based upon its failure to demand negotiations. Finally, the City contends that the at-issue subjects constitute prohibited subjects of negotiations. The Police Club supports the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision.

FACTS

The Police Club represents a unit of Niagara Falls Police Department employees including uniformed police officers, detectives, communication technicians and police dispatchers. The City and the Police Club are parties to a collectively negotiated agreement (agreement) for the period January 1, 2004-December 31, 2007.

In 1984, the Niagara Falls City Council (City Council) enacted a Local Law imposing a residency requirement for all new City employees. Pursuant to §5 of the Local Law, an employee found to have violated the residency requirement is deemed to have voluntarily resigned from his or her position. Upon reestablishing residency, however, the employee is entitled to reinstatement to his or her former position if the position is vacant.

In 1996, the City Council amended §5 slightly to read, in part:

Should the City Administrator decide that the employee is a non-resident in violation of this local law, the employee shall be deemed to have voluntarily resigned from employment. Upon establishing residency, an individual so resigned may apply for reinstatement to his or her former position and shall be reinstated if the position is vacant.

On March 9, 2009, the City Council enacted legislation that deleted the sentence in §5 with respect to employee reinstatement following reestablishment of residency. On March 20, 2009, the City of Niagara Falls Mayor (Mayor) approved the amendment and

it was subsequently filed with the New York Secretary of State. It is undisputed that the amendment was approved and implemented by the Mayor without negotiations with the Police Club.

DISCUSSION

In *City of Niagara Falls*,² we held that an appeal procedure for challenging an initial City determination that a unit member is not in compliance with the City's residency requirement is a mandatory subject. Our decision was premised upon the fact that such a determination by the City adversely affects an employee's terms and conditions of employment because the determination results in the employee being deemed to have voluntarily resigned.

In the present case, we affirm the ALJ's conclusion that the subjects of the Police Club's charge are mandatory subjects of negotiations under the Act. A procedure for the reinstatement of a unit employee following the reestablishment of residency, and the right to be reinstated to a former position if it is vacant, constitute benefits equivalent to preferential recall procedures that we have found to be mandatorily negotiable.³ Contrary to the City's argument, the at-issue subjects are not pre-employment qualifications, but rather benefits for unit employees who retain a continuing nexus to City employment despite being deemed to have resigned for violating the residency requirement.

We also affirm the ALJ's rejection of the City's argument that it did not have a duty to negotiate these mandatory subjects under the Act because the Police Club did not demand negotiations. While a demand is a necessary precondition to an obligation

² 43 PERB ¶3006 (2010).

³ *Somers Faculty Assoc*, 9 PERB ¶3014 (1976).

under the Act to negotiate the impact of an employer's decision,⁴ the duty to negotiate a change in a mandatory subject of negotiations does not require a demand.⁵

Finally, we examine the City's argument that Public Officers Law §30.4(3) renders the at-issue subjects prohibited under the Act.

We have previously held that the imposition of a residency requirement for police officers subject to Public Officers Law §30.4(3) is nonmandatory because it constitutes the exercise of a managerial prerogative.⁶ By its explicit terms, however, Public Officers Law §30.4(3) is applicable to a police force consisting of "less than two hundred full-time members." In the present case, the stipulated record does not include an essential fact necessary to support the City's argument that unit members are subject to that state law: the police force has fewer than 200 full-time members.⁷ Therefore, the City has failed to demonstrate that the law is applicable to Police Club unit members.

Even if we found Public Officers Law §30.4(3) to be applicable, the subject of the charge is not rendered prohibited or nonmandatory by the statute. The plain and clear language of Public Officers Law §30.4(3) grants certain localities the right to unilaterally impose a residency requirement on its police officers. The statute, however, does not contain language that explicitly or implicitly prohibits negotiations over related

⁴ *North Babylon Union Free Sch Dist*, 7 PERB ¶3027 (1974).

⁵ *Board of Educ of the City Sch Dist of the City of New York*, 40 PERB ¶3002 (2007); *Great Neck Water Pollution Control Dist*, 28 PERB ¶3030 (1995).

⁶ *City of Mount Vernon*, 18 PERB ¶3020 (1985); *Salamanca Police Unit, CSEA*, 12 PERB ¶3079 (1979).

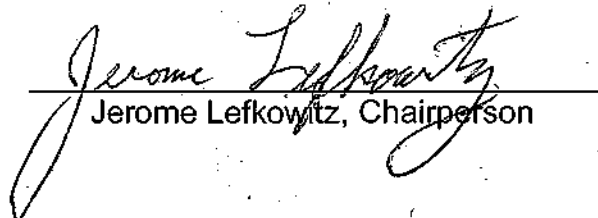
⁷ Although the City asserts in its brief that it employs fewer than 200 full-time police officers, this factual assertion is unsupported by the stipulated record. As we have previously emphasized, parties bear responsibility to ensure a complete record, either through a stipulation of facts or through the presentation of evidence at a hearing. *City of Niagara Falls, supra*, note 2.

procedures and rights with respect to satisfying the residency requirement imposed by the City. Public Officers Law §30.4(3) is simply not "so unequivocal a directive to take certain action that it leaves no room for bargaining."⁸

IT IS THEREFORE ORDERED that the City:

1. Cease and desist from unilaterally implementing the amendment to the residency law eliminating the procedure and right to reinstatement of an employee to his or her position upon the re-establishment of residency if the position remains vacant;
2. Forthwith extend to any employee deemed to have resigned pursuant to the residency law the right to reinstatement upon re-establishing residency if his or her position remains vacant;
3. Forthwith negotiate the elimination of the language of the residency law regarding reinstatement with the Police Club; and
4. Sign and post the attached notice at all locations normally used to communicate both in writing and electronically, with unit employees.

DATED: May 27, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

⁸ Board of Educ of City Sch Dist of City of New York v New York State Pub Empl Rel Bd, 75 NY2d 660 at 668, 23 PERB ¶7013 at 7014 (1990).

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

1. Stop unilaterally implementing the amendment to the residency law eliminating the procedure and right to reinstatement of an employee to his or her positions upon the re-establishment of residency if the position remains vacant;
2. Forthwith extend to any employee deemed to have resigned pursuant to the residency law the right to reinstatement upon re-establishing residency if his or her position remains vacant;
3. Forthwith negotiate the elimination of the language of the residency law regarding reinstatement with the Police Club.

Dated

By

(Representative)

(Title)

City of Niagara Falls
.....

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,
TIOGA COUNTY LOCAL 854, TIOGA
COUNTY EMPLOYEES UNIT 8850,**

Charging Party,

CASE NO. U-27939

- and -

COUNTY OF TIOGA,

Respondent.

**NANCY E. HOFFMAN, GENERAL COUNSEL (DAREN J. RYLEWICZ of
counsel), for Charging Party**

**HOGAN, SARZYNSKI, LYNCH, SUROWKA & DEWIND, LLP (EDWARD J.
SARZYNSKI of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board 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) dismissing an improper practice charge alleging that the County of Tioga (County) violated §§209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) when it disciplined six unit members, including the CSEA unit president and shop steward, for engaging in protected activity under the Act, and when it sought to discipline the unit president and shop steward more severely than the other four unit members.

Following a hearing, the ALJ issued a decision dismissing the charge, concluding that the at-issue activities of the six unit employees were not protected under the Act. In addition, the ALJ determined that the County had demonstrated legitimate

nondiscriminatory reasons for seeking greater disciplinary penalties against the CSEA unit president and the shop steward. Finally, the ALJ credited the testimony of the County personnel director who testified that she was not aware that one of the six unit employees was a shop steward at the time that the County entered into settlement discussions with CSEA over the disciplinary claims against the six employees.¹

EXCEPTIONS

In its exceptions, CSEA asserts that the ALJ erred in concluding that the at-issue activities of the six unit employees were not protected under the Act, in crediting the County personnel director's testimony that she was unaware of the shop steward's status when the parties commenced settlement discussions, and in finding that the unequal punishment of the unit president and shop steward did not violate §§209-a.1(a) and (c) of the Act. The County supports the decision of the ALJ, and asserts there are no legal or factual bases for reversing the ALJ's decision.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision, as modified herein.

FACTS

Joan Kellogg (Kellogg) works for the County Health Department. She has been CSEA unit president for a county-wide unit since July 1, 2005. At all times relevant, Penny Sindoni (Sindoni) was a Health Department senior typist and a CSEA shop steward. In 2007, Kellogg sent an email to County Personnel Officer Bethany O'Rourke (O'Rourke) with a list of unit employees who were shop stewards including Sindoni.

During her tenure as unit president, Kellogg processed a number of grievances including a class action grievance regarding the County's flexible schedule policy that

¹ 43 PERB ¶4521 (2010).

was settled at arbitration. In addition, Kellogg discussed other concerns directly with County Personnel Officer O'Rourke, although regular labor-management meetings between the County and CSEA had been discontinued.

In late 2005, Kellogg began receiving verbal complaints from unit member Linda Cook (Cook) about alleged abusive workplace conduct by Cook's new immediate supervisor Christeenia A. Cargill (Cargill), the County Health Department Director of Children with Special Health Care Needs, who had been hired earlier in the year. A few months later, unit members Kimberly DeRouchie (DeRouchie) and Gail Barton (Barton) made similar verbal complaints to Kellogg about Cargill's alleged behavior. Cook, DeRouchie and Barton also complained to shop steward Sindoni that Cargill was verbally abusive and that she slammed doors and glared at people.

In August 2006, County Personnel Officer O'Rourke, County Health Department Director Johannes Peeters (Peeters) and County Director of Administrative Services Denis McCann (McCann) met with Kellogg and CSEA Labor Relations Specialist Shawn Lucas (Lucas) to discuss problems involving Kellogg's job performance. The meeting resulted in an agreement that Kellogg would meet more regularly with McCann to review her workload.

In the summer 2006, Kellogg scheduled a meeting with CSEA Labor Relations Specialist Lucas regarding complaints against Cargill. Present at the meeting were Kellogg and unit members Cook, DeRouchie and Barton. Following that meeting, CSEA participated in a series of meetings with County Personnel Officer O'Rourke and County Health Department Director Peeters regarding Cargill in late 2006 and 2007. Lucas or CSEA unit vice-president Lisa Baker (Baker) attended those meetings on

behalf of CSEA along with Cook and DeRouchie.² Kellogg, Sindoni and Cargill did not attend the meetings.

O'Rourke and DeRouchie were the only participants at the County-CSEA meetings who testified before the ALJ.³ They testified that at the meetings Cook and DeRouchie expressed frustration with Cargill's supervision and job performance. The issues discussed included Cargill's failure to return client telephone calls, her delays in completing Cook's evaluation and Cargill's allegation against Cook for breaching confidentiality. There is no evidence in the record that the CSEA representatives or the unit members complained at the meetings that Cargill had engaged in verbal abuse, slammed doors or that CSEA invoked the County's workplace violence policy prohibiting disruptive, menacing, threatening and abusive behavior. At one of the meetings with CSEA, O'Rourke referred to the complaints by DeRouchie and Cook as "childish" and between meetings County Health Department Director Peeters spoke with Cargill about her conduct toward them.

The result of the County-CSEA meetings was the County's adoption of CSEA's proposal that the County conduct a training session in conflict resolution for all Health Department employees. Consistent with that agreement, the County offered the conflict resolution training to unit members.⁴ The record does not include any evidence that CSEA Labor Relations Specialist Lucas and unit vice-president Baker took any further

² Barton resigned from County employment in April 2007. Transcript, p. 29.

³ Both were called as County witnesses. CSEA did not call Labor Relations Specialist Lucas, unit vice president Baker or unit member Cook to testify.

⁴ The training took place in 2007 and not in 2006 as found by the ALJ. *Supra*, note 1, 43 PERB ¶4521 at 4580.

action with respect to the issues raised regarding Cargill following the County-CSEA meetings. Furthermore, there is no evidence that Lucas or Baker engaged in any further communications with DeRouchie and Cook or reported the results of the meetings to Kellogg and Sindoni.

In May 2007, DeRouchie, Cook, Sindoni and co-worker Lisa Schumacher (Schumacher) began wearing a pink ribbon at work. The pink ribbon was similar to the pink ribbon symbol worn for breast cancer awareness. The activity was originally proposed by DeRouchie to show symbolic support for her and Cook. During a disciplinary interrogation conducted by the County in August 2007, Sindoni stated that the ribbon wearing was intended to "show support for each other and we agreed we would do that because Kim [DeRouchie] was upset because Gail [Barton] quit."⁵

In May 2007, Kellogg, Sindoni, DeRouchie, Schumacher and Cook had dinner with their former co-worker Barton. At the time, Kellogg did not wear the pink ribbon. During the course of their dinner discussion, the phrase "I Hate Teena Club" was utilized to refer to those wearing the ribbon. Kellogg testified before the ALJ that DeRouchie, Cook and Barton expressed hatred for Cargill at the dinner, and that Kellogg viewed Cargill as stupid and incompetent. At some point, unit member Katie Searles (Searles), who was not present at the dinner, began wearing the ribbon at work as well.

On May 22, 2007, after Kellogg became upset over Cargill's conduct toward her and Sindoni, Kellogg made a personal complaint to County Director of Administrative Services Denis McCann (McCann). In addition, she began to wear the ribbon. Kellogg

⁵ Respondent Exhibit 25, pp. 9-10. This statement was added by Sindoni as part of her handwritten amendments to the interrogation transcript.

testified before the ALJ that she started wearing the ribbon "in support for everyone else because I hadn't taken a stand, I tried to stay clear of those issues."⁶ At her interrogation in August 2007, however, Kellogg emphasized that the ribbon wearing had a symbolic personal purpose:

It was intended to give me support for myself because I felt very intimidated and very, it was for my, to make me feel better because I felt so terrible.⁷

On the same day Kellogg began to wear the pink ribbon, she spoke with County Administrative Assistant Barbara McCormick (McCormick) about her recent interaction with Cargill. During their conversation, Kellogg showed McCormick the ribbon and stated that it represented the "I Hate Teena Club."⁸ McCormick testified that she declined Kellogg's offer to join the club, and "laughed it off."⁹ Although Kellogg denied attempting to recruit McCormick, Kellogg admitted telling McCormick that she would also hate Cargill after working with her. McCormick reported Kellogg's comments about the "I Hate Teena Club" to County Director of Administrative Services McCann. McCann learned that other employees in the Health Department were aware of the existence of the so-called club.

After consulting with County Personnel Officer O'Rourke and County Health Department Director Peeters, County Director of Administrative Services McCann commenced an investigation on May 25, 2007. Over the next several months, McCann

⁶ Transcript, pp. 41, 55.

⁷ Respondent Exhibit 24, p. 14.

⁸ Transcript, pp. 60, 211; Respondent Exhibit 24, p. 15.

⁹ Transcript, pp. 211-212.

prepared a written statement for each employee he interviewed and forwarded the signed statements to O'Rourke. During the interviews, McCann asked each employee questions regarding their level of knowledge about the "club," including which employees were members, whether they were solicited to join the club, and whether the ribbon was an indication of club membership.

McCann separately interviewed County employees Mary Gelatt (Gelatt), Nancy Dow (Dow) and Roxie Canavan (Canavan) on May 25, 2007; he interviewed McCormick and two other County employees during the following week. All of the employees interviewed by McCann stated that they knew about the club and the related ribbon wearing. McCormick informed McCann that Kellogg solicited her to join; Gelatt revealed that she had been solicited by Sindoni.

Over Memorial Day weekend, Kellogg learned that County employees were being questioned about the club and the ribbons. In response, she telephoned former CSEA unit president Kathleen McEwen (McEwen) to find out whether McEwen thought the six employees might be disciplined for their conduct. During the conversation, McEwen expressed her opinion that the employees might face discipline.¹⁰ Kellogg also telephoned Labor Relations Specialist Lucas about the ribbons. Lucas recommended that the employees stop wearing them.

Based upon the advice received from McEwen and Lucas, Kellogg called Sindoni on May 29, 2007 to encourage her and the others to stop wearing the ribbons. Kellogg stated during her interrogation that she called only Sindoni "because I knew Linda [Cook] was not at work and Kim [DeRouchie] is frequently hard to get to. I don't

¹⁰ Transcript, pp. 194-195.

know Lisa [Schumacher] or Katie's [Searles] numbers."¹¹ Thereafter, the ribbon wearing ceased.

In late June 2007, during a conversation with CSEA local president Lynn Wool (Wool) regarding an unrelated union matter, Cargill first learned of the existence of a "hate club"¹² Wool mentioned the so-called club in the context of inquiring about how Cargill was feeling. Thereafter, Cargill obtained additional information from a co-worker about the purpose of the ribbons that Cargill had previously observed being worn by DeRouchie, Cook, Schumacher, Searles and Sindoni. Cargill met with Peeters, who informed her that the County had been investigating the issue but delayed notifying her to avoid unnecessarily upsetting her. Cargill also telephoned former CSEA unit president McEwen to express her displeasure and fear over the conduct of the other employees.

In July 2007, Cargill prepared and submitted a threat summary to the County under its workplace violence policy. Following receipt of Cargill's complaint, the County Attorney and O'Rourke commenced their own investigation. The investigation included interviews with Cargill, McCormick, Gelatt and other County employees.

During her interview, McCormick reported that Kellogg hated Cargill and Cargill's predecessor, and repeated that Kellogg had asked her to join the club. She also stated that Sindoni described herself as vindictive and as someone who would retaliate against anyone who provided truthful information to McCann. McCormick also stated that she and her co-workers feared Sindoni because of Sindoni's anger and

¹¹ Respondent Exhibit 24, p. 26.

¹² Joint Exhibit 12, p. 250.

vindictiveness, a sentiment also expressed by Cargill in a separate interview. Gelatt repeated to O'Rourke and the County Attorney that Sindoni solicited her to join the club. She also reported that Sindoni became very angry when she learned that Gelatt had provided truthful information to McCann.

As part of the investigation, the County Attorney and O'Rourke interrogated Kellogg, Sindoni, DeRouchie, Cook, Schumacher and Searles on August 17, 2007. Following those interrogations, O'Rourke recommended that each employee be disciplined. The proposed punishments varied, however, based upon O'Rourke's judgment of each employee's specific conduct, cooperation during the investigation and expression of remorse.

Consistent with O'Rourke's recommendations, the County presented proposed disciplinary settlements to Lucas. The penalties proposed for Kellogg and Sindoni were the most severe: a four-week suspension and termination respectively. The County proposed letters of reprimand for Searles, Schumacher and DeRouchie, and a two-week suspension without pay for Cook. All of the employees would also be required to personally apologize to Cargill.

Following a request from Lucas, O'Rourke sent an email outlining the County's rationale for seeking different penalties. Among the stated reasons for seeking a more severe penalty against Kellogg was the allegation that Kellogg solicited others to join the club. The County subsequently modified its settlement offers by reducing the proposed suspension of Cook to one-week and increasing the proposed penalty of DeRouchie from a letter of reprimand to a one-week suspension.

DeRouchie, Cook, Schumacher and Searles accepted the settlement offers and, with CSEA's representation, entered into stipulations of settlement without the County

filing disciplinary charges pursuant to Civil Service Law §75. DeRouchie and Cook agreed to one-week suspensions for participating in the club, for wearing the ribbon and for creating a hostile work environment for Cargill. Searles and Schumacher accepted a letter of reprimand for being a club member and for wearing the ribbon.

After Kellogg refused to accept the County's settlement offer, she was served with Civil Service Law §75 charges seeking her termination for creating a hostile work environment and violating the County's workplace violence policy. The charges included detailed allegations regarding the wide scope of Kellogg's involvement with the club and the ribbons. Furthermore, the specifications alleged that Kellogg misused the County's email system in July and August 2007 to send derogatory email regarding Cargill and Peeters. Kellogg was also charged with certain job performance deficiencies that had already been resolved with the County. Kellogg entered into a settlement of the disciplinary charges, which was negotiated by CSEA. Under the settlement terms, Kellogg accepted a suspension without pay from October 2, 2007 to October 31, 2007 for participating in the club, recruiting new members, wearing the ribbon and creating a hostile work environment for Cargill. As part of the settlement, Kellogg also agreed to a written warning regarding her job performance.

The County maintained its position that Sindoni should either resign or face disciplinary charges seeking her termination. According to O'Rourke's testimony, the severity of the proposed penalty was premised upon Sindoni having engaged in more serious acts of misconduct.

In late September 2007, the County issued Civil Service Law §75 charges against Sindoni setting forth 16 specific acts of misconduct or incompetence, which the County alleged created a hostile work environment and violated its workplace violence

policy. Among the 16 specifications were allegations that she participated in the club, wore the ribbon and recruited others to join. In addition, the charges alleged that she had a loud argument with Cargill, monitored Cargill's workplace errors, conversations and actions, retaliated against co-workers for speaking to the County about the club, expressed disappointment to a co-worker for failing to lie, and made threats that caused co-workers to fear retaliation from her for participating in the County's investigation.

After a hearing, the Civil Service Law §75 hearing officer found Sindoni guilty of the charges and recommended her termination, which the County adopted. An Article 78 proceeding was filed challenging the termination, which resulted in the Appellate Division, Third Department upholding the termination.¹³

DISCUSSION

To demonstrate that the County's disciplinary actions were improperly motivated in violation of §§209-a.1(a) and (c) of the Act, CSEA has the burden of demonstrating by a preponderance of evidence that: a) the affected unit employees engaged in a protected activity under the Act; b) such activity was known to the person or persons taking the adverse employment action; and c) the adverse employment action would not have been taken "but for" the protected activity.¹⁴

In its exceptions, CSEA asserts that the six unit employees engaged in protected activity under the Act when they wore pink ribbons at work. We disagree.

¹³ *Sindoni v County of Tioga*, 67 AD3d 1183 (3d Dept 2009).

¹⁴ *Elwood Union Free Sch Dist*, 43 PERB ¶3012 (2010); *UFT (Jenkins)* 41 PERB ¶3007 (2008), *confirmed sub nom. Jenkins v New York State Pub Emp Rel Bd*, 41 PERB ¶7007 (Sup Ct New York County 2008) *affirmed* 67 AD3d 567, 42 PERB ¶7008 (1st Dept 2009); *City of Salamanca*, 18 PERB ¶3012 (1985); *Town of Independence*, 23 PERB ¶3020 (1990); *County of Orleans*, 25 PERB ¶3010 (1992); *Stockbridge Valley Cent Sch Dist*, 26 PERB ¶3007 (1993); *County of Wyoming*, 34 PERB ¶3042 (2001).

The scope of protected employee activities under §§202 and 203 of the Act is narrower than the scope of activities protected under §7 of National Labor Relations Act (NLRA).¹⁵ This difference in the scope of statutory protections emanates from the fact that unlike §7 of the NLRA, the Act does not protect employees who engage in concerted activities for "mutual aid and protection."¹⁶ Therefore, in order for conduct to be found to be a protected concerted activity for purposes of the Act, it must have some relationship with forming, joining or participating in an employee organization.

To determine whether a particular activity is protected under the Act we evaluate "the totality of all relevant circumstances, with a focus upon the purpose and effect of that activity."¹⁷ As part of that evaluation, we must examine the content of the activity in the context of all relevant surrounding circumstances.

Employee statements and actions that are organized, prompted or encouraged by an employee organization will, in general, be found to be protected concerted activity for purposes of the Act. The wide scope of protected concerted activities under the Act includes statements and activities by a unit employee as part of an employee organizational activity, relates to an employee organization policy, involves employee organizational representation or stems from a dispute emanating from a collectively

¹⁵ 29 USC §157. See also, *Rosen v New York State Pub Empl Rel Bd*, 72 NY2d 42, 21 PERB ¶7014 (1988); *NYCTA v New York State Pub Empl Rel Bd*, 8 NY3d 226, 40 PERB ¶7001 (2007); *Love Canal Area Revitalization Agency (Bannister)*, 28 PERB ¶3040 (1995).

¹⁶ 29 USC §157.

¹⁷ *Village of Scotia*, 29 PERB ¶3071, at 3169 (1996), confirmed sub nom. *Village of Scotia v New York State Pub Empl Rel Bd*, 241 AD2d 29, 31 PERB ¶7008 (3d Dept 1998). See also, *Metropolitan Suburban Bus Auth (Lomuscio)*, 23 PERB ¶3006 (1990); *NYCTA (Alston)*, 20 PERB ¶4575 (1987) *affd* 20 PERB ¶3065 (1987).

negotiated agreement.¹⁸ In such contexts, the concerted wearing of ribbons and other symbolic forms of speech or protest by unit members will be generally protected under the Act, particularly when employees are permitted to wear ribbons or other emblems at work in support of other causes.

Based upon the facts and circumstances presented in this record, however, we conclude that the wearing of pink ribbons by the six unit employees is not protected concerted activity under the Act. The record evidence demonstrates that while the ribbon wearing was concerted, in the generic sense, it was unrelated to forming, joining or participating in an employee organization. Instead, the symbolic speech was for the purpose of expressing only a shared personal animus regarding Cargill, a sign of camaraderie tied to that dislike and an expression of support for each other.

The ribbon wearing commenced only after CSEA completed its meetings with the County, which resulted in the conflict resolution training. The activity was not related to any ongoing CSEA representation. It did not stem from the terms of the collectively negotiated agreement or a pending claim under the County's workplace violence policy. Nor was it part of a symbolic campaign against the County or Cargill for allegedly failing to comply with the County's policy.

In reaching our conclusions, we infer from CSEA's failure to call Labor Relations Specialist Lucas and unit vice president Baker as witnesses that they would have

¹⁸ In certain limited circumstances, conduct in the workplace with a nexus to organizational activity may be found unprotected under the Act but only when the objective evidence demonstrates that under the totality of the circumstances it is overzealous, confrontational or actually disruptive. *State of New York (Division of Parole)*, 41 PERB ¶3033 (2008). To prove that defense, however, an employer must present objective evidence of disruption emanating from the conduct. It cannot rely upon a mere prediction of disruption or a workplace disruption caused by its own overreaction to the at-issue conduct.

testified that they were unaware of the ribbon wearing until after the County commenced its investigation, that the activity was not related to their discussions with the County regarding unit employees' complaints and that in their judgment the conflict resolution training adequately resolved the employee complaints about Cargill's supervision.¹⁹

The evidence demonstrates that CSEA did not organize or encourage the symbolic conduct by the six unit members. While Kellogg and Sindoni hold CSEA offices, the context of their involvement demonstrates that they did not wear the ribbons, or encourage others to do so, in their union capacities. Rather, they wore the ribbons because of their strong personal dislike of Cargill. Kellogg began wearing the ribbon only after a direct incident with Cargill, which resulted in Kellogg filing a "personal complaint"²⁰ with McCann. During her interrogation, Sindoni candidly acknowledged her continued dislike for Cargill, which stemmed, in part, from a dress code complaint she made against Cargill.²¹ Furthermore, we note that Kellogg and Sindoni did not cite to their CSEA titles, duties or activities during their respective interrogations or in their subsequent handwritten amendments to the interrogation transcripts.

We next turn to CSEA's exception challenging the ALJ's crediting of O'Rourke's testimony that she was unaware of Sindoni's shop steward status at the time that the County decided upon the disciplinary penalties it would seek including Sindoni's resignation or termination.

¹⁹ *State of New York (Division of Parole)*, *supra*, note 18.

²⁰ Brief of Charging Party in Support of Exceptions, p.3.

²¹ Respondent Exhibit 25, pp. 11-12.

Credibility determinations by an ALJ are generally entitled to substantial deference by the Board.²² In the present case, we find no objective evidence in the record to disturb the ALJ's credibility finding that O'Rourke did not recall Sindoni's shop steward status at the time that the County commenced settlement discussions with CSEA. While Kellogg may have included Sindoni on a list of shop stewards emailed to O'Rourke, it is quite plausible that O'Rourke may have forgotten the content of that email, particularly when Sindoni had no interactions with O'Rourke in her shop steward role and Sindoni did not mention her CSEA status during her interrogation. Based upon the foregoing, we deny CSEA's second exception.

Finally, we examine CSEA's exception seeking to overturn the ALJ's finding that the more severe disciplinary penalties sought against Kellogg and Sindoni were motivated by their status in CSEA in violation of §§209-a.1(a) and (c) of the Act.

Based upon our review of the record, we conclude that CSEA failed to demonstrate by a preponderance of the evidence that the disciplinary penalties were motivated by Kellogg and Sindoni's organizational status or activities.

With respect to Sindoni, CSEA failed to prove an essential element of its *prima facie* case: that the County was cognizant of her status as a shop steward at the time it decided to seek her resignation or discharge. Therefore, we affirm the ALJ's decision dismissing the amended charge as it relates to the disciplinary penalty against Sindoni.

Even if we were to reach a different conclusion on the issue of the County's knowledge, however, we would find that the respective punishments sought by the County were not improperly motivated.

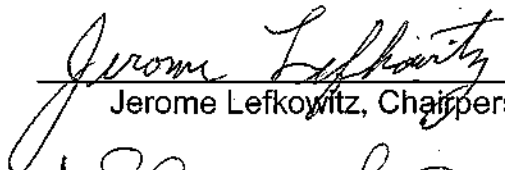
²² *Mount Morris Cent Sch Dist*, 41 PERB ¶13020 (2008).

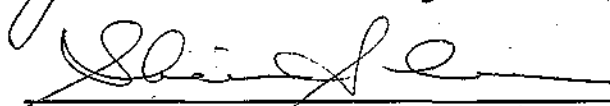
The pursuit of more severe penalties against the two CSEA officers is not dispositive proof of improper motivation.²³ Those disparities, as well as the resurrection of other job performance issues regarding Kellogg, and Sindoni's prior work history constitute circumstantial evidence of improper motivation.²⁴ However, the County presented legitimate nondiscriminatory reasons for its actions demonstrating that Kellogg and Sindoni were not similarly situated to the other four unit members. The evidence reveals that the County sought harsher penalties against them because their alleged misconduct was of a greater magnitude than that committed by the other employees. Both were reported to have solicited others to participate and Sindoni was accused of making threats that created fear among her co-workers and engaging in other misconduct toward Cargill. The fact that Cargill may have feared both Sindoni and DeRouchie does not demonstrate that the County's reasons for seeking harsher penalties against Kellogg and Sindoni were pretextual.

Based upon the foregoing, the decision of the ALJ is affirmed as modified.

IT IS, THEREFORE, ORDERED that CSEA's exceptions are denied, and the charge is dismissed.

DATED: May 27, 2011
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Board Member

²³ *County of Cattaraugus*, 24 PERB ¶3001 (1991).

²⁴ *Hudson Valley Comm Coll*, 25 PERB ¶3039 (1992).