STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

CASE NO. DR-121

Upon a Petition for Declaratory Ruling

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel) and MICHAEL T. MURRAY for Patrolmen's Benevolent Association of the City of New York, Inc.

PROSKAUER ROSE LLP (M. DAVID ZURNDORFER, NEIL H. ABRAMSON and DANIEL ALTCHECK, of counsel), for the City of New York

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 by the Director of Public Employment Practices and Representation (Director) dismissing a petition for a declaratory ruling (petition) filed by the PBA.[1]

On April 27, 2007, the PBA filed both a petition and an improper practice charge containing identical allegations and requesting similar relief. In its petition, the PBA seeks a declaration that a provision of a collectively negotiated agreement between the City of New York (City) and the Uniformed Firefighters Association of Greater New York, Local 94, IAFF, AFL-CIO (Association) constitutes an unlawful parity clause that will adversely impact the PBA's ability to participate in a pending interest arbitration with the City.

On May 2, 2007, the Director issued a deficiency notice to the PBA with respect to the petition. The notice also informed the PBA that its improper practice charge

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[1] 40 PERB ¶6602 (2007).

would be processed.[2] On May 3, 2007, the City submitted a letter to the Director asserting that PERB lacked jurisdiction to grant the requested declaratory relief or to determine the improper practice charge based on the Court of Appeals decision in *Patrolmen's Benevolent Association v City of New York*.[3] On May 11, 2007, the PBA notified the Director that it objected to the deficiency notice and indicated an intent to file exceptions if the petition is dismissed.

On June 21, 2007, the Director dismissed the petition on the grounds that the requested declaratory ruling did not concern a justiciable dispute between the PBA and the City regarding the negotiability of a bargaining demand made by either party pursuant to §210.1(a) of the Rules of Procedure (Rules).

EXCEPTIONS

In its exceptions, the PBA contends that the petition questioning the legality of the at-issue provision in the agreement between the City and the Association should not have been dismissed because it allegedly raises a "scope of negotiations" question under §210.1(a) of the Rules. According to the PBA, the phrase "scope of negotiations" encompasses both the negotiability of demands between the parties as well as the interpretation of an external contractual provision that may affect the interest arbitration between the City and the PBA. In the alternative, the PBA asserts that the issuance of a declaratory ruling regarding the at-issue provision would be in the public interest

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[2] The improper practice charge, Case No U-27555, is pending before an Administrative Law Judge (ALJ).

[3] 97 NY2d 378, 34 PERB ¶7040 (2001).

pursuant to §210.2 of the Rules. The City supports the Director's dismissal of the petition.[4]

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

FACTS

The relevant facts are undisputed. The PBA and the City are parties to a pending interest arbitration. The City's petition for interest arbitration was filed on or about October 24, 2006 and the PBA's response was filed on or about November 22, 2006. One of the issues presented in the interest arbitration is the appropriate wage schedule for members of the PBA bargaining unit.

DISCUSSION

Section 205.6(c) of the Rules sets forth the applicable standards relating to a petition for a declaratory ruling involving an interest arbitration.[5] Rule §205.6(c) states:

> The proposed arbitration of any matter set forth in the petition or response may be objected to by either party as not being within the scope of mandatory negotiations by filing a declaratory ruling petition pursuant to Part 210 of this Chapter. If filed by the respondent, such a petition may not be filed after the date of the filing of the response filed in accordance with section 205.5 of this Part; if filed by the petitioner, such a petition may not be filed more than 10 working days after its receipt of the response.

In *State of New York (Division of State Police),*[6] the Board reiterated the purpose of the declaratory ruling procedure:

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[4] The Association also filed a brief in opposition to PBA's exceptions and in support of the Director's decision. The Board has not considered the Association's brief because the Association was not a party before the Director nor did it move for leave to intervene before the Board or to appear as *amicus curiae*.

[5] *State of New York (Division of State Police),* 38 PERB ¶3007, at 3022 (2005).

[6] *Supra,* note 5.

> The purpose of the declaratory ruling proceeding is to provide a less adversarial means than an improper practice proceeding for resolving an existing justiciable issue between parties concerning, among other matters, the character of subjects of negotiations under the Act.[7]

In *City of Plattsburgh,*[8] the Board discussed the limited nature of the negotiation issues to be resolved in the context of a declaratory ruling:

> The issues which may be raised in a declaratory ruling petition, however, are limited, in relevant respect, to scope of negotiations issues. The inquiry is limited to whether the demand in question is a mandatory, nonmandatory or prohibited subject of negotiations. Here, the City has attempted to raise issues that are not relevant to a scope of negotiations inquiry, such as the existence of an actual impact of its service agreement upon unit employees or the meaning of a zipper clause in the parties' collective bargaining agreement. As noted by the Director, these issues are appropriately raised in an improper practice charge.[9] (Footnotes omitted)

In dismissing the PBA's petition, the Director correctly concluded that the petition does not seek a declaration regarding the negotiability of a demand between the PBA and the City. In fact, the petition does not seek a ruling regarding "any matter" set forth in the City's petition for interest arbitration or the PBA's response as required by Rule §205.6(c). Instead, the petition seeks an interpretation and legal conclusion of a contractual provision between the City and another employee organization. Therefore, the petition seeks a ruling regarding an issue beyond the stated purposes for the declaratory ruling process under the Rules.[10]

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[7] *Supra*, note 5 at 3023. *See also*, *Town of Henrietta*, 24 PERB ¶6604, at 6606 (1991), *affd;* 25 PERB ¶6501 (1992); *City of Hornell*, 36 PERB ¶3033 (2003).

[8] 32 PERB ¶3014 (1999).

[9] *Supra*, note 8 at 3024-3025.

[10] *New York State Nurses Assn*, 24 PERB ¶6601 (1991); *County of Orange*, 28 PERB ¶6601 (1995).

The PBA's reliance on the holding in *City of New York*[11] is misplaced. In *City of New York,* a majority of the Board affirmed a decision concluding that the City violated §209-a.1(d) of the Act when it entered into a parity clause with other employee organizations. The fact that a parity clause with another employee organization may or may not constitute an improper practice does not mean that the issue is appropriate for a resolution through a declaratory ruling. Indeed, the challenge to an alleged parity clause, implicating another employee organization, is more appropriately determined in the context of an improper proper practice charge rather than the less adversarial declaratory ruling process.

Furthermore, contrary to the PBA's argument, the issuance of a declaratory ruling on a legal issue beyond the purpose of the declaratory ruling procedure would not be in the public interest.

In affirming the Director's dismissal of the petition, the Board does not take a position regarding the legality of the challenged clause in the agreement between the City and the Association. In addition, we do not reach the issue of PERB's jurisdiction based on the decision in *Patrolmen's Benevolent Association v City of New York.*[12] Both issues are *sub judice* in the related improper practice charge pending before an ALJ.

DATED: September 25, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

[11] 10 PERB ¶3003 (1977).

[12] *Supra*, note 3.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

FASHION INSTITUTE OF TECHNOLOGY

CASE NO. E-2358

Upon the Application for Designation of
Persons as Managerial or Confidential.

LITTLER MENDELSON (BERTRAND POGREBIN and ORIT GOLDRING of counsel) for Employer

DAVID ENG-WONG, for Intervenor United College Employees of FIT

BOARD DECISION AND ORDER

This case comes to the Board on exceptions[1] filed by the Fashion Institute of Technology (FIT) to a decision of the Administrative Law Judge (ALJ) dismissing its application seeking the designation of Anne Miller, Acting Director of Health Services, as managerial in accordance with the criteria set forth in §201.7(a) of the Public Employees' Fair Employment Act (Act).[2] The title of Director of Health Service is in the

[1] No exceptions have been taken to the ALJ's designation of Bonnie Born, Benefits Manager, and Lourdes Rodriguez, Salary and Certification Manager as confidential.

[2] Section 201.7(a) defines the term "public employee" as "any person holding a position by appointment or employment in the service of a public employer, except that such term shall not include for the purposes of any provision of this article other than sections two hundred ten and two hundred eleven of this article, ...persons who may reasonably be designated from time to time as managerial or confidential upon application of the public employer to the appropriate board.... Employees may be designated as managerial only if they are persons (i) who formulate policy or (ii) who may reasonably be required on behalf of the public employer to assist directly in the preparation for and conduct of collective negotiations or to have a major role in the administration of agreements or in personnel administration provided that such role is not of a routine or clerical nature and requires the exercise of independent judgment. Employees may be designated as confidential only if they are persons who assist and act in a confidential capacity to managerial employees described in clause (ii)."

bargaining unit represented by the United College Employees of FIT (UCE), which opposes the designation.

EXCEPTIONS

FIT excepts to the ALJ's decision which concluded that although the Director of Health Services formulates policy, such policy formulation is not related to FIT's primary educational mission and, therefore, cannot form the basis for a managerial designation under the Act. FIT also excepts to the ALJ's conclusion that while the Director of Health Services has a role in personnel administration those duties do not support a managerial designation because most of the employees supervised are not unit employees. UCE supports the ALJ's decision.

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

FACTS

The facts are not in dispute and are set forth in detail in the ALJ's decision.[3] They are repeated here only as necessary to address the exceptions.

FIT is a specialized college offering degrees at the associate, baccalaureate and graduate levels in the design and business professions, combining professional studies with a liberal arts curriculum for both full and part-time students. FIT includes in its mission statement the following objectives:

> to offer professional education in design, applied arts, business and technology by providing courses that develop skill and knowledge for career advancement, taught by professional faculty in close cooperation with industry;
>
> to provide, in addition to professional studies, a broad based education in the liberal arts, offering a wide spectrum of

[3] 40 PERB ¶4007 (2007).

> courses in all the disciplines with emphasis on cultural, intellectual, social and ethical values;
>
> to provide an environment that promotes and fosters student growth, maturation and self development through comprehensive student support services programs and activities;
>
> to provide exposure to the realities of the industry through opportunities for research, internships, cooperative education and other field experiences;
>
> to provide an environment that promotes and supports diversity, and responds to student's individual educational and other field experiences.

The Director of Health Services (Director) formulates and implements FIT's health services policy, procedure and programs and is responsible for the supervision of the Department of Health Services (Department). Anne Miller is the Acting Director of Health Services. She is a nurse practitioner and has been employed by FIT for over 15 years. Her predecessor was Rita Rooney, who was also a nurse practitioner.

The Department runs an on-campus Health Center that provides primary health care, health maintenance and health promotion to full-time students and emergency care, first aid and triage to full and part-time students, faculty and staff. The mission statement for the Department of Health Services states that:

> The Mission of the Fashion Institute of Technology–Health Services is to provide a focus on the campus for health-related concerns and activities. The constituency of the Fashion Institute of Technology-Health Services is the students.
>
> Health related activities include individual and group assessment, treatment and referral when appropriate for medical care, education and/or counseling; consultation when appropriate with administrators regarding special needs of students with health problems; concern with possible environmental and other threats to the campus; a

> broad program of health education, preventive medicine and providing a high level of primary care. The concept of patient participation, patient education, health and wellness promotion are integral parts of the treatment plan, which creates a major impact on academic performance as an outcome.

The Director is responsible for the Health Center's operation, including managing its personnel, setting its policies and procedures and creating its budget. The Director prepares the Department's budget which is partially funded by FIT. The Department's primary source of funding comes from the student activity fees which are allocated by the student association. Former Director Rooney negotiated with the student association for an increase in the student activity fee to be used to fund additional services.

The Director has the discretion to determine the services to be provided by the Health Center. The Director also decides the manner in which such services are to be provided by determining the number and type of medical providers to be hired. These decisions are made by the Director based upon an annual anonymous student survey, the results of which are published in the Department's year-end report, at the Director's behest.[4]

The Health Center's staff includes an office manager, who reports to the Health Services Director, clerical assistants, and a mostly part-time staff of approximately twenty-five health professionals whose salaries are funded by the student health services fee. The Director hires, fires and sets the work schedule, rate of pay and terms

[4] The former Director Rooney initiated the survey to determine student satisfaction with the Health Center's services and a survey of parental needs and satisfaction and formulated policies to address those concerns.

and conditions of employment of the Health Center's contract staff.[5]

The Director prepares and issues a year-end report that is submitted to the Dean for Student Development, which he submits to the Vice President for Student Affairs, together with the year-end reports of other departments that report to him.[6] The Vice President for Student Affairs, in turn, forwards the year-end reports to FIT's President.

The Director has discretion in implementing health laws and regulations. Former Director Rooney took the necessary steps to obtain the accreditation for the Health Center in 1996. In the fall of 2006, Acting Director Miller made the determination to reapply for the accreditation. Additionally, the Director decided that all health care providers hired by the Health Center be certified.

The Department's policy and procedure manual was originally created by former Director Rooney. Acting Director Miller annually reviews and updates the manual and establishes long and short range goals for the Department with respect to the maintenance of quality medical care, the maintenance of clinical records, patient rights, medical guidelines and protocols, employee professional improvement, pharmaceutical services, laboratory procedures and health education policies, as well as job descriptions for Department medical employees.

The Director, in conjunction with FIT's Director of Residential Life and other departments, is responsible for planning educational and health outreach programs for alcohol and substance abuse and eating disorders. The Director also has participated in developing the residential life evacuation and emergency policies and the psychiatric

[5] While the Director consults with the Dean for Student Development, the Dean relies upon the Director's expertise in these areas.

[6] Neither the Dean for Student Development nor the Director of Health Services is a member of the President's Cabinet.

emergency policy, as well as security, emergency and ambulance procedures.[7]

The Director, in conjunction with the Dean, evaluates and determines the health insurance carriers for FIT students. The Director also determines the referral policy to outside physicians and clinics and develops policies relating to which hospital students will be sent for subsequent care.

DISCUSSION

A managerial employee within the meaning of §201.7(a) (i) of the Act is a person who formulates policy on the behalf of the public employer. The sole issue presented to the Board in FIT's exceptions is whether the policy formulated by the Director of Health Services meets the standard we initially set forth in *State of New York*[8]: "the development of the particular objectives of a government or agency thereof in the fulfillment of its mission and the method, means, and extent of achieving such objectives." We find that it does.

In *City School District of the City of Binghamton*,[9] the Board rejected the argument that the policy formulation standard for the designation of an employee as managerial, pursuant to §201.7(a)(1) of the Act, is limited to labor relations. The Board then determined that several directors of the District "formulated policy" within the meaning of the Act because they considered District-wide problems and matters of concern in their respective areas of responsibility and acted to resolve and deal with such problems and concerns in furtherance of the District's educational program. While

[7] The Director has developed policies for defibrillator and CPR training for the security staff.

[8] 5 PERB ¶3001, at 3005 (1972).

[9] 8 PERB ¶3084 (1975).

the Board did not conclude that the Director of Attendance was a managerial employee, its decision was based on the Director's "limited opportunity to select among options and determine the direction the District takes in the sphere in which he operates."[10]

In the present case, the ALJ determined that FIT's primary mission was education, with a focus also on serving the professions of design, applied arts, business and technology. In contrast, the ALJ characterized the area of Health Services as merely ancillary and equated it to support services. Therefore, the ALJ found that the duties of the Director were unrelated to FIT's primary mission and did not support a managerial designation.

The record does not support the ALJ's finding. Based on the record, we conclude that Health Services is an institution-wide FIT program which is sufficient for a managerial designation of the Director even though such services are only one aspect of FIT's mission.[11]

FIT's mission statement clearly indicates that one of the goals of the institution is "to provide an environment that promotes and fosters student growth, maturation and self development through comprehensive student support services programs and activities". In furtherance of that goal, FIT maintains the Department that has been designed "to provide a focus on the campus for health-related concerns and activities." The Department offers not only patient care for the students but educational and support programs in such diverse areas as HIV prevention, eating disorders and women's health issues.

Based on this record, we conclude that FIT, as part of its mission, has

[10] *Id.* at 3147.

[11] *City Sch Dist of the City of Binghamton, supra,* note 9.

designated the services and programs offered by the Department as part of its overall mission in promoting and fostering student growth and self-development. Therefore, determinations about whether and to what extent to provide health services to FIT's constituency involve "policy formulation" within the meaning of §201.7(a)(1) of the Act. As we stated in *City of Binghamton:*[12]

> To formulate policy is to participate with regularity in the essential process involving the determination of the goals and objectives of the government involved, and of the methods for accomplishing those goals and objectives that have a substantial impact upon the affairs and the constituency of the government. The formulation of policy does not extend to the determination of the methods of operation that are merely of a technical nature.

It is undisputed that the Director exercises independent judgment in determining the scope and nature of the services offered by the Department, including how to provide them, who will provide them and the budget allocations for such services. The Director interacts with the Dean, the student association and with other program areas to coordinate some of the services offered, but the Director's decisions are routinely implemented with little or no oversight from the Dean. Clearly, the Director is "not only a person who has the authority or responsibility to select among options and to put a proposed policy into effect, but also a person who participates with regularity in the essential process which results in a policy proposal and the decision to put such proposal into effect."[13] The Director has the ability to act independently to devise and implement college-wide policy. Given this level of authority, the Director's placement in the college hierarchy and the fact that the Director is not a member of the President's

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[12] 12 PERB ¶3099, at 3185 (1979).

[13] *Supra*, note 5 at 3005.

cabinet are not dispositive.

Based on the foregoing, we grant FIT's exception[14] and reverse the decision of the ALJ denying FIT's application to designate the Director of Health Services as managerial. [15]

We hereby designate Anne Miller, Acting Director of Health Services, as managerial.

SO ORDERED.

DATED: September 25, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

[14] Given our finding herein, we do not reach FIT's other exception.

[15] The facts in this case and the ALJ's decision do not require the Board to apply or reconsider the holdings in *State of New York (DEC)*, 36 PERB ¶3029 (2003) and *Dormitory Authority of the State of New York*, 38 PERB ¶3029 (2005), *confirmed sub nom., CSEA v New York State Pub Empl Rel Bd*, 39 PERB ¶7011 (2006). Therefore, we do not comment on them here.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

POLICE BENEVOLENT ASSOCIATION OF WAPPINGERS FALLS,

Charging Party,

- and -

CASE NO. U-26450

VILLAGE OF WAPPINGERS FALLS,

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

GOLDBERGER AND KREMER (BRIAN S. KREMER, ESQ.), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Police Benevolent Association of Wappingers Falls (PBA) to a decision of an Administrative Law Judge (ALJ) dismissing an improper practice charge filed by the PBA against the Village of Wappingers Falls (Village).[1] The PBA's charge alleged that the Village violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when the Village included its General Municipal Law (GML) §207-c proposal as part of its response to the PBA's petition for arbitration filed pursuant to §205.5(5)(b) of the Rules of Procedure (Rules).

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[1] 40 PERB ¶4529 (2007).

EXCEPTIONS

In its exceptions, the PBA contends that §205.6(a)(2) of the Rules[2] creates a *per se* prohibition against parties submitting to interest arbitration any proposal made during mediation. In addition, the PBA challenges the ALJ's conclusion that the subject of the Village's proposal had been the subject of direct negotiations between the parties prior to mediation. The PBA does not contend that the Village's conduct during the direct negotiations between the parties or during the mediation session, including the Village proposing a GML §207-c procedure during mediation, constituted bad faith bargaining. The Village supports the ALJ's decision.

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

FACTS

The relevant facts are straightforward and not in dispute. The parties commenced negotiations in December 2003[3] for a successor agreement to one that would expire on May 31, 2004. During those negotiations, the PBA made a variety of proposals, including one regarding GML §207-c procedures. The PBA's GML §207-c proposal was discussed by the parties at various negotiation sessions. At one such session prior to the declaration of impasse, the Village informed the PBA that the Village viewed the GML §207-c proposal to be a nonmandatory subject of bargaining and that it was uninterested in pursuing the proposal.

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[2] Rules, §205.6(a)(2) states that objections to arbitrability may include: "a matter proposed was not the subject of *negotiations* prior to the petition" (emphasis added).

[3] Transcript, p. 21.

In September 2005, the PBA filed a declaration of impasse pursuant to §205.1(b) of the Rules. On September 26, 2005, the Director of Conciliation (Director) appointed a mediator. Thereafter, a mediation session was scheduled to take place on November 17, 2005. On November 16, 2005, a new attorney representing the Village sent an email to the PBA with an attached PDF file containing the Village's proposal for GML §207-c procedures. The email stated in part:

> Attached as a pdf file is a copy of a proposed GML 207-c procedure for your review. In relation to the various proposals dated July 5, 2005 put forward which I am using as a basis for review, I am looking forward to discussing them with an eye toward the overall economic picture presented. I believe that this is preferable to simply rejecting each and all of them as unacceptable in the aggregate and offers an opportunity for progress. The same is true of the procedural changes proposed.[4]

The November 17, 2005 mediation session, which lasted a few hours, did not result in an agreement. Five days later, the PBA filed a petition for interest arbitration, pursuant to §205.4 of the Rules, that incorporated its proposals including its GML §207-c proposal. Thereafter, the Village filed a response, dated December 7, 2005, to the PBA's petition containing a copy of the Village's GML §207-c proposal.

On December 20, 2005, the PBA filed its charge alleging that the Village violated §209-a.1(d) by submitting its GML §207-c proposal with its response to the petition for interest arbitration.

DISCUSSION

The ALJ rejected the PBA's argument that the Village's submission of the GML §207-c proposal was objectionable, pursuant to §205.6(a)(2) of the Rules, solely because it was a proposal made for the first time during mediation. In addition, the ALJ

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[4] Joint Exhibit 3.

concluded that the charge should be dismissed because the subject of the Village's proposal, GML §207-c procedures, was directly related to the PBA proposal that had been discussed at negotiations prior to the declaration of impasse. We agree with both of the ALJ's conclusions.

The PBA does not claim in its exceptions that the totality of the Village's conduct during direct negotiations or during mediation demonstrates bad faith bargaining.[5] Instead, the PBA contends that the Village violated the Act as a matter of law based on the Village's submission to interest arbitration of a demand put forward for the first time during mediation. The PBA's argument is premised on a narrow construction of the term "negotiations" as utilized in §205.6(a)(2) of the Rules. Under the PBA's interpretation, the term "negotiations" means only proposals exchanged during direct bargaining between the parties prior to the declaration of impasse, thereby excluding any and all proposals made during mediation.

The PBA's narrow construction of §205.6(a)(2) of the Rules is fundamentally flawed. As the Board noted in *New York City Transit Authority and Manhattan and Bronx Surface Transit Operating Authority*,[6] pursuant to §205.15(a) of the Rules, even after the filing of a petition for interest arbitration the Director has the power "to direct the parties to conduct further negotiations, with or without mediation assistance." Thus,

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[5] Therefore, the Board is not being asked to determine whether the Village approached direct negotiations and mediation with a sincere and good faith desire to reach an agreement. *See Southampton PBA*, 2 PERB ¶3011 at 3274 (1969); *Cent Sch Dist No* 6, 6 PERB ¶3018 at 3043 (1973).

[6] 39 PERB ¶3006 (2006).

the Rules themselves define negotiations to include the mediation process.[7]

It is well-settled that the duty to negotiate in good faith under the Act extends to conduct following a declaration of impasse.[8] As the ALJ correctly recognized, mediation constitutes a continuation of negotiations between the parties, albeit with an appointed third party present to aid the parties in reaching a voluntary agreement pursuant to §209.4(a)(1) of the Act. In contrast, in interest arbitration and fact-finding, third parties are appointed to render determinations or recommendations relating to outstanding issues.

Contrary to the PBA's contention, permitting the submission of a proposal first raised at mediation to interest arbitration is not inconsistent with encouraging good faith negotiations. During mediation, it is common for parties, with or without the mediator's assistance, to make new proposals or counterproposals aimed at reaching a voluntary agreement. The adoption of the PBA's proposed *per se* rule would adversely impact the mediation process by limiting the numerous reasonable options that may close the gap between the parties resulting in an agreement. Furthermore, the PBA's argument is contrary to the primary purpose of the Act, namely, the promotion of harmonious and cooperative relationships by encouraging the voluntary resolution of disputes.[9]

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[7] 39 PERB ¶3006 at 3023. *See also*, Rules, §205.6(a)(3) which precludes interest arbitration of a matter that "had been resolved by agreement during the course of negotiations." Surely, that Rule cannot be construed to permit the reopening of a previously disputed matter that has been resolved at mediation.

[8] *See, City of Mount Vernon*, 11 PERB ¶3095 at 3156 (1978); *Poughkeepsie Public School Teachers Assn,* 27 PERB ¶3079 at 3182 (1994). *See also, County of Rockland*, 29 PERB ¶3009 (1996).

[9] Act, §200.

In rejecting the PBA's proposed *per se* rule regarding new proposals in mediation, we are not suggesting that all new proposals raised at that stage may be included in a petition for interest arbitration or in a response to such petition. The submission of a proposal to interest arbitration that is presented for the first time at mediation and is not reasonably related to the subject matter of the negotiations and/or the discussions during mediation may, under the totality of the circumstances, violate §205.6(a)(2) of the Rules. In addition, evidence of a purposeful and conscious delay in making proposals until mediation may constitute sufficient proof that the party making the proposals did not engage in bargaining with a sincere desire to reach an agreement prior to the declaration of impasse.[10]

The PBA's reliance on the ALJ's decision in *Southhold Town Police Benevolent Association, Inc.*[11] is misplaced. In finding a violation in that case, the ALJ concluded that the employee organization had tactically refrained from making a particular demand until mediation and that the proposal was outside the context of the prior direct negotiations. As the ALJ correctly stated in footnote 4 of the decision:

> This is not to say that a new issue may not arise in negotiations or mediation when proposed as a response to a change in the position of the other party or as a means to resolve an impasse. The impropriety here is the attempt to introduce a demand beyond context and not referable to the existing state of negotiations[12]

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[10] *Supra*, note 5.

[11] 14 PERB ¶4613 (1981).

[12] *Supra*, note 11 at 4733, n.4. Similarly, the ALJ decision in *City of Buffalo (Fire Dept)* 30 PERB ¶4524 (1980) did not adopt the *per se* rule urged by the PBA. In that case, a violation was found by the ALJ because the subject matter of the proposal was raised for the first time at mediation and a copy of the actual proposal was not presented to the other party until after mediation.

In the present case, we agree with the ALJ that the Village's proposal, presented at mediation for the first time, was properly submitted to interest arbitration. It is clear that the subject matter of the proposal is reasonably related to the PBA's original GML §207-c proposal that had been discussed at negotiations. In fact, the Village's proposal constitutes a counterproposal to the PBA's original proposal and is aimed at attempting to bridge the gap on an outstanding issue.

At the same time that we reject the PBA's argument relating to mediation, we reaffirm prior decisions that have concluded that introduction of any new proposal at interest arbitration or fact-finding can breach the duty to engage in good faith negotiations.[13] As the Board stated in *Town of Haverstraw Patrolman's Benevolent Association*:[14]

> Interest arbitration is not, and was not, intended as an alternative to, or substitute for, good faith negotiations. Rather, it is a procedure of last resort in...impasse situations when efforts of the parties themselves to reach agreement through true negotiations and conciliation procedures have actually been exhausted.

In *McGraw Faculty Association,*[15] the ALJ correctly articulated the rationale for precluding submission of matters in interest arbitration that were not discussed during direct negotiations or mediation:

> The presentation of items which were neither discussed during negotiations or at the mediation stage subverts the

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[13] *Schenectady Comm Coll Faculty Assn,* 6 PERB ¶3027 (1973); *Binghamton Fire Fighters, Local 729, IAFF,* 9 PERB ¶3072 (1976); *PBA of Pelham Manor*, 10 PERB ¶4510 at 4524 (1981); *Florida Teachers Assn*, 15 PERB ¶4513 at 4535 (1982); *Croton Police Assn,* 16 PERB ¶4603 at 4743 (1983).

[14] 9 PERB ¶3063 at 3109 (1976). *See also, Lynbrook PBA*, 10 PERB ¶3067 at 3119 (1977).

[15] 34 PERB ¶4558 (2001).

> impasse processes and frustrates the impasse processes and frustrates efforts to narrow open issues and reach an agreement.[16]

For the reasons set forth above, we deny the PBA's exceptions and affirm the decision of the ALJ. We, therefore, find that the Village did not violate the Act by submitting its GML §207-c proposal for consideration at interest arbitration.

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

DATED: September 25, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

[16] *Supra,* note 15 at 4689.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FOOD & COMMERCIAL WORKERS, LOCAL 1262, AFL-CIO,

Petitioner,

-and-

CASE NO. C-5688

HUDSON CITY 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 United Food & Commercial Workers, Local 1262, 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: All cafeteria workers at all of the schools of Hudson City School District, including managers.

Excluded: General managers, food service supervisor, and temporary per diem food servers.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Food & Commercial Workers, Local 1262, 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: September 25, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LABORERS INTERNATIONAL UNION OF NORTH AMERICA LOCAL 17,

Petitioner,

-and-

CASE NO. C-5709

TOWN OF PRATTSVILLE,

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 Laborers International Union of North America Local 17 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time employees assigned to the Town of Prattsville Highway Department.

Excluded: Superintendent.

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

DATED: September 25, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF WILSON,

Petitioner/Employer,

-and- **CASE NO. C-5732**

TEAMSTER LOCAL 264, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Employee Organization.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure of the Board, and it appearing that a negotiating representative has been selected,[1]

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

IT IS HEREBY CERTIFIED that the Teamsters Local 264, International Brotherhood of Teamsters 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

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[1] Supporting a separate case initiated by the employee organization (C-5739), that employee organization filed a showing of interest from a majority in the unit, which is in our file for that case, and was presented at the conference on this case. The parties, having had such notice, we take administrative notice of that proof of support.

and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Full-Time and Regular Part-Time Highway Department Employees.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 264, International Brotherhood of Teamsters. 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: September 25, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member