

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**CHENANGO FORKS TEACHERS ASSOCIATION,  
NYSUT, AFT, AFL-CIO, LOCAL 2561,**

Charging Party,

**CASE NO. U-24520**

- and -

**CHENANGO FORKS CENTRAL SCHOOL DISTRICT,**

Respondent.

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**JAMES R. SANDNER (ROBERT T. REILLY, of counsel), for Charging Party**

**COUGHLIN & GERHART, L.L.P. (LARS P. MEAD of counsel), for  
Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Chenango Forks Central School District (District) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge filed by the Chenango Forks Teachers Association, NYSUT, AFT, AFL-CIO, Local 2561 (Association). The improper practice charge alleges that the District violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally announced that it would discontinue its practice of reimbursing current and retired employees age 65 or older, and their spouses, for the cost of Medicare Part B health insurance premiums (premiums).

In her decision, the ALJ correctly noted that employers under the Act have a duty to negotiate with respect to a unilateral change of a past practice with respect to retirement benefits for current employees in the bargaining unit.

### **EXCEPTIONS**

The District excepts to the ALJ's decision on the grounds that: a) the ALJ should have deferred to the arbitration opinion and award wherein the arbitrator found that the District's action did not violate a contractual provision and denied the Association's grievance; b) the District did not have a past practice of reimbursing the cost of the premiums; c) there is no contractual right to reimbursement for the cost of the premiums; d) the reimbursement of those premiums to retirees is not a term and condition of employment; e) the improper practice charge was rendered moot by the parties' 2004-2007 collectively negotiated agreement (agreement), which covers health insurance for current and retired employees and contains a "supersession" clause; and (f) the continued payment of the reimbursements would be an unconstitutional gift of public funds.

The Association's response to the District's exceptions contends that: a) the ALJ's decision should be affirmed because reimbursement for the premiums is a mandatory subject of bargaining for current employees as a form of deferred compensation; b) the arbitrator had not found the lack of a past practice, but rather that the parties had not reached an agreement to establish a binding past practice; c) reimbursement for the premiums is not prohibited by §201.4 of the Act and is not an unconstitutional gift of public funds; and d) the improper practice charge has not been rendered moot by the parties' subsequent agreement.

At the Board's request, on June 6, 2007, counsel for both parties appeared for oral argument regarding the exceptions and response and the question of what is the appropriate test under the Act for the establishment of a past practice.

Based upon our review of the stipulated record and our consideration of the parties' arguments set forth herein, we are reversing and remanding the case to the ALJ to develop a record on the limited issues of whether, and to what extent, the Association and/or current employees had actual or constructive knowledge of the District's practice of reimbursing the cost of the premiums to retirees.

### **FACTS**

As noted, the parties stipulated to the facts, which are fully set forth in the ALJ's decision<sup>1</sup> and are repeated here only as necessary to address the exceptions.

The District has reimbursed the premiums "to members or retirees 65 years of age or older since minimally 1980."<sup>2</sup> While retirees have actually received the benefit over the years, the parties stipulated that "(t)he parties are unaware of any evidence that a current employee has ever received" the benefit.<sup>3</sup> Until 1988, the duty to pay such reimbursements was mandated by the District's former insurance provider, the Empire Plan. After the District changed its insurance provider to Blue Cross/Blue Shield Super Blue Health Insurance Plan, the new insurance provider did not require the reimbursement. Nonetheless, the District continued to make the reimbursement payments to eligible retirees for approximately five years at a cost in excess of \$100,000 per year.

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<sup>1</sup> 39 PERB ¶4602 (2006).

<sup>2</sup> Stipulation of Facts, ¶19.

<sup>3</sup> Stipulation of Facts, ¶24.

On June 12, 2003, the District's Business Administrator, Kathy Blackman, sent a memorandum to all current employees announcing that, effective July 1, 2003, the District was discontinuing its practice of reimbursing the premiums to retirees 65 years of age or older. The memorandum stated:

The District currently reimburses retirees 65 years of age or older for Medicare B premiums withheld from Social Security Administration checks. Effective July 1, 2003, this practice will no longer continue. The District is currently paying in excess of \$100,000 per year and cannot afford this expense in addition to the significant funds spent on health insurance. The District will continue to pay your health insurance premiums to the same extent as the District will pay premiums for active employees.

In addition, on or about June 24, 2003, the District sent separate letters to retirees informing them that "Effective July 1, 2003, we will no longer reimburse you or your spouse" for the premiums.<sup>4</sup>

On September 12, 2003, the Association filed the instant improper practice charge alleging that the reimbursement of the premiums is a benefit that accrues to unit employees while they are employed, which is paid when they retire, and the District's announcement that it was unilaterally discontinuing the benefit was a unilateral change in a term and condition of employment. In addition, the Association filed a grievance alleging that the District's announcement violated the parties' 2001-2004 agreement, which provides that the District will offer health insurance coverage to employees and retirees.

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<sup>4</sup> Stipulation of Facts, ¶18, Exhibit F. Several retirees commenced an Article 78 proceeding in New York Supreme Court challenging the District's action under a state law limiting the discretion of the District to diminish benefits for retirees. The Appellate Division, Third Department reversed the Supreme Court decision in favor of the retirees and remanded the matter to Supreme Court for a determination requiring additional facts. *Bryant v Bd of Ed*, 4 Misc3d 423 (2004), *revd and remanded*, 21 AD3d 1134 (3d Dept 2005).

On December 12, 2003, the improper practice charge was deferred by the ALJ<sup>5</sup> to the parties' contractual grievance procedure pursuant to the Board's decision in *Herkimer County BOCES*.<sup>6</sup>

On November 6, 2004, the arbitrator selected to hear the grievance issued an opinion and award finding that the agreement was silent as to reimbursement of the premiums for both current employees and retirees. The arbitrator further found that the contract contained no maintenance of benefits clause. Although the District voluntarily made payments reimbursing retirees for the premiums even after its obligation to do so under the Empire Plan no longer existed, the arbitrator stated that such "voluntariness" of the District's actions did "not contain sufficient evidence of a mutual understanding and agreement to establish a binding past practice."<sup>7</sup>

Thereafter, the Association moved to reopen the improper practice charge based on the arbitrator's determination that the parties' agreement did not cover the issue in dispute. On December 31, 2004, the ALJ issued her decision granting the Association's motion to reopen.<sup>8</sup>

### **DISCUSSION**

In the District's exceptions and the Association's response, the parties focus on whether or not a past practice has been established under the Act, requiring the District to continue that practice. In support of their respective positions, the District cites to the

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<sup>5</sup> *Chenango Forks Cent Sch Dist*, 36 PERB ¶14601 (2003).

<sup>6</sup> 20 PERB ¶13050 (1987).

<sup>7</sup> Stipulation of Facts, Exhibit S, p. 10.

<sup>8</sup> *Supra*, note 1.

language contained in the arbitration opinion and award regarding whether a past practice existed, while the Association asserts that there has been a decades-long payment of the benefit to unit members upon retirement.

In the arbitration opinion and award, the Association's grievance was denied on the grounds that the District did not have a contractual obligation to reimburse the premiums because the agreement lacked language requiring such payments and because it did not contain a maintenance of benefits clause requiring the continuation of extra-contractual past practices.<sup>9</sup>

The ALJ correctly concluded that the arbitrator's statement in his opinion and award regarding the lack of a past practice concerning the at-issue benefit is entirely *dicta*. In doing so, the ALJ correctly found that the arbitrator's statement was neither convincing nor binding on PERB.<sup>10</sup> Furthermore, to the extent that the arbitrator's statement regarding the standard for a past practice may have been intended to apply the Act's criteria for the establishment of a past practice, it was repugnant to the Act.<sup>11</sup>

The Board's criteria for establishing a binding past practice under the Act date back to the decision in *Niagara Frontier Transportation Authority* (hereafter, *Niagara Frontier*).<sup>12</sup> However, the Board's variant statements since then regarding those criteria have caused some confusion. Accordingly, we hereby trace those statements and clarify our holdings.

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<sup>9</sup> *Supra*, note 7.

<sup>10</sup> *Schuyler-Chemung-Tioga BOCES*, 34 PERB ¶3019 (2001).

<sup>11</sup> *NYCTA (Bordansky)*, 4 PERB ¶3031 (1971).

<sup>12</sup> 18 PERB ¶3083 (1985).

In *Niagara Frontier*, a case involving an alleged past practice establishing the exclusivity of unit work, we asked two questions: was the at-issue work performed by unit employees exclusively for a sufficient period of time to have become binding and was the work assigned to non-unit personnel substantially similar to that exclusive unit work? The same test was applied in *City of Rochester*,<sup>13</sup> where we found that 13 months of such exclusivity was sufficient to establish a violation of the past practice of police exclusively providing traffic control at a continuously ongoing construction project.

In *County of Nassau* (hereafter, *County of Nassau*),<sup>14</sup> we enunciated our most authoritative statement regarding the applicable test for the establishment of a binding past practice: the "practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue." Citing to *City of Rochester*, we decided that, "as found by the Assistant Director, the County's...practice was unequivocal and was continued uninterrupted for a period of time under the circumstances to create a reasonable expectation among the affected unit employees that the [practice] would continue."<sup>15</sup> In relying on the holding in *City of Rochester*, the Board recognized that the at-issue practice had continued unequivocally and uninterrupted for 17 months as distinguished from a practice, for example, that might have occurred less frequently or continuously and, therefore, would not be insulated

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<sup>13</sup> 21 PERB ¶3040 (1988), *affd*, *City of Rochester v New York State Pub Empl Rel Bd*, 155 AD2d 1003, 22 PERB ¶7035 (4<sup>th</sup> Dept 1989).

<sup>14</sup> 24 PERB ¶3029, at 3058 (1991).

<sup>15</sup> *Id.*

from unilateral change. In doing so, we made clear that the circumstances of each case need to be considered in determining when a past practice has been established.

We here find that the clear meaning of our decision in *County of Nassau* is that the expectation of the continuation of the practice is something that may be presumed from its duration with consideration of the specific circumstances under which the practice has existed.

The *County of Nassau*<sup>16</sup> decision has been cited consistently in subsequent cases as the authority for the applicable test for the establishment of a past practice. Nevertheless, those subsequent articulations of the test have utilized varying language and could be read to suggest a different meaning.<sup>17</sup>

In light of the fact that subsequent Board decisions have utilized language at variance with the test in *County of Nassau*, while at the same time resting upon that case, without articulating any reason for the difference, we conclude that the Board's intermittent departures from the test were inadvertent. The inadvertence of the departures is confirmed by the Board's most recent relevant decision,<sup>18</sup> which followed the test.

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<sup>16</sup> *Supra*, note 14.

<sup>17</sup> Among the following cases there are inconsistencies regarding the relevance of the circumstances and the implications of reasonable expectations. *County of Nassau*, 38 PERB ¶13030 (2005); *County of Saratoga and Sheriff of Saratoga County*, 37 PERB ¶13024 (2004); *City of Peekskill*, 35 PERB ¶13016 (2002); *State of New York (DOCS – Groveland Corr Fac)*, 35 PERB ¶13030 (2002); *Bellmore Union Free Sch Dist*, 34 PERB ¶13009 (2001); *Town of Shawangunk*, 33 PERB ¶13054 (2000); *County of Westchester*, 33 PERB ¶13025 (2000); *State of New York (DOCS – Wende Corr Fac)*, 33 PERB ¶13022 (2000) and *Cananstota Cent Sch Dist*, 32 PERB ¶13003 (1999).

<sup>18</sup> *County of Nassau*, *supra*, note 17.

In the alternative, based upon our judgment regarding the merits of the *County of Nassau* test, to the extent that the Board's subsequent decisions were intended to modify that test in general to require additional proof of mutuality of agreement and/or knowledge or acquiescence by a managerial or high level supervisory employee, we hereby overrule them. It is antithetical to the language and intent of the Act to require additional proof of an agreement between a public employer and an employee organization for PERB to find a past practice to exist. Section 205.5(d) of the Act expressly denies PERB jurisdiction over such agreements. Neither is any other kind of mutual understanding between a public employer and an employee organization required for a past practice to be binding.

In the present case, the record establishes that the District had either actual or constructive knowledge of the past practice based on the District's reimbursement practice of the premiums, without restriction or qualification, the District's continuation of the reimbursement between 1988 and 2003 totaling approximately \$500,000 and the June 12, 2003 memorandum that cited the cost of the practice as the rationale for ending it.<sup>19</sup> This conclusion is supported, in this case, by the annual budgetary process mandated by Education Law, §2022.

Moreover, even if such evidence did not exist, the extended period of the practice alone, under normal circumstances, would have constituted circumstantial evidence sufficient to establish a *prima facie* proof of the employer's knowledge, thereby imposing

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<sup>19</sup> See *Otsellic Valley Cent Sch Dist*, 29 PERB ¶¶3005 (1996); (applying the actual or constructive knowledge standard to an employee organization's awareness of a change in a past practice). See also, *Monroe BOCES #1*, 28 PERB ¶¶3068 (1995); *Sidney Cent Sch Dist*, 28 PERB ¶¶3066 (1995).

upon the District the burden of proof of demonstrating that under the totality of the circumstances it did not have actual or constructive knowledge of the past practice.<sup>20</sup>

Our conclusion regarding the District's knowledge in the present case is not impacted by the fact that the District's administrators and managerial staff may have changed over time. While it is true that under other circumstances a public employer may not be held responsible under the Act for every practice created by an individual supervisor or manager when it can demonstrate the absence of actual or constructive knowledge, in the present case the totality of the circumstances establishes that the District had actual or constructive knowledge of the practice based upon the expenditure of revenue to multiple retirees, with such payments being subject to documentation in District records, and, like all expenditures, also subject to review during the preparation of annual budgets.

In her decision, the ALJ correctly concluded that the Association's charge did not cover persons who were affected by the District's announcement but had retired before the most recent agreement expired. There is no duty under the Act to bargain for those who are not in the bargaining unit, including retirees.<sup>21</sup> The charge focuses on a benefit for current employees who retire during the life of the agreement, which will generally be

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<sup>20</sup> See *City of Schenectady*, 26 PERB ¶3038 (1993) (where the Board adopted the totality of the circumstances standard for employer liability for an individual supervisor's conduct). See also *Board of Educ of the City Sch Dist of the City of New York*, 15 PERB ¶4603, *affd*, 15 PERB ¶3136 (1982); *State of New York (Dept of Taxation and Finance)*, 30 PERB ¶3028 (1997) (where an employer was found to have violated the Act when a supervisor unilaterally changed a past practice regarding a dress code established by his predecessor).

<sup>21</sup> See, e.g., *Troy Uniformed Firefighters Assn, Local 2304, IAFF*, 10 PERB ¶3015 (1977).

found to be mandatory if the underlying subject matter is mandatory.<sup>22</sup> Health insurance benefits for current employees, or benefits related to health insurance, is a mandatory subject of negotiations, whether or not those employees subsequently retire during the period covered by the agreement.<sup>23</sup>

It is undisputed that the District unilaterally announced to unit members that it was discontinuing payment of the premium to unit members and some of the employees might have been entitled to the benefit while employed or would become entitled to the benefit upon retirement. If an enforceable past practice existed regarding a mandatory subject of negotiations, the District would violate the Act by discontinuing that practice with respect to persons who were unit employees, even if the practice relates to a benefit to be provided upon retirement.<sup>24</sup>

This matter has come before the Board on a stipulated record. Although stipulations by the parties can be a convenient, productive and cost-saving means of setting forth the applicable facts for consideration, such stipulations can sometimes, inadvertently or purposefully, fail to include relevant facts necessary for the ALJ or the Board to render a final determination.

In the present case, the stipulated record clearly demonstrates that retirees, who by definition are outside the bargaining unit, received reimbursement for the premiums. Unfortunately, the stipulation is ambiguous regarding to what extent, if any, the

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<sup>22</sup> See, e.g., *Lynbrook Police Benevolent Assn*, 10 PERB ¶¶3067 (1977), *revd in part sub nom., Inc Vil of Lynbrook v PERB*, 64 AD2d 902, 11 PERB ¶¶7012 (2d Dept 1978), *reinstated*, 48 NY2d 398, 12 PERB ¶¶7021 (1979).

<sup>23</sup> Regarding health insurance, see, e.g. *Town of Haverstraw v PERB*, 75 AD2d 874, 13 PERB ¶¶7006 (2d Dept 1980); *Town of Chili*, 16 PERB ¶¶3110 (1983) (premiums).

<sup>24</sup> *Cohoes Police Benevolent Protective Assn*, 27 PERB ¶¶3058 (1994).

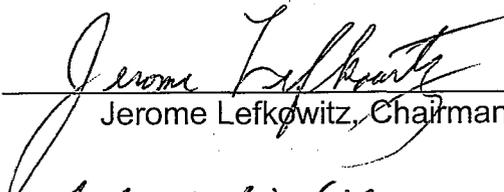
Association and/or current employees had actual or constructive knowledge of the benefit and, therefore, had a "reasonable expectation" that the practice would be continued.<sup>25</sup> Therefore, in the circumstance of this particular past practice, the Board remands this matter to the ALJ to take additional evidence regarding whether the Association and/or current employees had actual or constructive knowledge of the benefit and for the issuance of a decision based upon that additional evidence, if any.

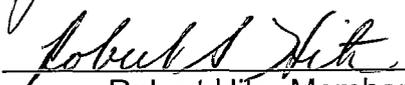
We have considered the remaining exceptions filed by the District and have found them to be without sufficient merit.

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

IT IS, THEREFORE, ORDERED that this matter be and it hereby is remanded to the ALJ.

DATED: July 25, 2007  
Albany, New York

  
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Jerome Lefkowitz, Chairman

  
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Robert Hite, Member

<sup>25</sup>See *County of Nassau*, 38 PERB ¶13004 (2005), where we found that there was no "reasonable expectation" that a benefit received by a nonunit employee would inure to the benefit of a unit employee, even when the unit employee assumed some of the duties performed by the nonunit employee.

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

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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.

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**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**

**BOARD DECISION AND ORDER**

On August 9, 2004, the New York State Parole Officers Benevolent Association (Association) filed a petition seeking to fragment approximately 1200 employees of the State of New York (Division of Parole) (State) in various Parole Officer titles (parole officers) from the Professional, Scientific and Technical Unit (PS&T) represented by the

Public Employees Federation (PEF) and be certified as the representative for the new unit.<sup>1</sup>

In support of its petition, the Association alleged that: 1) the parole officers perform law enforcement duties warranting their removal from the otherwise "civilian" PS&T unit; 2) the parole officers have not been adequately represented by PEF; and 3) the parole officers share a unique community of interest. PEF opposed the petition. The State took no position with respect to the fragmentation of the parole officers from the PS&T unit, except to posit that if the parole officers were fragmented on the basis of their law enforcement duties, the most appropriate unit placement would be in the existing agency law enforcement services unit (ALES) represented by the New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (Counsel 82).<sup>2</sup>

The Administrative Law Judge (ALJ) proceeded on the law enforcement duties aspect of the petition separately, reasoning that if fragmentation were granted on that basis alone evidence of inadequate representation and community of interest would not be necessary. After five days of hearing, the ALJ decided that the criminal law enforcement duties were not the exclusive or primary characteristic of the duties of the parole officers and that fragmentation was not warranted on that basis. He determined to proceed on the other grounds alleged by the Association.

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<sup>1</sup> The petition seeks the following titles: Facility Parole Officer 1, Facility Parole Officer 1 Spanish Speaking, Facility Parole Officer Trainee 1, Facility Parole Officer Trainee 2, Facility Parole Officer 2, Parole Officer, Parole Officer Spanish Language, Parole Officer Trainee 1, Parole Officer Trainee 1 Spanish Language, Parole Officer Trainee, Parole Officer Trainee 2 Spanish Language, Parole Revocation Specialist 1, Parole Revocation Specialist 2, Senior Parole Officer and Senior Parole Officer Special Services. Although part of the Parole Officer series, the proposed unit does not include Parole Revocation Hearing Officers.

<sup>2</sup> Although put on notice of the pending petition, Council 82 declined to intervene.

The Association then excepted to the ALJ's interim decision on the facts and the law; PEF responded, asserting that the ALJ's decision was correct. In an interim decision issued by the Board on June 27, 2007,<sup>3</sup> the Board treated the Association's exceptions as a motion for leave to file an interlocutory appeal, granted the motion and extended the State's time to respond to the motion or to notify the Board that it would not be filing a response. The State has neither filed a response nor advised the Board that it would not be doing so.<sup>4</sup>

**EXCEPTIONS**

The Association excepts to the ALJ's interim decision on three grounds:

- A. The ALJ erroneously determined that the parole officers' "control and supervision" and "on-going, proactive involvement in the lives of parolees" is not law enforcement.
- B. The ALJ erroneously determined that the conditions of release the Division of Parole (Division) is charged with enforcing are not penal in nature, and thus erroneously determined the enforcement of the same is not criminal law enforcement.
- C. The ALJ misinterpreted PERB decisional precedent by too narrowly construing the law enforcement grounds for fragmentation.

PEF supports the ALJ's decision, arguing that the ALJ correctly stated the facts and correctly applied Board precedent to the record facts.

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

**FACTS**

The ALJ's decision contains a detailed analysis of the qualifications and job

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<sup>3</sup> 40 PERB ¶13007 (2007).

<sup>4</sup> The State did not file a post-hearing brief with the ALJ and did not respond to the Association's motion for leave to file exceptions to the Board.

duties of employees in the parole officer titles,<sup>5</sup> the facts are repeated here only as necessary to reach the exceptions.

The record establishes that the Division is responsible for the promotion and enhancement of the public safety and protection through the development of supervision and treatment plans for offenders returning to the community by preparing an inmate for release from prison, supervising that inmate (now a parolee) on parole after release and, if necessary, returning that parolee to prison, should the parolee violate the terms of parole in an important respect.<sup>6</sup>

To fulfill its responsibilities, the Division employs Facility Parole Officers 1 to prepare the documents for consideration of an inmate for parole by the Parole Board and to prepare the inmate for release. These officers are supervised by Facility Parole Officers 2. Once an inmate is released to the Division's jurisdiction, a Parole Officer is assigned to provide supervision. Senior Parole Officers supervise Parole Officers and Facility Parole Officers 2. If a parolee violates parole, the Parole Officer recommends that the Senior Parole Officer issue a warrant placing the parolees back into the custody of the Division.

A Preliminary Hearing Officer serves as the impartial hearing officer to determine whether the Division had probable cause to believe that a violation of the conditions of release<sup>7</sup> has occurred. If a parolee contests the findings of the Preliminary Hearing Officer, he or she can request a hearing before a Division Parole Revocation Hearing

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<sup>5</sup> 40 PERB ¶4003 (2007).

<sup>6</sup> See, Executive Law, §259-a, *et seq.*

<sup>7</sup> Prior to parole, felons must execute a Certificate of Parole specifying 13 conditions of release that must be obeyed by the parolee, accepting parole supervision and acknowledging that they and their property are subject to search and inspection. See, 9 NYCRR 8003.2.

Officer. The Division is represented at such a hearing by the Parole Revocation Specialist 1 or 2, acting as the prosecuting attorney. If the Division prevails at the hearing, the parolee is returned to a State correctional facility to serve the balance of his or her sentence.

The qualifications for appointment as Parole Officer or Facility Parole Officer 1 are that applicants must be 21 years of age or more, possess a four-year college degree and the physical, mental and moral fitness to provide a balanced approach to influencing human behavior and to use judgment in the enforcement of the rules and regulations of presumptive release, parole and conditional release.<sup>8</sup> Civil Service requirements include an additional three years of experience as a "social caseworker or group worker in a recognized social services, correctional, criminal justice, community or human welfare agency."<sup>9</sup> While a law degree or a Master's degree in social work may substitute for two of the three years of required experience, police officer training or experience will not.<sup>10</sup> Additionally, the only other state title that is eligible for transfer into the parole officer series is the Department of Correctional Services Correction Counselor, also in the PS&T unit.<sup>11</sup> The other titles in the parole officer series have the same educational requirements and additional experience requirements.

All parole officers are designated as peace officers.<sup>12</sup> They receive eight weeks of training upon their appointment, with Facility Parole Officers receiving additional

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<sup>8</sup> Executive Law, §259-f (2).

<sup>9</sup> Joint Exhibit No. 1.

<sup>10</sup> Transcript, p.132.

<sup>11</sup> CSL, §70.1.

<sup>12</sup> CPL, §2.10 (23). Parole Revocation Hearing Officers are not peace officers.

training on the job. Both Parole Officers and Facility Parole Officers receive peace officer training along with training in: basic law; social work practice and case management; street survival; firearms and self defense; arrest procedures; substance abuse relapse prevention and domestic violence prevention. Beyond annual re-qualification in firearms and a three-hour course in use of force/deadly force required to maintain peace officer status, any other law enforcement-related training is voluntary.

By comparison, titles in the ALES unit receive much more extensive training in law enforcement. The police officer titles in that unit, such as the Traffic and Police Officers and Park Police Officers, complete a 23-week residential training program. Environmental Conservation Officers and Investigators, also police officers, attend a residential training academy and receive over 13 weeks of in-service training. Forest Rangers, who were then peace officers, complete a 26-week training program that is consistent with the training and mandatory certifications necessary for law enforcement officers. Unlike the parole officer titles, none of these titles requires a baccalaureate degree, but all require much more extensive training in criminal law enforcement.<sup>13</sup>

The ALJ's decision provides a detailed analysis of the job description for Parole Officers, breaking down the summary statement and each of the eleven activities that follow. Six of the activities and their related tasks involve public relations, community outreach and internal reporting requirements. The remaining activities involve supervision, control and rehabilitation of parolees, investigations of suspected violations of the conditions of parole, apprehension and re-incarceration of parolees who have violated their parole conditions and the administrative proceedings necessary to do so. These activities have the most tasks associated with them; the activity with the most

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<sup>13</sup> See *State of New York*, 33 PERB ¶13042 (2000), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 300 AD2d 929, 35 PERB ¶7020 (3d Dept 2002).

tasks is the development and modification of an individual treatment plan for parolees.

The Parole Officer's primary responsibility is the supervision of parolees.<sup>14</sup> The record shows that there are occasions when Field Parole Officers may be involved in investigation, surveillance, apprehension and arrest that carry with them the same dangers as those involved in the investigation, surveillance, apprehension and arrest of an individual suspected of committing a violent crime. However, those duties do not constitute the primary duties of the Field Parole Officers and are not the duties of those Parole Officers who are assigned to correctional facilities<sup>15</sup> or the parole revocation investigation or hearing process.

Of the 1200 employees who hold a parole officer title, only approximately 22 Field Parole Officers are assigned to the Division's Bureau of Special Service (BSS). Those assigned to BSS work with both federal and state law enforcement agencies to investigate major crimes when parolees are believed to be involved in persistent criminal activity or are working with the law enforcement agencies as informants. These voluntary special assignments involve criminal investigations, execution of search warrants and making criminal arrests, in which Field Parole Officers are at times used interchangeably with police officers assigned to the same project or task force.

### **DISCUSSION**

We will discuss each of the Association's exceptions *seriatim*.

The Association contends that the record does not support the ALJ's conclusions as to what constituted police officer qualifications and duties. We disagree. The ALJ's decision sets forth over 25 pages of facts, outlining in detail the qualifications and duties

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<sup>14</sup> Transcript, p. 45.

<sup>15</sup> Transcript, pp. 135-36.

of each of the parole officer titles and correctly applied Board precedent to those facts.

A majority of the testimony at the hearing about the performance of law enforcement duties by parole officers dealt with the Field Parole Officers assigned to BSS, whose duties are specialized and “not typical of the class.”<sup>16</sup> The record shows that most employees in the parole officer titles have little involvement in traditional law enforcement duties. Indeed, the Division does not require a parole officer to make an arrest even if he sees a crime being committed by a parolee.<sup>17</sup> A parole officer may make the arrest as a peace officer, but may also call upon a police officer for assistance.<sup>18</sup> The jurisdiction of parole officers lies in the enforcement of the parolee’s conditions of release, not criminal law. Therefore, the ALJ was correct in stating that parolees who violate the conditions of release are subject to the supervision and control of parole officers, whether or not the violation also constitutes a violation of criminal law.

The Association also contends that the ALJ erred in concluding that enforcement of a parolee’s conditions of release does not constitute general law enforcement.

While Penal Law, §§70.40 and 70.45 set forth the statutory framework for parole, conditional release and post-release supervision, it is the Executive Law that establishes the Division and governs the conditions under which parole is granted and revoked.<sup>19</sup> As pointed out by the ALJ, only one of the thirteen conditions of release enforced by Parole Officers deal with activity that is criminal in nature and violation of any one of the conditions may result in the revocation of parole and re-incarceration.

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<sup>16</sup> Joint Exhibit No. 9.

<sup>17</sup> Transcript, pp. 740-41.

<sup>18</sup> Transcript, p. 329.

<sup>19</sup> Executive Law, Art. 12-B.

The bulk of the Association's arguments in this exception relate to the activities of those Field Parole Officers assigned to task forces and special operations. As noted earlier, only approximately 22 out of 1200 Parole Officers work side-by-side with federal and state law enforcement officers performing law enforcement duties

Finally, the Association argues that the ALJ misinterpreted and narrowly construed PERB decisions regarding the general law enforcement basis for fragmentation.

We have long dealt with the issues associated with the most appropriate unit for public employees in police officer titles or who primarily or exclusively perform general criminal law enforcement activities associated with police officers:

In *State of New York*,<sup>20</sup> reaffirming our initial unit decision establishing the Security Services Unit, the Board rejected an effort to have all State police officers, other than those employed by the State Police, placed in a separate and distinct unit. Our decision in that case is reflective of the long-standing principle under §207.1 of the Act that the most appropriate bargaining unit is generally the largest unit because larger units are more likely to provide effective and meaningful negotiations.<sup>21</sup> An equally important longstanding principle is that fragmentation of existing units will not be granted without proof of compelling evidence, such as a conflict of interest or inadequate representation.<sup>22</sup>

In a series of decisions that followed *State of New York, supra*, the Board

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<sup>20</sup> 5 PERB ¶3022 (1972)

<sup>21</sup> *State of New York*, 2 PERB ¶¶3035-3038, 3044 (1968). See also *County of Schenectady*, 25 PERB ¶3043 (1992); *County of Ulster*, 22 PERB ¶3030 (1989).

<sup>22</sup> *Deer Park UFSD*, 22 PERB ¶3014 (1989); *State of New York*, 21 PERB ¶3050 (1988); *Chautauqua County BOCES*, 15 PERB ¶3126 (1982).

determined that distinct bargaining units were most appropriate for employees holding police officer titles in police departments. Subsequently, the Board found that separate bargaining units were appropriate for certain other employees holding titles that are statutorily granted police powers and whose duties are predominately the enforcement of New York's general criminal laws.

In *City of Amsterdam*,<sup>23</sup> the Board articulated an explicit rationale for fragmenting police officers, recognizing that police officers were fundamentally different from all other public employees because "the police service is concerned with the broad spectrum of human rights, public order and the protection of life and property."<sup>24</sup> Based on their unique legal authority and responsibilities, the Board concluded that the most appropriate unit for police officers was a unit consisting only of police officer titles excluding all other employees, including those who perform other public safety functions.

The rationale underlying the creation of distinct units for police officers was elaborated on in *Village of Skaneateles*<sup>25</sup>: "1) the special and unique police community of interest deriving from their law enforcement duties and the hazards attendant thereto; 2) the compatibility of such separate unit with the joint responsibilities of the public employer and public employees to serve the public, the primary commitment of law enforcement being part and parcel of the employer's fundamental mission to preserve public order; and 3) the separate impasse resolution procedures under §209.4 of the Act which can create pitfalls to stable labor relations for a combined police and non-

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<sup>23</sup> 10 PERB ¶3031 (1977).

<sup>24</sup> *Id.* at 3061.

<sup>25</sup> 16 PERB ¶3070 (1983).

police unit."<sup>26</sup>

In *County of Dutchess and Dutchess County Sheriff*,<sup>27</sup> the Board reconsidered its prior fragmentation decisions regarding sheriff's department personnel,<sup>28</sup> finding that the "law enforcement" responsibilities and duties of Deputy Sheriffs and other sheriff's department employees may be sufficient to warrant the establishment of a separate unit of Deputy Sheriffs. The Board acknowledged that the typical duties of Deputy Sheriffs, which may include patrolling in a police vehicle or on foot, investigating suspicious activities, making arrests, maintaining order in crowds and public gatherings, and answering questions for the public, may fairly be considered to be police work. The Board found that the law enforcement duties of Deputy Sheriffs could justify a separate bargaining unit for them based upon an arguable unique community of interest and/or actual or potential conflict of interest with other employees in the Sheriff's Department who may not have any similar assigned duties and remanded the matter for the taking of further evidence as to the actual duties of the Deputy Sheriffs.<sup>29</sup>

Thereafter, in *County of Erie and Sheriff of Erie County*,<sup>30</sup> the Board was presented with a case seeking the fragmentation of Deputy Sheriffs-Criminal from a unit which included Deputy Sheriffs-Officers based on the general law enforcement duties

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<sup>26</sup> *County of Warren*, 21 PERB ¶3080, at 3082 (1988).

<sup>27</sup> 26 PERB ¶3069 (1993).

<sup>28</sup> See *County of Erie and Erie County Sheriff*, 25 PERB ¶3062 (1992); *County of Erie and Erie County Sheriff*, 22 PERB ¶3055 (1989); *County of Warren*, *supra*, note 26; *County of Albany and Albany County Sheriff*, 19 PERB ¶3054 (1986); *County of Albany and Albany County Sheriff*, 15 PERB ¶3008 (1982); *County of Schenectady and Sheriff of Schenectady County*, 14 PERB ¶3013 (1981).

<sup>29</sup> The case was settled after the remand.

<sup>30</sup> 29 PERB ¶3031 (1996).

assigned to the Deputy-Sheriffs-Criminal. In rendering its determination, the Board recognized that police officer status under CPL §1.20(34) is one factor to be considered in uniting determinations. In addition, the Board applied the definition of police officer contained in CSL §58(3) and found that employees with police powers, whose exclusive or primary duties were "the prevention and detection of crime and the enforcement of the general criminal laws of the state," were entitled to a fragmented unit. Concluding that the Deputy Sheriffs-Criminal had the qualifications, training and duties that are unique to police officers responsible for the prevention and detection of crime under the general criminal laws of the state and that such law enforcement duties were their exclusive or primary job responsibilities, the Board granted the fragmentation petition as to those employees.

Four years later in *County of Rockland*,<sup>31</sup> the Board applied the rationale from *County of Erie and Sheriff of Erie County, supra*, to fragment Investigative Aides in a District Attorney's office from a unit of civilian employees, based upon the fact that the aides were assigned exclusively to perform criminal law enforcement duties, much of which were undercover, including infiltrating and investigating narcotics networks and other crime networks; conducting surveillances; providing backup and security for other undercover officers, using deadly force to do so if necessary; participating with other police agencies in raids; making arrests; and maintaining custody and control of evidence. Finding that the Investigative Aides' training and "predominant" duties in criminal law enforcement established for them a community of interest separate and apart from other employees in the unit, the Board held that the fragmentation sought was warranted because the Investigative Aides were regularly exposed to criminal law

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<sup>31</sup> 32 PERB ¶13074 (1999), *confirmed*, 34 PERB ¶17013 (Sup Ct Albany County 2001), *affirmed* 295 AD2d 790, 35 PERB ¶17013 (3d Dept 2002).

enforcement by virtue of their training and duties. However, in reaching its decision in that case, the Board declined to decide whether the Investigative Aides were granted the statutory authority to engage in police officer duties and focused solely on their training and job responsibilities to conclude that fragmentation was appropriate.

Applying the same standard in *State of New York*,<sup>32</sup> the Board fragmented the Forest Ranger position, along with certain other titles with police officer powers, from the Security Services Unit, although Forest Rangers were peace officers. After reviewing the qualifications, training and duties of the Forest Rangers, the Board found that they performed a full-range of criminal law enforcement duties for approximately 50% of their time and were involved in search and rescue missions during which they directed responding personnel, including State police and deputy sheriffs, for approximately 20% of their duties. Although Forest Rangers had not been granted police officer powers under Criminal Procedure Law §1.20(34), the Board concluded that their duties were sufficient to support fragmentation: they provided ancillary services which are directly and predominantly related to criminal law enforcement. Since that decision, the Legislature has amended the Criminal Procedure Law to expressly grant Forest Rangers police officer status.<sup>33</sup>

Therefore, Board precedent firmly establishes that fragmentation is appropriate for public employees who are police officers or hold a title that has also been granted police officer status by the Legislature and whose exclusive or predominant duties are

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<sup>32</sup> 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).

<sup>33</sup> CPL §1.20(34)(v).

the enforcement of the State's general criminal laws.<sup>34</sup> To the extent that *County of Rockland* and *State of New York*<sup>35</sup> suggest otherwise, we decline to follow them. Rather, we rely upon the long-standing principles for fragmentation set forth in *State of New York*,<sup>36</sup> *Village of Skaneateles*<sup>37</sup> and *Deer Park Union Free School District*.<sup>38</sup>

There are a multitude of titles assigned to perform important law enforcement related duties involving public safety. However, whether a position has been granted police officer status under CPL §1.20(34) remains the initial factor to be considered in determining whether fragmentation is appropriate based on the performance of those duties. The Legislature, in drafting the Criminal Procedure Law, has established a clear dichotomy between the respective scope of law enforcement authority of police officers and peace officers confirming the unique authority and responsibilities of individuals with police officer status.<sup>39</sup>

None of our prior uniting decisions dealing with various law enforcement titles supports the fragmentation sought by the Association.<sup>40</sup> Notwithstanding the important public safety functions performed by parole officers, as well as the dangers they face in

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<sup>34</sup> We do not reach the issue of whether a separate impasse resolution procedure under §209.4 of the Act alone warrants fragmentation. See *State of New York*, 39 PERB ¶3032 (2006).

<sup>35</sup> *Supra*, note 32.

<sup>36</sup> *Supra*, note 20.

<sup>37</sup> *Supra*, note 25.

<sup>38</sup> *Supra*, note 22.

<sup>39</sup> See, CPL §2.20.

<sup>40</sup> Neither do the other cases cited by the Association in its brief support fragmentation. They are either not controlling or not relevant to our inquiry into the duties actually performed by the Division's parole officer titles.

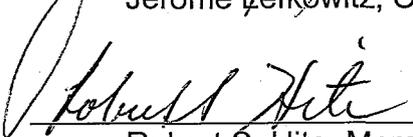
dealing almost exclusively with a population of convicted felons, the Legislature has not granted them police officer status. In addition, the evidence in the record establishes that the parole officer titles do not perform criminal law enforcement duties as their exclusive or predominant responsibility, even those parole officers who are assigned to special services or operations. Indeed, some of the parole officer titles have virtually no criminal law enforcement duties.

Based upon the foregoing, we deny the Association's exceptions and affirm the decision of the ALJ. Therefore, the matter is remanded to the ALJ for further processing consistent with this decision.

SO ORDERED.

DATED: July 25, 2007  
Albany, New York

  
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Jerome Lefkowitz, Chairman

  
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Robert S. Hite, Member

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

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In the Matter of

**MONROE POLICE BENEVOLENT ASSOCIATION,  
INC.,**

Charging Party,

**CASE NO. U-26964**

- and -

**VILLAGE OF MONROE,**

Respondent.

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**JOHN M. CROTTY, ESQ., for Charging Party**

**RICHARD A. GLICKEL, ESQ., for Respondent**

**BOARD DECISION AND ORDER**

This case comes to the Board on exceptions filed by the Monroe Police Benevolent Association, Inc. (PBA), to a decision of an Administrative Law Judge (ALJ) that conditionally dismissed the PBA's improper practice charge which alleged that the Village of Monroe (Village) violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it directed an employee in the PBA bargaining unit to execute a medical confidentiality waiver form, different from the form agreed upon in the parties' collectively negotiated agreement, as a condition to his continued receipt of benefits under General Municipal Law (GML) §207-c.

The ALJ deferred the improper practice charge to the parties' contractual grievance procedure because the PBA had filed a grievance alleging that the Village's

use of the new form violated the collectively negotiated agreement and the alleged §209-a.1(a) violation was unsupported by the facts.

### **EXCEPTIONS**

The PBA excepts to the ALJ's decision, arguing that the ALJ erred by deferring the improper practice charge when PERB has exclusive, non-delegable jurisdiction to hear a charge alleging contract repudiation and that the Village asserted no colorable defense to the alleged contract repudiation. The PBA further argues that the ALJ incorrectly dismissed the alleged §209-a.1(a) violation. The Village supports the ALJ's decision.

Based on our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ and remand the case to the ALJ for further processing consistent with our decision, *infra*.

### **FACTS**

The relevant facts are set forth in the ALJ's decision and are repeated here only as necessary to decide the exceptions.<sup>1</sup>

The PBA and the Village are parties to a collectively negotiated agreement that contains a negotiated GML §207-c procedure, including a negotiated medical confidentiality waiver form. Section 14.3 of the procedure also states: "The parties agree that any disputes relating to the administration of the provisions of this procedure shall be resolved through the hearing procedure contained in Section 11 herein and all other disputes shall be processed through Article 17-Grievance Procedure."

The gravamen of the charge is that the Village implemented the use of a medical confidentiality waiver form, entitled "HIPAA Compliant Waiver for the Administration of

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<sup>1</sup> 40 PERB ¶14512 (2007).

Benefits Under General Municipal Law 207-c," that is different from the negotiated GML §207-c confidentiality waiver form. The charge also alleges that, on June 28, 2006, a bargaining unit member was sent a memorandum requiring him to execute and return the new confidentiality waiver form as a condition of being allowed to return from GML §207-c leave or face losing his GML §207-c benefits.

In its answer, the Village asserted that it had already addressed the PBA's concerns regarding the new confidentiality waiver form. The Village stated that the use of the new form was required by the Health Insurance Portability and Accountability Act of 1996 (HIPAA)<sup>2</sup> relating to the required content of a valid medical information release authorization form before a health care provider releases confidential medical information. Further, the Village alleges that it created the new form based on a standard form developed by the New York State Office of Court Administration for the release of health information during litigation.

The PBA thereafter filed a grievance, which, at the time of the pre-hearing conference in this matter, was scheduled for arbitration. The ALJ, having been made aware of the filing of the grievance, requested that the parties brief the issue of deferral of the improper practice charge to the parties' contractual grievance procedure.

### **DISCUSSION**

The PBA argues in its improper practice charge that the Village's actions in substituting a release form different from the contractually agreed upon form constitutes a unilateral change in a mandatory subject of negotiations in violation of §209-a.1(d) of the Act. The PBA further argues in its charge that the Village threatened the officer with

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<sup>2</sup> Pub L No 104 -191, 110 Stat 1936 (1996) (codified primarily in Titles 18, 26 and 42 of the United States Code).

losing his GML §207-c benefits if he continued to assert his rights to use the contractually agreed-upon form in violation of §209-a.1(a) of the Act.

In its brief and in its exceptions, the PBA contends that the ALJ erred in conditionally dismissing the charge under *Herkimer County BOCES*,<sup>3</sup> on the grounds that the Village's use of a different medical confidentiality waiver form constitutes a repudiation of the collective bargaining agreement because the Village has acted without a colorable contractual claim of right.

Contrary to the PBA's argument, our decisions determining whether a repudiation of the parties' collective bargaining agreement has occurred have not required a colorable claim of *contract* right, but only that the respondent has raised an arguable defense to the allegation that it has disavowed a collectively negotiated agreement or a specific provision thereof.<sup>4</sup> Although certain Board decisions have pointed to a respondent's "claim of contractual privilege" in defense of a repudiation claim<sup>5</sup> that does not mean that a "colorable" defense to a repudiation charge may rest only on a *contractual* claim of right.<sup>6</sup> In *Board of Education of the City School District of the City of*

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<sup>3</sup> 20 PERB ¶¶3050 (1987).

<sup>4</sup> *Jefferson County Board of Supervisors*, 6 PERB ¶¶3031 (1973), *revd on other grounds, Jefferson County Board of Supervisors v New York State Pub Empl Rel Bd*, 44 AD2d 893, 7 PERB ¶¶7009 (4<sup>th</sup> Dept 1974), *affd* 36 NY2d 534, 8 PERB ¶¶7008 (1985).

<sup>5</sup> See *Honeoye Cent Sch Dist*, 18 PERB ¶¶3085 (1985); *Connetquot Cent Sch Dist*, 21 PERB ¶¶3049 (1988); *Monticello Cent Sch Dist*, 22 PERB ¶¶3002 (1989); *NYCTA*, 35 PERB ¶¶3008 (2002).

<sup>6</sup> See *Comsewogue Union Free Sch Dist*, 27 PERB ¶¶3047 (1994); *Board of Educ of the City Sch Dist of the City of Buffalo*, 25 PERB ¶¶3064 (1992); *State of New York (SUNY-College at Potsdam)*, 22 PERB ¶¶3045 (1989).

*Buffalo*<sup>7</sup>, the Board stated:

In several decisions, we have distinguished a contract repudiation, which is cognizable as an improper practice, from a contract breach or a contract enforcement, which is not. In making that distinction, we have emphasized that a meritorious repudiation claim arises only in "extraordinary circumstances" in which a party to the contract denies the existence of an agreement or acts in total disregard of the contract's terms without any colorable claim of right. [citations omitted.]

In the alternative, the PBA challenges the ALJ's finding that the Village's asserted legal claim under HIPAA in support of its use of a different medical confidentiality waiver form constitutes a colorable claim of right in defense of its conduct. The PBA argues that the ALJ erred in concluding that the Village had a colorable legal claim without examining the merits of the Village's legal claim. We agree.

The Village does not deny that the collectively negotiated agreement exists or that it has no obligation under the contractually negotiated GML §207-c procedure to use the agreed-upon form. Instead, it argues that HIPAA requires it to have bargaining unit members execute a medical confidentiality waiver form containing supplemental language and that the supplemental language is cosmetic in nature.

Upon our review of the applicable HIPAA regulations, we conclude that HIPAA does not constitute a colorable claim of right for the Village's unilateral action. In response to the exceptions, the Village has not articulated a persuasive legal argument demonstrating that its actions were mandated by HIPAA.

Pursuant to the standards promulgated by the Secretary of the Department of Health and Human Services, a "covered entity" may not use or disclose protected health

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<sup>7</sup> *Supra*, note 7, at 3135.

information without a valid authorization as defined by the HIPAA regulations.<sup>8</sup> Under HIPAA and its regulations, the definition of a “covered entity” does not include employers but does include a health care provider.<sup>9</sup> Therefore, although a physician may face possible sanctions for disclosing medical information without a valid authorization under the standards mandated by HIPAA, the Village would not face similar sanctions by continuing to abide by the negotiated form.

The Village, in response to the PBA’s exceptions, acknowledges the limited regulatory scope of HIPAA. Nevertheless, it attempts to justify its unilateral action on the claim that a physician may refuse to release health care information to the Village without a valid HIPAA authorization form, thereby infringing on its right to investigate an employee’s claim under GML §207-c. Such speculation does not constitute a defense to a repudiation charge.<sup>10</sup> Even if the Village were a “covered entity”, HIPAA does not require that an authorization form be as broad in scope as the Village’s new form.<sup>11</sup>

Based on the Village’s lack of a colorable contractual or legal claim of right, we conclude that the ALJ erred in finding that the Village did not repudiate the collectively negotiated agreement.<sup>12</sup> Therefore, we reverse the ALJ’s decision to conditionally dismiss the §209-a.1(d) allegation pursuant to the policies articulated in *Herkimer County BOCES* and remand it to the ALJ for further processing consistent with our

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<sup>8</sup> 45 CFR §164.508(a).

<sup>9</sup> 42 USC §§ 1320d-1(a), 1320d(3), 45 CFR §160.103.

<sup>10</sup> *Monticello Cent Sch Dist*, 22 PERB ¶3002 (1989).

<sup>11</sup> 45 CFR §164.508(c).

<sup>12</sup> *Supra*, note 3.

decision herein.<sup>13</sup>

On remand, in determining the merits of the charge, the broader questions of whether the new medical release form is negotiable under GML §207-c<sup>14</sup> and to what extent HIPAA's regulations preempt the negotiability of medical confidentiality waiver forms subject to HIPAA<sup>15</sup> should be examined.

Finally, the PBA argues that the ALJ erred in dismissing the alleged violation of §209-a.1(a) of the Act. The PBA argues that the purported threat to the police officer of the loss of GML §207-c benefits if he persisted in using the contractual medical confidentiality waiver form was interference in the employee's concerted and protected exercise of contractual rights.

The PBA cites to our decision in *City of Albany*<sup>16</sup> as support for its assertion that if an employee exercises a contract right and is threatened by his or her employer and the employer does not have a colorable claim of right under the same contract, the employer must be found to have violated §209-a.1(a) of the Act. Our decision in that case held:

Although we have suggested that an employer may violate the Act if it interferes with or discriminates against an employee for the employee's exercise of a contract right, [footnote omitted] we believe that such a violation requires minimally that the employee's contract right be clear and that the employer's interference or discrimination be taken without a colorable claim of corresponding right. For example, an employer arguably violates the Act if it threatens an employee with

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<sup>13</sup> *Supra*, note 3.

<sup>14</sup> *See, Schenectady PBA v PERB*, 85 NY2d 480, 487 (1995).

<sup>15</sup> *See, Patchogue-Medford Union Free Sch Dist*, 20 PERB ¶3041 (1997) (holding that Title IX of the Education Amendments of 1972, 20 USC §1681, and related federal regulations did not preempt the negotiability of certain aspects of an employer's sexual harassment policy.)

<sup>16</sup> 25 PERB ¶3026 (1992).

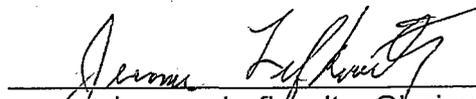
discipline for filing a grievance if the contractual procedure plainly permits the employee to file the grievance.

The PBA argues that because the Village here does not assert a colorable contractual claim of right, it can be found to have violated §209-a.1(a) when it cautioned the officer that his GML §207-c benefits would be in jeopardy if he did not execute the amended medical confidentiality waiver form. Based on our conclusion that the Village did not have a colorable claim of right under the HIPAA to require the new waiver form, it cannot defend against the §209-a.1(a) charge by relying on the HIPAA requirement that individuals be informed of the consequences for refusing to sign a valid authorization form.<sup>17</sup> For the same reasons we have sustained the PBA's repudiation argument, we reverse the ALJ's decision to dismiss the PBA's §209-a.1(a) claim and remand it for further processing consistent with our decision.

Based on the foregoing, we sustain the PBA's exceptions, reverse the ALJ and remand the case to the ALJ.

IT IS, THEREFORE, ORDERED that the improper practice charge is reinstated and the case is remanded for further processing.

DATED: July 25, 2007  
Albany, New York

  
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Jerome Lefkowitz, Chairman

  
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Robert S. Hite, Member

<sup>17</sup> 45 CFR 164.508(c)(2)(ii)(B) requires that an authorization set forth "(t)he consequences to the individual of a refusal to sign the authorization when, in accordance with paragraph (b)(4) of this section, the covered entity can condition treatment, enrollment in the health plan, or eligibility for benefits on failure to obtain such authorization."

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5693**

**TOWN OF WINDHAM,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure 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 United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time Police Officers.

Excluded: Chief of Police and all other employees.

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

DATED: July 25, 2007  
Albany, New York

  
Jerome Lefkowitz, Chairman

  
Robert S. Hite, Member

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-5699**

**TOWN OF CAIRO,**

Employer,

-and-

**NEW YORK STATE LAW ENFORCEMENT OFFICERS  
UNION, DISTRICT COUNCIL 82, AFSCME, AFL-CIO,**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure 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 United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

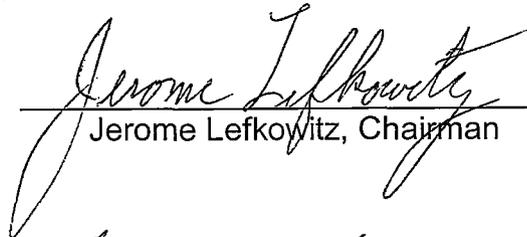
public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Police Officers employed by the Town of Cairo.

Excluded: Police Chief and all other Town employees.

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

DATED: July 25, 2007  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairman

  
\_\_\_\_\_  
Robert S. Hite, Member

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

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In the Matter of

**ARKPORT STAFF UNITED,**

Petitioner,

-and-

**CASE NO. C-5700**

**ARKPORT CENTRAL SCHOOL DISTRICT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

A representation proceeding<sup>1</sup> 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 Arkport Staff United has been designated and selected by a majority of the employees of the above-named public employer, in

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<sup>1</sup> The petition as filed sought inclusion of the title Registered Professional Nurse (School Nurse). The Arkport Faculty Association intervened in this proceeding for the sole purpose of seeking placement of that title in its unit. The Petitioner and Intervenor have agreed that the most appropriate placement of the title is in the Intervenor's unit. The District has refused to consent to that placement, therefore, the Intervenor has been advised that the proper avenue for placement of the Registered Professional Nurse in its unit would be the filing of a unit placement petition. As a result of the Petitioner's agreement to withdraw its request for the title, the Intervenor has withdrawn its interest in this petition.

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.

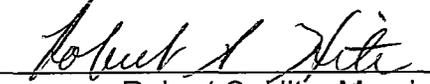
Included: All full time and part time employees in the titles of: Teacher Aide (including Special Education Aide, Library Aide, Instructional Aide), Maintenance Mechanic, Head Building Maintenance Mechanic, Groundskeeper, Student Services Secretary, Account Clerk/Payroll Attendance Coordinator, Cleaner, Custodian, and all other secretarial, buildings, grounds and maintenance titles, and computer support titles employed by the Arkport Central Schools.

Excluded: Secretary to the Superintendent and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Arkport Staff United. 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: July 25, 2007  
Albany, New York

  
\_\_\_\_\_  
Jerome Lefkowitz, Chairman

  
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Robert S. Hite, Member