STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE PAROLE OFFICERS BENEVOLENT ASSOCIATION,

Petitioner,

- and - **CASE NO. C-5441**

STATE OF NEW YORK (DIVISION OF PAROLE),

Employer,

-and-

PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Incumbent/Intervenor.

BARTLO, HETTLER & WEISS (CHARLES J. NAUGHTON, of counsel) for Petitioner

WALTER J. PELLEGRINI, GENERAL COUNSEL (JAMES D. TAYLOR of counsel) for Employer

WILLIAM P. SEAMON, ESQ., GENERAL COUNSEL (STEVEN M. KLEIN of counsel) for Intervenor

INTERIM BOARD DECISION AND ORDER

This case comes to us on exceptions, dated April 2, 2007, filed by the New York State Parole Officers Benevolent Association (Association). The Association seeks review of an interim decision by the Administrative Law Judge (ALJ), dated February 12, 2007, concluding that the at-issue Parole Officer titles in the State of New York (Division

of Parole) (State) should not be removed from the bargaining unit of professional, scientific, and technical employees represented by the Public Employees Federation, AFL-CIO (PEF) based on their law enforcement duties. PEF has filed a response in opposition to the exceptions, dated May 25, 2007. The State has not filed a response to the Association's exceptions.

PROCEDURAL MATTERS

On August 9, 2004, the Association filed a representation petition seeking to represent a bargaining unit composed of approximately 1,200 employees of the State holding titles in the Parole Officer series. Among the three bases for the petition is the Association's claim that the law enforcement duties of the Parole Officer titles necessitate their removal from the professional, scientific, and technical unit represented by PEF premised on Board precedent holding that employees performing criminal law enforcement duties are entitled to a separate bargaining unit from employees who do not perform such duties.[1] In the alternative, the Association's petition seeks fragmentation for the at-issue titles under the standards set forth in *Town of Southampton*[2] or *Icahbod Crane Central School District.*[3]

Both the State and PEF filed responses to the Association's petition.

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[1] *See, County of Erie and Sheriff of Erie County,* 29 PERB ¶3031 (1996), *confirmed sub nom., County of Erie v New York State Pub Empl Rel Bd*, 247 AD2d 671, 31 PERB ¶7004 (3d Dept 1998); *County of Rockland*, 32 PERB ¶3074 (1999), *confirmed sub nom., United Federation of Police Officers v County of Rockland, et al.,* 34 PERB ¶7019 (Sup Ct Albany County 2001).

[2] 37 PERB ¶3001 (2004).

[3] 33 PERB ¶3042 (2000), *confirmed sub nom.; CSEA v New York State Pub Empl Rel Bd,* 300 AD2d 929, 35 PERB ¶7020 (3d Dept 2002).

Prior to commencing the investigatory hearing, the ALJ determined that the most efficient means of processing the representation petition would be through the bifurcation of the articulated bases for the Association's petition and focused initially on the issue of whether the titles should be fragmented based on their alleged law enforcement duties. Five days of hearing were held relating to this sole issue.

On February 12, 2007, the ALJ issued an interim decision concluding that criminal law enforcement is not the primary or exclusive duty of the employees holding the at-issue titles.[4] The Association has filed exceptions with the Board and PEF has responded to those exceptions. The State has not filed a response to the Association's exceptions.

DISCUSSION

The Association asserts a purported right to file exceptions without permission based on our decision in *State of New York,*[5] wherein the Board accepted and decided exceptions from an ALJ's interim decision in a representation case without the party making a motion for leave pursuant to §212.4(g) of PERB's Rules of Procedure (Rules).

Historically, the Board has granted leave to file interlocutory exceptions to non-final rulings and decisions in situations where the moving party can demonstrate

[4] 40 PERB ¶4003 (2007).

[5] 39 PERB ¶3032 (2006).

extraordinary circumstances.[6] Although perhaps an inexact standard, application of the extraordinary circumstances standard has resulted in the rejection of most requests for permission to file exceptions, especially regarding interim decisions and rulings in improper practice cases.[7] In the vast majority of such cases, we have recognized that it is far more efficient for the Board and the parties to await a final disposition by the ALJ or the Director of Public Employment Practices and Representation (Director) before examining interim determinations.

In contrast, we have been far more willing to grant leave to file interlocutory exceptions in representation cases under the extraordinary circumstances standard, when the issue raised in the motion for leave has important statewide policy or legal implications for the processing of future representation petitions, may help insure procedural certainty in such processing or where our decision may obviate the need for further processing of the petition.[8]

The *State of New York*[9] decision relied upon by the Association constituted a departure from a long series of decisions requiring a party to request permission to file

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[6] *Buffalo Municipal Housing Auth*, 35 PERB ¶3009 (2002); *City of Newburgh,* 33 PERB ¶3031 (2000); *Council 82 AFSCME*, 32 PERB ¶3040 (1999); *Watertown City Sch Dist*, 32 PERB ¶3022 (1999); *New York State Housing Finance Agency,* 30 PERB ¶3022 (1997); *Town of Shawangunk*, 29 PERB ¶3050 (1996); *Greenburgh No 11 Union Free Sch Dist*, 28 PERB ¶3034 (1995); *Mt Morris Cent Sch Dist,* 26 PERB ¶3085 (1993).

[7] *Town of Shawangunk, supra*, note 6.

[8] *Town of Ramapo*, 40 PERB ¶3006 (June 27, 2007); *Buffalo Municipal Housing Auth, supra,* note 6; *State of New York (NYSCOPBA)*, 31 PERB ¶3058 (1998); *County of Putnam*, 31 PERB ¶3031 (1998); *State of New York (Div of Military and Naval Affairs)*, 18 PERB ¶3084 (1985).

[9] *Supra*, note 5.

exceptions for interlocutory review of interim decisions and rulings pursuant to §212.4(h) of the Rules. Although we agree that the "ultimate issue" raised and determined in *State of New York* would have constituted a valid basis for the grant of permission to file exceptions, to the extent the case established a basis for filing exceptions to interim decisions and rulings without permission, it is hereby overruled.

In the present case, the ALJ's interim decision regarding whether fragmentation of the Parole Officers was appropriate based on their law enforcement duties is subject to §212.4(h) of the Rules which states, in relevant part, that: "*All* motions and rulings made at the hearing shall be part of the record of the proceeding, and unless expressly authorized by the board, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision." (emphasis added). Therefore, we must determine whether the Association should be granted permission to file exceptions pursuant to §212.4(h) of the Rules.

We note that §212.4(h) of the Rules does not identify the precise procedural vehicle for requesting interlocutory review. The appropriate method for seeking leave to file exceptions is through a written motion, on notice to all parties, setting forth the relevant facts, the issues to be determined and the reason why interlocutory relief should be granted. In the present case, the Association's exceptions will be treated as a motion for relief pursuant to §212.4(h).[10]

Upon a review of the ALJ's decision, the Association's exceptions and PEF's response, we are persuaded that extraordinary circumstances exist in this

[10] *State of New York (Unified Court System)*, 36 PERB ¶3031 (2003).

representation case for the grant of leave to file exceptions. A decision with respect to the law enforcement duty standard for fragmentation in the present case may obviate the need for further hearings and may help clarify the applicability of that standard to non-police job titles throughout New York State.

The State shall have seven working days after receipt of this decision to either file a response to the Association's exceptions pursuant to the requirements in §213.3 of the Rules or notify the Board in writing that it will not be filing a response.

DATED: June 27, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RAMAPO POLICE SUPERIOR OFFICER'S ASSOCIATION,

Petitioner,

- and - **CASE NO. C-5604**

TOWN OF RAMAPO,

Employer,

-and-

RAMAPO POLICE BENEVOLENT ASSOCIATION,

Incumbent/Intervenor.

JOHN M. CROTTY, ESQ., for Petitioner

MICHAEL KLEIN, ESQ., TOWN ATTORNEY (JACK SCHLOSS, ESQ., of counsel), for Employer

INTERIM BOARD DECISION AND ORDER

This case comes to us on exceptions, dated January 16, 2007, filed by the Ramapo Police Superior Officer's Association (Association). In the alternative, the Association seeks leave to file exceptions pursuant to §212.4(g) of PERB's Rules of Procedure (Rules).

The Association seeks review of an interim ruling by the Director of Public Employment Practices and Representation (Director), dated December 21, 2006, denying a motion by the Association for certification without an election pursuant to

§201.9(g)(1) of the Rules. The Town of Ramapo (Town) has not filed a response to the Association's exceptions and/or its application for leave to file exceptions.[1]

FACTS

On May 22, 2006, the Association filed a representation petition seeking to represent a bargaining unit composed of seven (7) Lieutenants employed by the Town. The Lieutenant title is within a bargaining unit represented by the Ramapo Police Benevolent Association (PBA). The PBA did not file a response to the petition and informed the Administrative Law Judge (ALJ), through counsel, that it consented to the proposed fragmentation and would not be participating in any further proceedings.

At the July 20, 2006 conference before the ALJ, the Town consented to the proposed fragmentation of the Lieutenants from the PBA bargaining unit, but averred that three individuals holding the title are not public employees pursuant to §201.7(a) of the Public Employees' Fair Employment Act (Act) because they are managerial and should be excluded from the new unit.

On October 10, 2006, a hearing commenced pursuant to §212.4 of the Rules before the ALJ on the question whether the three Lieutenants should be excluded from the unit because they are managerial. At the hearing, the Association requested that the Director recommend to the Board that the Association be certified without an election, pursuant to §201.9(g)(1) of the Rules.[2] On October 23, 2006, the Association filed a letter motion with the Director requesting certification without an election prior to

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[1] Pursuant to §212.4(g) of the Rules, the grant or denial of a motion for interlocutory appeal remains at the sole discretion of the Board regardless of whether the non-moving party has filed a response to the motion.

[2] Transcript, pp. 32-36.

a determination being reached on whether the three at-issue Lieutenants are managerial pursuant to §201.7(a) of the Act.

On November 9, 2006, the hearing before the ALJ continued. On November 28, 2006, the Town filed a letter with the Director opposing the Association's motion for certification without an election.

On December 21, 2006, the Director issued an interim ruling denying the Association's motion for a certification without an election prior to a determination concerning the three Lieutenants' alleged managerial status. In his interim decision, the Director concluded that PERB's historical administrative practice of determining managerial and/or confidential status in the context of the uniting criteria set forth in §207.1 of the Act is fully consistent with both the Act and Rules. Following issuance of the Director's decision, the hearing before the ALJ continued on February 20, 2007 and June 14, 2007.

DISCUSSION

Historically, the Board has granted leave to file interlocutory exceptions to non-final rulings and decisions in situations where the moving party can demonstrate extraordinary circumstances.[3] In the present case, the Director's interim decision denying the motion made by the Association during the pendency of the hearing is subject to §212.4(h) of the Rules, which states, in relevant part: "*All* motions and rulings made at the hearing shall be part of the record of the proceeding, and unless expressly

[3] *Buffalo Municipal Housing Auth,* 35 PERB ¶3009 (2002); *City of Newburgh,* 33 PERB ¶3031 (2000); *Council 82 AFSCME*, 32 PERB ¶3040 (1999); *Watertown City Sch Dist*, 32 PERB ¶3022 (1999); *New York State Housing Finance Agency,* 30 PERB ¶3022 (1997); *Town of Shawangunk,* 29 PERB ¶3050 (1996); *Greenburgh No 11 Union Free Sch Dist,* 28 PERB ¶3034 (1995); *Mt Morris Cent Sch Dist,* 26 PERB ¶3085 (1993).

authorized by the board, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision." (emphasis added). Therefore, we must determine whether the Association has demonstrated extraordinary circumstances warranting the grant of permission to file exceptions pursuant to §212.4(h) of the Rules.

The Association argues that the Board should grant it leave to file interlocutory exceptions on the ground that it seeks to raise important statutory and policy issues before the Board relating to the interplay between §§207.1 and 201.7(a) of the Act. Specifically, the Association requests that the Board determine whether certification of an employee organization with proof of majority status should be issued by the Director even when a dispute remains *sub judice* on the question of whether one or more individuals is a managerial employee pursuant to §207.1 of the Act.

We are persuaded that extraordinary circumstances exist warranting the grant of leave to the Association to pursue exceptions because of the important statewide policy implications of the Association's argument as it relates to the handling of managerial and/or confidential issues in the processing of future representation petitions and to insure procedural certainty in such processing.[4] Based on our decision to grant the Association leave to file exceptions, we do not reach the Association's assertion that it

[4] Although §212.4(h) of the Rules does not identify the precise procedural vehicle for requesting interlocutory review, the appropriate method is for the party requesting such review to file a written motion, on notice to the other party, setting forth the relevant facts, the issues to be determined and the reason why interlocutory relief should be granted. *See, State of New York (Div of Parole)*, 40 PERB ¶3007 (June 27, 2007) In the present case, the Association's exceptions will be treated as a motion for relief pursuant to §212.4(h). *See, e.g., State of New York - Unified Court System*, 36 PERB ¶3031 (2003).

had a right to file exceptions to the Director's interim ruling pursuant to §213.2 of the Rules.[5]

The Town shall have seven working days after receipt of this decision to file a response to the Association's exceptions or file cross-exceptions consistent with the provisions of §213.3 of the Rules. Thereafter, the Association may file a response to any cross-exceptions filed by the Town within seven working days after of such cross-exceptions.

DATED: June 27, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

[5] The Association asserts such a right based on the decision in *State of New York*, 39 PERB ¶3032 (2006) wherein the Board concluded that a party had a right to file exceptions to an ALJ's interim decision in a representation case because the interim decision reached an "ultimate issue." The Board in *State of New York, supra*, did not articulate any test for distinguishing an "ultimate issue" from an "intermediate" one and overlooked relevant earlier precedent regarding the applicable standards under the Rules. *See, Buffalo Municipal Housing Auth, supra, City of Newburgh, supra, Town of Shawangunk, supra.* Based on the inconsistency of the *State of New York* decision with our Rule and precedent, it has been overruled by our decision issued today in *State of New York (Division of Parole),* 40 PERB ¶3007 (June 27, 2007).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ORANGETOWN POLICEMEN'S BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NO. U-25717

TOWN OF ORANGETOWN,

Respondent.

BUNYAN & BAUMGARTNER, LLP (JOSEPH P. BAUMGARTNER of counsel), for Charging Party

KEANE & BEANE, P.C. (LANCE H. KLEIN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on a single exception filed by the Town of Orangetown (Town) 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). An improper practice charge had been filed by the Orangetown Policemen's Benevolent Association (PBA) alleging a violation of §209-a.1(d) of the Act when the Town informed police officers and the PBA that they had no right to video or audio tape medical examinations conducted to determine eligibility for benefits for line-of-duty injuries under General Municipal Law (GML) §207-c.

EXCEPTIONS

The Town's sole exception to the ALJ's decision is limited to its contention that prior precedent interpreting GML §207-c and the Act establish that it was not

obligated to negotiate with respect to the video or audio taping of a GML §207-c medical examination. The PBA's response supports the ALJ's decision.

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

FACTS

The facts are fully set forth in the ALJ's decision and are repeated here only as necessary to address the exceptions.[1] The case was decided on a stipulated record submitted and agreed to by the parties at the hearing.

In December 2004, Police Officer John Fitzgibbons, having filed a claim for GML §207-c benefits for a line-of-duty injury, was directed by Chief of Police Kevin A. Nulty to undergo a medical examination by the Town's designated physician. Fitzgibbons went to the scheduled examination accompanied by a PBA representative. The physician was then informed by Fitzgibbons that it was his intent to have the PBA representative video tape the examination. The physician refused to conduct the examination under those circumstances and gave Fitzgibbons a note stating: "the examination was not performed because the officer with the accompanying PBA representative placed requirements on the examination which were deemed unacceptable." Thereafter, Nulty informed Fitzgibbons that an examinee did not have the right to video tape the physical examination under GML §207-c.

Police Officer Susan Lanoce received a letter, dated January 26, 2005, from Nulty directing her to undergo a medical examination regarding a GML §207-c claim she had filed. In the letter, Nulty stated that an examinee did not have the right to video tape the Town's examination. Upon appearing for the

[1] 39 PERB ¶4611 (2006).

medical examination, Lanoce informed the physician that she intended to audio tape the examination. When the physician refused to allow the examination to be audio taped, Lanoce left. Thereafter, the examination was rescheduled by the Town and Lanoce was given a written notification "that there is to be no video or audio-taping of the Town's examination."

On February 7, 2005, Nulty sent a letter to PBA President Dennis Buckley, stating that there was to be no video or audio taping at GML §207-c medical examinations. Prior to this letter, the Town had no written policy about video or audio taping GML §207-c medical examinations conducted by the Town's designated physician. In addition, neither the PBA nor any officer had ever requested, or attempted, to video or audio tape a GML §207-c medical examination prior to Fitzgibbons' attempt in December 2004. Neither party sought to negotiate the subject prior to the filing of the improper practice charge.

PROCEDURAL MATTERS

Following a review of the exceptions and response, the Board sent a letter, dated May 18, 2007, inviting the parties to present oral argument on June 6, 2007 to address the following issues: a) was the Town's action a unilateral change in the GML §207-c procedure or was it the PBA that was seeking to alter the procedure; and b) is a unilateral change a necessary element of the §209-a.1(d) violation alleged by the PBA.

During oral argument, the Town contended that its actions had been an attempt to maintain the *status quo* and that it was the PBA which attempted to make a unilateral change in the procedure without negotiations because there was no past practice of video or audio taping of GML §207-c medical examinations.

Therefore, the Town asserted that it was the PBA that had violated the Act by attempting to unilaterally change a past practice without negotiations.

In response, the PBA contended during oral argument that the Town had waived its ability to raise the argument about the lack of a past practice of audio or video recording of GML §207-c medical examinations or assert that the PBA failed to demand negotiations on the subject. In support of its waiver argument the PBA cited §213.2(b)(4) of PERB's Rules of Procedure (Rules). Further, the PBA asserted that an employee organization is incapable of making a unilateral change in violation of the Act because it is public employers, not employee organizations, that have control over terms and conditions of employment.

DISCUSSION

We first address the issues, raised in our letter to the parties, that were the subject of oral argument.

Initially, we note that the Board has never held that an employee organization violated its duty to negotiate in good faith in violation of §209-a.2(b) of the Act by unilaterally altering a term and condition of employment. In contrast, the National Labor Relations Board has found labor organizations to have violated §8(b)(3) of the National Labor Relations Act when they unilaterally change a term or condition of employment.[2]

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[2] *Communication Workers Local 1170 (Rochester Telephone),* 194 NLRB 872 (1972), enfd 474 F2d 778 (2d Cir 1972); *Painters New York District Council 9 (Westgate Painting), 186 NLRB 964 (1970), enfd 453 F2d 783 (2d Cir 1971), cert denied 408 US 930 (1972).* Based on the distinctions between the Act and the National Labor Relations Act, we take no position regarding whether this federal precedent is instructive or persuasive for purposes of interpreting the Act. *See, New York City Transit Auth v New York State Pub Empl Rel Bd*, 8 NY3d 226, 40 PERB ¶ 7001 (2007); *Thousand Islands Cent Sch Dis*t, 11 PERB 3025(1978).

In the present case, we are constrained by our Rules from reaching the question of whether the PBA unilaterally changed the past practice and, therefore, was required to seek to negotiate the issue of video or audio taping of the medical examination because this issue was waived by the Town when it failed to include it in its exceptions.

Section 213.2(b) of the Rules state:

(b) The exceptions shall:

(1) set forth specifically the questions or policy to which exceptions are taken;
(2) identify that part of the decision, report, order, ruling or other findings or determinations to which exceptions are taken;
(3) designate by page citation the portions of the record relied upon; and
(4) state the grounds for exceptions. *An exception which is not specifically urged is waived.* (emphasis added)

As noted, the Town's sole exception is limited to its argument that GML §207-c renders the issue of video or audio taping the medical examination a prohibited subject of bargaining because "initial eligibility determinations for Section 207-c benefits lie within the employer's exclusive authority...."

Furthermore, we are unable to reach the question of whether the PBA violated the Act by attempting to video and audio tape the initial medical examination, thereby changing the GML §207-c procedure, because the Town did not file an improper practice charge against the PBA alleging a violation of §209-a.2(b) of the Act.[3]

Instead, the Town asserted in its answer, as its fourth affirmative defense to the charge: "The PBA never negotiated the right to video or audio tape

[3] Under the Rules, it is well established that the Board cannot adjudicate a counterclaim to an improper practice charge. *Albany Prof Perm Firefighters Assn*, 4 PERB ¶3071, at 3729 (1971).

conducted medical examinations."[4] Nevertheless, like its exceptions, the Town's post-hearing memorandum of law to the ALJ focused exclusively on its statutory argument under GML §207-c and did not touch upon the Town's fourth affirmative defense.

Because of the failure of the Town to file an exception contending that the PBA was the party that unilaterally altered the past practice and failed to seek negotiations, that question has not been preserved for Board review.[5]

Furthermore, the Town failed to except to the ALJ's ruling that Nulty's February 7, 2005 letter specifying that "there will be no video or audio taping of the Town's GML 207-c examinations" was a unilateral change in then existing GML §207-c procedure. It was stipulated between the parties that the February 7, 2005 letter constituted the first written policy regarding video taping and audio taping of GML §207-c physical examinations.[6]

Based on the Town's failure to file an exception on the issue, the Board affirms the ALJ's conclusion that that the prohibition against video and audio taping of the GML§207-c examination set forth in Nulty's February 7, 2005 letter constitutes a unilateral change of a past practice.

Finally, due to the narrowness of the Town's exception, the Board need not determine in this case the broader issue regarding whether and to what

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[4] ALJ Exhibit 2, ¶13.

[5] Rules, §213.2(b)(4). *See also, State of New York (OMH)*, 31 PERB ¶3051 (1998); *NYCTA*, 35 PERB ¶3028 (2002). A different outcome in this case would have resulted if the Board had not been precluded by the strict language of this Rule from re-examining this issue. The Board cannot reach this issue on its own motion. *See* Rules, §213.6(b).

[6] Transcript, p. 10.

extent the intrusiveness of overt or covert audio or video taping outside or inside the workplace renders it a mandatory subject of bargaining.[7]

In light of the Town's sole exception, the only issue before us is whether the scope of negotiable procedures under GML §207-c, as interpreted by relevant case law, includes the video or audio taping of a medical examination. The ALJ found that was negotiable and we hereby affirm that finding.

It is well-settled that pursuant to GML §207-c, a municipality is granted the authority to make an initial eligibility determination about an officer's entitlement to the benefit.[8] Various subjects that are part of the municipality's initial determination under GML §207-c are not negotiable, such as the waiver of confidentiality by the employee for the release of medical records relevant to the injury or illness for which the employee seeks GML §207-c benefits.[9] In contrast, an employer's demand for an overbroad confidentiality waiver relating to a GML

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[7] *Compare*, *Colgate-Palmolive Co*, 323 NLRB 515, 155 LRRM 1034 (1997) (holding that a private employer had a statutory duty under the National Labor Relations Act to engage in collective bargaining over the installation and continued use of surveillance cameras); *Niagara Frontier Transit Metro System, Inc.*, 36 PERB ¶3036 (2003)(holding that a public employer had a duty to negotiate the impact of the decision to use video footage obtained from surveillance cameras on buses in disciplinary proceedings). *See also, Elmont Union Free Sch Dist*, 28 PERB ¶4693 (1995); *City of Syracuse*, 14 PERB ¶4645 (1981); Labor Law §203-c (statutory prohibition against employer video taping of employees in rest rooms, locker rooms and other rooms designated by the employer for employees to change their clothing.)

[8] *DePoalo v County of Schenectady*, 85 NY2d 527 (1995).

[9] *City of Schenectady*, 25 PERB ¶3022 (1992), *affd*, *Schenectady Police Benevolent Assn v New York State Pub Empl Relations Board*, 85 NY2d 480, 28 PERB ¶7005 (1995).

§207-c examination is negotiable.[10] Other procedural aspects of the initial determination have also been found to be mandatory subjects of negotiations.[11]

It is incumbent upon the municipality when unilaterally adopting a policy or procedure beyond the statutory language of GML §207-c to establish that its action is merely the codification of existing practice or policy. Absent such proof, as is the case here, an employer's unilateral implementation of GML §207-c procedures is mandatorily negotiable.[12]

The Board has characterized the receipt of GML §207-c benefits as akin to wages and, therefore, mandatorily negotiable:

> ...as GML §207-c benefits are a form of wages, procedures which condition, restrict or potentially deny an employee's receipt of those benefits are terms and conditions of employment within the meaning of the Act, which must be negotiated before they are adopted or implemented except as negotiations are preempted by law or public policy.[13]

In doing so, the Board has rejected arguments that GML §207-c generally preempts any duty to bargain over the procedures by which the statutorily mandated payments of wages and health care expenses are made. In *Village of Hamburg*,[14] we held that "[t]he duty to bargain over GML §207-c is not limited

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[10] *Supra.*

[11] *See Police Association of New Rochelle, New York, Inc.*, 13 PERB ¶3082 (1980); *Local 589, International Association of Firefighters, AFL-CIO v City of Newburgh*, 17 PERB ¶7506 (Sup Ct Orange County 1984).

[12] *Town of Cortlandt*, 30 PERB ¶3031 (1997), *confirmed sub nom. Town of Cortlandt v Pub Empl Rel Bd*, 30 PERB ¶7012 (Sup Ct Westchester County 1997).

[13] *Id.* at 3077.

[14] 36 PERB ¶3030, at 3088 (2003).

solely to procedures for the review of light-duty assignments or procedures for the termination of benefits." The Board's holding in *Village of Hamburg, supra,* quoted language from the decision of the Court of Appeals in *City of Watertown*,[15] that "matters related to section 207-c, but not specifically covered by the statute, are mandatory subjects of bargaining."[16] In the *City of Watertown*, *supra*, the Court upheld our determination that a demand for arbitration of disputes involving eligibility for benefits under GML §207-c was a mandatory subject of negotiations.

Based on the exception filed in this case, the Board affirms the ALJ's conclusion that the video or audio taping of the medical examination under GML §207-c is a mandatory subject of bargaining not only because it is a procedure for accumulating evidence to be utilized by the PBA and employee in the review of the initial determination, but also because such a procedure for making the initial determination is not precluded from negotiations by the specific statutory language of GML §207-c.

Finally, the Board rejects the Town's reliance on the Court of Appeals' decision in *Poughkeepsie Professional Firefighters' Association v New York State Public Employment Relations Board.*[17] In that decision, the Court confirmed our decision[18] that the demand for a particular *de novo* review procedure regarding an employee's claim under GML §207-a, rather than an

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[15] 30 PERB ¶3072 (1997), *confirmed*, *City of Watertown v New York State Pub Empl Rel Board*, 31 PERB ¶7013 (Sup Ct Albany County 1998), *revd*, 263 AD2d 797, 32 PERB ¶7016 (3d Dept 1999), *motion for leave to appeal granted*, 94 NY2d 751 33 PERB ¶7003 (1999), *revd*, 95 NY2d 73, 33 PERB ¶7007, at 7016 (2000).

[16] *Id.* at 7016.

[17] 6 NY3d 514, 39 PERB ¶7005 (2006).

[18] 36 PERB ¶3014 (2003).

employer's initial eligibility determination, was a nonmandatory subject of negotiations. The Court's decision in *Poughkeepsie Professional Firefighters' Association, supra,* cannot be reasonably construed as prohibiting negotiations regarding a blanket prohibition against a procedure for accumulating evidence to be utilized in a procedure for challenging the employer's initial determination under GML §207-c.

Based on the foregoing, we deny the Town's exception and affirm the decision of ALJ.

The Board, therefore, finds that the Town violated §209-a.1(d) of the Act when it unilaterally prohibited video or audio taping of the medical examination conducted as part of the initial determination of eligibility for GML §207-c benefits.

IT IS, THEREFORE, ORDERED that

1. The Town immediately rescind its prohibition against video or audio taping of GML §207-c medical examinations;
2. Remove from unit members' personnel files any documents placed in those files as a result of the implementation of the prohibition; and
3. Sign and post the attached notice in all locations customarily used to communicate with employees in the unit represented by the PBA.

DATED: June 27, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, 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 Orangetown represented by the Orangetown Policemen's Benevolent Association that the Town of Orangetown will

1. immediately rescind its prohibition against videotaping or audiotaping of GML §207-c medical examinations; and

2. remove from unit members' personnel files any documents placed in those files as a result of the implementation of the prohibition.

Dated . . . . . By . . . . . .
(Representative) (Title)

Town of Orangetown

. . . . . .

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

JOHNSON CITY POLICE ASSOCIATION,

Charging Party,

CASE NO. U-26316

- and -

VILLAGE OF JOHNSON CITY,

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

COUGHLIN & GERHART, LLP (JOSEPH J. STEFLIK, JR. of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Village of Johnson City (Village) to a decision of an Administrative Law Judge (ALJ) finding that the Village violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act). An improper practice charge had been filed by the Johnson City Police Association (Association), alleging that the Village had violated §209-a.1(d) of the Act when it submitted to compulsory interest arbitration a bargaining proposal that had not previously been negotiated.

The parties submitted the case to the ALJ on a stipulated record. Based upon the record and the parties' briefs, the ALJ found that the submission to interest arbitration of a demand that was characterized as "off the record and for settlement only" violated §209-a.1(d) of the Act.

EXCEPTIONS

The Village excepts to the ALJ's decision, arguing that the ALJ erred by finding that the proposal at issue was "informal" and that the parties' negotiations were "off the record".[1] The Association's response supports the ALJ's decision.

Upon our review of the record and our consideration of the parties' arguments, we reverse and remand the decision to the ALJ for further development of the factual record.

FACTS

The facts are set forth in the ALJ's decision and are repeated here only as necessary to address the exceptions.[2]

During collective negotiations for a successor agreement to the one that expired on May 31, 2004, the Association proffered to the Village a drug and alcohol testing proposal,[3] dated March 4, 2005, as part of a package of proposals that contained the following opening statement:

> This "Off the Record Offer of Settlement" is being made to the Village of Johnson City (Village) with the understanding and agreement by the Village that it is to be used by the parties to attempt a negotiated settlement and that it cannot

[1] In its answer and exceptions, the Village asserts that the Association negotiated in bad faith in violation of §209-a(2)(b) of the Act by failing to include the drug and alcohol testing policy in the demands it submitted to interest arbitration and by refusing to acknowledge the Village's right to submit the proposal to interest arbitration. Based on the fact that the Village did not file an improper practice charge against the Association, the issue of whether the Association violated the Act is not before the Board nor was it before the ALJ. *See, Albany Professional Permanent Firefighters Assn*, 4 PERB ¶3071, at 3729 (1971).

[2] 40 PERB ¶4509 (2007).

[3] The expired collective bargaining agreement was silent on the subject of drug and alcohol testing.

> release or use its contents in any other proceeding or forum (i.e., mediation, arbitration, etc.) without the express written consent of the Johnson City Police Association (PBA) President or designee. The purpose of the "Offer" is for the limited purposes of settlement. The PBA reserves the right to modify and/or withdraw its "Offer" at any time.

On May 5, 2005, the Village responded via e-mail with an attachment containing the Village's revised proposals which stated, with respect to the Association's drug and alcohol proposal, that the "concept of [Association's] proposal is acceptable; language revisions are being prepared." In addition, the Village's revised proposals stated: "These proposals are made as a package. All other proposals are to be withdrawn."[4] Thereafter, the Village sent a letter, dated June 8, 2005,[5] to the Association, stating that:

> Pursuant to our agreement, the following constitutes the revised proposal of the Village....The purpose of this proposal is for settlement only. The Village reserves the right to modify and/or withdraw this proposal at any time.
>
> **********
>
> Article__ (Substance Abuse) – the [Association] proposal is generally acceptable; the Village is reviewing revisions to accommodate practical concerns.

The same caveat and the same language with respect to "Substance Abuse" were reiterated by the Village in its June 20, 2005 letter to the Association.[6]

There is no evidence in the stipulated record regarding the negotiations, if any, that ensued between the parties regarding the proposed drug and alcohol testing policy

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[4] Joint Exhibit 7.

[5] Joint Exhibit 9.

[6] Joint Exhibit 16

and procedure. The Association thereafter filed a declaration of impasse with PERB's Office of Conciliation. The record does not contain the declaration of impasse or evidence regarding whether the proposed drug and alcohol testing policy was discussed without condition between the parties during mediation.

On September 20, 2005, the Association filed a petition for compulsory interest arbitration with PERB's Director of Conciliation.[7] The petition contained no reference to a drug and alcohol testing policy. The Village filed a response to the petition dated October 4, 2005, attaching its May 5, 2005 revised proposals that included the proposal entitled: "Drug Testing – concept of [Association] proposal is acceptable; language revisions are being prepared."[8]

The Association then filed the instant improper practice charge alleging that the Village violated §209-a.1(d) of the Act when it included in its response to the Association's petition a copy of the Village's revised proposals, e-mailed to the Association on May 5, 2005, that included the language "Drug Testing – concept of PBA proposal is acceptable; language revisions are being prepared."

DISCUSSION

In its second exception, the Village contends that although the Association had proposed the drug and alcohol testing policy "off the record," the Village had accepted the proposal "on the record", but that the Association refused to continue to negotiate regarding the proposal.

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[7] Joint Exhibit 13.

[8] Joint Exhibit 14.

The Association's initial proposal regarding drug testing was contained in the Association's March 4, 2005, package of proposals clearly entitled "Off the Record Offer of Settlement." The Association's package of proposals contained additional language conditioning its use to settlement discussions and stating that it could not be utilized or offered into evidence in any other forum without the Association's consent. The Village's May 5, 2005 and June 8, 2005, responses to the drug and alcohol testing proposal accepted the "concept" of the Association's proposed drug and alcohol testing policy and stated that "language revisions (regarding the proposal) are being prepared."

The stipulated record before the ALJ does not establish that the Village ever accepted the conditions placed by the Association that the drug and alcohol testing proposal was "off the record." It is noted that the Village's exceptions on the issue are ambiguous. The Village asserts in its exceptions that it accepted the Association's drug and alcohol testing proposal "on the record" but at the same time states that "virtually all of the proposals made by both the Village and Association were 'off the record'."

In addition, the stipulated record does not contain the Association's declaration of impasse and the record is silent as to what, if anything, was discussed and agreed upon by the parties with respect to the "off the record" characterization of the Association's proposal or whether the parties discussed the language revisions mentioned in the Village's revised proposals.

There have been two prior ALJ decisions that have concluded that the inclusion of an agreed upon "off the record" proposal in a declaration of impasse constituted an improper practice. In *Police Benevolent Association of the City of White Plains*,[9] an

[9] 25 PERB ¶4691 (1992).

employer's proposal was characterized by its negotiator as "off the record" and if not accepted by the parties, it would be as if it were never made. The hearing record established that the employee organization's representatives agreed to the approach and made their own "off the record" proposals in response. When the employee organization thereafter included the employer's "off the record" proposal in its declaration of impasse, the ALJ found the employee organization violated §209-a.2(b) of the Act by engaging in bad faith negotiations. Similarly, in *Uniondale Administrators' Association*,[10] an ALJ found a violation when an employer's proposal entitled "District Off the Record Proposal Not to Be Revealed to Any Mediator or Fact-Finder Without District Agreement" was submitted to fact-finding. The ALJ in that case concluded that the introduction of an "off the record" proposal in fact-finding was the same as the submission of a proposal that had not been previously "negotiated", and was, likewise, improper.[11]

We hereby adopt the rationale articulated by the ALJs in those two decisions. The Act encourages the parties to engage in "a free exchange of ideas and the 'give-and-take' which marks good faith negotiations".[12] An agreement between the parties to exchange "off the record" proposals, especially toward the end of collective negotiations and immediately prior to impasse, can be an important and effective tool in reaching a

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[10] 20 PERB ¶4634 (1987).

[11] *See, Schenectady County Comm Coll*, 6 PERB ¶3027, *affg* 6 PERB ¶4503 (1973).

[12] *County of Saratoga and Saratoga County Sheriff*, 17 PERB ¶3033, at 3056 (1984), *confirmed sub nom. County of Saratoga, New York and Saratoga County Sheriff v Newman and CSEA,* 17 PERB ¶7010 (Sup Ct Saratoga County 1984).

final agreement. At the same time, a party cannot avoid its duty to negotiate in good faith by conditioning all of its proposals prior to impasse to be "off the record."

Discussions regarding contract proposals that the parties have agreed to be "off the record" do not constitute negotiations under the Act. Therefore, such "off the record" or informal proposals may not be submitted to an arbitration panel as proposals that have been negotiated and are still "open" and in need of resolution.[13]

In the present case, the stipulated record fails to shed sufficient light on what transpired during negotiations following the submission by the Association of the "off the record" proposal. In light of the limited nature of the stipulated record, we are unable to determine whether the "off the record" condition placed by the Association on its proposal was accepted by the Village and/or whether the treatment of the proposal by the parties was consistent with the Association's condition. Therefore, the matter must be remanded to the ALJ to develop a fuller record on this issue.

Finally, the Village's proposal on drug and alcohol testing only refers to the Association's proposal, without incorporating the language of the proposed policy, and notes that it was subject to language revisions. Such a proposal may be too vague and incomplete to be negotiable and, as a result, may not be appropriately submitted to interest arbitration.[14] In addition, the record is unclear whether the Village ever

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[13] *See, Town of Haverstraw*, 9 PERB ¶3063 (1976); PERB's Rules of Procedure, §205.6(a) (2).

[14] *See, Newburgh Teachers Assn and Newburgh Enlarged City Sch Dist*, 21 PERB ¶4521 (1988), *affd*, 21 PERB ¶3036 (1988), *confirmed sub nom. Board of Education of the Enlarged City School District v PERB*, 22 PERB ¶7009 (Sup Ct Albany County 1989). The issue of vagueness is not before the Board in exceptions or cross-exceptions. *See* Rules, §213(b)(4).

forwarded to the Association proposed language revisions to the proposal and whether those revisions were the subject of negotiations.

Because of his determination that the Association's proposal had been "off the record", the ALJ did not decide whether the Village's proposal was too vague and, if not, whether it was a mandatory subject of bargaining Therefore, the matter is also remanded to the ALJ for decision, if necessary, on those issues.

Based on the foregoing, we reverse and remand the case to the ALJ for further processing consistent with our decision herein.

DATED: June 27, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF NEW YORK,

Employer,

- and - **CASE NO. IA2006-024**

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Petitioner.

PROSKAUER ROSE LLP (M. DAVID ZURNDORFER of counsel), for Employer

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for Petitioner

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) to a decision of the Director of Conciliation (Director) regarding objections raised by the PBA to the processing of a petition for compulsory interest arbitration filed by the City of New York (City).

We have considered the exceptions on an expedited basis.[1]

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[1] The PBA requested oral argument; this request was denied by letter dated June 19, 2007. In their respective briefs, both the PBA and the City refer the Board to the content of the Record on Appeal (cited as R__) and the Supplemental Record on Appeal (cited as SR__) that were filed with the Appellate Division, Third Department, in connection with the City's now withdrawn appeal from the decision and order by Albany County Supreme Court in the related case of *Hanley and the City of New York v Curreri*, 40 PERB ¶7002 (Sup Ct Albany County 2007). Consistent with the parties' briefs, the Board will cite to the Record and Supplemental Record in the same manner in this decision.

EXCEPTIONS

In its exceptions, the PBA challenges both the legal authority of the Director as well as the historical practices of this agency in processing petitions for compulsory interest arbitration pursuant to §209.4 of the Public Employees' Fair Employment Act (Act). Specifically, the PBA challenges the decision of the Director on the grounds that: a) the Director did not have authority to issue a panel selection list (list) on December 12, 2006 pursuant to §209.4(c)(ii) of the Act or issue a decision with respect to the PBA's objections to the list; b) the Director erred in concluding that the PBA was procedurally barred from objecting to the inclusion of two arbitrators on the December 12, 2006 list; and c) the two arbitrators included on the list are not "disinterested" as required by §209.4(c)(ii) of the Act. The City has filed a response to the PBA's exceptions.

Based on our review of the record and the Board's consideration of the parties' arguments, we modify, and as modified, affirm the decision of the Director.

FACTS

The PBA is the exclusive negotiating representative for a unit consisting of over 23,000 police officers employed by the City. The PBA and the City have engaged in negotiations for a collective bargaining agreement to succeed their 2002-2004 collective bargaining agreement.[2]

On or about July 7, 2006, the City filed with the Director a declaration of impasse and the Director appointed a mediator on August 2, 2006.[3] Subsequent mediation sessions proved unsuccessful. On October 25, 2006, the City filed a petition for interest

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[2] SR 11-38.

[3] SR 5-70.

arbitration;[4] the PBA filed its response on November 22, 2006, stating that it did not object to the appointment of a tripartite interest arbitration panel under the Act.[5] Both the petition and response were addressed to PERB's Office of Conciliation.

On December 4, 2006, the Director received a letter, dated November 30, 2006, from the PBA designating its party-appointed arbitrator to the interest arbitration panel.[6] On December 7, 2006, the Director received a letter from the City, dated December 4, 2006, designating its party-appointed arbitrator.[7]

After the parties were unable to mutually agree upon the public member to chair the interest arbitration panel, on December 12, 2006, pursuant to §209.4(c)(ii) of the Act, the Director sent to both parties a list of nine arbitrators, including arbitrators Stanley L. Aiges and Arnold M. Zack, from which the parties were to select the public member. At the time that the Director sent the list, the Board was composed of the then Chairman and one other member.[8] The PBA received the list on December 14 and the City received the list on December 15, 2006.

The Act requires that upon receipt of the list, the parties are to alternately strike one of the named arbitrators until one name remains; that person is then designated as

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[4] SR 74-114.

[5] SR 116-133.

[6] SR 135.

[7] SR 137.

[8] Pursuant to §205.1 of the Act, the Board consists of a total of three members appointed by the Governor with the advice and consent of the Senate. Under PERB's Rules of Procedure (Rules) §200.1, the *board* is defined as the Public Employment Relations Board, or any two members thereof.

the public member. This name striking process is to be completed by the parties within five days of receipt of the list.[9]

Given that both parties received the list by December 15, 2006, the name striking process should have been completed by December 20, 2006. Nevertheless, it is undisputed that the parties agreed that they would meet on December 27, 2006, at 3:00 p.m. to proceed with the striking process.[10] This agreement was based on an e-mail from the City to the PBA on December 17, 2006[11] and a subsequent telephone conversation between the parties on December 19, 2006.[12]

On December 22, 2006, one of the two members of the Board resigned and on December 27, 2006, the remaining Board member, Chairman Cuevas, resigned.[13]

Prior to December 27, 2006, the parties did not seek permission from the Director for an extension of time to complete the striking process. In addition, the parties did not inform the Director of their agreement to extend the statutory and regulatory time frame for the name striking process, nor did they inform him of any negotiated conditions regarding that agreement.

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[9] Act, §209.4(c)(ii); Rules, §205.7.

[10] R 6-7.

[11] SR 201. The e-mail states that the City's counsel was actually engaged on various dates and, therefore, proposed December 21 or 22, 2006 for the meeting. The e-mail is silent regarding the statutory and regulatory five day period for completion of the striking process.

[12] R18. In its December 28, 2006 letter, the City states that during the December 19, 2006 conversation, the City expressed a concern that the parties comply with the five day period to complete the striking process but that the PBA's counsel insisted that the meeting be held on December 27 or 28, 2006 so that his client could be present. SR 206-208.

[13] From December 28, 2006, the three Board positions remained vacant until the Senate confirmed the *current* Chairman and the Board member on April 18, 2007.

The meeting scheduled for December 27, 2006 did not occur. Instead, at the request of the parties, a telephone conference call was held with the Director. During the conference call, the City informed the Director that the parties had been scheduled to meet that day to engage in the striking process but, because the PBA was raising objections to the list, the meeting did not take place. The PBA informed the Director that it objected to the list on the grounds that: a) the list included arbitrators Aiges and Zack who had both issued decisions in prior City-PBA interest arbitrations that the PBA viewed as adverse; and b) the Director lacked authority to issue the list in the first instance and lacked authority to further process the matter in the absence of a Board.

At the close of the December 27, 2006 conference call, the Director invited the parties to submit written arguments concerning the issues raised in the conference call.

On December 27, 2006, the PBA faxed a letter to the Director asserting "a limited and special appearance," to request that the Director issue a written decision on the following issues: a) whether the Director had the power and authority to have issued the list without the express approval or direction of the Board; b) whether the Board would exclude from the list of proposed arbitrators, those arbitrators who had previously served on an interest arbitration panel involving the PBA and the City; c) whether the Director had the power and authority to require the PBA to participate in the selection of the public member without the express authority or direction of the Board; and d) whether the Director has power and authority without the express approval or direction of the Board to impose sanctions on a party's refusal or failure to participate in the selection process.[14]

[14] SR 203-204. In requesting the written decision from the Director on those issues, the PBA did not claim, as it does in its exceptions, that the Director lacked authority to issue a decision.

On December 28, 2006, the City sent a letter to the Director claiming that the PBA failed to participate in the selection process, as required by §205.7 of the Act, by failing to comply with the parties' agreement to meet on December 27, 2006 to engage in the striking process.[15] Based on its allegation, the City requested that "all names on the December 12, 2006 list immediately be deemed acceptable to the PBA, so that the City can choose the public member" of the panel pursuant to §205.7 of the Rules.[16]

In response, the PBA sent a letter to the Director, dated January 2, 2007, contesting the City's assertion that the PBA had failed to participate in the striking process.[17] In addition, the PBA reiterated its objection to the list because two of the arbitrators had "issued adverse decisions to the PBA" and that list had not been issued by Board or at its express direction.[18]

Following receipt of the volley of correspondence, the Director attempted on several occasions to have the parties consider alternatives aimed at the harmonious selection of the public member of the interest arbitration panel.

On January 22, 2007, the City sent a letter to the Director stating that it was unilaterally designating Zack, one of the arbitrators the PBA objected to, as the public member.[19] The City's letter reiterated the identical argument it had made in its December 28,

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[15] SR 206-208.

[16] SR 208.

[17] SR 157-158.

[18] SR 158.

[19] SR 161.

2006 letter. Three days later, the PBA responded, opposing the City's unilateral selection of Zack based on the arguments contained in its earlier letters to the Director.[20]

Thereafter, the Director referred the correspondence to PERB's Acting Associate Counsel who, on January 26, 2007, sent a letter to the parties requesting additional written legal arguments regarding the various issues in dispute as set forth in the parties' correspondence to the Director.[21]

Prior to responding to the January 26, 2007 letter from PERB's Acting Associate Counsel, the City commenced a CPLR Article 78 proceeding in Albany County Supreme Court, seeking a judgment to compel the Director to designate Zack as the public member on the interest arbitration panel on the grounds that the PBA had allegedly failed to participate in the name striking process.[22] In response to the City's Article 78 proceeding against the Director, an answer was filed by the Director and, on February 16, 2007, the PBA moved to intervene as a party.[23]

Following commencement of the City's Article 78 proceeding, on February 14, 2007, both the City and the PBA responded to the January 26, 2007 letter from PERB's Acting Associate Counsel. [24]

On March 17, 2007, Justice Eugene P. Devine issued a decision and order granting the PBA's motion to intervene and dismissing the City's Article 78 proceeding.[25] Thereafter,

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[20] SR 164-165.

[21] SR 213-214.

[22] R 12-47.

[23] R 49-81, 83-134; SR 174-242.

[24] SR 222-236.

[25] 40 PERB ¶7002 (Sup Ct Albany County 2007); R5-10.

the City filed a notice of appeal, obtained an order from the Appellate Division, Third Department granting leave to file an expedited appeal, and perfected that appeal. On May 31, 2007, the City withdrew its appeal pending in the Appellate Division, Third Department.

On May 21, 2007, the Director issued the decision that is the subject of the PBA's exceptions. In it, he denied the PBA's challenge to his authority to issue the December 12, 2006 list of arbitrators or to take any further steps in processing the interest arbitration petition without express approval or direction from the Board. In addition, the Director rejected the PBA's objection to the inclusion of arbitrators Aiges and Zack on the list, concluding that the PBA's objection was untimely and that both arbitrators were "disinterested", as that term is utilized in §209.4(c)(ii) of the Act. Furthermore, the Director denied the City's contention that the PBA had failed to participate in the selection process as required by the Act and Rules and/or that the City's first choice should automatically become the public member and chair of the panel.

DISCUSSION

In 1998, the Act was amended to grant PERB jurisdiction to resolve impasses in collective negotiations involving the City's police and fire departments through the impasse resolution procedures contained in §209.4.[26] The expressed legislative purpose for the amendment was to enhance the orderly and prompt resolution of collective bargaining disputes involving police and fire units thereby enhancing public safety and preventing disruptions in essential services.[27] The importance of expedited processing of petitions for interest arbitration is underscored by the specific statutory time frames set forth in the Act.[28]

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[26] L 1998, ch 641, §2.

[27] L 1998, ch 641, §1. *See, Patrolmen's Benevolent Assn v City of New York*, 97 NY 2d 378 (2001).

[28] *See, Town of New Windsor,* 31 PERB ¶3061 (1998).

Pursuant to §209.4(c) (ii) of the Act[29], disputes involving police officers, if not resolved in mediation, will be referred, upon the filing of a petition by one or both parties, to a tripartite arbitration panel consisting of one member appointed by the public employer, one member appointed by the employee organization and one neutral or "public" member appointed jointly by the parties or, if they are unable to agree, designated pursuant to an alternate striking procedure from a list supplied by the Director.

On May 30, 2007, the PBA filed its exceptions to the Director's May 21, 2007 decision.[30] The City did not file cross-exceptions to the Director's decision.

In its exceptions, the PBA challenges the power and authority of the Director to issue the December 12, 2006 list of arbitrators, to designate an arbitration panel and to issue his May 21, 2007 decision without express authority from the Board. In addition, the PBA excepts to the Director's conclusion that the PBA was procedurally barred from objecting to the list as well as the Director's finding that arbitrators Aiges and Zack were "disinterested" as required by §209.4(c)(ii) of the Act. The PBA's exceptions do not challenge the Director's power and authority to process declarations of impasse and petitions for interest arbitration or to appoint a mediator, although §§209.2 and 209.3 of

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[29] §209.4(c)(ii) states in relevant part: "the public arbitration panel shall consist of one member appointed by the public employer, one member appointed by the employee organization and one public member appointed jointly by the public employer and the employee organization who shall be selected with ten days after receipt by the board of a petition for creation of the arbitration panel...If, within seven days after the mailing date, the parties are unable to agree upon the one public member, the board shall submit to the parties a list of qualified, disinterested persons for the selection of the public member. Each party shall alternately strike from the list one of the names with the order of striking determined by lot, until the remaining one person shall be designated as public member. This process shall be completed within five days of receipt of this list. The parties shall notify the board of the designated public member."

[30] The PBA has not challenged the Director's decision based on the unfortunate lack of a Board quorum for the period December 22, 2006 – April 18, 2007. Therefore, the PBA has waived that argument pursuant to §213.2(b)(4) of the Rules.

the Act and §§205.1, 205.4, 205.14 of the Rules make reference to the Board performing those functions.

A. THE DIRECTOR'S AUTHORITY TO ISSUE THE MAY 21, 2007 DECISION

We deny the PBA's exception claiming that the Director did not have authority to issue his May 21, 2007 written decision. The delegated power and authority of the Director to issue decisions involving the dispute resolution provisions of the Act and Rules were reiterated by the Board in *Board of Education of the City School District of the City of New York*.[31] In denying the PBA's exception, we note that it was the PBA, on December 27, 2006, that had specifically requested the Director to issue a written decision on the issues now before us.[32]

B. THE DIRECTOR'S AUTHORITY OVER INTEREST ARBITRATION PROCESS

Similarly, we reject the PBA's exception challenging the Director's authority to issue the list and to designate the public arbitration panel. The Act expressly grants to the Board the power to establish "panels of qualified persons broadly representative of the public to be available to serve as mediators, arbitrators or members of fact-finding boards"; "to make such inquiries as it deems necessary for it properly to carry out its functions and powers"; to delegate its powers to "any person appointed by the board for the performance of its functions"; and to make rules and "to exercise such other powers as may be appropriate to effectuate the purposes and provisions" of the Act.[33] In the

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[31] 34 PERB ¶3016 (2001).

[32] SR 203-204.

[33] Act, §§205.5(i), (j), (k), and (l).

Rules, the Board has empowered the Director to act as "the agent of the board so designated,"[34] to administer its dispute resolution functions under §209 of the Act.[35]

In a series of prior decisions, the Board has confirmed that the Director has been delegated the authority to render initial decisions and rulings regarding many different aspects of the dispute resolution procedures set forth in the Act. In *Town of New Windsor,*[36] we reiterated that delegation and noted that the Director's decisions regarding the interest arbitration process were subject to Board review upon exceptions despite the absence of such a procedure set forth in the Rules:

> We have for many years reviewed Director determinations involving the compulsory interest arbitration provisions of the Act and Rules.... our review is not dependent upon the Director granting a party the right to appeal the determination which is sought to be reviewed. Our right and power to review staff determinations is inherent in our delegation to those persons of the power to make them. Moreover, our review is necessary for there to be a final order which can be appealed judicially. The absence from our Rules of an express procedure for the appeal of Director determinations may be an inconvenience to parties, but it is not a bar to our review of those determinations. (footnotes omitted) [37]

In *New York City Transit Authority,*[38] the Board emphasized that the Director "is the head of the Office of Conciliation, an office that provides mediation, fact-finding and arbitration services."[39] Although that case did not call upon us to reiterate the scope of the responsibilities and duties delegated to Director regarding the provision of arbitration services, those duties include the preparation and issuance of a list of individuals for an

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[34] Rules, §200.3.

[35] Act, §§205.4 (a), 205.5 (i), (j), and (k).

[36] *Supra,* note 28.

[37] *Id.* at 3133. *See also, Russell v PERB,* 13 PERB ¶7015 (Sup Ct Albany County, 1980).

[38] 39 PERB ¶3006 (2006).

[39] *Id.* at 3024.

interest arbitration panel, the designation of such a panel, as well as issuing decisions regarding a party's request to disqualify an arbitrator on a list for not being "disinterested."

For over twenty-five years, the Board has issued decisions reviewing the Director's determinations on jurisdictional questions such as whether an impasse in negotiations exists,[40] substantive issues such as whether a petitioning party is entitled to interest arbitration[41] and procedural disputes regarding the striking procedure.[42]

Despite our prior decisions, including our reiteration of the Board's delegation of authority to the Director, the PBA contends that those decisions are all distinguishable on the grounds that no other party has ever challenged the Director's authority to perform the duties that are challenged in its exceptions.[43] In fact, the Director's authority and power has not been challenged because it is plainly present.

Finally, we find no merit to the PBA's effort at parsing our Rules in an attempt to support its claim that the Director has not been delegated the power and authority to

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[40] *City of New York*, 34 PERB ¶3033 (2001); *Board of Educ of the City School Dist of the City of New York*, 34 PERB ¶3016 (2001).

[41] *Niagara Frontier Transportation Auth*, 30 PERB ¶3009 (1997); *County of Oneida and Oneida County Sheriff*, 20 PERB ¶3044 (1987); *Village of Southampton*, 16 PERB ¶3049 (1983); *Yates County and Yates County Sheriff's Assn,* 16 PERB ¶8001 (1982); *New York State Parkway PBA,* 13 PERB ¶3079 (1980), *confirmed sub nom. Russell v PERB,* 14 PERB ¶7010 (Sup Ct Albany County, 1981).

[42] *Town of New Windsor*, *supra*, note 28.

[43] Since the 1998 amendment to the Act, after two prior separate rounds of negotiations, the PBA filed both declarations of impasse and petitions for interest arbitration with the Director. In 2001 and 2004, the PBA defended, before the Board, the Director's rulings in processing declarations of impasses and appointing mediators in response to exceptions filed in those cases by the City. *See, City of New York*, 37 PERB ¶3018 (2004); *City of New York*, 34 PERB ¶3033 (2001). Prior to December 27, 2006, the PBA did not dispute the Director's authority and power with respect to the impasse resolution procedures including the power to issue interest arbitration selection lists and arbitrator designations.

oversee the arbitration panel selection process in interest arbitration cases. As we noted in *Town of New Windsor,*[44] the absence of an explicit provision in our Rules does not preclude the existence of a particular procedure. Similarly, the language distinctions in the Rules cited by the PBA, between interest arbitration and grievance arbitration procedures,[45] are insufficient to contradict the Board's delegation of authority to the Director regarding the panel selection process in interest arbitration.

Despite the purpose of §209.4 of the Act to insure prompt resolution of negotiation impasses, we find that both parties in this case bear responsibility for the unnecessary delays in the final selection of the arbitration panel.

C. PROCEDURAL ISSUE REGARDING OBJECTION TO THE TWO ARBITRATORS

Both §209.4(c) (ii) of the Act and §205.7 of the Rules mandate that the name striking process must be completed "within five days" of receipt of the list. In the present case, the City and PBA should have completed the name striking process by December 20, 2006, because they both received the list from the Director by December 15, 2006. Nevertheless, the parties mutually extended the statutory time frame beyond the five days. Thus, it was both parties' initial decision to mutually extend the mandatory time frame that set the stage for procedural maneuverings by each, resulting in a six-month delay in designating the arbitration panel.

In its second exception, the PBA challenges the Director's determination that the PBA waived its right object to Aiges and Zack by failing to object to these arbitrators on the list for cause within the five days set forth in the Act and Rules. The parties' agreement to extend the striking process was silent regarding the extension of the time

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[44] *Supra,* note 28.

[45] Rules, §§205.2(c), 205.7 and 207.7.

to object to an arbitrator for cause. Nevertheless, for the reasons set forth below, the Board modifies the Director's decision to the extent that he found that the PBA waived the right to object to the arbitrators.

It is well-settled that a party that fails to seek the disqualification of an arbitrator based on a known disqualifying relationship will be deemed to have waived the objection if it is not raised prior to the arbitration.[46] The issue of disqualification of an arbitrator must be resolved in the first instance.[47] Under §209(4)(c)(ii) of the Act, the Legislature granted the Board primary jurisdiction to render final determinations as to whether an individual is "qualified" and "disinterested" to serve on the interest arbitration panel. By delegation from the Board, the Director has the authority and power to establish the list of "qualified, disinterested persons" and to forward that list to the parties for the name striking process to be completed within the five day period. Although the Rules are silent on the issue, either party can make a factually specific objection to the Director, within the name striking period, challenging one or more individuals on the list on the grounds that he or she is not disinterested as required by the Act.[48] Like other substantive and procedural issues, the decision by the Director regarding the issue of disqualification is subject to review through objections to the Board.

Based on the fact that a disqualification objection to an individual on a list must be made to the Director during the name striking period, we find that the agreement by

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[46] *Milliken Woolens, Inc. v Weber Knit Sportswear, Inc.*, 11 AD2d 166, 168 (1st Dept 1960), *affd* 9 NY2d 878, *rehearing den*, 10 NY2d 750 (1961); *City of Albany v PERB*, 86 Misc2d 476 (Sup Ct Albany County 1976).

[47] *JP Stevens and Rytex Corporation,* 34 NY2d 123 (1974).

[48] *See, City of Albany v PERB,* 86 Misc2d at 478-479.

the parties to extend the name striking process until December 27, 2006, also extended the time for either party to object to an individual on the list.

D. DENIAL OF PBA's OBJECTIONS TO ARBITRATORS AIGES AND ZACK

Therefore, we consider the merits of the PBA's exception that the Director erred in failing to disqualify arbitrators Aiges and Zack on the grounds that they are not "disinterested" as required by §209. 4(c)(ii) of the Act.[49] In 1974, when the Legislature amended the Act to include interest arbitration, it did not define the term "disinterested."[50] Nonetheless, for over a century, the term "disinterested" has been interpreted by New York case law as requiring an arbitrator to have both a lack of a pecuniary interest in the outcome and a lack of bias or prejudice.[51]

Following a review of the record, the Board concludes that the PBA's disqualification objection to arbitrators Aiges and Zack is without merit. The fact that both arbitrators may have served on a previous interest arbitration panel with respect to the parties does not demonstrate that they have an interest in the outcome or are biased and prejudiced. In *Buffalo Police Benevolent Association v City of Buffalo,*[52] an interest arbitration panel was found to be disinterested under the Act and, therefore, able to rehear and determine a dispute even after the panel's initial award was vacated.

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[49] The PBA does not dispute that both arbitrators are qualified under the Act to be a neutral member of an interest arbitration panel.

[50] L 1974, ch 724, §3; L 1974, ch 725, §3.

[51] *Bradshaw v Agricultural Insurance Company of Watertown, NY,* 137 NY 137 (1893); See also, Black's Law Dictionary, Sixth Edition, definition of "disinterested": Not concerned, in respect to possible gain or loss, in the result of the pending proceedings or transactions. Not having any interest in matter referred to or in controversy; free from prejudice or partiality; impartial or fair minded; without pecuniary interest; not previously interested; not biased or prejudiced" Citations omitted.

[52] 82 AD2d 635 (4th Dept 1981).

Even a gratuitous comment in a prior arbitration decision and award regarding police officers employed by another employer is insufficient to establish that an arbitrator is not "disinterested" under the Act to hear a subsequent interest arbitration.[53] Consequently, we conclude that the PBA did not waive its right to object to arbitrators Aiges and Zack.

Finally, we find no merit to the PBA's claim that Zack is not disinterested under the Act because of a purported financial dispute he may have with the Cornell University School of Industrial and Labor Relations (ILR) where the PBA's potential witnesses may be the ILR's current dean and an ILR professor.[54] The PBA has failed to meet its burden of demonstrating with affidavits the specific nature of this collateral dispute between arbitrator Zack and ILR and establishing a causal connection that demonstrates the dispute to be sufficient to establish bias or prejudice warranting disqualification.

E. REMAINING PBA EXCEPTIONS DENIED

The Board has considered the remaining arguments by the PBA and has found them to be without merit.

Based on the foregoing, we modify the decision of the Director and, as modified, affirm and remand the matter to the Director for further processing consistent with our decision herein.

IT IS, THEREFORE, ORDERED that within five days of receipt of this decision, the City and the PBA, shall complete the name striking process with respect to the December 12, 2006 list. Any further delays, on consent or otherwise, by either party will

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[53] *City of Albany v PERB*, 86 Misc2d at 479-480.

[54] The PBA's first reference to the alleged dispute was relegated to a footnote in a letter submitted almost two months after the PBA's original objection to Zack. SR 226. The fact that the PBA repeated the conclusory allegation in it's sworn pleading in *Hanley and the City of New York v Curreri, supra,* does not enhance its probative value. SR 182.

be deemed as an unwillingness to participate in the selection process and the Director shall have authority to select the neutral arbitrator for the panel without further consultation with either party pursuant to Rule, §205.7(b).

DATED: June 27, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NORTH SALEM SCHOOL-RELATED PROFESSIONALS, NYSUT, AFT, AFL-CIO,

Petitioner,

-and- **CASE NO. C-5694**

NORTH SALEM CENTRAL 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,

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

IT IS HEREBY CERTIFIED that the North Salem School-Related Professionals, NYSUT, AFT, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Custodial employees, Transportation employees, Maintenance employees and Mechanics.

Excluded: All others.

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

DATED: June 27, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member