

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

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-5848

VILLAGE OF WHITEHALL,

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,

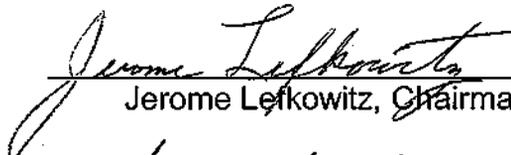
IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations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

Included: All part-time Police Officers.

Excluded: All full-time Police Officers, all other employees and elected officials of the Village of Whitehall.

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: June 16, 2009
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member


Sheila S. Cole, Member

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

In the Matter of

**TRANSPORT WORKERS UNION OF
GREATER NEW YORK, LOCAL 100,**

Charging Party,

-and-

CASE NO. U-26837

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

**GLADSTEIN, REIF AND MEGINNISS, LLP (PETER ZWIEBACH of counsel),
for Charging Party**

**MARTIN B. SCHNABEL, GENERAL COUNSEL AND VICE PRESIDENT
(ROBERT K. DRINAN of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Transport Workers Union of Greater New York, Local 100 (TWU) to a decision by the Administrative Law Judge (ALJ) dismissing its charge alleging that the New York City Transit Authority (NYCTA) violated §§209-a.1 (a), (c) and (d) of the Public Employees' Fair Employment Act (Act) by unilaterally implementing new, more stringent standards limiting dual employment for certain unit employees.¹

The ALJ determined that NYCTA had acted in accordance with the terms of its existing dual employment policy and therefore had not unilaterally changed that policy in violation of §209-a.1(d) of the Act.

¹ The TWU did not except to the ALJ's dismissal of the alleged violations of §§209-a.1(a) and (c) of the Act.

EXCEPTIONS

TWU excepts to the ALJ's decision, contending that, *inter alia*, the ALJ erred in finding that NYCTA had reserved the right to unilaterally implement heightened department-specific standards for off-duty employment and that NYCTA failed to meet its burden of demonstrating an objective need to implement the more stringent standards. NYCTA supports the ALJ's decision and argues, in the alternative, that the charge should be dismissed on the following grounds: the charge is not timely; the subject of the charge is nonmandatory; and TWU failed to demonstrate a breach of a binding past practice.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ and conclude that NYCTA violated §209-a.1(d) of the Act when it implemented the stricter dual employment standards.

FACTS

TWU represents train operators, conductors and tower operators employed by NYCTA in its Division of Rapid Transit Operations (RTO).

On April 19, 2000, NYCTA issued a Policy/Instruction for Dual Employment (2000 policy) applicable to employees of NYCTA, the Manhattan and Bronx Surface Transit Operating Authority (MABSTOA) and the Staten Island Rapid Transit Authority (SIRTOA).

NYCTA's dual employment policy states: "Full time employment with the Authority is deemed to be an employee's primary employment. All employees must be fit for duty during their working hours."

The guidelines, contained in the 2000 policy, state:

Requests for dual employment will be reviewed and approved on a case-by-case basis. Employees' Department Heads, with the approvals of the Vice Presidents, Human Resources, Labor Relations and Law, may create and disseminate department-specific standards which may be more stringent than standards set forth in this P/I, as warranted to assure the safety of the public and of Authority employees.

Employees who wish to engage in dual employment, and Division/Department Heads responsible for approval of dual employment requests, must determine whether the proposed outside employment complies with the following guidelines.

In addition, the guidelines require all employees to ensure, *inter alia*, that:

1. The dual employment shall not interfere with the proper and effective discharge of the employee's duties with the Authority or otherwise render the employee unfit for duty.
2. The dual employment shall not create a conflict of interest or an appearance of a conflict in the performance of the employee's employment with the Authority.
3. A current employee may not commence a secondary job until his/her dual employment has been approved in writing.

The 2000 policy defines public safety positions and safety sensitive positions.

Four positions are identified as public safety positions: bus operator, conductor, tower operator and train operator. Safety sensitive positions are described in the policy as:

Positions, as defined by the Federal Transit Administration, in which the incumbents perform the following functions: operate, dispatch, control or maintain revenue service vehicles including when not in revenue service; operate nonrevenue service vehicles that require drivers to hold Commercial Driver's License, or provide security services that require the incumbent to carry a firearm.

There are guidelines in the 2000 policy specifically applicable to public safety and safety sensitive positions:

1. The proposed outside employment may not result in total, combined work time that prevents the employee from having eight consecutive non-working hours in the 16-hour period before reporting to work for the Authority.
2. Employees who previously received approval for dual employment must seek new approval within five (5) days of notification of an assignment change, either in their NYC Transit employment or their outside employment, that results in changes in work days, shift changes, work location changes, and/or work assignments.

In addition, the four safety sensitive positions are subject to the following limitation under the 2000 policy guidelines:

1. Dual employment requests may be approved for a maximum of one year; employees must resubmit requests for review and approval annually, or as required by Subsection IV.B.2. above.

By letter dated February 8, 2006, NYCTA's Vice President, Office of Labor Relations advised TWU that NYCTA planned to issue and implement more stringent dual employment standards applicable to NYCTA train operators, conductors and tower operators and offered to negotiate the impact of the proposed standards, which were enclosed with the letter.² The following day, TWU responded, by letter, objecting to NYCTA's plan to unilaterally implement stricter standards and asserting that the subject was a mandatory subject.³ In the letter, TWU referred to a series of arbitration decisions and awards sustaining separate grievances filed by a train operator and

² Joint Exhibit 1A.

³ Joint Exhibit 1B.

various conductors challenging NYCTA denials of their respective dual employment applications under the 2000 policy.⁴

In a letter dated February 14, 2006, NYCTA's Vice President, Office of Labor Relations stated that:

The proposed modifications to the dual employment standards for Train Operators, Conductors and Tower Operators are based upon providing a safer environment for our customers and employees. *Management did not rely upon any safety studies.* (emphasis added)

On April 26, 2006, NYCTA issued the new more stringent standards for dual employment applicable only to train operators, conductors and tower operators which reads as follows:

Train Operators, Conductors and Tower Operators are required to have eight consecutive non-working hours in the 16-hour period before reporting to work for NYC Transit. In addition the following requirements apply:

1. The eight consecutive hours of non-work time is exclusive of the commuting time to and from both the NYC Transit and the secondary job, i.e. such commuting/travel time cannot be included in calculating the eight consecutive non-working hours.
2. No dual employment will be approved where the secondary employment plus commuting time is greater than four hours immediately preceding the employee's scheduled tour at NYC Transit.

⁴ Joint Exhibit 4A-4E. On November 2, 2005, one of those arbitration awards was judicially confirmed pursuant to CPLR §7510. *Orr and Toussaint v NYCTA*, Index No. 109939/05 (Sup Ct, NY County 2005), nor. Joint Exhibit 5. In general, NYCTA Policy/Instructions are not incorporated into the parties' collectively negotiated agreements. An arbitrator, however, does have authority under the agreement to determine whether NYCTA has not complied with or has misinterpreted an unincorporated Policy/Instruction. Joint Exhibit 6, §2.1(a); Charging Party Exhibit 2.

3. No dual employment will be approved where an employee may work more than six days in a calendar week including NYC Transit work plus the secondary job, i.e. an employee must have at least one NYC Transit RDO free from work each week.
4. An employee requesting dual employment is required to list the estimated travel time to and from his/her NYC Transit and the secondary job. NYC Transit shall determine the reasonableness of the travel time listed. It is the responsibility of employees to notify NYC Transit immediately of changes in his/her work schedule at the secondary job or the commuting time to and from both jobs.

NYCTA and TWU met to discuss the impact of the new standards but were unable to reach an agreement, and the new standards became effective on May 1, 2006.

During the hearing before the ALJ, Kevin O'Connell (O'Connell), RTO Division Chief Transportation Officer, testified that NYCTA implemented the more stringent standards for conductors, tower operators and train operators because they are safety sensitive positions and NYCTA wanted to ensure that employees in those positions had sufficient rest between jobs to avoid train accidents resulting from fatigue.

The evidence presented at the hearing establishes that the new dual employment standards are not applicable to bus operators, the fourth public safety position identified in the 2000 policy, or to train dispatchers, a safety sensitive position, with responsibilities for monitoring the movement of trains, responding to accidents and determining whether a train crew member is fit for duty when she or he reports for work.

DISCUSSION

The charge alleges that NYCTA violated §209-a.1(d) of the Act when it unilaterally implemented the new standards on May 1, 2006, and required train operators, conductors and tower operators to comply with them.

The ALJ found that NYCTA had not acted unilaterally in implementing the new standards because the original 2000 policy reserved to NYCTA the authority to approve more stringent department-specific standards.

TWU contends that the ALJ erred in concluding that NYCTA did not violate §209-a.1(d) of the Act because of a reserved unfettered right to unilaterally implement more stringent department-specific standards for dual employment. In addition, it asserts that the ALJ erred because NYCTA failed to meet its burden of demonstrating an objective need warranting the implementation of the more stringent standards for RTO conductors, tower operators and train operators. We agree.

An employer's reservation of rights to act unilaterally with respect to a term and condition of employment constitutes a mandatory subject.⁵ When an employer acts consistent with an unchallenged policy explicitly reserving for itself the unfettered discretion to determine whether to continue a specific term and condition of employment, the employer's decision to act pursuant to the reservation of right is not considered to be unilateral under the Act.⁶ Unlike contract reversion to a specifically negotiated provision, however, a reservation of right in an employer's policy does not

⁵ See generally *Sachem Cent Sch Dist*, 21 PERB ¶¶3021 (1988); *County of Livingston*, 26 PERB ¶¶3074 (1993); *Garden City Union Free Sch Dist*, 27 PERB ¶¶3029 (1994).

⁶ *State of New York (GOER and Dept of Health)*, 25 PERB ¶¶3005 (1992). Cf, *New Berlin Cent Sch Dist*, 25 PERB ¶¶3060 (1992).

stem from the employer satisfying its duty to negotiate under the Act.⁷ Therefore, the Board must strictly construe a policy-based reservation of right in order to effectuate the policies of the Act.

In the present case, the 2000 policy guidelines did not reserve unfettered discretion to NYCTA to implement more stringent standards for dual employment on a department-specific basis. We interpret the phrase "as warranted" in the 2000 policy as establishing a pre-condition to NYCTA's exercise of its discretion: the existence of facts and circumstances warranting more stringent standards for dual employment in a particular department. The need to discern such facts and circumstances by NYCTA under the 2000 policy, prior to implementation of the stricter standards, is confirmed by the requirement that any proposed change be reviewed and approved by various NYCTA Vice Presidents.

Based upon the evidence in the record, we conclude that NYCTA failed to present sufficient evidence establishing that implementation of the at-issue standards is warranted consistent with its reservation of rights under the 2000 policy. Prior to the implementation of the stricter standards, NYCTA admitted to TWU that the standards were not based on safety studies. During the hearing before the ALJ, NYCTA did not present evidence of any events, since the promulgation of the 2000 policy, demonstrating that the policy had been ineffective as applied to conductors, tower operators and train operators in protecting the safety of the public and employees or that NYCTA had an immediate need to act unilaterally. Finally, NYCTA did not present any rationale for not applying the same new stricter standards to bus operators and train

⁷ NYCTA, 41 PERB ¶3014 (2008).

dispatchers, as it did to train and tower operators and train conductors, given that fatigue by employees in all five positions, defined as either a public safety or safety sensitive position, might adversely impact public transportation safety. Therefore, we reverse the ALJ's conclusion that the adoption of the stricter standards is consistent with the rights reserved by NYCTA in the 2000 policy.

Based on this finding, we turn to NYCTA's alternative arguments in support of dismissing the charge.

Contrary to NYCTA's claim, TWU's charge is timely because it was filed within four months of NYCTA's implementation of the reserved right announced in its 2000 policy.⁸

In addition, we reject NYCTA's claim that the subject matter of the unilateral change is nonmandatory because it has a relationship to NYCTA's mission of protecting the safety of the public. In general, employer restrictions on employee use of non-working time for outside employment are mandatory subjects under the Act.⁹ In determining whether a unilateral change to a work rule violates the Act, we first identify the subject matter of the rule and then apply a balancing test by examining the evidence to determine whether the employer's interests in a particular mission-related rule change outweigh the impact that the change has on the employees' terms and conditions of

⁸ *Middle County Teachers Assn*, 21 PERB ¶3012 (1988).

⁹ *Local 589, Intl Assn of Fire Fighters*, 16 PERB ¶3030 (1983); *Ulster County Sheriff*, 27 PERB ¶3028 (1994); *City of Buffalo (Police Dept)*, 23 PERB ¶3050 (1990); *Hewlett-Woodmere Union Free Sch Dist*, 38 PERB ¶3006 (2005); *City of Albany*, 42 PERB ¶3005 (2009).

employment.¹⁰ As we recently emphasized, the fact that a work rule may have some relationship "to an employer's mission does not permit the employer to act unilaterally in any manner it deems appropriate."¹¹

In the present case, the subject matter of NYCTA's 2000 policy is the ability of TWU unit employees to engage in off-duty work which then must be balanced against NYCTA's obligation to provide safe public transportation services. Based upon our review of the record, we find no credible evidence that the new more stringent dual employment standards for conductors, tower operators and train operators were necessary to meet the needs of providing safe transportation services, or that NYCTA faced a new or acute problem requiring the more stringent standards. As noted above, NYCTA did not present evidence establishing that the 2000 policy was ineffective in ensuring public safety, and it is undisputed that NYCTA did not rely on safety studies to establish and implement the new standards. Furthermore, NYCTA did not present any rationale for not applying the same stricter standards to bus operators and train dispatchers who have responsibilities where fatigue can adversely impact safe public transportation services.¹²

¹⁰ *City of Albany*, supra note 9; *Hewlett-Woodmere Union Free Sch Dist*, supra note 10. *State of New York (Department of Transportation)*, 27 PERB ¶3056 (1994).

¹¹ *City of Albany*, supra note 9, 42 PERB ¶3005, at 3007.

¹² Based upon our conclusions today, we do not reach the issue of whether NYCTA violated an enforceable past practice under the Act. See generally, *Chenango Forks; Cent Sch Dist*, 40 PERB ¶3012 (2007); *City of Oswego*, 41 PERB ¶3011 (2008); *Inc Vil of Hempstead*, 19 PERB ¶3002 (1986), reversed, *Inc Vil of Hempstead v New York State Pub Empl Rel Bd*, 20 PERB ¶7010 (Sup Ct Alb County 1987), reversed, 137 AD2d 378, 21 PERB ¶7013 (1988), *lv denied*, 72 NY2d 808, 21 PERB ¶7018 (1988), on remand, 22 PERB ¶4522 (1989).

Based on the foregoing, TWU's exceptions are granted and the decision of the ALJ is reversed.

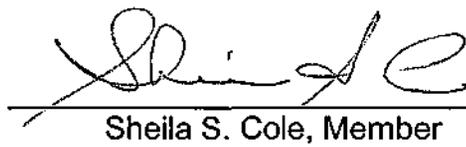
IT IS, THEREFORE, ORDERED that NYCTA shall forthwith:

1. Rescind the April 26, 2006 dual employment standards for train operators, conductors and tower operators that became effective on May 1, 2006;
2. Make whole any unit employees against whom the more stringent dual employment standards have been applied since its May 1, 2006 implementation until such time as the new standards are rescinded with interest at the maximum legal rate; and
3. Sign and post a notice in the form attached at all locations normally used by it to post written communications for unit employees.

DATED: June 16, 2009
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member


Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the New York City Transit Authority (NYCTA) in the unit represented by Transport Workers Union of Greater New York, Local 100 that NYCTA will forthwith:

1. Rescind the April 26, 2006 dual employment standards for train operators, conductors and tower operators that became effective on May 1, 2006;
2. Make whole any unit employees against whom the more stringent dual employment standards have been applied since its May 1, 2006 implementation until such time as the new standards are rescinded with interest at the maximum legal rate.

Dated

By
on behalf of NYCTA

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

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

In the Matter of

**LOCAL 891, INTERNATIONAL UNION OF OPERATING
ENGINEERS, AFL-CIO,**

Charging Party,

CASE NO. U-27711

- and -

**BOARD OF EDUCATION OF THE CITY SCHOOL
DISTRICT OF THE CITY OF NEW YORK,**

Respondent.

SPIVAK LIPTON LLP (NEIL D. LIPTON of counsel), for Charging Party

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE
BARGAINING (RUSSELL J. PLATZEK of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Board of Education of the City School District of the City of New York (District) to a decision by the Administrative Law Judge (ALJ) with respect to an improper practice charge filed by Local 891, International Union of Operating Engineers, AFL-CIO (Local 891) on June 21, 2007, alleging that the District violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally imposed a three-hour limitation on the amount of leave time that bargaining unit members may take when they donate blood as part of a blood drive during the workday.

The ALJ concluded that the District violated §209-a.1(d) of the Act when it

unilaterally changed a past practice wherein bargaining unit employees were permitted to take varying amounts of leave time, up to a full day off, on workdays when they donated blood during blood drives. In finding a violation of §209-a.1(d), the ALJ rejected the District's contract reversion defense premised on a provision of the parties' collectively negotiated agreement (agreement) and District Personnel Memorandum No. 22, dated November 23, 1998 (Memorandum 22).¹

EXCEPTIONS

In its exceptions, the District contends that the ALJ erred in failing to sustain the District's contract reversion defense, and in failing to conclude that Memorandum 22 was distributed to Local 891 and bargaining unit members. Finally, the District asserts that the ALJ's decision is contrary to public policy because it results in an unconstitutional gift of public funds. Local 891 supports the ALJ's decision.

FACTS

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

Local 891 represents a bargaining unit of Custodian Engineers employed by the District in its schools and programs throughout New York City.

Since 1951, Local 891 has sponsored, with the District's knowledge, a twice-annual blood drive involving bargaining unit members. The program is administered and organized by Local 891's blood bank committee. For most of its existence, Local 891's blood drive

¹ The ALJ dismissed Local 891's allegation that the District violated §209-a.1(a) of the Act and Local 891 has not filed cross-exceptions to that portion of the ALJ's decision.

² 41 PERB ¶4575 (2008).

was conducted at the District's former Brooklyn headquarters in the Beaux Arts-style building at 110 Livingston Street. Local 891 now conducts the blood drive at its office in the Brooklyn Navy Yard and at satellite locations in Staten Island and Long Island.

On days when Local 891 holds its blood drive, bargaining unit members initially report to work and then notify the District's Division of School Facilities if they will be leaving their assignment to donate blood. Since the inception of Local 891's blood drive, bargaining unit members documented when they left their work assignments to participate in the drive and took varying lengths of leave time, from one to eight hours. Although some Custodian Engineers returned to their work assignments after donating blood, this was not required by the District.

The District participates in a separate blood donor program, entitled the New York City Employees' Blood Program, in conjunction with New York City's Department of Citywide Administrative Services (NYC DCAS).

The parties' agreement is silent with respect to Local 891's blood donation drive and the District's separate blood drive. In addition, the agreement is silent with respect to the amount of leave time a bargaining unit employee may take when participating in either blood drive. Article V of the parties' agreement states in relevant part that:

The Custodian Engineer shall be in attendance at his/her assignment for day school services from 8:00 a.m. to 5:00 p.m. on weekdays, except on stated holidays, on the Friday after Thanksgiving when this day has been declared a non-school day by the Department of Education, on Rosh Hashanah and Yom Kippur when declared administrative office holidays and at such time as official permission has been granted for his absence.³

³ Joint Exhibit 1, Article V, p. 40.

The agreement also contains provisions with respect to custodial time records and vacation leave.⁴

On November 23, 1998, the District's Division of Human Resources Director, Howard S. Tames, issued Memorandum 22 which states that the District, as a participant in the New York City Employees' Blood Program, is obligated to follow NYC DCAS's policies and regulations. Among the policies and regulations referenced in Memorandum 22 is a limitation of three hours of compensatory time for a "productive blood donor who donates blood through the New York City Employee Blood Program during working hours."⁵ Following issuance of the policy, the prior practice of the bargaining unit continued with employees taking between one and eight hours of leave on blood donation days.

In 2007, shortly after being appointed the District's Division of School Facilities Executive Director, John O'Connell (O'Connell), received an inquiry from Manhattan Borough Facilities Director, Timothy George, about the District's compensatory time policy for blood donations by Custodian Engineers. In response to the inquiry, O'Connell contacted the District's Division of Human Resources and obtained a copy of Memorandum 22. He also requested all five Borough Facilities Directors to examine the time records of Custodian Engineers and determine the amount of leave each employee utilized on blood donation days. The research conducted by the Facilities Directors revealed that over the past decade, Custodian Engineers took between one

⁴ Joint Exhibit 1, Article III(15) pp. 27-28, Article VIII, p. 43..

⁵ Employer Exhibit 1, II(A)(1).

hour and eight hours of leave when donating blood.⁶

On May 24, 2007, O'Connell sent an email to Local 891 President Robert Troeller and Vice President Matthew Wile limiting the amount of leave time for blood donations by Local 891 bargaining unit members to three hours, inclusive of travel time.

DISCUSSION

In its exceptions, the District contends that it met its burden of demonstrating its contract reversion defense, contained in its answer, based upon Article V of the agreement and Memorandum 22. It does not contest that employee leave time to donate blood is a mandatory subject of negotiations under the Act.⁷ Nor does it dispute that Local 891 met its burden of demonstrating a past practice under the criteria reiterated in *Chenango Forks Central School District*.⁸

Following our review of the record, we affirm the ALJ's conclusion that the District did not meet its burden of proof with respect to its contract reversion defense.

In order to meet its burden, the District is obligated to present evidence demonstrating that the parties negotiated a specific provision in their agreement which is reasonably clear on the subject presented and that the at-issue change by the District constitutes a reversion to that negotiated provision from an inconsistent past practice.⁹

⁶ Employer Exhibit 3.

⁷ See generally, *City of Albany*, 7 PERB ¶3078 (1974) confirmed sub nom. *City of Albany v Helsby*, 48 AD2d 998, 8 PERB ¶7012 (3d Dept 1975) affirmed, 38 NY2d 778, 9 PERB ¶7005 (1975); *Triborough Bridge and Tunnel Auth*, 27 PERB ¶3076 (1994).

⁸ 40 PERB ¶3012 (2007).

⁹ *NYCTA*, 41 PERB ¶3014 (2008); *NYCTA*, 42 PERB ¶3012 (2009).

In the present case, we affirm the ALJ's conclusion that Article V of the agreement does not address the subject matter of the charge. While Article V conditions certain absences to the receipt of official permission, it does not address the number of hours a bargaining unit member is entitled to when participating in a blood drive. In construing Article V, we note that the parties in Article VIII explicitly set limitations on the amount of vacation leave earned by bargaining unit members. Therefore, we deny the District's contract reversion defense premised on the agreement.

We next turn to the District's contract reversion defense premised on Memorandum 22, which is a policy unilaterally imposed by the District in 1998. A unilaterally imposed policy is not an agreement and it cannot form the basis for a contract reversion; it does not stem from the employer having satisfied its duty to negotiate under the Act.¹⁰ Therefore, when a subsequent enforceable practice is inconsistent with an employer's written policy, the employer can no longer rely on that policy to unilaterally end or modify the practice without violating §209-a.1(d) of the Act. Where, however, there is evidence establishing that the contours of the practice include an employer's unfettered discretion to continue or to modify the practice consistent with a prior explicit written reservation¹¹ or evidence establishing an explicit waiver to negotiate by the employee organization,¹² there would be no enforceable practice.

¹⁰ *NYCTA*, 42 PERB ¶3012 (2009).

¹¹ *State of New York (GOER and Dept of Health)*, 25 PERB ¶3005 (1992).

¹² *Onondaga-Madison BOCES*, 13 PERB ¶3015 (1980), *confirmed sub nom. BOCES Sole Supervisor Dist v New York Pub Empl Rel Bd*, 82 AD2d 691, 14 PERB ¶7025 (3d Dep't, 1981); *See, CSEA v Newman*, 88 AD2d 685, 15 PERB ¶7011 (3d Dep't 1982), *aff'd*, 61 NY2d 1001, 17 PERB ¶7007 (1984).

In the present case, Local 891 has demonstrated an enforceable past practice inconsistent with Memorandum 22's limitation of three hours of leave time for participating in a blood drive and, under the Act, the District cannot revert to that policy to unilaterally end or modify the binding past practice.¹³ Based upon the foregoing, the District violated §209-a.1(d) of the Act when it unilaterally imposed a limitation on the amount of leave time for blood donations by bargaining unit employees because the limitation is inconsistent with the past practice.

In light of the binding nature of the past practice since issuance of Memorandum 22, the issue of whether it was distributed to Local 891 or to bargaining unit members is irrelevant to the present case. Therefore, we deny the District's exceptions over the question of the distribution of Memorandum 22.

Finally, we reject the District's argument that the result of the ALJ's decision constitutes a violation of public policy because it constitutes an unconstitutional gift of public funds. It is well established that when an employer has a legal obligation to provide an employee with a benefit, whether as a result of a judgment, an arbitration award, an agreement or a decision finding a violation of the Act, that benefit does not constitute a prohibited gift.¹⁴ In the present case, there exists an enforceable past practice of bargaining unit employees taking leave for blood donations during their workday without any limitation on the amount of such leave time. Based upon the

¹³ Furthermore, Memorandum 22, by its express terms, is limited only to New York City Employee Blood Program. Therefore, the District's reliance on Memorandum 22 is without merit because the policy has no relevance to the undisputed decades-old leave practice with respect to the Local 891 blood drive.

¹⁴ *Antonopoulou v Beame*, 32 NY2d 126 (1973); *FIT*, 41 PERB ¶3010 (2008).

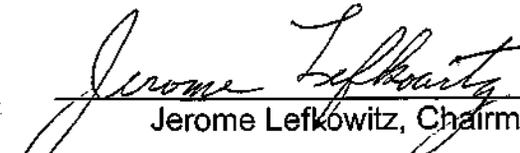
District's legal obligation under the Act to continue that term and condition of employment, remedying the District's violation does not constitute an unconstitutional gift of public funds.

Based on the foregoing, we deny the District's exceptions and affirm the ALJ's decision.¹⁵

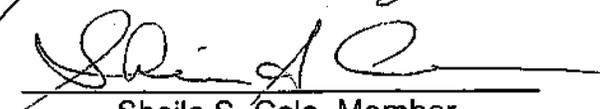
IT IS, THEREFORE, ORDERED that the District shall forthwith:

1. Rescind its notice dated May 25, 2007, which imposed a three-hour limitation on the amount of leave time a Local 891 bargaining unit member may take for blood donations and reinstate the practice in effect prior to May 25, 2007;
2. Make Local 891 bargaining unit members whole, with interest at the maximum legal rate, for losses resulting from the District's implementation of its May 25, 2007 notice;
3. Sign and post a notice in the form attached at all locations ordinarily used to post notices of information to unit employees.

DATED: July 23, 2009
Albany, New York



Jerome Lefkowitz, Chairman



Sheila S. Cole, Member

¹⁵ Board Member Hite took no part.

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Board of Education of the City School District of the City of New York, in the unit represented by Local 891, International Union of Operating Engineers, AFL-CIO, that the District forthwith will:

1. Rescind its notice dated May 25, 2007, which imposed a three-hour limitation on the amount of leave time a unit member may take for blood donations and reinstate the practice in effect prior to May 25, 2007; and
2. Make unit members whole, with interest at the maximum legal rate, for losses resulting from the District's implementation of its May 25, 2007 notice.

Dated

By
on behalf of the **Board of Education of the
City School District of the City of New York**

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

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

In the Matter of

**MANHASSET EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION, NYSUT, AFT,
AFL-CIO,**

Charging Party,

CASE NO. U-26091

- and -

MANHASSET UNION FREE SCHOOL DISTRICT,

Respondent.

CONRAD W. LOWER, Labor Relations Specialist, for Charging Party

**SEYFARTH SHAW LLP (PETER A. WALKER and LORI M. MEYERS of
counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board from an order of remittitur from the Appellate Division, Third Department confirming our decision,¹ finding that the Manhasset Union Free School District (District) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act), but directing the Board, under the unique facts and circumstances of the present case, to reexamine our remedial order to meet specifically identified potential contingencies that may prevent or delay the District's compliance, to wit: the possible need for taxpayer approval for the purchase of buses to enable the District to

¹ *Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), *confirmed sub nom. and mod, in part, Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd*, 61 AD3d 1231, 42 PERB ¶7004 (3d Dept 2009).

restore the at-issue unit work and the District's current contractual obligations with respect to that work.

Following remittal from the Appellate Division, the District filed a letter with the Board dated June 1, 2009, requesting a full evidentiary hearing on the issue of remedy on the grounds that the Administrative Law Judge (ALJ) refused to accept evidence on remedy and that there "may be additional and other reasons why PERB's original remedy was unreasonable and contrary to law." On June 2, 2009, the Board requested the parties to submit an offer of proof identifying any disputed facts requiring an evidentiary hearing and any legal issues requiring additional briefing in light of the Appellate Division's decision.

In response to the Board's request, the District filed an offer on June 18, 2009, contending that an evidentiary hearing is necessary, at the present time, to determine which displaced Manhasset Educational Support Personnel Association, NYSUT, AFT, AFL-CIO (Association) bargaining unit members are entitled to reinstatement and to determine the amount of back wages and benefits that are due and owing to each displaced Association bargaining unit member as the result of the District's violation of §209-a.1(d) of the Act. On June 18, 2009, the Association filed its offer asserting that the factual issues raised by the District can be raised and determined in the context of a compliance proceeding.

Following careful examination of the offers made by the respective parties, we deny the District's request for an evidentiary hearing at the present time. To the extent that the District now contends that the ALJ erred in excluding evidence related to remedy, it waived that issue when it failed to include the issue among its 59 exceptions

to the ALJ's decision.² Furthermore, it is a well-established general Board practice to address factual issues with respect to the proper application of a remedial order to particular individuals during a compliance proceeding following judicial enforcement of a PERB remedial order pursuant to §213(a) of the Act.³ The District expressly acknowledged this procedural reality in its brief to the Appellate Division.⁴

In its decision, the Appellate Division cited to *County of Chautauqua*,⁵ where the Board affirmed an ALJ's proposed remedial order in a subcontracting case where the respondent had sold the necessary equipment to perform the at-issue work and, therefore, may not have been able to restore the unit work that had been unlawfully transferred. To meet the facts and circumstances discerned from the record in that case, our remedial order directed that if the employer was unable to restore the at-issue unit work, it should make comparable unit work available to all displaced unit employees without loss of unit work to any current employees or, if no comparable unit work is available, to pay the displaced unit employees all lost wages and benefits until such time as the unit work becomes available.

² Rules of Procedure (Rules), §213.2(b)(4); *CSEA v New York State Pub Empl Rel Bd*, 73 NY2d 796, 21 PERB ¶7017 (1988); *Town of Orangetown*, 40 PERB ¶3008 (2007), *confirmed sub nom. Town of Orangetown v New York State Pub Empl Rel Bd*, 40 PERB ¶7008 (Sup Ct Albany Co 2007); *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶3006 (2008).

³ See, *City of Poughkeepsie v Newman*, 95 AD2d 101, 16 PERB ¶7021 (3d Dept 1983), *app dismissed*, 60 NY2d 859, 16 PERB ¶7027 (1983), *lv denied* 62 NY2d 602, 17 PERB ¶7009 (1984); *Uniondale Union Free Sch Dist*, 21 PERB ¶3044 (1988).

⁴ See, *Manhasset Union Free Sch Dist v New York State Pub Empl Rel Bd*, Appellant's Brief, p. 56.

⁵ 21 PERB ¶4588 (1988), *aff*, 22 PERB ¶3016 (1989).

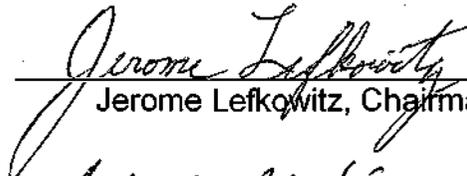
Upon remittitur from the Appellate Division, and after further review of the facts and circumstances in the present case, we conclude that the remedial approach in *County of Chautauqua* would best effectuate the policies and purposes of the Act and, therefore, we have modified our remedial order accordingly. Nothing in this decision should be construed as constituting a modification of our remedial policies and practices under the Act.

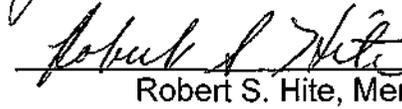
IT IS, THEREFORE, ORDERED that the District shall forthwith:

1. Cease and desist from unilaterally transferring to nonunit employees the work of employees in the bargaining unit represented by the Manhasset Educational Support Personnel Association (Association) including unit work consisting of the transporting of students from home to public school, to athletic and field events, and summer school, and the providing of maintenance and repair for District equipment;
2. Restore all such subcontracted transportation services unit work to unit employees;
3. Reinstate unit members with back wages and benefits suffered as a result of the subcontracting of the unit work, with interest at the maximum legal rate, less interim earnings;
4. In the event that restoration of the unit work to unit employees is impossible due to taxpayer disapproval of the purchase of buses and other equipment necessary to restore the unit work, make comparable work available to all displaced unit members, without loss of work to any current unit employees, or pay the displaced unit employees all back wages and benefits, with interest at the maximum legal rate, less interim earnings, until such time as comparable unit work becomes available;
5. In the event that restoration of unit work is delayed due to present District contractual obligations, pay the displaced unit employees all back wages and benefits, with interest at the maximum legal rate, less interim earnings, as the result of the subcontracting of the work until such time as the unit work is restored;
6. Negotiate in good faith with the Association concerning the terms and conditions of employment of unit employees; and

7. Sign and post the attached notice at all locations customarily used to communicate with unit employees.

DATED: July 23, 2009
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member


Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Manhasset Union Free School District in the unit represented by the Manhasset Educational Support Personnel Association, NYSUT, AFT, AFL-CIO, that the Manhasset Union Free School District forthwith will:

1. Refrain from unilaterally transferring to nonunit employees the work of employees in the bargaining unit represented by the Manhasset Educational Support Personnel Association (Association) including unit work consisting of the transporting of students from home to public school, to athletic and field events, and summer school, and the providing of maintenance and repair for District equipment;
2. Restore all such subcontracted transportation services unit work to unit employees and reinstate unit employees with back wages and benefits suffered as a result of the subcontracting of the unit work, with interest at the maximum legal rate, less interim earnings;
3. In the event that restoration of the unit work to unit employees is impossible due to taxpayer disapproval of the purchase of buses and other equipment necessary to restore the unit work, make comparable work available to all displaced unit members, without loss of work to any current unit employees, or pay the displaced unit employees all back wages and benefits, with interest at the maximum legal rate, less interim earnings, until such time as comparable unit work becomes available
4. In the event that restoration of unit work is delayed due to present District contractual obligations, pay the displaced unit employees all back wages and benefits, with interest at the maximum legal rate, less interim earnings, as the result of the subcontracting of the work until such time as unit work is restored;
5. Negotiate in good faith with the Association concerning the terms and conditions of employment of unit employees.

Dated

By
(on behalf of Manhasset Union Free School District)

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

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

In the Matter of

KEVIN BIEGEL,

Charging Party,

CASE NO. U-28834

- and -

**STATE OF NEW YORK (DEPARTMENT OF
CORRECTIONAL SERVICES),**

Respondent.

KEVIN BIEGEL, *pro se*

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Kevin Biegel (Biegel) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing, as deficient, an improper practice charge filed on December 23, 2008, alleging that the State of New York (State) violated §§209-a.1(a), (d) and (g) of the Public Employees' Fair Employment Act (Act) based upon a series of alleged acts by the State commencing in November, 2005 and continuing through November 18, 2008, when Biegel's second request for reinstatement to his former position was denied.

After Biegel filed two amendments to the charge, the Director dismissed the pleading, pursuant to §204.2(a) of the Rules of Procedure (Rules), based upon the following grounds: Biegel lacks standing to pursue an alleged violation of §209-a.1(d) of the Act; the amended charge fails to allege sufficient facts which, if proven, would establish timely and meritorious claims under §§209-a.1(a) and (g) of the Act.¹

¹ 42 PERB ¶4523 (2009).

EXCEPTIONS

Biegel excepts to the Director's dismissal of his charge asserting, *inter alia*, that his amended charge alleges sufficient facts to set forth timely and meritorious claims under §§209-a.1(a), (d) and (g) of the Act. In support of his exceptions, Biegel asserts that the State has not provided him with an explanation for its refusal to reinstate him. Furthermore, he alleges that the State has violated his rights under the United States and New York State Constitutions.²

Based upon our review of the record and consideration of Biegel's arguments, we affirm the Director's dismissal of the charge.

FACTS

For purposes of reviewing the dismissal of the charge, we will accept the allegations as being true and grant those allegations all reasonable inferences.³

In September 2006, Biegel was employed by the State as a correction officer at Greene Correctional Facility. On September 11, 2006, the State issued a notice of discipline seeking to terminate him for alleged acts of misconduct toward an inmate. These alleged acts also formed the basis for criminal charges against Biegel which resulted in his arrest on September 3, 2006. Pending the outcome of the disciplinary charges, Biegel was suspended from his position.

The New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) filed a disciplinary grievance on his behalf on September 11, 2006 and submitted an appeal to disciplinary arbitration on October 25, 2006. The

² In his exceptions, Biegel also requests documents pursuant to the Freedom of Information Law (FOIL). His FOIL request has been referred to our Records Access Officer.

³ *Dutchess Community Coll*, 41 PERB ¶13029 (2008).

scheduling of the arbitration was postponed, however, pending the outcome of the criminal charges.

Following Biegel's acquittal of the criminal charges in November 2007, NYSCOPBA and the State commenced settlement discussions with respect to the pending notice of discipline. Biegel claims that during those discussions, the State promised to remove the notice of discipline from his personnel file as part of the settlement. On January 4, 2008, Biegel entered into a settlement agreement with the State resolving the notice of discipline. Under the agreement, Biegel retired from State service in exchange for payment of back wages.

Between August and December 2008, Biegel sent a series of letters to State officials asserting, *inter alia*, that he was falsely accused of misconduct toward the inmate and that the settlement and his decision to retire had been coerced. In his various letters, Biegel stated that he was rescinding his retirement and requested reinstatement to his former position, a written apology, reimbursement for his legal fees, and the removal of the notice of discipline from his personnel file.

On September 10, 2008, the State sent him a letter denying his requests for an apology, reimbursement for his legal fees and the removal of the notice of discipline. On October 24, 2008 and November 18, 2008, the State sent letters to Biegel denying his request for reinstatement. In the November 18, 2008 letter, Commissioner Brian Fischer (Fischer) set forth the primary factors the State considers in determining requests for reinstatement, and he informed Biegel that the denial of his request was made following another review of his personnel file.

DISCUSSION

Pursuant to §204.2(a) of the Rules, the Director is required to review all newly

filed charges as a means of weeding out facially deficient claims.⁴ Under the Rule, the Director has the authority to dismiss a charge on the grounds that it fails to allege facts that, as a matter of law, constitute a violation under §209-a of the Act or fails to allege facts that would establish that the purported violation took place within four months prior to the filing of the charge.

In the present case, we affirm the dismissal of Biegel's claim that the State violated §209-a.1(d) of the Act because it is well-settled that an individual lacks standing to pursue such an alleged violation.⁵

Next, we examine Biegel's challenge to the Director's dismissal of certain claims as untimely. Pursuant to §204.1(a)(1) of the Rules, an improper practice charge must be filed within four months from when a charging party knew or should have known of the alleged violation of the Act.⁶ Granting all reasonable inferences to Biegel's allegations, as we must, he alleges that the State violated §209-a.1(a) of the Act by coercing him on January 4, 2008 to retire as part of the disciplinary settlement, thereby constructively discharging him from his position.⁷ Based upon the fact that the charge was filed more than four months after the settlement and his retirement, we affirm the dismissal of that aspect of the charge.

⁴ *MABSTOA*, 40 PERB ¶3023 (2007).

⁵ *Board of Educ of the City Sch Dist of the City of New York (Jenkins)*, 38 PERB ¶3012 (2005).

⁶ *TWU (Abraham)*, 36 PERB ¶3008 (2003).

⁷ *Holland Patent Cent Sch Dist*, 32 PERB ¶3041(1999); *State of New York (SUNY Oswego)*, 36 PERB ¶3015 (2003), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 8 AD3d 796, 37 PERB ¶7002 (3d Dept 2004); *Morris v Schroder Capital Mgt Intl*, 7 NY3d 616, 621 (2006) ("Constructive discharge occurs 'when the employer, rather than acting directly, deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation'")(citations omitted).

We also affirm the Director's dismissal of the alleged violation of §209-a.1(g) of the Act. The amended charge does not allege that, within four months of the filing of his charge, the State denied a request by Biegel for NYSCOPBA representation during questioning, in which it reasonably appeared that he may be subject to potential disciplinary action. Although §209-a.1(g) of the Act is entitled to a liberal construction, the amended charge fails to include any of the necessary elements to state a timely and meritorious violation of that provision.⁸

Furthermore, we affirm the Director's dismissal of Biegel's remaining alleged violations of §209-a.1(a) of the Act. In *State of New York (SUNY Oswego)*,⁹ the Board recognized that an employer's refusal to permit the withdrawal of a resignation can violate §209-a.1(a) of the Act if the denial is motivated by anti-union animus. Biegel has not plead any facts which, if proven, would establish that the State was improperly motivated when it refused his requests for reinstatement, an apology, reimbursement of legal fees and the removal of the notice of discipline.¹⁰ There are no allegations in the amended charge that even suggest a causal connection between the State's denial of Biegel's requests and his prior representation by NYSCOPBA with respect to the disciplinary charges. In addition, contrary to the exceptions, the State did provide Biegel with an explanation for its refusal to reinstate him in Fischer's November 18, 2008 letter.

Finally, we deny Biegel's exceptions which assert that the State violated the

⁸ *Tarrytown PBA*, 40 PERB ¶3024 (2007). See also, *City of Albany*, 42 PERB ¶3005 (2009).

⁹ *Supra* note 7.

¹⁰ *State of New York (Office of Court Administration)*, 32 PERB ¶3063 (1999); *State of New York (Division of Parole)*, 41 PERB ¶3033 (2008).

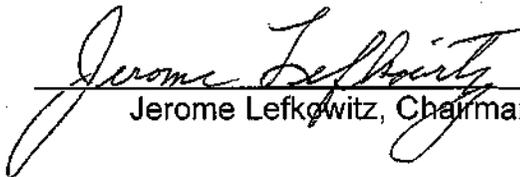
United States and New York State Constitutions. Pursuant to §§205.5(d) and 209-a.1 of the Act, PERB has the authority to determine whether an improper employer practice has occurred; we do not have subject matter jurisdiction over constitutional claims against an employer.

For the reasons set forth above, we deny Biegel's exceptions and affirm the decision of the Director.

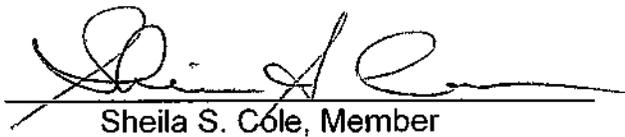
IT IS, THEREFORE, ORDERED, that the charge must be, and hereby is, dismissed in its entirety.

SO ORDERED.

DATED: July 23, 2009
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member


Sheila S. Cole, Member

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

In the Matter of

KEVIN BIEGEL,

Charging Party,

CASE NO. U-28885

- and -

**STATE OF NEW YORK (DEPARTMENT OF
CORRECTIONAL SERVICES),**

Respondent.

KEVIN BIEGEL, *pro se*

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Kevin Biegel (Biegel) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing, as deficient, an improper practice charge, as amended, filed on January 20, 2009 alleging that the State of New York (State) violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it refused his requests to be reinstated to his former position.

Following an initial review of the amended charge, pursuant to §204.2(a) of the Rules of Procedure (Rules), the Director dismissed the amended charge concluding that it failed to allege sufficient facts to state a claim of a violation of §209-a.1(a) of the Act.¹

¹ 42 PERB ¶4524 (2009).

EXCEPTIONS

Biegel excepts to the Director's decision asserting, *inter alia*, that his amended charge sets forth sufficient facts to state a claim of a violation of §209-a.1(a) of the Act. In support of his exceptions, Biegel asserts that the State has not provided him with an explanation for refusing to reinstate him. Furthermore, he alleges that the State violated his rights under the United States and New York State Constitutions.²

Based upon our review of the record and consideration of Biegel's arguments, we affirm the Director's dismissal of the amended charge.

FACTS

For purposes of reviewing the dismissal of the amended charge, we will accept the allegations as true and grant those allegations all reasonable inferences.³

In 1990, Biegel commenced employment as a correction officer at the Greene Correctional Facility. In September 2006, the State issued a notice of discipline alleging that Biegel had engaged in misconduct. During settlement discussions with the State, Biegel was represented by the New York State Correctional Officers and Police Benevolent Association, Inc (NYSCOPBA). In January 2008, the notice of discipline was resolved, and Biegel retired as part of the settlement.

On October 16, 2008, Biegel informed the State that he was rescinding his decision to retire and requested reinstatement to his former position. In response, the Director of Human Resources of the New York State Department of Correctional Services Daniel F. Martuscello III, wrote Biegel on October 24, 2008, stating that

² In his exceptions, Biegel also requests documents pursuant to the Freedom of Information Law (FOIL). His FOIL request has been referred to our Records Access Officer.

³ *Dutchess Community Coll*, 41 PERB ¶3029 (2008).

Biegel's request had been reviewed and that a determination had been made that his reinstatement would not be in the Department's best interests. Following a second request for reinstatement, Commissioner Brian Fischer (Fischer) wrote Biegel on November 18, 2008. In his letter, Fischer identified the primary factors that the State considers in determining requests for reinstatement, and informed Biegel that the denial of his request had been made following another review of his personnel file.

DISCUSSION

Pursuant to §204.2(a) of the Rules, the Director is responsible for reviewing all newly filed charges as a means of weeding out facially deficient charges.⁴ Under the Rules, the Director has the authority to dismiss a charge on the grounds that it fails to allege facts that, as a matter of law, constitute a violation under §209-a of the Act.

Granting all reasonable inferences to the allegations in the amended charge, it is Biegel's position that the State violated §209-a.1(a) of the Act when it refused to permit him to withdraw his resignation. In *State of New York (SUNY Oswego)*,⁵ the Board recognized that an employer's refusal to permit the withdrawal of a resignation can violate §209-a.1(a) of the Act if the denial is motivated by anti-union animus. In his amended charge, however, there are no allegations which even suggest a causal connection between the State's denial of Biegel's requests for reinstatement and his prior representation by NYSCOPBA with respect to the disciplinary charges.⁶

Furthermore, contrary to Biegel's exceptions, in Fischer's November 18, 2008 letter, the

⁴ *MABSTOA*, 40 PERB ¶3023 (2007).

⁵ 36 PERB ¶3015 (2003), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 8 AD3d 796, 37 PERB ¶7002 (3d Dept 2004).

⁶ *State of New York (Division of Parole)*, 41 PERB ¶3033 (2008).

State did provide him with an explanation for its refusal to reinstate him.

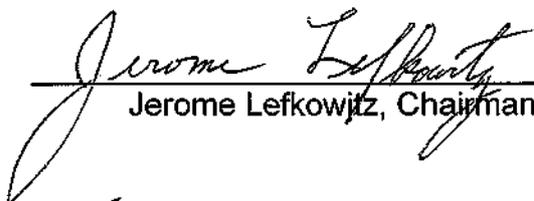
Finally, we deny Biegel's exceptions which assert that the State violated the United States and New York State Constitutions. Pursuant to §§205.5(d) and 209-a.1 of the Act, PERB has the authority to determine whether an improper employer practice has occurred; we do not have subject matter jurisdiction over constitutional claims against an employer.

For the reasons set forth above, we deny Biegel's exceptions and affirm the decision of the Director.

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

SO ORDERED.

DATED: July 23, 2009
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member


Sheila S. Cole, Member

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

In the Matter of

KEVIN BIEGEL,

Charging Party,

- and -

CASE NO. U-28886

**STATE OF NEW YORK (DEPARTMENT OF
CORRECTIONAL SERVICES),**

Respondent.

KEVIN BIEGEL, *pro se*

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Kevin Biegel (Biegel) to a decision by the Director of Public Employment Practices and Representation (Director) dismissing, as deficient, an improper practice charge, as amended, filed on January 20, 2009, which alleges that the State of New York (State) violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it refused his request to remove a September 11, 2006 notice of discipline and other derogatory materials from his personnel file in violation of the collectively negotiated agreement (agreement) between the State and the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA).

Following an initial review of the amended charge, pursuant to §204.2(a) of the Rules of Procedure (Rules), the Director dismissed the amended charge on the grounds that PERB lacks jurisdiction over an alleged breach of a collectively negotiated agreement and that the amended charge fails to allege sufficient facts to state a claim

of a violation of §209-a.1(a) of the Act.¹

EXCEPTIONS

Biegel excepts to the Director's decision asserting, *inter alia*, that his amended charge sets forth sufficient facts to state a claim of a violation of §209-a.1(a) of the Act based upon the State's refusal to remove the notice of discipline from Biegel's personnel file. Furthermore, he alleges that the State violated his rights under the United States and New York State Constitutions when it denied his request for reinstatement.²

Based upon our review of the record and consideration of Biegel's arguments, we affirm the Director's dismissal of the amended charge.

FACTS

For purposes of reviewing the dismissal of the amended charge, we will accept the allegations as being true and grant those allegations all reasonable inferences.³

Under the State – NYSCOPBA agreement, any adverse material contained in a personnel file over a year old, may be removed upon an employee's written request.

On September 11, 2006, the State issued a notice of discipline against Biegel alleging various acts of misconduct toward an inmate. On September 10, 27, and October 2, 2008, Biegel requested the State to remove the notice of discipline from his personnel file on the grounds that it contained false allegations. In addition, he requested that the "Stackhouse file" be removed because it includes documents which

¹ 42 PERB ¶4525 (2009).

² In his exceptions, Biegel also requests documents pursuant to the Freedom of Information Law (FOIL). His FOIL request has been referred to our Records Access Officer.

³ *Dutchess Community Coll*, 41 PERB ¶3029 (2008).

also contain false allegations against him. On October 31, 2008, Biegel sent another letter to the State alleging that he had been told by NYSCOPBA representatives that the notice of discipline was going to be dismissed and removed from his personnel file. The State has not complied with Biegel's multiple requests for the removal of the derogatory materials.

DISCUSSION

Pursuant to §204.2(a) of the Rules, the Director is responsible for reviewing all newly filed charges as a means of weeding out facially deficient charges.⁴ Under the Rules, the Director has the authority to dismiss a charge on the ground that it fails to allege facts that, as a matter of law, constitute a violation under §209-a of the Act.

Granting all reasonable inferences to the allegations in the amended charge, as we must, there are no allegations which can be reasonably construed as stating a claim that the State's failure to honor his requests for the removal of the derogatory materials is unlawfully motivated in violation of §209-a.1(a). In addition, there are no allegations which even suggest a causal connection between the State's denial of his requests and Biegel's representation by NYSCOPBA with respect to the disciplinary charges.⁵

Finally, we deny Biegel's exceptions which assert that the State has violated the United States and New York State Constitutions. Pursuant to §§205.5(d) and 209-a.1 of the Act, PERB has the authority to determine whether an improper employer practice has occurred; we do not have subject matter jurisdiction over constitutional claims against an employer.

For the reasons set forth above, we deny Biegel's exceptions and affirm the

⁴ *MABSTOA*, 40 PERB ¶13023 (2007).

⁵ *State of New York (Division of Parole)*, 41 PERB ¶13033 (2008).

decision of the Director.

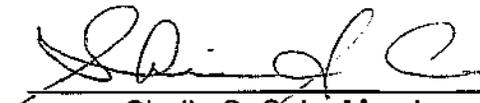
IT IS, THEREFORE, ORDERED, that the charge must be, and hereby is,
dismissed in its entirety.

SO ORDERED.

DATED: July 23, 2009
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member


Sheila S. Cole, Member

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

In the Matter of

VILLAGE OF HIGHLAND FALLS,

Charging Party,

- and -

CASE NOS: U-26843
U-26844

**HIGHLAND FALLS PATROLMEN'S BENEVOLENT
ASSOCIATION, INC.**

Respondent.

**HITSMAN, HOFFMAN & O'REILLY (JOHN O'REILLY AND EVELYN MILLER
of counsel), for Charging Party**

JOHN M. CROTTY, for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Highland Falls Patrolmen's Benevolent Association (PBA) and cross-exceptions filed by the Village of Highland Falls (Village) to a decision by an Administrative Law Judge (ALJ) on two improper practice charges, as amended, filed by the Village alleging that the PBA violated §209-a.2(b) of the Act by including a General Municipal Law (GML) §207-c proposal in its interest arbitration petitions on behalf of separate PBA units of full-time and part-time Village police officers.¹

Following submission of the cases on a stipulated record, the ALJ rejected the Village's argument that the PBA's GML §207-c proposal is a unitary demand. He,

¹ 40 PERB ¶4525 (2007).

therefore, analyzed each challenged portion of the proposal and concluded that the PBA violated §209-a.2(b) of the Act because the proposal contains a nonmandatory dispute resolution mechanism in §11 of the proposal with respect to such issues as initial eligibility determinations, light duty assignments and the termination of benefits under GML §207-c. Specifically, the ALJ found §§4, 6(A), 7(B), 7(C), 10(1), and 14 to be nonmandatory because disputes under each section would be subject to an arbitral hearing applying traditional arbitration standards, pursuant to §11 of the proposal, rather than an arbitral review procedure limited to standards and procedures equivalent to that applied in a Civil Practice Law and Rules (CPLR) Article 78 proceeding.² The ALJ, however, rejected the Village's contention that §§3, 8 and 9 of the proposal, along with the remaining portions of §§4, 6, 7 and 10, are nonmandatory.

EXCEPTIONS

In its exceptions, the PBA contends that the ALJ erred in failing to find the proposed arbitral procedure to be mandatory, based upon the decisions in *Watertown Police Benevolent Association (Watertown)*,³ and erred in analyzing the proposal based upon two subsequent decisions in *Poughkeepsie Professional Firefighters' Association*,

² The ALJ reached his conclusion following an analysis of prior precedent with respect to the negotiability of GML §207-c dispute resolution procedures. See, *Watertown PBA*, 30 PERB ¶3072 (1997), *confirmed sub nom. City of Watertown v New York State Pub Empl Rel Bd*, 31 PERB ¶7013 (Sup Ct Albany County 1998), *revd* 263 AD2d 797, 32 PERB ¶7016 (3d Dept 1999), *revd* 95 NY2d 73, 33 PERB ¶7007 (2000) (hereinafter *Watertown*); *Poughkeepsie Prof Firefighters' Assn, Local 596, IAFF*, 33 PERB ¶3029 (2000) (*Poughkeepsie I*); *Poughkeepsie Firefighters' Assn, Local 596, IAFF* 36 PERB ¶3014 (2003), *annulled sub nom. Poughkeepsie Prof Firefighters' Assn, Local 596, IAFF v New York State Pub Empl Rel Bd*, 36 PERB ¶7016 (Sup Ct Albany County 2003) *revd*, 16 AD3d 797, 38 PERB ¶7005 (3d Dept 2005) *affd* 6 NY3d 514, 39 PERB ¶7005 (2006) (*Poughkeepsie II*). As will be seen, *infra*, we do not need to reexamine the holdings in *Watertown*, *Poughkeepsie I* and *Poughkeepsie II* in order to determine whether the PBA's proposal is mandatory.

³ *Supra* note 2.

Local 596, IAFF (Poughkeepsie I and Poughkeepsie II).⁴ The PBA supports the ALJ's decision in all other respects.

The Village supports the ALJ's decision to the extent that he found the proposed arbitral procedure to be nonmandatory based upon the decisions in *Poughkeepsie I and Poughkeepsie II*. The Village, however, cross-excepts to the ALJ's finding that the PBA's proposal is not unitary and asserts that the ALJ erred in finding §§3, 7 and 9 of the proposal, along with the remaining portions of §§4, 6 and 10 to be nonmandatory.

Based upon our review of the record and consideration of the parties' arguments, we reverse, in part, but affirm the decision of the ALJ finding that the PBA violated §209-a.2(b) of the Act.

REQUEST FOR AMICI BRIEFS AND ORAL ARGUMENT

Following the filing of the PBA's exceptions and the Village's response and cross-exceptions, the Board issued a notice inviting interested entities to submit *amici* briefs. In response to the Board's request, five *amici* filed separate briefs. Thereafter, the PBA and Village each submitted supplemental briefs responding to the arguments raised in those briefs. In addition, the Board held oral argument.

FACTS

The relevant facts, including the full text of the PBA's GML §207-c proposal, are fully set forth in the ALJ's decision and appendix⁵ and are repeated here only as necessary to determine issues raised by the parties.

The PBA is the certified representative for two separate bargaining units composed respectively of Village full-time police officers and Village part-time police

⁴ *Supra* note 2.

⁵ *Supra* note 1, 40 PERB ¶4525 at 4577-4583.

officers. The collective bargaining agreements between the PBA and the Village expired on May 31, 2004. Following an impasse in negotiations, the PBA filed petitions for compulsory interest arbitration, pursuant to §204 of the Act, which included the identical GML §207-c proposal entitled "Proposed New Agreement-General Municipal Law Section 207-c Procedure." The proposal is comprised of 14 numbered paragraphs which, *inter alia*, set forth the application procedure for GML §207-c benefits (§3), establishes a Claims Manager position and defines the authority and duties of that position (§§4, 6, 7, 9 and 10), creates procedures with respect to medical examinations and treatment (§6), light duty assignments (§7) and termination of benefits (§10). Finally, §11 provides for final and binding arbitration with respect to disputes between the parties over various issues including determinations made by the Claims Manager.

DISCUSSION

Our discussion begins with the Village's cross-exception contending that the ALJ erred in failing to conclude the PBA's proposal is a nonmandatory unitary demand. We agree with the Village.

The Board has defined a unitary demand as a proposal containing multiple sections or paragraphs which cannot be reasonably understood to constitute severable and independent proposals. If a proposal is a unitary demand, it is nonmandatory if any portion of it is found to be nonmandatory.⁶

Following our review of the PBA's GML §207-c proposal, we conclude that it is a unitary demand. The terms and structure of the proposal demonstrate that it is intended to be a comprehensive and non-severable single proposal with respect to GML §207-c

⁶ *Pearl River Union Free Sch Dist*, 11 PERB ¶13085 (1978); *City of Oneida PBA*, 15 PERB ¶13096 (1982); *City of Newburgh*, 18 PERB ¶13065 (1985), *confirmed sub nom. City of Newburgh v Newman*, 19 PERB ¶17005 (Sup Ct Albany County 1986).

benefits. The proposal's title makes clear that it is aimed at establishing a "new agreement" by creating a "Section 207-c Procedure" for such benefits. In §1, the proposal specifies that the procedure set forth in the remaining 13 paragraphs "shall regulate the application and benefit award *process* for 207-c benefits."⁷ (emphasis added). Section 14, at the end of the proposal, states:

"The intent is to read *this procedure* in conformity with General Municipal Law Section 207-c. In the event that General Municipal Law Section 207-c is amended either party may, upon written notice to the other, *reopen negotiations of this procedure* to address such change in the statute."⁸ (emphasis added).

Between §§1 and 14, there are a dozen sections specifying, *inter alia*, the creation of a "Claims Manager" and defining the duties and authority of that position on behalf of the Village. Those duties run from the initial application for benefits through the Claims Manager's determinations with respect to initial eligibility, medical treatment, light duty and termination of benefits. Each of those determinations would be subject to review through an arbitral procedure set forth in §11.

Pursuant to §2(d), the Village would be limited to designating a single individual to perform the duties the Claims Manager under the proposal. In §4, the proposal delineates the powers that would be conferred upon the Claims Manager for rendering an initial eligibility determination within a 30-day calendar period specified in the proposal. Among those powers would be the ability of the Claims Manager to order a claimant and other witnesses to provide testimony. At the same time, §4 states that "[a] determination on initial eligibility shall be made within a reasonable time, based upon

⁷ *Supra* note 1, 40 PERB ¶4525 at 4578.

⁸ *Supra* note 1, 40 PERB ¶4525 at 4582.

the investigation *without holding* a hearing." (emphasis added) In any event, a public employer's determination as to which managerial duties should be assigned to which managerial employee or employees is a managerial prerogative.⁹ While the duties of a risk or claims manager might be a term and condition of employment of that manager, they are not the duties of PBA unit employees subject to that manager's supervision or determinations.¹⁰

In 1986, *in City of Schenectady*,¹¹ the Board held that the creation of a risk manager position to render determinations and to oversee the procedures related to those determinations, under a GML §207-c procedure, is a nonmandatory subject of negotiations. The holding in *City of Schenectady* is consistent with the well-established principles under the Act that the creation of a position, along with the essential duties, responsibilities and tasks of that position, are nonmandatory.¹²

In light of our conclusion that the PBA's unitary demand is nonmandatory, we do not reach the remaining issues raised by the parties in the exceptions and cross-exceptions, including whether the proposed arbitral process is mandatory under prior precedent and the policies of the Act, and whether certain aspects of the proposal are

⁹ *Board of Educ of the City Sch Dist of New York*, 5 PERB ¶¶3054 (1972).

¹⁰ *Supra* note 9.

¹¹ 19 PERB ¶¶4544, *affd* 19 PERB ¶¶3051 (1986), *confirmed sub nom. City of Schenectady v New York State Pub Empl Rel Bd*, 135 Misc2d 1088, 19 PERB ¶¶7023 (Sup Ct Albany County 1986) *affd* 132 AD2d 242, 20 PERB ¶¶7022 (3d Dept 1987), *lv denied*, 71 NY2d 803, 21 PERB ¶¶7007 (1988); *Poughkeepsie I*, *supra* note 2.

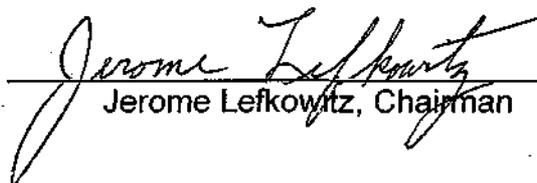
¹² *Waverly Cent Sch Dist*, 10 PERB ¶¶3103 (1977); *Churchville-Chili Cent Sch Dist*, 17 PERB ¶¶3055 (1984); *Town of Henrietta*, 25 PERB ¶¶6501 (1992).

mandatory under *City of Cohoes*¹³ because they reiterate statutory obligations under GML §207-c.

Based upon the foregoing, the ALJ's decision is reversed, in part, but affirmed.

IT IS, THEREFORE, ORDERED that the Association negotiate in good faith by withdrawing its respective GML §207-c proposals from interest arbitration.

DATED: July 23, 2009
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member


Sheila S. Cole, Member

¹³ 31 PERB ¶13020 (1998), *confirmed sub nom. Uniformed Firefighters of Cohoes v Cuevas*, 32 PERB ¶17026 (Sup Ct Albany County 1999), *affd* 276 AD2d 184, 33 PERB ¶17019 (3d Dept 2000), *lv denied*, 96 NY2d 711, 34 PERB ¶17018 (2001).

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

In the Matter of

**UNITED COLLEGE EMPLOYEES OF THE FASHION
INSTITUTE OF TECHNOLOGY,**

Petitioner,

CASE NO. CP-939

- and-

FASHION INSTITUTE OF TECHNOLOGY

Employer.

DAVID ENG-WONG, for Petitioner

**LITTLER MENDELSON, P.C. (BERTRAND B. POGREBIN and ORIT
GOLDRING, of counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Fashion Institute of Technology (FIT), and cross-exceptions filed by the United College Employees of the Fashion Institute of Technology (UCE), to a decision by an Administrative Law Judge (ALJ) on a unit clarification and unit placement petition filed by UCE, seeking a determination that the positions of Executive Studies Program Director, Deputy Director of the Museum at FIT (Deputy Director), and Director of Environmental Health and Safety Compliance (Health and Safety Director), are already encompassed within the UCE bargaining unit or should be placed in that unit. Following five days of hearings, the ALJ issued a decision dismissing UCE's unit clarification petition but granting the

unit placement petition, in part.¹ The ALJ concluded that the Deputy Director position should be placed into the UCE bargaining unit but denied the placement of the Executive Studies Program Director and Health and Safety Director positions into the UCE bargaining unit on the grounds that the incumbents in those positions are managerial under the criteria set forth in §201.7(a) of the Public Employees' Fair Employment Act (Act).²

EXCEPTIONS

FIT challenges the ALJ's decision to place the Deputy Director into the UCE bargaining unit contending that James Hanley (Hanley) is managerial pursuant to §201.7 of the Act because he formulates policy and has a major role in the administration of the parties' agreement and/or personnel administration. UCE supports the ALJ's decision to place the Deputy Director position into the bargaining unit.

In its cross-exceptions, UCE contends that the ALJ erred in concluding that Eric Hertz (Hertz), the Executive Studies Program Director, and Joseph Arcoleo (Arcoleo), the Health and Safety Director are managerial, pursuant to §201.7 of the Act. FIT

¹ 41 PERB ¶4004 (2008).

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)."

supports the ALJ's exclusion of the Executive Studies Program Director and the Health and Safety Director from the bargaining unit.

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

RELEVANT LEGAL STANDARD

Pursuant to §201.7(a) of the Act, a managerial employee is a person who formulates policy on behalf of an employer, is required to directly assist in the preparation and formulation of an employer's collective bargaining proposals, plays a major role in the administration of an agreement or plays a major role in personnel administration.

Since the 1971 amendment to §201.7(a) of the Act to exclude managerial and confidential employees from coverage under the Act, the Board has held that the statutory criteria for such designations should be applied strictly, in order to preserve existing negotiating units, with all uncertainties resolved in favor of coverage under the Act.³ This approach stems directly from the text and legislative history of the 1971 amendment.

Our careful scrutiny in making managerial designations is also based upon our recognition that, unlike the National Labor Relations Act,⁴ the Act does not exclude supervisors from coverage nor does it define what constitutes a supervisor.⁵ As a

³ See, *State of New York*, 5 PERB ¶3001 (1972); *City of Binghamton*, 10 PERB ¶3038 (1977); *City of Jamestown*, 19 PERB ¶3019 (1986); *Owego-Apalachin Cent Sch Dist*, 33 PERB ¶3005 (2000); *County of Ostego* 34 PERB ¶3024 (2001).

⁴ 29 USC §§152(3) and (11).

⁵ *St. Paul Boulevard Fire Dist*, 42 PERB ¶3009 (2009).

result, we draw a distinction between employees who perform various supervisory duties and responsibilities, who are covered by the Act, and the much narrower subset of employees with broad powers to develop "particular objectives of a government or agency thereof in the fulfillment of its mission and the method, means and extent of achieving such objectives."⁶

We draw a similar distinction between supervisory and managerial employees under the Act with respect to duties related to the administration of an agreement and personnel administration. It is common for supervisors to be involved in the processing of grievances, but a managerial designation will be made, pursuant to §207.1(a)(ii) of the Act, only when it is demonstrated that the supervisor plays a "major role" in implementing the agreement, including the authority to change the employer's procedures or methods of operation, or engages in a similarly significant role in personnel administration.⁷

The clearest articulation of the applicable standard for determining whether an employee formulates policy, pursuant to §207.1(a)(i) of the Act, was set forth in *City of Binghamton*:

To formulate policy is to participate with regularity in the

⁶ *State of New York*, supra note 3, 5 PERB ¶¶3001 at 3005; *Bd of Educ, Copiague Public Schools, UFSD, No. 5*, 6 PERB ¶¶3001(1973), confirmed sub nom. *Bd of Educ of Sch Dist No. 1 v Helsby*, 42 AD2d 1056, 6 PERB ¶¶7012 (2d Dept 1973), affd, 35 NY2d 877 (1974), *State of New York-Unified Court System*, 30 PERB ¶¶3067 (1997), confirmed sub nom. *Lippman v New York State Pub Empl Rel Bd*, 263 AD2d 891, 32 PERB ¶¶7017 (3d Dept 1999).

⁷ *State of New York*, supra note 3; *Metropolitan Suburban Bus Auth*, 7 PERB ¶¶3025 (1974), confirmed sub nom. *Metropolitan Suburban Bus Auth v New York State Pub Empl Rel Bd*, 48 AD2d 206, 8 PERB ¶¶7009 (3d Dept 1975), lv denied, 37 NY2d 712 (1975); *Bd of Educ of the City Sch Dist of the City of New York*, 15 PERB ¶¶3031 (1982).

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 methods of operation that are merely of a technical nature.⁸

We applied this well-established standard in *Fashion Institute of Technology*,⁹ when we designated the acting Director of Health Services as managerial because she formulated and implemented campus-wide policies and procedures related to FIT's mission by providing health support services to students.

We note, however, in *Dormitory Authority of the State of New York*¹⁰ (*Dormitory Authority*), the Board announced a "different template with which to evaluate the managerial status of a title"¹¹ premised on an employer's adoption of a less hierarchical structure which grants greater employee participation in decision-making. While we agree that organizational structure is relevant to determining whether a person is managerial pursuant §201.7(a)(i) of the Act, we overrule *Dormitory Authority* to the extent it adopted a new standard rendering hierarchical compression or an employer's adoption of other alternative forms of work organization as a determinative or primary factor. An organizational structure or culture that encourages employee input into the creation and modification of employer policies or the means of operation does not

⁸ *Supra* note 3, 10 PERB ¶¶3038 at 3185.

⁹ 40 PERB ¶¶3018 (2007), *confirmed sub nom. United College Employees of the Fashion Institute of Technology, Local 3457, NYSUT, AFT, AFL-CIO v New York State Pub Empl Rel Bd*, 41 PERB ¶¶7003 (Sup Ct New York County 2008).

¹⁰ 38 PERB ¶¶3029 (2005), *confirmed sub nom. CSEA v New York State Pub Empl Rel Bd*, 34 AD3d 884, 39 PERB ¶¶7011 (3d Dept 2006).

¹¹ 38 PERB ¶¶3029 at 3097.

necessarily metamorphosize an employee into a person that should be designated managerial under §201.7(a) of the Act. Granting managerial designations primarily based upon such a structure or culture would be at variance with *City of Binghamton*¹² and has the potential to disrupt existing negotiation units through organizational reassessments and restructuring, a result we find inconsistent with the Legislature's intent in enacting the 1971 amendment to §201.7(a).

DISCUSSION

The exceptions and cross-exceptions require the Board to determine whether Hanley formulates FIT policy, has a major role in the administration of the parties' agreement or a major role in personnel administration, pursuant to §§201.7(a)(i) and (ii) of the Act and whether Hertz and Arcoleo formulate FIT policy pursuant to §201.7(a)(i) of the Act.

FIT is a specialized college within the State University of New York (SUNY) with the Board of Education of the City of New York as its local sponsor. FIT offers courses leading to associate, baccalaureate and graduate degrees. In addition, it offers professional studies programs in art, design, business and technology.

FIT is administered by a Board of Trustees (Board), which has the authority to appoint the FIT President (President), to formulate policy in conjunction with the President and her cabinet, to adopt curricula subject to approval by the SUNY Board of Trustees, to adopt an annual budget, to approve increases in student tuition and fees, and to accept gifts and property suitable for carrying out FIT's programs and purposes.

¹² *Supra* note 3.

The President is the chief executive officer with daily responsibilities that include appointing employees, except those officers selected by the Board. The President's cabinet is composed of seven Vice-Presidents, the Director of the Museum at FIT (Museum) and six Deans, who are unrepresented employees.

FIT has six schools of instruction, each supervised by a Dean: School of Art and Design; School of Business and Technology; School of Continuing and Professional Studies; Curriculum and Instruction; School of Graduate Studies; and the School of Liberal Arts. Each school is subdivided into departments, programs, centers or institutes. Within an FIT school that confers degrees, a subdivision is headed by a Department Chair or an Associate Department Chair. In contrast, a subdivision in a non-degree conferring FIT school is headed by a Director, Manager or Coordinator.

Among the non-degree conferring schools is the School of Continuing and Professional Studies which is comprised of four centers and programs: the Enterprise Center; the Executive Studies Program,¹³ the Center for Pre-College Programs and the Center for Professional Studies.

Joan Volpe (Volpe) is the Coordinator for the Center of Professional Studies. She is responsible for designing, managing and marketing non-degree seminar and training programs. She reports to the Dean of Continuing Education and Professional Studies and the Vice President for Academic Affairs.

The Educational Foundation for the Fashion Industries (Educational Foundation) is a not-for-profit foundation which performs advisory and fundraising activities on behalf

¹³ The Executive Studies Program was subsequently moved of FIT's School of Graduate Studies. Transcript, p. 571.

of FIT. The Educational Foundation has its own Board and it receives gifts and donations on behalf of FIT and maintains an endowment for the FIT Museum.

UCE represents a unit composed of non-instructional, instructional and supervisory personnel, including Museum Curators, Faculty, Department Chairs, Program Managers, Directors and Coordinators in FIT's six schools of instruction.

A. Deputy Director James Hanley

Following our review of the record in the present case, we deny FIT's contention that Hanley's duties as Deputy Director demonstrate that he is managerial pursuant to §207.1(a) of the Act. We concur with the ALJ's finding that Valerie Steele (Steele), who is the Director and Chief Curator of the Museum and a member of the President's cabinet, is the only staff member who formulates FIT's Museum policies.

In 2003, Hanley was hired to the newly created Assistant Director position to assist Steele in the administration of the Museum's operations. His administrative responsibilities include budgetary and financial matters, fundraising, and the supervision of staff. He assists in the preparation of the Museum's proposed budget which Steele presents to FIT's President. Following Board approval of the budget, Hanley is responsible for monitoring the use of the funds allocated to each Museum department. Steele is responsible for determining whether to abolish or significantly modify a Museum department or its funding.

Steele has ultimate authority over all purchases; however, Hanley supervises and approves purchase orders and requisitions under Steele's supervision. Hanley communicates directly with the Educational Foundation with respect to Foundation

expenditures for the Museum and advises Steele about the amount of available Foundation funds.

Hanley has fundraising responsibilities, but he does not act independently of Steele. For example, they helped establish the Couture Council, a group of individuals willing to make contributions in exchange for certain Museum services and benefits.

A Museum committee composed of Steele, Hanley and Museum Curators review and determine which objects should be purchased for the Museum's collection. In preparation for a Paris auction, Steele, Hanley and the Curators studied the auction catalog and determined which objects Hanley should attempt to purchase at the auction. Steele and Hanley then calculated the amount that Hanley would bid for each of those objects during the auction.

Hanley took the necessary administrative steps to obtain an accreditation of the Museum from the American Association of Museums (AAM) including applying for a federal grant for a museum assessment study, supervising the preparation of the necessary reports, corresponding with AAM; assisting Steele in selecting an appropriate surveyor and drafting a Board resolution, which was subsequently adopted, declaring the Museum to be a permanent part of FIT's operations.

At the time Hanley was hired, a draft deaccession policy for the Museum had been presented to the President for her approval. The deaccession policy sets the criteria and procedure for the sale or transfer of objects from the Museum's collection. After becoming Deputy Director, Hanley proposed a new policy requiring the Museum to notify the original donor of the Museum's intent to sell an object and to credit the original donor from the proceeds of the sale.

Hanley is a member of the Museum's exhibition planning committee, along with Steele and other staff. The committee determines when portions of the Museum's collection will be exhibited at other institutions. Although Hanley may negotiate and draft the contracts for such exhibitions, Steele retains ultimate approval authority over the contracts. Hanley, however, does have primary administrative responsibility over making arrangements for the delivery of objects from the Museum's collection to an exhibition and making the necessary travel arrangements for staff.

Hanley has supervisory responsibilities with respect to Museum staff including counseling staff, approving timesheets and overtime requests. He makes recommendations to Steele about hiring, leaves of absence, promotions and terminations. Staff evaluations are prepared by Museum Department Heads which are reviewed by Steele and Hanley. Hanley prepares evaluations for non-tenured Museum Department Heads and Curators. With respect to tenure, Hanley is responsible for making recommendations which are forwarded to the President and Board for review and approval. Finally, Hanley has had involvement with a single employee grievance which was handled by a Human Resources representative.

While it is clear that Hanley performs many supervisory and administrative duties on behalf of the Museum, and contributes ideas with respect to the Museum's budget, programs and fundraising, he does not have substantial and unfettered discretion in making daily decisions with respect to Museum programs and operations. Contrary to FIT's arguments, the scope and nature of Hanley's duties are not analogous to the

duties described in earlier Board decisions where we designated employees because they formulate policy under §201.7(a)(i) of the Act.¹⁴

Finally, we do not find that Hanley's supervisory duties with respect to subordinate staff and his minor participation in a single grievance demonstrate that he plays a major role in employee relations warranting a designation pursuant to §201.7(a)(ii) of the Act.

B. Executive Studies Program Director Eric Hertz

Next, we turn to UCE's cross-exceptions challenging the ALJ's conclusion that Executive Studies Program Director Hertz formulates policy pursuant to §201.7(a)(i) of the Act. Following our review of the record, we conclude that the ALJ erred in finding that Hertz formulates policy.

In 2004, FIT hired Hertz to be the Director of the newly established Executive Studies Program Director. The creation of the program had its genesis in a recommendation made by Volpe, the Coordinator of the Center of Professional Studies.

At the beginning of his tenure, Hertz examined executive education programs offered at other colleges and interviewed members of senior fashion industry management to obtain their feedback about possible FIT program models. Following his research, he presented a plan to the President, Vice President of Academic Affairs Cortes (Cortes) and the Dean of the School of Continuing Education and Professional Studies Kornberg (Kornberg) which was approved.

¹⁴ See, e.g., *Town of Brookhaven*, 27 PERB ¶13043 (1994); *State of New York*, 36 PERB ¶13029 (2003); *Dormitory Auth of the State of New York*, *supra* note 10.

Since that time, Hertz's primary responsibilities have been primarily the administration and marketing of a non-degree executive study program under the supervision of the President, Vice President Cortes and Dean Kornberg. His recommendations with respect to the program budget, tuition, and teacher compensation are all subject to his supervisors' review and approval. The program offers a certificate course, known as the Advanced Management Program (AMP), aimed at second tier fashion management with 10-15 years of experience. Hertz designed and structured AMP as a four module course, selected the instructors, determined which instructors would be invited to return, administered the registration and reviewed participant evaluations.

Hertz's duties, however, are limited to only one program offered within the multitude of subdivisions within FIT's six schools of instruction.¹⁵ Department Chairs, Associate Department Chairs and Coordinators, who are in the UCE bargaining unit, perform similar duties to Hertz in the creation and marketing of courses and programs within their respective subdivisions. In addition, they are at the same level in the FIT hierarchy and are subject to the same supervisory structure. While such comparative facts are not determinative of Hertz's managerial status under §201.7(a)(i) of the Act, they are relevant in our determination that Hertz's duties do not rise to the level of determining FIT's mission and objectives or establishing the means for accomplishing those objectives.

¹⁵ *Compare, East Meadow Union Free Sch Dist*, 16 PERB ¶3027 (1983) (School district employee designated managerial based upon her district-wide responsibility for directing the music and art program and establishing the curriculum).

C. Health and Safety Director Joseph Arcoleo

We reach a different conclusion with respect to the managerial status of Arcoleo under §201.7(a)(i) of the Act and, therefore, deny UCE's cross-exceptions with respect to him.

In 2003, FIT created the Health and Safety Director position, a position responsible for the development and implementation of a campus-wide environmental health and safety program. The position is directly subordinate to the FIT General Counsel in the college's organizational chart.¹⁶

The evidence in the record firmly establishes that Arcoleo creates, implements and enforces campus-wide policies and procedures with respect to environmental, health and safety compliance. At the time of his appointment, FIT lacked written policies with respect to environmental, health, and safety issues.

Arcoleo's exclusive responsibilities include preparing and enforcing FIT environmental, health and safety policies. In addition, he is responsible for educating staff and students, as well as outside contractors, about the substance of the policies. He ensures FIT's compliance with federal, state, and municipal environmental, health and safety laws, rules and regulations and has wide discretion for determining when FIT's policies should contain stricter standards than those required by law.

Following his appointment, Arcoleo conducted an assessment of existing FIT practices and procedures to determine where the college needed to establish and implement policies. As part of his assessment, he visited classrooms and laboratories

¹⁶ Petitioner's Exhibit 2.

in various FIT departments where he interviewed staff and students. Following his assessment, Arcoleo prepared a detailed schedule for the development and implementation of campus-wide policies and procedures. Consistent with that schedule, Arcoleo prepares policies and procedures.

In 2004, Arcoleo prepared a proposed respiratory protection program policy which includes more stringent standards than those mandated by law to protect against airborne hazards. The respiratory policy requires the use of localized exhaust ventilation as the primary means for protecting students and staff against hazardous vapors, fumes and dust instead of utilizing respirators. During his visits to classrooms and laboratories, Arcoleo informs staff and students about the general policy against the use of respirators, the circumstances when respirators are appropriate and the policy's regulations concerning the proper use and maintenance of respirators. When he discovers a practice at variance with the policy, Arcoleo notifies the appropriate department head about their department's noncompliance.

He also proposed a policy and outline for FIT contractors in preparing work specific environmental, health and safety plans. Although FIT has not formally adopted his recommendation for it to be a standard FIT contract provision, Arcoleo has been permitted to enforce the policy with outside contractors.

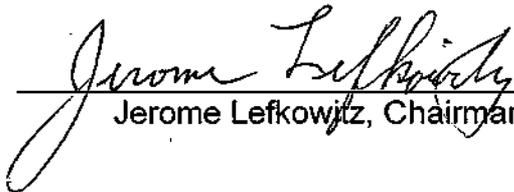
Arcoleo also created a policy regulating welding and burning and other "hot work" aimed at complying with all federal, state, and local regulations. The policy mandates safety precautions and requires the submission of a permit to Arcoleo's office describing the work. The permit form has been distributed to FIT departments and various departments have complied with the permit requirement.

Finally, Arcoleo prepared the written criteria for the selection of a hazardous materials contractor to dispose of FIT's hazardous waste, which was incorporated into FIT's request for proposals. Pending selection of a contractor, Arcoleo ordered a temporary moratorium on FIT's hazardous waste disposal. He also prepared the final draft of an FIT hazard communication program along with an emergency response procedure for hazardous chemical and hazardous waste incidents.

Based upon Arcoleo's broad authority to formulate and implement campus-wide policies and procedures, under the direct supervision of FIT's General Counsel, we conclude that he is managerial pursuant to §201.7(a)(i) of the Act.

IT IS, THEREFORE, ORDERED that the unit placement petition is granted to the extent of placing the Deputy Director of the Museum at FIT and Executive Studies Program Director into the negotiating unit represented by UCE and the unit placement petition is dismissed as to the Director of Environmental Health and Safety Compliance.

DATED: July 23, 2009
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member


Sheila S. Cole, Member

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

In the Matter of

**TOWN OF WALLKILL POLICE
BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

CASE NO. U-27426

- and -

TOWN OF WALLKILL,

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

**HITSMAN, HOFFMAN & O'REILLY LLC (JOHN F. O'REILLY of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the Town of Wallkill (Town) and exceptions filed by the Town of Wallkill Police Benevolent Association, Inc. (PBA) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge, which alleges that the Town violated §§209-a.1(a), (d) and (e) of the Public Employees' Fair Employment Act (Act) when it implemented Local Law No. 2 of 2007 (Local Law) which established police disciplinary procedures in conflict with the negotiated disciplinary procedures contained in the parties' expired collectively negotiated agreement (agreement).

At a hearing before the ALJ, following the stipulated admission of exhibits, both parties rested after making opening statements and without calling any witnesses. Following the hearing, the parties stipulated to the admission of additional exhibits. After both parties submitted briefs arguing their respective legal positions, the ALJ

issued a decision concluding that the Town violated §§209-a.1(d) and (e) by implementing the Local Law and dismissing the PBA's claim that the Town repudiated the agreement, in violation of §§209-a.1(a) and (d), by refusing to comply with the agreement's negotiated disciplinary procedure.¹

EXCEPTIONS

In its exceptions, the Town asserts that the ALJ exceeded her authority when she rejected the Town's legal arguments that police disciplinary procedures are a prohibited subject based upon the provisions of Town Law §§154 and 155 and the holdings in *Patrolmen's Benevolent Association of the City of New York, Inc. v New York State Public Employment Relations Board*² (hereinafter *NYCPBA*) and other court decisions. In addition, the Town contends that the ALJ erred in: a) her conclusion that the police disciplinary procedure in the Town is not a prohibited subject of negotiations; b) her interpretation of *NYCPBA* and *Auburn Police Local 195, Council 82, AFSCME v Helsby*³ (hereinafter *Auburn*); c) her application of the Board's analysis in *Tarrytown Patrolmen's Benevolent Association, Inc.*⁴ (hereinafter *Tarrytown*) and her reliance on the holding in *Elias v Town of Crawford*⁵ (hereinafter *Crawford*); and d) her order that the Town return to the negotiated disciplinary procedures in the agreement.

The PBA supports the ALJ's decision finding that the Town violated §§209-a.1(d)

¹ 41 PERB ¶14562 (2008).

² 6 NY3d 563, 39 PERB ¶7006 (2006).

³ 10 PERB ¶13045 (1977), *vacated*, 91 Misc2d 909, 10 PERB ¶7016 (Sup Ct Albany County, 1977), *affd*, 62 AD2d 12, 11 PERB ¶17003 (3d Dept 1978), *affd*, 46 NY2d 1034, 12 PERB ¶17006 (1979).

⁴ 40 PERB ¶13024 (2007).

⁵ 17 Misc3d 176, 41 PERB ¶17505 (Sup Ct Orange County 2007).

and (e) by implementing the new disciplinary procedure but excepts to the ALJ's dismissal of its claim that the Town's conduct constituted a repudiation of the agreement in violation of §§209-a.1(a) and (d). The Town supports the ALJ's decision dismissing the PBA's repudiation claim.

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

FACTS

The relevant facts are set forth in the ALJ's decision and are repeated here only as necessary to address the exceptions. The PBA has been the exclusive negotiation representative for the unit of Town police officers since 1998.⁶ The parties' last agreement expired on December 31, 2003.

Article 29 of the parties' expired agreement sets forth the negotiated procedures for the discipline of Town police officers.

Section 29.1 of the agreement states, in part:

This procedure and its terms shall be the sole and exclusive procedure and remedy for employee disciplinary matters other than termination and shall constitute a waiver of rights bargaining unit members have or may have under Civil Service Law Section 75 and Town Law section 155.

Under the negotiated disciplinary procedure, the Police Chief (Chief) has the authority to issue a notice of discipline setting forth allegations of misconduct or incompetence along with a proposed penalty. Following issuance of a notice of discipline, the Chief must conduct a disciplinary interview with the officer and, thereafter, issue a written decision. If the Chief finds the officer guilty, the officer may appeal the

⁶ 31 PERB ¶3000.12 (1998).

notice of discipline and penalty to the Town Supervisor, who is required to conduct a private informal meeting with the officer, and thereafter issue a written decision. The PBA can serve and file a demand for arbitration within 14 days of receipt of the Town Supervisor's decision. The selected arbitrator's opinion and award is final and binding on the parties.

Prior to implementation of the Local Law, the Town and the PBA were parties to a number of arbitrations pursuant to Article 29 of the agreement.

On January 25, 2007, the Town Board (Board) enacted the Local Law which adopted a new Town police disciplinary procedure and directed the Chief to take all necessary steps to implement the new procedure. The stated intent of the legislation was to establish a new Town police disciplinary procedure pursuant to Town Law §§154 and 155 and in accordance with the Town's interpretation of *NYCPBA*.⁷

Under the disciplinary procedures established by the Local Law, the Chief, Deputy Chief or the Chief's designee can issue a notice of discipline and conduct a disciplinary interview of the police officer. Following the disciplinary interview, the Chief issues a written decision which is referred to the Board for a determination of the charges. Within 14 days after receipt of the Chief's decision, the police officer can request a hearing and the Board has the option to designate a Board member to hear the case or to select a hearing officer. Following a hearing, the Board member or hearing officer is responsible for submitting recommended findings of fact and a proposed disciplinary penalty to the Board for its final determination. The Board's final determination is subject to challenge pursuant to CPLR Article 78 within 30 days from the date of the Board's determination.

⁷ The Local Law does not reference Civ Serv Law §§75 and 76.

On February 5, 2007, a PBA representative wrote to the Town Supervisor stating the PBA's position that the Town is obligated to follow the negotiated disciplinary procedure contained in the expired agreement. Although the Town did not respond to the PBA's letter in writing before the filing of the charge on June 13, 2007, the Town's counsel confirmed that the Town will be implementing the Local Law.⁸

DISCUSSION

A. Authority of the ALJ to Rule on the Legal Question of Prohibition

Contrary to the Town's exceptions, the ALJ did not exceed her authority by rejecting the Town's argument, premised on Town Law §§154 and 155, NYCPBA and other case law, that the Town's police disciplinary procedure is a prohibited subject of negotiations.

During the course of processing improper practice charges, representation petitions and declaratory rulings, the agency is frequently presented with questions of statutory interpretation with respect to the Act, as well as external law. While the courts will grant varying degrees of deference to our statutory interpretation depending on whether it involves an application of the Act, such as defining a statutory term of art, or the resolution of a question of pure statutory construction aimed at discerning legislative intent,⁹ the mere fact that an ALJ rejects a legal argument presented by one party or

⁸ In *Town of Wallkill*, 42 PERB ¶3006 (2009), we recently dismissed a related improper practice charge alleging that the Town violated §§209-a.1(a) and (d) of the Act when it failed to explicitly respond to three PBA information requests concerning the Town's intentions with respect to complying with the negotiated disciplinary procedure.

⁹ See, *Matter of Suffolk Regional OTB v New York State Racing & Wagering Bd*, 11 NY3d 559 (2008); *Matter of Rosen v New York State Pub Empl Rel Bd*, 72 NY2d 42, 21 PERB ¶7014 (1988); *Poughkeepsie Professional Firefighters' Assn v New York State Pub Empl Rel Bd*, 6 NY3d 514, 39 PERB ¶7005 (2006); *NYCTA v New York State Pub Empl Rel Bd*, 8 NY3d 226, 40 PERB ¶7001 (2007).

another does not render the ALJ's decision *ultra vires*.

Therefore, we deny the Town's exception asserting that the ALJ lacks authority to determine the primary legal question presented by the parties, whether a police disciplinary procedure is a prohibited subject.¹⁰

We next turn to the Town's exceptions challenging the ALJ's conclusion that the Town violated §§209-a.1(d) and (e) of the Act by implementing the Local Law police disciplinary procedures.

B. Police Disciplinary Procedures in the Town of Wallkill

Following careful consideration of the Town's exceptions, we conclude that the Town's unilateral change with respect to the police disciplinary procedures is not a prohibited subject.

B. (1) Applicable Precedent with Respect to Negotiability of Town Police Discipline

As we discussed in *City of Albany*¹¹ (hereinafter *Albany*) for over three decades, the Board and the courts have generally held that police disciplinary procedures constitute a mandatory subject of negotiations under the Act.¹²

¹⁰ We also deny the Town's exception asserting that the ALJ erred in describing its counsel's letter as stating that the Town had implemented the Local Law. The Local Law itself contains a directive to the Chief to take all necessary actions to implement the new procedures. Furthermore, during the hearing, the Town's counsel acknowledged that the Town was treating the Local Law as superseding the negotiated disciplinary procedures. Transcript, p. 24.

¹¹ 42 PERB ¶3005 (2009).

¹² See, *City of Albany*, 7 PERB ¶3078 (1974), 7 PERB ¶3079 (1974), *confirmed sub nom. City of Albany v Helsby*, 48 AD2d 998, 8 PERB ¶7012 (3d Dept 1975), *affd*, 38 NY2d 778, 9 PERB ¶7005 (1975); *City of Albany*, 9 PERB ¶3009 (1976), *confirmed sub nom. City of Albany v Helsby*, 56 AD2d 976, 10 PERB ¶7006 (3d Dept 1977). See also, *Binghamton Civil Service Forum v City of Binghamton*, 44 NY2d 23, 11 PERB ¶7508 (1978).

In *Auburn*,¹³ the Court of Appeals affirmed a decision by the Appellate Division holding that a proposal to negotiate a contractual alternative to Civ Serv Law §§75 and 76 for police discipline was not a prohibited subject of negotiations.

In reliance on *Auburn*, the Board in *Amherst Police Club, Inc.*¹⁴ held that a negotiation demand seeking a contractual disciplinary procedure for town police to replace the statutory disciplinary procedures set forth in Town Law §155, Unconsol Law §5775, and Civ Serv Law §§75 and 76, constitutes a mandatory subject of negotiations under the Act. In addition, in *Town of Wallkill Police Benevolent Association*,¹⁵ an ALJ's decision, finding that the PBA's negotiation demand for representation during a police disciplinary interrogation constitutes a mandatory subject of negotiations, became final following the failure of the Town to file exceptions.¹⁶

In *NYCPBA*, the Court reaffirmed the holding in *Auburn* that a proposal to negotiate a grievance/arbitration provision for police discipline to replace Civ Serv Law §§75 and 76 procedures was a mandatory subject of negotiations under the Act. The Court distinguished *Auburn*, however, and held that special police disciplinary procedures in that case, the New York City Charter and Administrative Code and the Rockland County Police Act (hereinafter RCPA), which pre-date Civ Serv Law §§75 and 76, demonstrate a public policy that outweighed the strong and sweeping policy supporting collective negotiations under the Act. In addition, the Court cited with favor

¹³ *Supra* note 3.

¹⁴ 12 PERB ¶13071 (1979).

¹⁵ 24 PERB ¶14566 (1991).

¹⁶ PERB's Rules of Procedure (Rules) §213.6.

prior Appellate Division decisions that had held that particular special state laws delegating police discipline to local officials rendered police disciplinary procedures a prohibited subject in those specific towns and municipalities.¹⁷

In construing *NYCPBA*, we note that the Court affirmed the Appellate Division, Second Department's decision in *Town of Orangetown v Orangetown Police Benevolent Association*,¹⁸ which held that RCPA, as a special law, preempts the negotiability of police discipline in a town subject to that special law. In addition, the Court cited with favor an earlier decision by the Appellate Division, Second Department,¹⁹ which relied upon another special law, WCPA, rather than Town Law §155, to conclude that the subject of police discipline in a town covered by WCPA is prohibited. More recently, in *Crawford*,²⁰ a Supreme Court justice held that Town Law §155, as a general law, does not render police discipline a prohibited subject under *NYCPBA*.

¹⁷ See, *Matter of Town of Greenburgh*, 94 AD2d 771, 16 PERB ¶7510 (2d Dept 1983), *lv denied*, 60 NY2d 551 (1983); (Westchester County Police Act [hereinafter WCPA], L 1936, c 104, as amended by L 1941, c 812, is a special law); *City of New York v MacDonald*, 201 AD2d 258, 27 PERB ¶7503 (1st Dept 1994) *lv denied*, 83 NY2d 759 (1994) (city charter and administrative code provisions originally enacted by the Legislature); *City of Mount Vernon v Cuevas*, 289 AD2d 674, 34 PERB ¶7038 (3d Dept 2001) *lv denied*, 97 NY2d 613, 35 PERB ¶7005 (2002) (city charter enacted by the Legislature, L 1922, c 490). See also, *Rockland County PBA v Town of Clarkstown*, 149 AD2d 516, 22 PERB ¶7516 (2d Dept 1989), *Stony Point PBA v Shankey*, 125 AD2d 314 (2d Dept 1986) *Steinman v Village of Spring Valley*, 261 AD2d 548 (2d Dept 1999) (RCPA is a special law); *Gizzo v Town of Mamaroneck*, 36 AD3d 162, 39 PERB ¶7527 (2006) *lv denied*, 8 NY3d 806 (2007) (WCPA is a special law).

¹⁸ 18 AD3d 879, 38 PERB ¶7507 (2d Dept 2005). See also, *Rockland County PBA v Town of Clarkstown*, *supra* note 17.

¹⁹ *Matter of Town of Greenburgh*, *supra* note 17.

²⁰ *Supra* note 5.

B(2) The Town Violated §§209-a.1(d) and (e) by Unilaterally Abandoning the Disciplinary Procedures Negotiated to Replace Civ Serv Law §§75 and 76

In the present case, both the Town and the PBA recognized the applicability of Civ Serv Law §75 to certain members of the bargaining unit when they negotiated, in Article 29 of the agreement, an express waiver of that statutory procedure in exchange for the negotiated grievance arbitration procedure.

In *Owen v Town Board of Town of Wallkill* (hereinafter *Owen*),²¹ the Appellate Division, Second Department held that a Town police officer, who was an honorably discharged veteran during a time of war, was entitled to Civ Serv Law §75 disciplinary procedures and not Town Law §155 procedures. The Appellate Division's holding in *Owen* was premised on a provision in Civ Serv Law 75.1(b), originally enacted in the Civil Service Law of 1909,²² granting an honorably discharged veteran certain procedural protections against discipline.²³ Subsequently, the Legislature expanded the coverage of the statutory disciplinary procedure, in the former Civ Serv Law §22, to certain public employees who are volunteer firefighters.²⁴ These Civil Service Law procedural protections for honorably discharged veterans and volunteer firefighters pre-date the enactment of Town Law §155.

²¹ 94 AD2d 768 (2d Dept 1983) *lv denied*, 60 NY2d 560 (1983). See also, *Town Bd of Town of Wallkill v Owen*, 127 AD2d 589 (2d Dept 1987); 1991 NY Op Atty Gen (Inf) 1067 (1991), 1991 WL 537220.

²² L 1909, c 15, and codified as Civ Serv Law §22.

²³ See, *Rizzo v Town of Hempstead*, 1 AD2d 906 (2d Dept 1956); *O'Brien v Hughes*, 270 AD 1072 (4th Dept 1946).

²⁴ See, L 1930, c 214; *Brown v Stephan*, 245 AD 588 (4th Dept 1935); *Wamsley v East Ramapo Cent Sch Dist Bd of Educ*, 281 AD2d 633 (2d Dept 2001).

In *Werner v Town of Niskayuna*²⁵ (hereinafter *Niskayuna*), a lower court held that *NYCPBA* is inapplicable to that Town's police officers because they are subject to Civ Serv Law §§75 and 76 procedures.²⁶

Despite the holding in *Owen*, as well as the terms of the agreement, the Town has not advanced any argument to support its unilateral action to abandon the negotiated grievance arbitration process to replace Civ Serv Law §75 procedures through the enactment of the Local Law.

Based upon the holding in *Auburn*, as reaffirmed in *NYCPBA*, along with the applicability of Civ Serv Law §75 procedures to at least some employees in the PBA unit, i.e., honorably discharged veterans and volunteer firefighters, we conclude that the negotiated police disciplinary procedure in the agreement to replace Civ Serv Law §75 is not prohibited. Therefore, the Town violated §§209-a.1(d) and (e) of the Act when it implemented the Local Law, and thereby unilaterally nullified the parties' negotiated procedures to replace Civ Serv Law §75.

B(3) The Town Violated §§209-a.1(d) and (e) of the Act by Unilaterally Abandoning the Disciplinary Procedures Negotiated to Replace Town Law §155

We reach a similar conclusion with respect to the Town's exceptions which assert that negotiations over police disciplinary procedures are preempted by Town Law §§154 and 155.

The Town challenges the ALJ's legal conclusion that Town Law §§154 and 155,

²⁵ 41 PERB ¶7518 (Sup Ct Schenectady County 2008) nor.

²⁶ More recently, the Appellate Division, Fourth Department in *Farabell v Town of Macedon*, 62 AD3d 1246 (4th Dept 2009) sustained the termination of a Town police officer under Civ Serv Law §75 while, at the same time, recognizing the applicability of the police disqualification provisions contained in Town Law §151.

as general laws, do not render police discipline a prohibited subject of negotiations. The Town's challenge is premised on its interpretation of *NYCPBA*, certain *dicta* contained in the Court of Appeals' decision in *Police Benevolent Assn of New York State Troopers, Inc. v Division of State Police* (hereinafter *NYS Troopers PBA*)²⁷ along with the Town's criticism of the Board's decision in *Tarrytown*²⁸ and a lower court's decision in *Crawford*²⁹ which conflict with the Town's arguments.

In *City of New York*,³⁰ the Board emphasized the narrowness of the holding in *NYCPBA*. Subsequently, in *Tarrytown*, we concluded that "only special state legislation, enacted prior to CSL §§75 and 76, granting specific local officials the power and authority over police discipline, can preempt police discipline negotiations under *NYCPBA*."³¹ Therefore, we held in *Tarrytown* that a special law applicable to Westchester County village police departments, but not Village Law §8-804, a general law, preempted the negotiability of police discipline in the Village of Tarrytown.³² More recently, in *Albany*, a Board majority reaffirmed *Tarrytown* by stating that "*NYCPBA* holds that a special State law, enacted prior to Civ Serv Law §§75 and 76(4), granting specific local officials the power and authority over police discipline, preempts the

²⁷ 11 NY3d 96, 41 PERB ¶7511 (2008).

²⁸ *Supra* note 4.

²⁹ *Supra* note 6.

³⁰ 40 PERB ¶3017 at 3072, note 53 (2007).

³¹ 40 PERB ¶3017 at 3102.

³² 40 PERB ¶3017 at 3105, note 27.

negotiability of police discipline under the Act in that municipality."³³

No court has held that Town Law §§154 and 155, in conjunction with *NYCPBA* and other decisions, render town police disciplinary procedures a prohibited subject. In contrast, two lower courts have ruled that police disciplinary procedure is not a prohibited subject to town police in local jurisdictions which are not subject to a special state police discipline statute.³⁴

The interpretation of *NYCPBA* in *Tarrytown, Albany and Crawford* is supported by the Appellate Division, Second Department's decision in *Town of Wallkill v Town of Wallkill Police Benevolent Association*,³⁵ where it rejected the Town's argument,³⁶ premised on *NYCPBA*, that an arbitration award finding that the Town violated the disciplinary procedures in Article 29 of the agreement should be vacated on public policy grounds because the award usurped the Chief's disciplinary authority. Furthermore, our interpretation is consistent with the approach followed by the Appellate Division, First Department in *City of New York v Patrolmen's Benevolent Association of the City of New York*³⁷ (*NYCPBA II*), which distinguished *NYCPBA* based upon the specific investigatory authority delegated to the Police Commissioner by the New York City Administrative Code.

³³ *Supra* note 11, 42 PERB ¶3005 at 3009.

³⁴ *Elias v Town of Crawford*, *supra* note 5; *Werner v Town of Niskayuna*, *supra* note 25.

³⁵ 56 AD3d 482, 42 PERB ¶7506 (2d Dept 2008), *lv denied*, 12 NY3d 709, 42 PERB ¶7507 (2009).

³⁶ *Supra* note 41, Reply Brief of the Petitioner-Appellant Town of Wallkill, Point II, 2007 WL 5879759.

³⁷ 56 AD3d 70, 41 PERB ¶7514 (1st Dept 2008), *lv granted*, 12 NY3d 707 (2009).

In *Tarrytown* and *Albany*, we referenced the text and legislative history of the Act, together with Board and judicial precedent, to support the conclusion that New York public policy, as established by the Legislature, favors the negotiability of police disciplinary procedures except in local jurisdictions subject to special State police discipline statutes that pre-date Civ Serv Law §§75 and 76.³⁸

As noted in *Albany*, despite over three decades of Board and court decisions concluding that, in general, police disciplinary procedures constitute a mandatory subject, the Legislature has not amended §§201, 204 and 209(4) of the Act to exclude police disciplinary procedures from the subjects that constitute terms and conditions of employment and are mandatorily negotiable for police officers of counties, cities, towns, villages and police districts.

In contrast, the Legislature has enacted amendments to §§209(2) and (4) of the Act which demonstrate a clear public policy decision that the subject of disciplinary procedures for police officers is, in general, negotiable but excluded from the subjects that can be finally resolved in a compulsory interest arbitration for specifically defined negotiations units.³⁹

The text and legislative history surrounding compulsory interest arbitration for

³⁸ Our conclusions in *Tarrytown* and *Albany* were premised on *NYCPBA*, where the Court reaffirmed *Auburn*, but found that certain prior special laws can render police discipline a prohibited subject. At the same time, we recognize that the provisions of a general law, with respect to other subjects, can embody a strong public policy rendering a particular subject prohibited. See, *Mamaroneck PBA, Inc. v New York State Pub Empl Rel Bd*, 66 NY2d 722, 18 PERB ¶7015 (1985); *Matter of Board of Educ v New York State Pub Empl Rel Bd*, 75 NY2d 660, 23 PERB ¶7012 (1990).

³⁹ See, L 1995, c 432; L 1995, c 447; L 2001, c 586; L 2002, c 220; L 2002, c 232; L 2003, c 641; L 2003, c 696; L 2004, c 63; L 2005, c 737; L 2007, c 190; L 2008, c 179; L 2008, c 234; §§209.4(e), (f), (g), (h) and (i) of the Act. See also, *County of Suffolk and Suffolk County Sheriff*, 40 PERB ¶3022 (2007).

members of the State Police provide the most explicit articulation of legislative intent with respect to the negotiability of police disciplinary procedures. When the Legislature extended compulsory interest arbitration to members of the State Police in 1995, it expressly provided in §209(4) of the Act that disciplinary procedures for the State Police cannot be submitted for resolution at compulsory interest arbitration as it is for other police bargaining units.⁴⁰ The 1995 amendment added a new subsection (e) to §209(4) of the Act which states:

With regard to members of any organized unit of troopers, commissioned or non-commissioned officers of the division of state police, the provisions of this section shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; *and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions proscribed by law.*⁴¹ (emphasis added)

The supporting memorandum by then Assembly Majority Leader Michael Bragman demonstrates that §209(4)(e) of the Act was not intended to exclude the negotiability of disciplinary procedures for members of the State Police:

Sections 1 and 2 of this bill amend sections 209(2) and (4) of the civil service law, the State's binding arbitration law, to include members of the State Police. Section 3 of this bill limits binding arbitration to compensation issues (including such items as salary, overtime, vacation pay, etc.). *Other issues will be subject to existing collective bargaining procedures.*⁴² (emphasis added)

⁴⁰ L 1995, c 432.

⁴¹ L 1995, c 432 §3.

⁴² New York State Bill Drafting Commission, Legislative Retrieval System, c 432, Memorandum in Support of Bill No. A07370A (1995).

Majority Leader Bragman's reference to the "other issues" subject to existing negotiation procedures clearly refers to disciplinary procedures and other non-compensation related issues that, although excluded from resolution at compulsory interest arbitration, remain negotiable under the Act.

Six years later, in 2001, the Legislature eliminated the exclusion of police disciplinary procedures and other subjects from final resolution at interest arbitration for the State Police by repealing §209(4)(e) of the Act but retaining the grant of compulsory interest arbitration, in §§204(2) and 209(4) of the Act, for State Police negotiation impasses.⁴³ The Assembly supporting memorandum for the 2001 amendment makes clear that the bill's purpose was to require members of the State Police to be treated in the same manner as local government police by permitting impasses over the subject of police disciplinary procedures, and other non-compensation related issues, to be finally resolved at compulsory interest arbitration:

Local Police officers and Firefighters currently are afforded full binding arbitration (i.e. compensatory and non-compensatory issues are subject to binding arbitration.) The legislation would simply grant all State Police officers equal treatment with respect to their local counterparts.⁴⁴

Although the Legislature, in the following year, reinstated the exclusion of

⁴³ L 2001, c 587.

⁴⁴ New York State Bill Drafting Commission, Legislative Retrieval System, L 1995, c 587, Memorandum in Support of Bill No. A8589 (2001).

disciplinary procedures⁴⁵ from State Police compulsory interest arbitration, the plain meaning of the text and legislative history of the 1995, 2001 and 2002 amendments demonstrate a clear New York public policy choice that disciplinary procedures to be a subject of negotiations and mediation under the Act.⁴⁶

In support of its exceptions, the Town relies upon *NYS Troopers PBA* where the Court held that a police employee organization waived, in a negotiated agreement, the right of employees to be represented during a non-disciplinary critical incident review.

Despite the Court's holding, the Town cites to the following *dicta* in that decision:

While the Taylor Law (Civil Service Law § 200 *et seq.*) requires public employers to bargain in good faith concerning all terms and conditions of employment (*Matter of City of Watertown v. State of N.Y. Pub. Empl. Relations Bd.*, 95 N.Y.2d 73, 78 [2000]), when legislation commits police discipline to the discretion of local authorities, as a matter of public policy, discipline is a prohibited subject of collective bargaining (*Matter of Patrolmen's Benevolent Assn. of City of N.Y., Inc. v. New York State Pub. Empl. Relations Bd.*, 6 N.Y.3d 563 [2006]).⁴⁷

According to the Town, this *dicta* demonstrates that the holding in *NYCPBA* does

⁴⁵ L 2002, c 232. Section 209(4)(e) of the Act currently states:

With regard to members of any organized unit of troopers, investigators, senior investigators, investigator specialists and commissioned or non-commissioned officers of the division of state police, the provisions of this section shall not apply to issues *relating to disciplinary procedures and investigations* or eligibility and assignment to details and positions, which shall be governed by other provisions prescribed by law. (emphasis added).

⁴⁶ The Legislature's enactment of §209-a(1)(g) of the Act in 2007, with respect to disciplinary procedures and collective negotiations, which does not exempt police officers from coverage, constitutes additional legislative recognition that disciplinary procedures are subject to collective negotiations and impasse procedures, in general under the Act for police and quasi-law enforcement personnel. L 2007, c 244.

⁴⁷ 11 NY3d at 102, 41 PERB ¶7511 at 7543.

not distinguish between a special law and a general law. We disagree. While the Court's wording is broad, it is superfluous to the Court's holding that the employee organization in that case had waived the right to representation during a non-disciplinary critical incident review.⁴⁸

Similarly, we reject the Town's contention that the Court's reference in *NYS Troopers PBA* to a lower court decision,⁴⁹ during its recitation of the procedural history of the various disputes between the parties, constitutes an affirmation of that lower court decision's holding that a general police disciplinary statute rendered the subject prohibited under the Act. In fact, a review of the briefs submitted to the Court establishes that the parties did not fully brief the issue of negotiability or present to the Court the relevant text and legislative history of the Act described herein, because the primary appellate issues were justiciability and waiver.⁵⁰

In *State of New York*⁵¹ (*Division of State Police*) the Board held that Exec Law §215(3), a general law, renders State Police disciplinary procedures a prohibited subject of negotiations and that legal conclusion was confirmed by a lower court. In reaching its conclusion, however, the Board did not examine the text and legislative history of

⁴⁸ See, Judge Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 NYU L. Rev 1249, 1256-7 (2006).

⁴⁹ *State of New York (Division of State Police)*, 38 PERB ¶3007 (2005), *confirmed sub nom. PBA of New York State Troopers v State of New York*, 39 PERB ¶7013 (Sup Ct Albany County 2006) nor.

⁵⁰ See, *Police Benevolent Association of New York State Troopers, Inc v Division of New York State Police*, Albany Co Index No. 522-06, Brief on Behalf of Plaintiffs-Appellants, Brief for Respondents and Reply Brief on Behalf of Plaintiffs-Appellants, on file with the Clerk of the New York Court of Appeals.

⁵¹ *Supra* note 49.

§§209(2) and (4) of the Act, which provides the clearest articulation of public policy with respect to the negotiability of police disciplinary procedures. While the confirming court referenced §204(4)(e) of the Act as demonstrating that "even the Taylor Law expressly recognizes its own limitations,"⁵² the court may have misapprehended the precise nature of the limitation contained in the Act which, while excluding police disciplinary procedures from compulsory interest arbitration, does not establish a similar exclusion with respect to negotiations and mediation. In light of the centrality of legislative intent in discerning New York public policy, we are not persuaded that the reasoning in *State of New York (Division of State Police)* supports a conclusion that Town Law §§154 and 155 preclude the negotiability of police discipline under the Act.⁵³

Finally, unlike the prefatory sections in RCPA and WCPA, which expressly exclude the applicability of other statutes or rules to the discipline of town police officers subject to those special laws,⁵⁴ Town Law §155 expresses a clear legislative intent and public policy permitting police disciplinary authority to be subject to subsequent modification like the Second Class Cities Law provision analyzed in *Albany*.

Town Law §155 states in relevant part:

Except as otherwise provided by law, no member or members of such police department shall be fined, reprimanded, removed or dismissed until written charges shall have been examined, heard and investigated in such manner or by such procedure, practice, examination and investigation as the board, by rules and regulations from

⁵² *Supra* note 49, 39 PERB ¶7013 at 7030.

⁵³ However, we do not need to reconsider, in the present case, the issue of whether Exec Law §215(3) renders police discipline a prohibited subject under the Act as the Board held in *State of New York (Division of State Police)*.

⁵⁴ WCPA, §1; RCPA, §1.

time to time, may prescribe (emphasis added).⁵⁵

Therefore, we conclude that Town Law §§154 and 155 do not render police disciplinary procedures a prohibited subject because they are general laws and Town Law §155 explicitly provides that its terms can be superseded by other provisions of law, such as the Act.

Based upon the foregoing, we deny the Town's exceptions and affirm, as modified, the decision of the ALJ.

C. The Town Did Not Repudiate the Negotiated Disciplinary Procedures In Violation of §§209-a.1(a) and (d) of the Act

We next turn to the exceptions filed by the PBA challenging the ALJ's dismissal of its repudiation claim asserting that the Town did not have a colorable claim of right to implement the Local Law.

It is well-settled that a meritorious repudiation claim arises only in extraordinary circumstances, where one party to an agreement denies the existence of an agreement or acts in total disregard of the negotiated terms without any colorable claim of right.⁵⁶ In *Village of Monroe*,⁵⁷ we reaffirmed that an arguable defense to a repudiation claim can be predicated on law, external to the Act, which requires a respondent to disavow the existence of a collectively negotiated agreement or a specific contract provision. In order to establish a colorable claim of legal right, however, a respondent must present a persuasive legal argument demonstrating that its actions may be required by external

⁵⁵ In contrast, Town Law §153 does not contain the same prefatory language and it has been found to preempt negotiations over police longevity payments. See, *Town of Mamaroneck PBA, Inc. v New York State Pub Employ Rel Bd*, *supra* note 38.

⁵⁶ *Bd of Educ of the City Sch Dist of the City of Buffalo*, 25 PERB ¶3064 (1992).

⁵⁷ 40 PERB ¶3013 (2007).

law. Such a defense will not be sustained unless the legal argument is well grounded in case law, statute or regulation.

In the present case, we affirm the ALJ's conclusion that the Town established a colorable claim of right with respect to its unilateral action in implementing the Local Law. While we have rejected the Town's legal arguments that Town Law §§154 and 155 render police discipline a prohibited subject, we conclude that the Town's mistaken interpretation of *NYCPBA* constitutes a colorable claim of right premised on external law sufficient to reject the PBA's repudiation claim.⁵⁸

D. The Proposed Remedial Order Is Not Inconsistent With §205.5 of the Act

Finally, we deny the Town's exception challenging the ALJ's proposed order on the ground that the order purportedly violates §205.5 of the Act. The proposed order is well within PERB's authority to require the restoration of the *status quo*, along with make whole relief, to remedy violations of §§209-a.1(a), (d) and (e) of the Act.

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

IT IS, THEREFORE, ORDERED that the Town of Walkill shall forthwith:

1. Cease the implementation of Local Law No. 2 with respect to the discipline of police officers who are in the PBA bargaining unit;
2. Return to the contractual disciplinary procedures in Article 29 of the agreement between the Town and the PBA, which remain in effect pursuant to § 209-a.1(e) of the Act;
3. Rescind any disciplinary action taken against any unit employee pursuant to Local Law No. 2 without prejudice to proceeding under the contractual disciplinary procedures in Article 29 of the agreement;

⁵⁸ *County of Orange and Sheriff of Orange County*, 25 PERB ¶3004 (1992), *confirmed sub nom.* 26 PERB ¶7004 (Sup Ct Rockland County 1993).

4. Make whole any unit employee who sustained any monetary loss as a result of the Town's use of the procedure in Local Law No. 2, together with interest at the maximum legal rate.
5. Sign and post a notice in the form attached at all locations normally used by it to post written communications to unit employees.

DATED: July 23, 2009
Albany, New York


Jerome Lefkowitz, Chairman


Robert S. Hite, Member


Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Town of Walkill in the unit represented by the Town of Walkill Police Benevolent Association, Inc.(PBA) that the Town of Walkill will forthwith:

1. Cease the implementation of Local Law No. 2 with respect to the discipline of police officers who are in the PBA bargaining unit;
2. Return to the contractual disciplinary procedures in Article 29 of the agreement between the Town and the PBA, which remain in effect pursuant to § 209-a.1(e) of the Act;
3. Rescind any disciplinary action taken against any unit employee pursuant to Local Law No. 2 without prejudice to proceeding under the contractual disciplinary procedures in Article 29 of the agreement;
4. Make whole any unit employee who sustained any monetary loss as a result of the Town's use of the procedure in Local Law No. 2, together with interest at the maximum legal rate.

Dated

By
on behalf of Town of Walkill

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