STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LAKE PLACID POLICE BENEVOLENT ASSOCIATION,

Petitioner,

-and- **CASE NO. C-6232**

LAKE PLACID VILLAGE, INC.,

Employer,

-and-

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor.

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, and it appearing that a negotiating representative has been selected,

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

IT IS HEREBY CERTIFIED that the Lake Placid Police Benevolent Association has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of

grievances.

Included: All Police Officers.

Excluded: Chief, Assistant Chief and all other employees.

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

DATED: May 27, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 342, UMD, ILA, AFL-CIO,

Petitioner,

- and -

CASE NO. C-6233

UNIONDALE FIRE DISTRICT,

Employer.

WILLIAM C. DeWITT, ESQ., for Petitioner

WILLIAM M. HENNESSEY, for Employer

BOARD DECISION AND ORDER

On December 6, 2013, Local 342, UMD, ILA, AFL-CIO (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Uniondale Fire District (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

Included: Automotive Mechanic, Cleaner, Fire Apparatus Mechanic, Firehouse Maintainer, Fire Prevention Officer and Senior Firehouse Maintainer.

Excluded: All elected Commissioners, District Secretary and all other employees.

Pursuant to that agreement, a secret-ballot election was held on March 17, 2014, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective negotiations by the petitioner, and IT IS ORDERED that the petition is dismissed.

DATED: May 27, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SIMPSON GRAY,

CASE NO. U-31531

Charging Party,

-and-

UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondent,

-and-

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

Employer.

SIMPSON GRAY, *pro se*

RICHARD E. CASAGRANDE, GENERAL COUNSEL (ERIC W. CHEN of counsel), for Respondent

DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS AND COLLECTIVE BARGAINING (KELLIE TERESE WALKER of counsel), for Employer

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Simpson Gray to a decision of an Administrative Law Judge ("ALJ") that dismissed his improper practice charge against the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO ("UFT") in which Gray alleged that UFT violated § 209-a.2 (c) of the Public Employees' Fair

Employment Act ("Act").[1] The ALJ held that Gray refused to prosecute his charge at a long-scheduled hearing on October 8, 2013.

EXCEPTIONS

Gray argues that he did not refuse to prosecute his charge. Rather, according to Gray, the ALJ unfairly refused to grant his request to cancel the hearing so that he could review the nearly 50 Administrative Law Judge exhibits that the ALJ introduced into the record at the outset of the hearing. In effect, he argues that the ALJ prejudiced his ability to prosecute his case to such an extent that he could not proceed on the scheduled day of the hearing. In that regard, he alleges that the ALJ was biased against him, noting that she had previously dismissed an improper practice charge that he had filed against UFT, also because he refused to present his evidence.

UFT and the Board of Education of the City School District of the City of New York ("District"), a statutory party pursuant to § 205.5 (d) and 209-a.3 of the Act filed responses to the exceptions supporting the ALJ's determination.

FACTS

The relevant facts with record references, largely consisting of the processing history of Gray's improper practice charge, are accurately set forth in the ALJ's decision. Briefly, on December 2, 2011, Gray filed an improper practice charge alleging, as amended, that the UFT violated § 209-a.2 (c) of the Act when it refused to assist him in appealing an unsatisfactory performance rating that the District gave to him. UFT and the District filed

[1] 46 PERB ¶ 4602 (2013).

answers and amended answers, each denying any violation of the Act and raising timeliness defenses.

At all relevant times, PERB's procedure was to assign improper practice charges to a conferencing ALJ, and then, if a hearing were necessary, to a different ALJ to conduct the hearing and write a decision. Accordingly, Gray's improper practice charge was assigned to a conferencing ALJ (Angela Blassman). After the matter was conferenced, it was assigned to a hearing ALJ (Philip Maier), who, by letter dated April 12, 2012, scheduled the matter for a hearing on June 13, 2012. By letter dated May 9, 2012, ALJ Maier adjourned the hearing in order to afford Gray time to file an amended charge. By letter dated May 24, Maier granted Gray an extension until June 8 to file his amendment. By letter dated August 27, Maier advised the parties that he had accepted employment elsewhere and that the matter would be reassigned to another ALJ to conduct the hearing. Thereafter, by letter dated January 10, 2013, the parties were advised that the matter had been reassigned to ALJ Elena Cacavas, the only remaining ALJ in PERB's Brooklyn office who could conduct the hearing under PERB's bifurcated procedure. The letter further advised that a hearing was scheduled for July 17, 2013.

UFT requested that the hearing be adjourned to another date due to the unavailability of certain witnesses. In requesting the adjournment, UFT's attorney explained that he had attempted to obtain Gray's consent, but that Gray had not responded to him. Gray then responded to UFT's letter on April 22, 2013, arguing that the case was taking "far too long for a proper and timely adjudication." ALJ Cacavas granted UFT's request by letter dated May 16, 2013, noting that Gray had not responded to UFT's request for his consent to the adjournment and that the grounds for UFT's request, the unavailability of witnesses,

constituted good cause. Although initially rescheduled for one day of hearing – October 9, 2013 – the ALJ later added an additional day – October 8 – to accommodate Gray's interest in completing the hearing quickly in the event a second hearing day was required.

The hearing opened on October 8, 2013, with the ALJ introducing 48 "ALJ Exhibits" consisting of the pleadings and letters and notices. All had been previously sent to the parties by PERB or submitted to PERB by the parties and copied to each other. Indeed, all but a very few of the documents consisted of letters regarding the processing of the case, such as requests for adjournments, responses and notices from the assigned ALJs. The balance of the documents consisted of the charge, its amendment, and the answers thereto. Each exhibit was accurately described for the parties by the ALJ on the record, and the ALJ advised the parties that they could introduce additional documents if they found it necessary.

Gray requested that the hearing be cancelled and rescheduled for another date so that he could review the ALJ exhibits. Noting the prolonged period it had taken to schedule the hearing for October 8 and 9, the ALJ observed that the documents had been in Gray's possession for many months and that he had had an ample opportunity to review them and prepare for the hearing.[2] Indeed, the latest of the ALJ exhibits was dated May 16, 2013, from ALJ Cacavas scheduling the hearing for October 8 and 9, 2013. Therefore, the ALJ called upon Gray to take the stand and present his proof. He replied, again, that he was unprepared to do so as he had not reviewed the ALJ exhibits. Again, he asked for an adjournment, which the ALJ again denied.

Gray refused to take the stand and present his proof in support of his charge. Therefore, the ALJ dismissed his charge.

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[2] Transcript, p. 14.

DISCUSSION

We find no reason to conclude that Gray was prejudiced – much less denied due process – by the ALJ's insistence that he present his proof in support of his charge at the October 8 hearing; a hearing that had been scheduled for nearly five months. There is no indication that Gray had not submitted or received any of the ALJ exhibits, which the ALJ accurately described on the record before accepting them into evidence.

Moreover, contrary to Gray's argument, an ALJ's bias toward a party is not established by the mere fact that the ALJ had previously ruled or decided against that party in any given proceeding or in any previous matter. Indeed, we find not the slightest suggestion that the ALJ was biased against Gray in denying his request to cancel the October 8 hearing or in dismissing his charge for want of prosecution. Accordingly, there is no reason why she was disqualified or should have recused herself from the hearing.

Finally, Gray was well aware of the potential consequences for not putting in his proof in support of his charge. In *United Fedn of Tchrs and District (Gray)*,[3] a substantially similar result ensued after Gray failed to adduce any proof in support of his charge. Accordingly, we endorse the ALJ's reliance on *United Fedn of Teachers (Armatas)*, where we held:[4]

> A charging party who takes it upon himself or herself to refuse to participate in a PERB proceeding because of an adverse ruling does so at his or her peril because such a refusal constitutes a failure to prosecute the charge and may result in the dismissal

[3] 42 PERB ¶ 3011 (2009), *petition for review dismissed sub nom. Gray v PERB*, 43 PERB ¶ 7004 (Sup Ct New York County 2-0010).

[4] 31 PERB ¶3042, at 3092 (1998).

of the charge.

Therefore, we deny Gray's exceptions and affirm the ALJ's decision dismissing his improper practice charge in its entirety.

DATED: May 27, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BLOOMING GROVE POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

CASE NO. U-28579

- and -

TOWN OF BLOOMING GROVE,

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

JACOBOWITZ & GAILEY, LLP (J. BENJAMIN GAILEY of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Town of Blooming Grove ("Town") to the determination of an Administrative Law Judge (ALJ) that it violated §209-a.1 (d) of the Public Employees' Fair Employment Act ("Act") by unilaterally terminating a past practice of allowing employees represented by the Blooming Grove Police Benevolent Association, Inc. ("PBA") the right to swap shifts and tours with one another.[1]

EXCEPTIONS

The Town alleges that the PBA failed to establish that shift and tour swapping among unit employees amounted to a "past practice" that is cognizable under the Act. Specifically, it alleges that such swaps were infrequent and unknown to the Town.

[1] 46 PERB ¶ 4576 (2013).

Alternatively, the Town alleges that the parties' collective bargaining agreement reflects its satisfaction of its duty to negotiate concerning the termination of the practice or that the PBA waived its bargaining rights concerning the subject.

The PBA filed a response in support of the ALJ's determination.

Having carefully reviewed the record and considered the parties' arguments, we affirm the decision of the ALJ, and we adopt her recommended order.

FACTS

The relevant facts are accurately recounted by the ALJ.

The Town operates a small police department consisting of 11 police officers, one detective, four sergeants and a chief of police. The 11 police officers and the detective are in a collective bargaining unit represented by the PBA. The sergeants are in a separate bargaining unit.

The PBA and the Town were, at the time of the at-issue conduct, parties to a collective bargaining agreement ("CBA") that expired on December 31, 2008. That agreement was renewed, in material respects, and expired on December 31, 2011. Article 6 of the CBA provides for three shifts for police officers (7:00 am – 3:00 pm, 3:00 pm – 11:00 pm, and 11:00 pm – 7:00 am) and the detective (10:00 am – 6:00 pm). Pursuant to Article 6, the police officers are assigned to their shifts for rotating tours of four days on and two days off, "unless 24-hour prior notice is given on shift change." In regard to such shift changes, Article 6 further provides: "Any such change in shift will only occur due to a shortage in personnel due to absence or special events requiring a concentration of personnel during a shift."

In an April 11, 2007 arbitration award, an arbitrator had occasion to construe Article 6 of the CBA. There, the arbitrator held that Article 6 granted the Town the right to involuntarily change an officer's shift under the prescribed conditions. However, the arbitrator held that the CBA was breached when Police Chief Carl Schupp directed a police officer to work a different shift in order to have him attend a training program because the conditions permitting such an involuntary change were absent.

Starting in July, 2008, Schupp began to deny requests for *voluntary* shift and tour swaps. In response, the PBA filed the instant improper practice charge.

Two witnesses were called by the PBA to testify at the hearing, Ronald Moraski, a 14-year employee of the Town's Police Department and the PBA's Vice President, and Lisa LiVigni, a unit police officer from 1996 until she was promoted to a nonunit sergeant in 2009. As accurately described by the ALJ, their testimony shows that for at least 10 years the department permitted a practice by which police officers could swap shifts and tours upon notice to the scheduling sergeant or, in his or her absence, another sergeant or the chief of police if no sergeant were available. They testified that such swaps were for hours, days, months and, in one case, a year in duration. The practice ended in July 2008, when Police Chief Schupp denied requests to swap shifts by LiVigni and Moraski. According to Moraski, Schupp explained that if he could not direct involuntary shift changes pursuant to the 2007 arbitration award, then he would no longer permit voluntary swaps.

Although the Town's answer to the charge alleges that the April 2007 arbitration award prohibits Schupp from allowing shift and tour swaps, Schupp testified that he did not recall the conversation with Moraski about why he would no longer permit voluntary

shift and tour swaps. Nevertheless, consistent with Moraski's and LiVigni's testimony, Schupp testified the he knew of the practice of tour and shift swapping during his tenure as a police officer from 1981, sergeant from 1987 and chief of police from 1994. To his recollection, however, such swaps were "infrequent." Indeed, according to Schupp, after he became chief of police, the requests were made to one of the sergeants, not him. Sometimes a sergeant would advise him of a swap adding that the sergeant assumed he would have no problem with it. Thus, *to his recollection*, swaps occurred perhaps five times during his tenure as a sergeant and another five times since he became Chief. However, he also testified that swaps occurred a few times each year. He recalled having personally approved some of them.

Schupp testified that swaps were often made between police officers and sergeants. He testified that he put a stop to such inter-ranks swaps because one of the sergeants was doing it too frequently and was sometimes reluctant to repay the police officer for the swap, causing tension among the ranks. After that, he permitted swaps only between employees of the same rank. He testified that other than that restriction, "there were no parameters set out" governing swaps.[2] After denying the at-issue requests from police officers to swap shifts and tours, Schupp continued to permit sergeants to swap them.

Despite Schupp's general knowledge of shift and tour swaps, he denied any recollection of specific swaps about which Moraski and LiVigni testified. Indeed, he denied any memory of a conversation memorialized in a letter from LiVigni to him about his denial of a specific swap that she requested to attend a funeral in July 2008.

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[2] Transcript, p. 71.

DISCUSSION

A collective bargaining obligation attaches to a past practice concerning non-contractual, mandatorily negotiable terms and conditions of employment where the practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the practice will continue.[3] The reasonableness of the expectation among the affected employees that the practice will continue can be presumed from the practice's duration, with consideration of the specific circumstances under which it has existed.[4] Following the *prima facie* showing, an employer may present a defense demonstrating that it lacked either actual or constructive knowledge of the practice and, thus, that it had not acquiesced to it.[5] However, constructive knowledge exists when the past practice is reasonably subject to the employer's managerial and/or supervisory responsibilities and obligations.[6]

Here, we find, as did the ALJ, that the record reveals a 10-year practice pursuant to which police officers were permitted to swap shifts and tours whenever they wished, upon notice to the scheduling sergeant or, in the absence of a scheduling sergeant,

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[3] *Chenango Forks Cent School Dist*, 40 PERB ¶ 3012 (2007), *confirmed sub nom. Chenango Forks Cent Sch Dist v New York State Pub Empl Relations Bd*, 95 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affirmed* 21 NY3d 255, 46 PERB ¶ 7008 (2013); *Manhassett Union Free Sch Dist*, 41 PERB ¶ 3005 (2008), *confirmed and mod in part sub nom. Manhassett UFSD v New York State Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remand* 42 PERB ¶ 3016 (2009); *Fashion Inst of Tech*, 41 PERB ¶ 3010 (2008), *confirmed sub nom. Fashion Inst of Tech v New York State Pub Empl Relations Bd*, 68 AD3d 605, 42 PERB ¶ 7011 (1st Dept 2009).

[4] *Id.*

[5] *Id.*

[6] *Id.*

another sergeant or the chief of police. Although such swaps were permitted to be made with sergeants, the ALJ correctly held that the termination of those inter-rank swaps was not mandatorily negotiable.[7] Conversely, shift and tour swaps that do not affect staffing requirements, such as those in issue here, are mandatorily negotiable.[8]

We further find that the practice was sufficiently continuous, uninterrupted and unequivocal to establish a reasonable expectation among the affected employees that the practice would continue. While Schupp's characterization of the frequency of shift and tour swaps differs from Moraski's and LiVigni's, the record shows that whenever a swap was requested it was permitted until Schupp terminated the practice. Put another way, while the frequency of the swaps is a relevant inquiry, the consistency of the practice is dispositive. In that regard, we find no fault with the ALJ's finding that Schupp's lack of recollection is less persuasive regarding the extent of the practice than Moraski's and LiVigni's recollection and description.[9] Although they could not recount the dates of the swaps or the persons involved, their testimony as a whole indicates to us that the practice was so routine as to be of little note when it occurred.

The record also establishes that Schupp and his sergeants knew of the practice. Indeed, the testimony of all three witnesses shows that the swaps were undertaken on notice to the supervisory officers.

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[7] *See, e.g., City of Oneida*, 14 PERB ¶ 3095 (1981). *Cf., Local 589, International Association of Fire Fighters, AFL-CIO*, 16 PERB ¶ 3030 (1983).

[8] *Id.*

[9] *See, e.g., Board of Educ of the City Sch Dist of the City of New York (Jenkins)*, 41 PERB ¶ 3007 (1008), *confirmed sub nom. Jenkins v New York State Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct New York County 2008), *affd* 67 AD3d 567, 42 PERB¶7008 (1st Dep't 2009).

Accordingly, we find that the record sufficiently establishes all elements of a past practice that may not be unilaterally terminated. Because the Town unilaterally terminated the practice, it violated § 209-a.1 (d) of the Act, unless the balance of its exceptions have merit.

The Town's exceptions allege that the parties' CBA manifests the satisfaction of its duty to negotiate concerning shift and tour swaps or that the PBA waived its bargaining rights concerning the subject. However, while the Town alleged in its answer to the charge that PERB lacked jurisdiction over the dispute; it did not allege either affirmative defense of duty satisfaction or waiver. Therefore, the Town's exceptions related to those defenses are not properly before us.[10]

Even if the Town's affirmative defenses were properly before us, we would reject them. Article 6 of the parties' CBA, upon which the Town chiefly relies, establishes fixed shifts and tours that could be changed by the Town only under specific circumstances in order to accommodate the Town's staffing requirements. Article 6 does not address voluntary shift and tour exchanges between employees of equal rank that do not affect the Town's staffing needs on any particular tour or shift. Furthermore, Article 16 of the CBA – the contractual management's rights clause – reserves to the

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[10] *See, New York City Transit Auth*, 20 PERB ¶ 3037 (1987), *confirmed sub nom. New York City Transit Auth v New york State Pub Empl Relations Bd*, 147 AD2d 574, 22 PERB ¶ 7001 (2d Dept 1989); *Clarkstown Cent Sch Dist*, 24 PERB ¶3047 (1991) ("Waiver is an affirmative defense which must be raised in the answer if the defense is to be properly considered."); *Shelter Island Union Free Sch Dist*, 45 PERB ¶ 3032 (2012); *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶ 3023 (2009); *County of Greene and Sheriff of Greene County*, 42 PERB ¶3031 (2009); *New York City Trans Auth*, 41 PERB ¶ 3014 (2008) (the affirmative defense of duty satisfaction must be pleaded and proved).

Town "all authority, rights and responsibilities" over its employees "under applicable laws and regulations . . . ." Among the applicable rights and responsibilities are those imposed on the Town under the Act, including the right and responsibility to negotiate with the PBA concerning police officers' terms and conditions of employment, such as the right to swap shifts and tours. Thus, Article 16 does not reflect the PBA's waiver of its bargaining rights concerning such swaps.

In finding that the Town's exceptions are unavailing, we note that the Town takes no exception to the ALJ's conclusion that PERB possesses jurisdiction over the dispute. While our jurisdiction is not determined by the parties' arguments, we agree with the ALJ's jurisdictional determination.

Accordingly, we deny the Town's exceptions and affirm the decision of the ALJ that the Town violated § 209-a.1 (d) of the Act by unilaterally terminating the practice of permitting officers represented by the PBA to swap shifts and tours upon notice to the scheduling sergeant or, in his or her absence, another sergeant or the chief of police, and we adopt the ALJ's recommended remedial order.

THEREFORE, IT IS ORDERED THAT the Town of Blooming Grove will:

1. Reinstate the past practice of allowing unit members to exchange, or swap, tours of duty, or portions of tours of duty, with one another, as it existed prior to July 2008;

2. Make unit employees whole for wages and benefits lost, if any, resulting from the denial of intra-unit tour exchanges, plus interest at the maximum legal rate; and

3. Sign and post the attached notice at all physical and electronic locations normally used to post notices to PBA unit members.

DATED: May 27, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO

THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

We hereby notify all employees of the Town of Blooming Grove (Town) in the unit represented by the Blooming Grove Police Benevolent Association, Inc. (PBA), that the Town will:

1. Reinstate the past practice of allowing unit members to exchange, or swap, tours of duty, or portions of tours of duty, with one another, as it existed prior to July 2008; and

2. Make unit employees whole for wages and benefits lost, if any, resulting from the denial of intra-unit tour exchanges, plus interest at the maximum legal rate.

Dated . . . . **By** . . . .
On behalf of Town of Blooming Grove

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

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

CASE NO. C-6005

Petitioner,

- and -

STATE OF NEW YORK,

Employer.

LISA M. KING, GENERAL COUNSEL (STEVEN M. KLEIN of counsel), for Petitioner

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL, for Employer

INTERIM BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the State of New York ("State") to an interim decision of PERB's Director of Public Employment Practices and Representation ("Director") in a representation proceeding initiated by the New York State Public Employees Federation, AFL-CIO ("PEF").[1] By its petition, PEF seeks to add nearly 2,000 employees to its bargaining unit of approximately 56,000 professional, scientific and technical employees (the "PS&T" unit). In his interim decision, the Director determined that 256 of the at-issue employees were properly placed into PEF's bargaining unit based upon the parties' March 27, 2013 agreement that the titles share a community of interest with titles in PEF's unit and that the employees do not perform

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[1] 46 PERB ¶ 4006 (2013).

duties warranting their designation as managerial or confidential within the meaning of § 201.7 (a) of the Public Employees' Fair Employment Act ("Act" or "Taylor Law"). As consideration for the agreement, PEF withdrew 11 other pending representation petitions involving numerous other positions that PEF wished to add to its unit. There remain hundreds of positions at issue in the instant petition.

EXCEPTIONS

The State argues that the Director should have granted its post-decision request to be relieved of its agreement with PEF on which he based his interim decision. Alternatively, it asks us to release it from its stipulation with PEF and remand the matter to the Director to decide the merits of the representation issues under §§ 201.7 (a) and 207.1 of the Act based on an evidentiary record. PEF argues that the State should not be released from its stipulation, emphasizing, among other things, that PEF has withdrawn several other representation petitions concerning other positions in consideration for the State's agreement that the at-issue 256 employees should be placed into its unit.

BACKGROUND

Since September 27, 1978, when PEF first became the representative of the PS&T unit,[2] the Governor's Office of Employee Relations ("GOER") and PEF have applied a process to expeditiously determine how newly created or reclassified titles would be treated for purposes of determining their representational status under the Act; that is, whether the positions should be treated as managerial or confidential or should

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[2] 11 PERB ¶3077, ¶3078, (1978).

be placed into PEF's bargaining unit. Under that process, upon creation or reclassification of a position, the State makes a determination whether the position performs duties warranting its designation as managerial or confidential, and it notifies PEF of its determination. If PEF disagrees with the State's determination that a position is managerial or confidential, it can file a petition with PERB to represent the position. That procedure was formally accepted by PERB in 1986.[3]

On August 25, 2010, PEF filed a petition to add approximately 2,000 employees to its bargaining unit of about 56,000 employees.[4] Thereafter, PEF and GOER engaged in settlement negotiations concerning that petition and eleven others that were pending before PERB that PEF had previously filed. Ultimately, PEF agreed to withdraw its petitions in all cases other than the instant one, while GOER agreed that all employees claimed by PEF in that petition other than those working for the Department of Transportation would be accreted to the PS&T unit. Therefore, they submitted to the Director a stipulation dated March 27, 2013, reflecting their agreement that certain employees at issue in the instant petition share a community of interest with others in the PS&T Unit and that none performs duties that would render them managerial or confidential within the meaning of the Act. In consideration, PEF withdrew its petitions regarding certain other titles.

Accordingly, by interim decision dated March 27, 2013, the Director placed the agreed upon positions into PEF's bargaining unit.

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[3] Joint Memorandum of Procedure concerning Negotiating Unit Designation, October 17, 1986.

[4] Case No. C-6005.

By letter dated April 19, 2013, after receiving the Director's interim decision, GOER requested that he retract it and consider PEF's petition on its merits rather than on the parties' agreement. It urged that the various State agencies where the employees work had not agreed to the placement of the titles into PEF's bargaining unit.[5]

PEF responded by opposing GOER's request. By letter dated May 9, 2013, the Director denied GOER's request.[6]

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[5] At page 15 of its brief to us, GOER recited that it discovered:

> through contacts from affected state agencies, that GOER had not provided the agencies whose employees are at issue in the Stipulation with sufficient guidance to properly analyze whether the employees who were the subject of the Stipulation were still performing in a managerial or confidential capacity. Indeed, GOER now has reason to believe that certain of the employees continue to perform duties that are appropriately deemed managerial or confidential under *Civil Service Law §201.7(a)*, contrary to what the State agreed to in the Stipulation.

[6] In his letter denying GOER's request to be relieved of its stipulation, the Director stated, in relevant part:

> [T]he State argues that PERB's decision in Public Employees' Federation, 45 PERB ¶3005 (2012), is controlling here. That case is also unavailing to the State. In that matter, the Board held that under circumstances not here relevant, a party may withdraw a request made pursuant to §304.1(d) of the Rules to withdraw an improper practice charge prior to the Director's processing that withdrawal request. Simply put, it is neither analogous nor applicable to any issue raised here.
>
> Moreover, apart from the above, the State's motion is factually insufficient in that it is based solely in conclusory terms. It states that "certain of the employees who were the subject of the stipulation continue to perform duties that are

DISCUSSION

GOER argues that PERB has it within its power to invalidate the stipulation in this matter and to void the Interim Decision on the ground that it was an inadvertent error for GOER's attorney to have executed it.

PERB, as any adjudicative agency, may and should invalidate a settlement when it is appropriate to do so, but only then. Indeed, in *Hallock v State of New York*, 64 NY2d 224 (1984), Judge Kaye wrote in the opening sentence (*id.*, at p. 228):

> A statement of settlement made by counsel in open court may bind his clients even where it exceeds his actual authority.

There, Hallock's lawyer had represented Hallock through prior settlement negotiations, which cloaked him with apparent, if not actual authority to finally settle the dispute. Therefore, the Court rejected Hallock's effort to be relieved of his obligations under the settlement on the theory that his attorney lacked authority to bind him to its terms.

In reaching its conclusion in *Hallock*, the Court found it relevant, but not dispositive, that the State established detrimental reliance on the settlement. According to the Court (*id.*, at p. 232):

> The discontinuance of lengthy litigation on the day of trial, in reliance on the adversary's settlement stipulation -- even for defendants, who often may

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appropriately deemed managerial or confidential...", but it does not identify those individuals. Their stipulation and my decision in reliance thereon, placed approximately 250 individuals into PEF's bargaining unit. The State's claim that only certain employees, absent identification of those individuals, is simply too vague to support an invalidation of its entire stipulation as to approximately 250 employees.

> prefer that judgment be deferred -- coupled with plaintiffs' silence for more than two months thereafter, is itself a change of position, if such a showing is indeed even required before the doctrine of apparent authority may be invoked. [Footnote omitted.] We need not inquire whether there was any actual loss of witnesses or evidence, for we recognize that, after five years, halting the machinery of litigation when a trial scheduled to begin that day is marked off the calendar constitutes detriment. Additionally, in the words of the dissenting Justice at the Appellate Division, to set aside this settlement stipulation "invites destruction of the process of open-court settlements, for every such settlement would be liable to subsequent rescission by the simple expedient of a litigant's self-serving assertion, joined in by his attorney and previously uncommunicated to either the court or others involved in the settlement, that the litigant had limited his attorney's authority" (98 AD2d 856, 858-859).

Here, as in *Hallock*, the parties have a well-established history of negotiating binding settlements regarding representation questions identical to those at issue before the Director, at a minimum, cloaking GOER with apparent authority to bind the State to the terms of the instant settlement.[7] Indeed, as a matter of law, GOER has actual authority to negotiate such settlements.

Article 24 of the Executive Law created GOER as an executive agency of the State and, in § 650, it provides that GOER shall:

> act as the governor's agent in conducting collective negotiations, to assure the proper implementation and administration of agreements reached pursuant to such negotiations, and to assist the governor and direct and coordinate the state's efforts with regard to the state's powers and duties under the public employees' fair employment act.

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[7] *State of New York,* 30 PERB ¶ 4018 (1997); 35 PERB ¶ 4016 (2002); 38 PERB ¶ 4022 (2005); 39 PERB ¶ 4007 (2006); 39 PERB ¶ 4016 (2006); 40 PERB ¶ 4015 (2007).

Executive Law § 653 provides that GOER "shall assist the governor with regard to relations between the state and its employees." Examples of such assistance are:

> acting as the governor's agent in discharging the powers and duties conferred on the governor by the public employees' fair employment act, [footnote omitted] as amended, including, without limitation, conducting collective negotiations with recognized or certified employee organizations and executing agreements reached pursuant thereto.

Therefore, GOER does not act as agent for each of the State's many agencies and departments, and their authorization to negotiate agreements with PEF under the Taylor Law is not required to enable GOER to bind the State to stipulations, including those that concern the representation status of State employees.

Furthermore, Executive Law §654 provides that other State "officers, departments boards, commissioners or agencies" can be required to cooperate with GOER in implementing and administering agreements that GOER has reached with State employee organizations, and not the other way around. If GOER wishes to condition its negotiations on the approval of each of the affected State agencies, that limitation on its authority must be clearly communicated during the negotiations, even assuming such conditions are enforceable over objection of the at-issue recognized or certified employee organization. Here, as in *Hallock*, there is no indication that PEF was aware of, much less that it acquiesced in, any such limitation on GOER's authority to agree to the at-issue unit placement.

Moreover, as in *Hallock*, PEF has acted with detrimental reliance on the settlement by withdrawing 11 other petitions concerning many other employees in

consideration for the State's agreement that the at-issue employees are appropriately included in PEF's bargaining unit. Likewise, as a result of the agreement, the parties are relieved of a great deal of litigation regarding the merits of the placement of each employee into PEF's unit.

Accordingly, on the facts of this case, we reject GOER's argument that it should be permitted to withdraw from its agreement with PEF.

NOW, THEREFORE, the State's exceptions are denied and PEF's petition in Case No. C-6005 is granted to the extent of the parties' March 27, 2013 stipulation, and the matter is remanded to the Director for further proceedings, as appropriate, to resolve the representation questions presented by PEF's petition concerning those positions not addressed herein.

DATED: May 27, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Petitioner,

CASE NO. CP-1367

- and -

DORMITORY AUTHORITY OF THE STATE OF NEW YORK,

Employer.

STEVEN A. CRAIN AND DAREN J. RYLEWICZ, GENERAL COUNSELS (PAUL S. BAMBERGER of counsel), for Petitioner

WHITEMAN, OSTERMAN & HANNA, LLP (NORMA G. MEACHAM, ESQ., of counsel), for Employer

INTERIM BOARD DECISION

This matter comes to us on interlocutory exceptions filed by the Dormitory Authority of the State of New York ("DASNY") to a March 5, 2014 letter ruling made by the Assistant Director of Public Employment Practices and Representation, in the absence of the assigned Administrative Law Judge, concerning the processing of a unit clarification/placement petition filed by the Civil Service Employees Association, Inc., Local 1000, AFSME, AFL-CIO ("CSEA"). The Assistant Director ruled, over DASNY's objection, that CSEA's petition seeking to add certain titles to its unit should be processed notwithstanding that the at-issue titles had been previously designated by the Board as managerial or confidential pursuant to § 201.7 (a) of the Public Employees' Fair Employment Act.[1] Further processing of CSEA's petition has been put on hold by the Assistant Director, pending disposition of DASNY's exceptions.

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[1] *DASNY*, 336 PERB ¶ 4004 (2003), 33 PERB ¶ 4000.11 (200), 18 PERB ¶ 4000.20 (1985) (certain employees designated on consent); *DASNY*, 38 PERB ¶ 4015, *afd in*

EXCEPTIONS

Relying on the prior designations of the at-issue employees,[2] DASNY argues that the instant petition should not have been processed because it is barred by both *collateral estoppel* and *res judicata*.

CSEA opposes the exceptions on two grounds. First, it argues that the exceptions are procedurally defective because they were not preceded by a notice of motion and motion for permission to file them. Second, it argues that the prior designations on which DASNY relies were granted on consent or on the basis of analyses that have been subsequently reversed by the Board.[3] Therefore, CSEA concludes that the prior designations are not controlling.

DISCUSSION

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part and revsd in part ¶ 3029 (2005), *confd sub nom. CSEA v PERB*, 34 AD3d 884, 39 PERB ¶ 7011 (3d Dept 2006) (certain employees designated on the merits of a record).

[2] *Id.*

[3] *See, Fashion Inst of Tech*, 42 PERB ¶ 3018 at 3061-3062 (2009), where we held:

> [I]n *Dormitory Authority of the State of New York* [38 PERB ¶ 3029 (2005)], the Board announced a "different template with which to evaluate the managerial status of a title" [*id.*, at p 3097] 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 to § 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 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 PERB ¶ 3099 (1979)] 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).

Because we deny the interlocutory exceptions, we do not treat with CSEA's procedural objection.

Both parties have legitimate arguments regarding the merits of CSEA's petition. However, none is so convincing as to warrant its summary dismissal or grant. Therefore, we find it most appropriate to have the parties address their arguments to the assigned ALJ. We will consider the merits of the petition on timely exceptions to the ALJ's final decision.

Accordingly, DASNY's interlocutory exceptions are hereby denied, and the matter is remanded to the assigned ALJ for further processing.

DATED: May 27, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member