STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 814, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

CASE NO. CU-6208

NEW YORK RACING ASSOCIATION, INC.,

Employer,

-and-

FEDERATION OF PRIVATE EMPLOYEES, A DIVISION OF THE NATIONAL FEDERATION OF PUBLIC AND PRIVATE EMPLOYEES AFFILIATED WITH DISTRICT 1 MARINE ENGINEERS BENEFICIAL ASSOCIAITON (MEBA), AFL-CIO,

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 State Employment Relations Act (SERA), and it appearing that a negotiating representative has been selected,

Pursuant to the authority vested by §705 of SERA,

IT IS HEREBY CERTIFIED that Local 814, International Brotherhood of

Teamsters has been designated and selected by a majority of the employees of the above-named employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time, regular part-time and Saratoga Seasonal employees in the job title of Parking Attendant.

Excluded: All other employees, including, but not limited to, all confidential, managerial and supervisory employees.

FURTHER, IT IS ORDERED that the above named employer shall negotiate collectively with Local 814, International Brotherhood of Teamsters. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 28, 2014
Albany, New York

Jerome Lefkowitz, Chairman

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CATTARAUGUS COUNTY DEPUTIES ASSOCIATION,

Petitioner,

-and-

CASE NO. C-6210

COUNTY OF CATTARAUGUS and CATTARAUGUS COUNTY SHERIFF,

Employer,

-and-

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

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 Cattaraugus County Deputies 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: Full-time and part-time deputy sheriffs.

Excluded: Substitute deputies, sergeants, lieutenants, captains, managerial and confidential employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Cattaraugus County Deputies 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: February 28, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6214

WESTERN REGIONAL OFF-TRACK BETTING CORPORATION,

Employer,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200UNITED,

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 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: Branch manager-mega branch, branch manager-super branch, branch manager, branch supervisor-mega branch, branch supervisor-super branch, branch supervisor, manager-telephone betting and supervisor-telephone betting.

Excluded: All others.

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: February 28, 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-6202

MELVILLE FIRE DISTRICT,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, 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 Local 342, UMD, ILA, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time District Mechanic, District Mechanic Helper, Fire House Attendant, Senior Fire House Attendant, Fire Marshall I, Fire

Marshall II and Clerk-Typist.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 342, UMD, ILA, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 28, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6211

WESTERN REGIONAL OFF-TRACK BETTING CORPORATION,

Employer,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200UNITED,

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 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: Bartender (hired prior to 4/1/07), bartender (hired after 4/1/07), cashier, coat room attendant, cocktail server, concession worker, count room attendant, custodian, dinner server, dishwasher, floor attendant, food & Beverage stock clerk, golf cart operator, hostess, lead bartender, lead concession worker, lead custodian, mutuel clerk(live)(hired prior to 4/1/07), mutual clerk(live)(hired after 4/1/07), runner, salad bar/buffet attendant and security guard.

Excluded: All others.

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: February 28, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6213

WESTERN REGIONAL OFF-TRACK BETTING CORPORATION,

Employer,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200UNITED,

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 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: Senior line operator, ticket machine operator, telephone betting operator, courier, maintenance, skilled maintenance, custodial, substitute ticket machine operator, admissions clerk, and flex employee.

Excluded: All others.

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: February 28, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ADJUNCT FACULTY ASSOCIATION, NASSAU COMMUNITY COLLEGE, Upon the Charge of Violation of §210.1 of the Public Employees' Fair Employment Act

CASE NO. D-283

BOARD DECISION AND ORDER

On September 30, 2013, the Chief Legal Officer of the Nassau County Community College and the County of Nassau (together, "Joint Employer") filed a charge pursuant to § 210.3 (c) of the Public Employees' Fair Employment Act ("Act") and § 206 of PERB's Rules of Procedure ("Rules"). The charge alleges that the Adjunct Faculty Association, Nassau Community College, ("Association") violated § 210.1 of the Act in that it caused, instigated, encouraged, condoned and engaged in a five-day strike against the Joint Employer from September 9, 2013, through and including September 13, 2013, during negotiations for a collective bargaining agreement to succeed that which expired on September 30, 2010. The charge further alleges that the strike resulted in the cancellation of approximately 33, 148, 139, 89, and 62 classes on each day of the strike, respectively.

After the matter was assigned to an Administrative Law Judge (ALJ), the Association filed an answer and PERB's Counsel intervened in the proceeding pursuant to § 206.2 (b) of the Rules.

Following discussions between PERB's Counsel and the attorneys for the other parties, a tentative agreement was reached to settle the matter.

Pursuant to the agreement:

> 1. The Association withdraws its answer to the charge, effective immediately. Accordingly, pursuant to § 206.5 (d) of PERB's Rules of Procedure (4 NYCRR § 206.5 [d]), the Association does not deny the allegations in the charge.
>
> 2. In consideration [of] the Association's withdrawal of its answer, the Office of Counsel will recommend to the Board that it impose a forfeiture of the Association's rights specified in Civil Service Law §§ 208.1 (b) and 208.3 regarding the collection and remittal of membership dues and agency fees for a period of seven months commencing with the first payroll period following the joint employer's receipt of the Board's decision on the charge.
>
> 3. In the event that the Board rejects the recommendation of the Office of Counsel regarding the period of forfeiture, the Association's withdrawal of its answer will be deemed a nullity, and the matter will be processed by the assigned ALJ.

On the basis of the unanswered charge, we find that the Association has violated § 210.1 of the Act in that it engaged in a strike as alleged, and we determine that the recommended penalty is a reasonable one and will effectuate the policies of the Act. In this regard we note that, despite the Association's best efforts to instigate participation in the strike, as alleged in the charge, PERB's Counsel advises us that the number of classes that had to be cancelled during the strike represents approximately 11% of the over 4,300 classes scheduled to be taught, yielding a comparatively minor impact on the Joint Employer's services and operations.

WE ORDER that the dues and agency shop fee deduction rights of the Adjunct Faculty Association, Nassau Community College be suspended for a period of seven months, commencing with the first payroll period following the Joint Employer's receipt

of this decision and order. Pursuant to § 210.3 (g) of the Act, the forfeited rights specified herein may be restored at the appropriate time upon the Association's filing a no strike affirmation described in § 207.3 (b) of the Act with the Board.

DATED: February 28, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SENECA COUNTY DEPUTY SHERIFF POLICE BENEVOLENT ASSOCIATION,

Charging Party, **CASE NO. U-31087**

- and -

COUNTY OF SENECA and SENECA COUNTY SHERIFF,

Respondent.

ENNIO J. CORSI, GENERAL COUNSEL (MATTHEW P. RYAN of counsel), for Charging Party

ROEMER WALLENS GOLD & MINEAUX LLP (EARL T. REDDING of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the County of Seneca and Seneca County Sheriff (together, "County") to a decision and ~~recommended~~ order of an Administrative Law Judge ("ALJ"). The ALJ held that the County violated §209-a.1 (d) of the Public Employees' Fair Employment Act ("Act") when, on or about February 11, 2011, the County unilaterally transferred certain security functions that had been exclusively performed by full-time deputy sheriffs represented by the Seneca County Deputy Sheriffs Police Benevolent Association ("PBA") to nonunit part-time deputies, and she recommended certain remedial measures, including a "make whole" order.

EXCEPTIONS

The County alleges that the PBA failed to satisfy the requisite burden of proof to establish the alleged violation of §209-a.1 (d) of the Act. It argues that the ALJ erred in shifting the burden of proof to the County to establish that the at-issue work *was not* exclusive to PBA unit employees rather than placing the burden on the PBA to establish that it was. The County further alleges that the ALJ erred in defining the at-issue work by fashioning a discernible boundary around the work that had been exclusively performed by PBA unit employees, thereby distinguishing it from similar work performed by nonunit employees at another location. It also contends that the ALJ erred in rejecting its "duty satisfaction" defense and in directing a "make whole" remedy absent evidence that any employee lost wages or benefits.

The PBA filed a response to the exceptions in support of the ALJ's determination and recommended remedial order.

For the reasons that follow, we deny the County's exceptions and affirm the decision of the ALJ. However, we modify her remedial order as discussed herein.

FACTS

The County and the PBA are parties to a collective bargaining agreement that expired on December 31, 2009. The PBA represents all full-time employees of the Sheriff's Department in the titles deputy sheriff, sergeant, investigator, detective and lieutenant, including road patrol and civil deputies. While the County employs part-time deputies, they are not included in the PBA's bargaining unit. The part-time deputies, along with one full-time unit deputy, routinely work in the Sheriff's civil division, serving summons and other legal process, and they provide security in the County courthouse.

Joseph Stevens, a full-time road patrol deputy from 1995 through 2003 and a

road patrol sergeant from 2003 through March 2010, and Frank Eldridge, a full-time road patrol deputy since 1995 and the PBA's president, testified on behalf of the PBA. Their testimony shows that from 1998, until at least November 2002, a full-time Sheriff's department post was located in the County office building. There, full-time deputies were assigned to perform various security duties within that building and the nearby Mental Health building. The security duties included patrolling both buildings and the various County offices located therein, including the Department of Social Services ("DSS"), twice a day and delivering and picking up the Sheriff's inter-office mail. The duties also included responding to calls by radio or telephone for assistance involving disturbances in the buildings. The post was staffed Monday through Friday from 8:00 a.m. through 4:00 p.m. while the County offices were open. The work was available to full-time unit road patrol deputies assigned as a contractual bid position on the basis of seniority in 7-week intervals. Their testimony also shows that the County's few part-time nonunit deputies were occasionally assigned the security work in the County office building to fill open shifts that arose when a full-time deputy was absent due to illness or other leaves, as expressly permitted by §5.02 of the parties' collective bargaining agreement.

Stevens' and Eldridge's testimony further establishes that the permanent post in the County office building was eliminated by January 2003.[1] However, their testimony shows that the practice of assigning the security duties in the County office building and the Mental Health building to full-time unit deputies continued unabated. Indeed, by email dated January 15, 2003, the Sheriff's office notified full-time deputies, part-time

[1] With the elimination of that post, a full-time School Resource Officer assignment was created as a unit post. The record does not indicate what that employee did.

deputies and sergeants that the security functions at the County office building were to be performed by the deputy assigned to the "North Patrol," which is another bid position available to full-time deputies based on seniority. The email directed the assigned North Patrol deputy to "stop at the [County office building] every morning and deliver the mail pick up mail and do a walk through . . . [making sure] to check DSS, County Clerk, DMV, etc." Because the County departments compensate the Sherriff's office for the security services, the email directed that the time spent by the deputy performing that assignment be recorded on the deputy's "road sheets." Accordingly, the security at the County office building ceased to be a discrete bid position and, instead, became part of the full-time North Patrol deputies' routine road patrol assignment, billable to other County departments.

According to Eldridge, the time spent on the security duties might be anywhere from five minutes to a couple of hours per day, depending on the radio calls that came in requiring the deputy's attention. Over the last several years, on the dates on which the work was recorded in the road patrol records, the reported time on the tasks was generally 30 minutes to 2 hours per day.

Stevens' and Eldridge's testimony was corroborated by Sheriff Jack Stenberg, who stated that the deputies assigned to the North Patrol continued to perform security duties in the County office building after 2003 as part of their routine road patrol assignments. Again, part-time deputies were assigned the work on occasions that full-time deputies were unavailable to perform the tasks, as permitted by the applicable collective bargaining agreement.

Records of the time billed to the other departments for the security work, introduced by the County at the hearing, reveal the scant frequency of such work being

performed by the part-time deputies after the permanent security post was abolished. As accurately accounted by the ALJ, the road patrol records for the years 2003 through 2010 show that rarely over the last several years has a part-time deputy performed the duties. In calendar year 2010, the total number of County office building stops for patrols or radio call response recorded on the road patrol sheets was 60. Only 3 were performed by a part-time deputy. Unit deputies reported 839 hours (road patrol and civil deputy), plus 33 hours by the road patrol lieutenant, for a total of 872 hours of work performed by unit employees, as compared to 2.5 hours, or less than 1%, performed by the nonunit part-time deputies.

Similarly, in 2009, the total number of stops at the County office buildings reported on the road patrol sheets was 94, with only 2 performed by part-time deputies. Unit deputies reported 879 hours, plus 42 hours for the road patrol lieutenant, for a total of 921 hours of security work performed by unit employees, as compared to 7 hours of work by nonunit part-time employees, again an amount of less than 1%.

In several of the prior years, part-time deputies were used to fill in on road patrols more extensively, reporting 30 hours in 2005, and 70 hours in 2006, in performance of the work at issue. By 2007, use of part-time deputies had diminished to only two occasions that year, for a total of 2.5 hours in 2007, and 2 hours in 2008.

Between July 2008 and February 2011, the Sheriff had an agreement with the DSS where the full-time unit deputy assigned to the Sheriff's civil division, which is housed in the County office building, was made available to respond to radio calls for assistance from the DSS office. For that coverage, the DSS reimbursed the Sheriff for the cost of three hours of the full-time civil deputy's time each day. Here, too, part-time deputies filled in when the full-time deputy was unavailable to perform the security

functions. As a routine matter, however, the part-time deputies were out of the building, serving process on behalf of the County.

By email dated February 18, 2011, concerning "County Office Building Security," Sheriff Stenberg informed all County departments that the Sheriff's department would provide security in the County office building and the Mental Health building from an office located in the County office building during hours when the buildings are open to the public. The email advised that Sheriff's department employees would be equipped with handheld radios and metal detectors, and that they should be contacted whenever necessary to respond to situations that threaten the well-being and safety of County employees. Finally, the email named the deputies who would be stationed in the building. All are nonunit part-time deputies. There is no dispute that the assignment was made unilaterally.

DISCUSSION

As accurately emphasized by the County, the settled test to determine the negotiability of a unilateral transfer of unit work to nonunit personnel was articulated by the Board in *Niagara Frontier Transportation Authority* ("*Niagara Frontier*"):[2]

> With respect to the unilateral transfer of unit work, the initial essential questions are whether the work had been performed by unit employees exclusively and whether the reassigned tasks are substantially similar to those previously performed by unit employees. If both these questions are answered in the affirmative, there has been a violation of § 209-a.1 (d), unless the qualifications for the job have been changed significantly.

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[2] 18 PERB ¶3083, at 3182 (1985). *See, also, County of Monroe and Sheriff*, 45 PERB ¶3048 (2012), *confd sub nom. Monroe County and Sheriff v New York State Pub Empl Relations Bd*, 111 AD3d 1342 (4th Dept 2013); *New York State Thruway Auth v Cuevas*, 279 AD2d 871 (3d Dept 2001); *New York City Trans Auth v New York State Pub Empl Relations Bd*, 251 AD2d 583 (2d Dept 1998), *lv den* 92 NY2d 819 (1999); *State of New York (Dept of Corrections) v Kinsella*, 220 AD2d 19 (3d Dept 1996).

The charging party bears the burden of proof to adduce facts that will answer the two threshold questions in the affirmative.

In assessing the exclusivity of the work, PERB applies a past practice analysis pursuant to which evidence of how the parties have treated the work is dispositive.[3] Under that analysis, work that had been exclusively performed by unit employees may be distinguished from similar work performed by nonunit personnel. Where the distinction has been sufficiently continuous and uninterrupted to create a reasonable expectation among the affected employees that the distinction would continue, a "discernable boundary" may be shown that differentiates the exclusive unit work from similar tasks performed by nonunit personnel.

Here, the evidence adduced by the PBA, corroborated by evidence adduced by the County, establishes a continuous and uninterrupted practice that reflects the parties' understanding that the performance of security work in the County office building and in the Mental Health building, including DSS, would be exclusively performed by full-time deputies in the PBA's bargaining unit, limited only by the parties' agreement that expressly permits the County to assign nonunit part-time deputies to perform the work when a full-time deputy is unavailable. Under such circumstances, the County's very limited reliance on the nonunit part-time deputies to substitute for the full-time unit deputies does not defeat the PBA's claim of exclusivity over the work or the negotiability

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[3] *See, e.g., Manhasset Union Free Sch Dist*, 41 PERB ¶3005 (2008), *confd and mod, in part, sub nom. Manhasset Union Free Sch Dist v New York State Pub Empl Relations Bd*, 48 AD3d 1231 (3d Dept 2011); *City of Rochester*, 21 PERB ¶3040 (1988), *confd sub nom. City of Rochester v New York State Pub Empl Relations Bd*, 155 AD2d 1003 (4th Dept 1989).

of the parties' practice under the *Niagara Frontier* test.[4]

Moreover, in *Board of Education of the City School District of the City of Long Beach*,[5] the Board held that the practice of using nonunit personnel to perform certain work whenever unit personnel were unavailable did not destroy the union's claim of exclusivity over the work. There, the Board stated:

> The District's exclusive utilization of a unit employee to teach the classroom element of its driver education program and its annual offer to unit employees of the opportunity to teach the roadwork element establish its recognition that the work primarily belongs to bargaining unit personnel. Indeed, we find that its annual offer of such employment before hiring nonunit personnel is an affirmation of this recognition. *Moreover, under these circumstances, we find that the utilization of nonunit personnel when an insufficient number of unit employees was available to teach was at the Association's sufferance and, therefore, does not constitute an elimination of the work from the bargaining unit nor a relinquishment of its rights to negotiate concerning the work involved.* [Emphasis added.]

Here, as in *Long Beach*, the County's limited permissible use of nonunit deputies to perform the at-issue security work was at the PBA's sufferance – indeed, its agreement.

Therefore, we find, as did the ALJ, that the PBA satisfied its burden of proof under the threshold prongs of the *Niagara Frontier* test. Although some of the evidence in support of the PBA's burden of proof was adduced by the County, the ALJ did not

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[4] *See, e.g., Manhasset Union Free Sch Dist, Id.* (use of private contractors to transport 10 out of a school district's 2,100 public school students to and from its public schools under special circumstances did not defeat union's claim of exclusivity over the transportation of public school children); *County of Onondaga*, 27 PERB ¶3048 (1994) (union retained exclusivity, although non-unit personnel performed 1.6% of the at-issue work). *Compare Honeoye Cent Sch Dist*, 39 PERB ¶3003 (2006), *confd sub nom. Sliker v New York State Pub Empl Relations Bd*, 42 AD3d 653 (3d Dept 2007) (because there was insufficient evidence to compare the frequency of unit and non-unit performance of work, evidence of the latter defeated union's claim of exclusivity).

[5] 26 PERB ¶3065 (1993).

shift that burden of proof. Moreover, we find that the occasional use of a nonunit employee to substitute for an absent full-time unit deputy pursuant to §5.02 of the parties' expired collective bargaining agreement manifests the County's satisfaction of its duty to negotiate with the PBA concerning that limited use of the nonunit deputies to perform the otherwise exclusive bargaining unit work. To that extent, we modify paragraph "1" of the ALJ's remedial order to reflect such permissible assignments.

However, for the reasons stated by the ALJ, we find nothing in the parties' collective bargaining agreement that establishes their understanding that the County could transfer all security work in the County office building and in the Mental Health building to nonunit part-time deputies. To that extent, therefore, we reject the County's "duty satisfaction" argument.

The County's use of nonunit deputies to provide security in the County courthouse, located at least 10 blocks away from the County office building and the Mental Health building, does not diminish the PBA's claim of exclusivity over the at-issue security work. Assuming that the work is similar,[6] PERB has recognized that a discernible boundary can be established, as here, by the employer's consistent application of a geographically defined distinction between work that is exclusive to the unit and work that is not.[7]

Finally, we also find, as did the ALJ, that the work now performed by the nonunit part-time deputies is substantially similar to the work previously performed by the full-time unit deputies. While the amount of security provided to the offices in the County

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[6] There is no evidence as to what the deputies do in the County courthouse.

[7] See, e.g., *City of Rochester*, supra, note 4.

office building and in the Mental Health building has fluctuated over the years, there is no evidence that the nature of the work has changed in any material respects.

Therefore, based on the record before us, we find that the County violated §209-a.1 (d) of the Act by unilaterally transferring the security functions at the County office building and the Mental Health building, including DSS, to nonunit part-time deputies.

With respect to the remedy, we find that the ALJ's recommended "make whole" order is appropriate. In that regard, we first note that any detriment to individual employees' terms and conditions of employment is immaterial to the alleged violation of §209-a.1 (d) of the Act where, as here, there is no relevant balance to be applied.[8] More to the County's point, the absence of evidence of such detriment does not defeat a "make whole" order. Who is owed and how much, if anything, under a "make whole" order are questions properly addressed in proceedings concerning compliance with the order.[9]

IT IS, THEREFORE, HEREBY ORDERED that the County:

1. Cease and desist from assigning to nonunit employees the work of the security of the County Office Building and Mental Health Building, except as permitted under the parties' collective bargaining agreement;
2. Forthwith return that work to the bargaining unit represented by the PBA;
3. Forthwith make whole all unit employees for any loss of wages and benefits, with interest at the maximum legal rate, suffered by reason of the County's assignment of such work to nonunit employees; and

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[8] *See, Niagara Frontier, supra* note 6.

[9] *See, e.g., New York State Pub Empl Relations Bd v County of Westchester*, 280 AD2d 849 (3d Dept 2001).

4. Sign and post the attached notice at all physical and electronic locations used to post communications to unit employees.

DATED: February 28, 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 County of Seneca and Seneca County Sheriff in the unit represented by the Seneca County Deputy Sheriff Police Benevolent Association that the County of Seneca and Seneca County Sheriff:

1. Will not assign to nonunit employees the work of the security of the County Office Building and Mental Health Building, except as permitted under the parties collective bargaining agreement;

2. Will forthwith return that work to the bargaining unit represented by the Seneca County Deputy Sheriff Police Benevolent Association; and

3. Will forthwith make whole all unit employees for any loss of wages and benefits, with interest at the maximum legal rate, suffered by reason of the County of Seneca and Seneca County Sheriff's assignment of such work to nonunit employees.

Dated . . . . . **By** . . . . . .
on behalf of the **COUNTY OF SENECA**
and SENECA COUNTY SHERIFF

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 ROCHELLE POLICE SUPERIOR OFFICERS ASSOCIATION, INC.,

Charging Party,

- and -

CASE NO. U-29959

CITY OF NEW ROCHELLE,

Respondent.

MARILYN D. BERSON, ESQ. for Charging Party

LAW OFFICE OF VINCENT TOOMEY (VINCENT TOOMEY & JAIMEE L. POCCHIARI of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions filed by the City of New Rochelle (City) to a decision by an Administrative Law Judge (ALJ)[1] finding that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it required that a unit employee in the negotiating unit represented by the New Rochelle Police Superior Officers Association (SOA) submit to an independent medical examination (IME) by a physician chosen by the City to determine the employee's fitness to return to work and when it thereafter ordered the employee to return to light duty in reliance on that examination and over that employee's objection.

Exceptions, Cross-Exceptions and Response

In its exceptions, the City contends that the ALJ erred in rejecting its jurisdiction,

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[1] 46 PERB ¶4523 (2013).

timeliness and duty satisfaction defenses and that the ALJ's finding interferes with its managerial prerogative to control sick leave abuse.

The SOA filed a response to the City's exceptions and filed cross-exceptions in which it contends that the ALJ erred in her analysis of our jurisdiction and in her failure to provide monetary relief to the affected unit employee.

The City filed a response to the cross-exceptions in which it contends that an expired collectively negotiated agreement may divest us of jurisdiction over a charge alleging a violation of §209-a.1(d) of the Act and that no monetary relief should be granted.

Having carefully considered the record and filings by the parties, we affirm the decision of the ALJ for the reasons that follow.

FACTS

The SOA is the collective negotiating agent for approximately 38 police sergeants, lieutenants and captains employed in the City's police department (Department). The City also employs approximately 130 patrol officers who are in a negotiating unit represented by the Police Association of New Rochelle, NY, Inc. (PBA).

Sick leave is a benefit available to Department police officers who are unable to report to work by virtue of a non-job related illness or injury.[2]

Departmental rules and regulations concerning sick leave and its abuse apply to both negotiating units. These rules require, *inter alia*, that employees report their inability to appear for a scheduled duty tour to their desk officer prior to the start of their tour and that they be confined to their residence during their scheduled tour unless

[2] Police officers whose illness or injury is job related receive benefits pursuant to New York State General Municipal Law (GML) §207-c.

excused therefrom. Officers must also provide a physician's note when they are on sick leave for three or more days and must contact their commanding officer weekly when they are out on sick leave for more than seven days. Officers who are disabled as a result of an off-duty injury must provide information regarding the injury and must provide medical documentation.

The sick leave policy allows light duty assignments for officers who are out on sick leave due to an off duty injury or illness and who wish to return to a light duty assignment without having to utilize sick leave time.

The Department's sick leave abuse policy provides that the City will investigate employees who use eight or more sick days per year. It designates as "sick leave abusers" employees who use 12 or more sick days per year unless their illness or injury is confirmed by medical documentation. Employees designated as abusers must thereafter document every absence and are denied certain benefits, i.e., special details, promotions, tour swaps and special pay upon retirement. The Department's Internal Affairs unit investigates sick leave abuse.

On or about January 20, 2010, Sergeant Thomas Carey went out on sick leave for an injury. He also filed a claim for benefits pursuant to GML §207-c, alleging that it was related to a back injury he sustained three years earlier. The City denied the GML §207-c claim and Carey remained out on sick leave. As he had not exhausted his sick leave, he continued to provide the City with medical documentation from his physician, which indicated that he was unable to return to work, and he remained in compliance with the City's sick leave policy.

On March 26, 2010, the City ordered that Carey undergo an independent medical examination (IME) on March 29, 2010 by a physician chosen by the City to determine Carey's fitness to return to work. The physician found that Carey could return to work on light duty and the City ordered that Carey return to a light duty assignment on April 5, 2010. Carey worked his regular shift, used his vacation and sick time, was paid for the days he worked at his contractual rate of pay and retired in May 2010.

It is undisputed that Carey was the only unit employee who was required to undergo an IME by a physician chosen by the City and ordered to report to work for a light duty assignment as a result of the IME over the employee's objection and contrary to the employee's physician's assessment.

In the ten years prior to the at-issue directive to Carey, only two Department officers on sick leave were ordered to undergo an IME. Both orders were at the direction of Anthony Murphy, the deputy police commissioner, and were occasioned by Murphy's belief that the officers were capable of working light duty. One employee, Mirable, was not included in the SOA's negotiating unit. The other employee, Feery, was ordered to undergo the IME but the Department withdrew the order because Ferry was scheduled for surgery a few days later. The SOA did not challenge that order because Feery never underwent the examination inasmuch as he retired shortly thereafter.

Murphy testified that, based upon his earlier orders to Mirable and Feery, he believed that "it would be a good practice to send [Carey] for [a] fitness for duty and see what the doctor has to say."[3] There is no evidence that either Mirable, Ferry or Carey were ever designated as sick leave abusers within the meaning of the City's sick leave policy.

[3] Transcript, p. 284.

The parties' collectively negotiated agreement contains several provisions relevant to our analysis as follows:

Article I, "Scope of Agreement", provides, at Section 5:

> 5. Termination and Modificiation. This AGREEMENT shall be effective as of the 1st day of January 2008, and shall remain in effect until the 31st of December 2009. This AGREEMENT shall be automatically renewed from year to year thereafter unless either party shall notify the other in writing on or before 180 days prior to the termination date, that it desires to modify this AGREEMENT. In the event that such notice is given, negotiations will commence no later than thirty (30) days thereafter.

Article VII, Section 7, entitled "Leaves", provides for the accrual of sick leave and extended sick leave to employees who have exhausted their accrued sick time:

> 7. Sick Leave.
> (a) An employee shall be entitled to twelve (12) sick days for each calendar year and shall be credited with his full entitlement of sick leave for that calendar year on January 1st.
> (b) There shall be no limit on maximum accumulation of sick days.
> (c) The present practice relating to employees who exhaust their sick leave shall continue, which is in individual cases, within the discretion of the City Manager to extend it by sixty (60) days and the City Council may extend an individual up to one (1) year.

The article also offers a cash incentive to reduce use of sick leave.

Article IX, "Hospitalization, Surgical, Major Medical Insurance and Death Benefits, provide those benefits and a welfare fund, and states at Section six:

> 6. Sick Leave (Exhaustion). In cases of contested sick leave status, the city will additionally take into account the opinion of a physician outside the Department or

City government.

Article 3, Management Rights, contains the following:

> 1. Fundamental Employer Rights. Management possesses the sole right to manage and direct the operations of the CITY and all management rights repose in it, but such rights must be exercised consistently with the provisions of this contract. These rights include but are not limited to the following: To determine the standards of service to be observed by the EMPLOYER: to determine the standards of selection for employment; to direct employees; to take disciplinary action for just cause; to relieve its employees from duty due to lack of work or funds; to maintain the efficiency of its operations; to determine the methods, means and number of personnel by which its operations are to be conducted; to determine the contents of job descriptions; to take all necessary actions to carry out its mission in emergencies; to exercise complete control and discretion over its organization and the technology of performing its work.

DISCUSSION

The procedures for granting and terminating sick leave[4] and returning to work are mandatorily negotiable.[5] Therefore, unless there is merit to any of the City's defenses, it has violated §209-a.1(d) of the Act when it ordered Carey to undergo an IME and report for light duty thereafter.

The City contends that we lack jurisdiction because Articles VII and IX of the collectively negotiated agreement constitute an arguable source of right to the SOA concerning the subject of its charge.

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[4] *Plainedge UFSD*, 7 PERB ¶3050 (1979).

[5] *City of Schenectady*, 24 PERB ¶3016 (1991).

We are divested of jurisdiction over alleged violations of §209-a.1(d) of the Act during the life of the agreement where the agreement provides a source of right concerning the subject of the charge.[6] Neither the City's answer nor any witness from either party referred to the agreement as "expired" or "current". Moreover, neither party offered any testimony concerning the negotiating history of any provision of the agreement. Additionally, the record is silent as to whether either party gave the notice sufficient to end the automatic renewal contemplated in Article I, §5, *infra*. The first reference to the status of the agreement is contained in the SOA's cross-exceptions, where it contends it "expired".

The ALJ made no finding as to the status of the agreement. Ordinarily we would remand the matter to the ALJ with an instruction to make such finding, however, we decline to do so here because, even if the agreement were in effect, neither Article VII nor Article IX operates as a source of right to the SOA or Carey concerning the subject of the charge.

Article VII provides for the accrual of sick leave and permits grants of extended sick leave to employees who have exhausted their accrued leave. The charge does not deal with sick leave accrual and Carey has not exhausted his sick leave.

The ALJ found that the title of Article IX, "Sick Leave (Exhaustion) is "clear error that does not assist in its interpretation of the language of the contractual section".[7] We disagree. In the absence of any bargaining history and mindful that the identical

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[6] *State of New York (SUNY Health Services Center),* 30 PERB ¶3019 at 3042 (1997). *County of Nassau*, 23 PERB ¶3055 (1990).

[7] 46 PERB ¶4523 at 4574 (2013).

language and heading appear in the collectively negotiated agreement between the City and the PBA, we are bound by the meaning of the words. Therefore, we must assume that the parties intended the word "exhaustion" to deal with those employees whose sick leave is exhausted as referenced in Article VII, Section 7 of the agreement. Inasmuch as Carey has not exhausted his sick leave, Article IX is not applicable to him.

Addressing the City's timeliness defense, the record establishes that, until Carey was ordered to undergo an IME in March 2010, unit employees who were out on sick leave for a non-job related illness or injury needed to provide documentation from their physician establishing their inability to return to work as a condition to their continuing eligibility for sick leave. They were never required to undergo an examination by a physician of the City's choice. That Mirable was so ordered in 2009 is not relevant herein because he was not a unit employee. Any practice applicable in a different bargaining unit does not bind the SOA.[8] That Feery was ordered to undergo an IME in October 2009 is also irrelevant because the City rescinded its order to Feery and he was not required to undergo the examination.

Likewise, it is uncontroverted that Carey was the first unit employee to have been ordered to return to light duty after such examination. Inasmuch as the charge was filed within four months of those directives to Carey, it is timely.[9] The ALJ, therefore, properly rejected the City's timeliness defense.

Finally, the City contends that it has satisfied its duty to bargain by virtue of its

[8] *See Chenango Forks Cent Sch Dist*, 40 PERB ¶3012 (2007); *County of Albany*, 38 PERB ¶3004 (2005).

[9] Rules, §209.1(a).

agreement to the contract provisions set forth above. We disagree.

Having bargained a subject to completion and reached an agreement concerning it, a party has satisfied its duty to negotiate and cannot be found to have violated §209-a.1(d) of the Act when it takes an action permitted by the terms of that agreement.[10]

In construing an agreement, we seek a practical interpretation of the language utilized.[11] As noted *infra*, Article IX, Section 6 supports neither the jurisdictional nor duty satisfaction defenses as it does not apply by its terms to Carey because, as noted, *infra*, the article applies to employees who have exhausted sick leave and Carey had not exhausted his sick leave.

Likewise, nothing contained in Article 3, Management Rights, constitutes a grant of right with respect to the subject of the charge.

Finally, we address the SOA's claim in its cross-exceptions that the ALJ's remedial order should be modified to provide monetary compensation to Carey at his overtime rate of pay. We decline to modify the ALJ's remedial order. Our orders are designed to place the parties in the position they would have been in had there not been a violation of the Act.[12] It is uncontroverted that Carey returned to work in a light duty capacity on April 5, 2010 and worked from that date until his retirement in May 2010. Carey was paid at the contractual rate of pay and utilized both vacation and sick leave. The SOA has not demonstrated that Carey has incurred any monetary loss by virtue of

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[10] *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶3023 (2009).

[11] New York City Transit Authority, 41 PERB ¶3014, at 3076 (2008).

[12] *See, State of New York*, 26 PERB ¶3062, (1993); *Burnt Hills-Ballston Spa Cent Sch Dist*, 25 PERB ¶3066 (1992).

the at-issue violation and we decline to speculate in that regard.

Based upon the foregoing, the ALJ's decision is affirmed and we conclude that the City of New Rochelle violated §209-a.1(d) of the Act when it unilaterally changed a mandatory subject of negotiation by requiring a unit employee to undergo an independent medical examination by a physician chosen by the City and to report for a light duty assignment.

THEREFORE, IT IS HEREBY ORDERED THAT the City of New Rochelle:

1. Cease and desist from ordering unit employees who are on sick leave to involuntarily undergo a medical examination by an independent medical examiner chosen by the City; and
2. Cease and desist from ordering unit employees on sick leave to involuntarily return to work; and
3. Sign and post the attached notice to employees at all physical and electronic locations customarily used to communicate with unit employees.

DATED: February 28, 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 City of New Rochelle in the bargaining unit represented by New Rochelle Police Superior Officers Association, Inc., that the City of New Rochelle will:

1. Not order unit employees who are on sick leave to involuntarily undergo a medical examination by an independent medical examiner chosen by the City;

2. Not order unit employees on sick leave to involuntarily return to work.

Dated . . . . . By . . . . . .

on behalf of City of New Rochelle

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JEANNINE BOEHME, et. al,

Charging Parties,

-and-

CASE NO. U-28586

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 1104, GRADUATE STUDENT EMPLOYEES UNION,

Respondent.

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

WEISSMAN & MINTZ, LLC (WILLIAM G. SCHIMMEL of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to this Board on exceptions filed by charging parties to a decision of an Administrative Law Judge (ALJ) dismissing their charge, which alleged that the union that represented them, the Communications Workers of America (CWA), Local 1104, Graduate Student Employees Union (GSEU), violated §§209-a.2 (a) and (c) of the Public Employees' Fair Employment Act (Act) in connection with the resolution of an earlier improper practice charge (Case No. U-26459). That charge complained about a change in the hours of work of teaching assistants and graduate assistants at the State University of New York (SUNY), University at Binghamton campus (University

at Binghamton).

EXCEPTIONS

The charging parties filed exceptions to the ALJ's conclusion that CWA's actions were not arbitrary, discriminatory or in bad faith, the standard necessary to establish a breach of the duty of fair representation. The Respondent argues that we should affirm the decision of the ALJ.

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

FACTS

In support of its charge, the charging parties asserted that Kathleen Sims (Sims), then the executive vice president of GSEU, was improperly motivated in the settling of a 2005 improper practice charge (U-26459), allowing that charge to be deemed withdrawn, and, administratively closed by PERB, without first advising the affected members, and thereafter, in deliberately misleading GSEU members as to the status of that 2005 case. In that charge, GSEU had complained that the University at Binghamton had unilaterally increased hours that teaching assistants and graduate assistants were required to teach.

The 2005 charge was filed by Alan Compagnon, then GSEU's attorney. SUNY's Assistant Vice Chancellor for employee relations, Raymond J. Haines, told Compagnon that SUNY would raise several procedural defenses. Compagnon was apparently concerned enough about these defenses to join Haines in requesting that the ALJ

adjourn the conference, and to commence settlement discussions.

Compagnon kept Sims, GSEU business agent Monazir Khan and PERB informed about his efforts to settle the case. Mr. Khan had held the position of statewide elected representative of all teaching and graduate assistants, a position that he lost in an election to Sims, and he then became business agent of the SUNY Binghamton campus. Sims and Khan appear to bear some animus towards one another, which apparently precipitated the charge herein.

Although Compagnon anticipated that negotiations on behalf of his clients would lead to a better result for GSEU and its teaching assistants, that was not to be. His last proposal was that $2,500 be distributed among the five most senior employees, which Haines accepted. As an indication of his good faith in the negotiations, Haines had SUNY set aside $2,500 for delivery to the five more-senior affected employees, and they were informed that five hundred dollars would be paid to each of them in return for their signature acknowledging such transaction. However, complaining that the amount of payment was "laughably low," none of the five made an effort to collect the money.

DISCUSSION

The articulated basis for the charge herein, which was filed on September 8, 2008, is that GSEU and, particularly Sims, deliberately, arbitrarily and in bad faith, breached its duty to represent unit employees fairly in the processing of case U-26459, the earlier improper practice charge filed on or about December 22, 2005, and in its communications with such unit employees concerning that matter. We, however, agree

with the ALJ that there has been no evidence of such improprieties. Indeed, Sims' only role in the negotiation of a resolution of that charge was limited to designating Compagnon to represent the union. Neither was there evidence that Sims had any role in Compagnon's agreement to the closing of the 2005 charge. Indeed, it appears that Compagnon had agreed to the settlement because he concluded that he was likely to get a better deal in negotiations with Haines than through litigation.

In their exceptions, charging parties assert that GSEU surprised them improperly when it did not call Sims as a witness, at which time she would have established her improprieties. They assert: "the Complaintants were entitled to the inference that Sims was not called because she would have been forced to admit to all of her intentional deceptions."[1] However, we find no justification for drawing a negative inference against GSEU by reason of its not calling a particular witness to testify; that burden of proof falls upon the charging party. (*State of New York [State University of New York at Buffalo]* 46 PERB ¶3021, at p 3040 (2013). Moreover, we agree with the ALJ that the testimony of charging parties' witnesses' impressions and undertakings is insufficient to meet that burden.

As to the teaching assistants' rejection of $500 agreed upon by Haines and Compagnon, there was a wide-ranging discussion among the teaching. Joshua Keiter, one of the five teaching assistants who was notified that he was entitled to the $500 from the employer, testified that he had received a telephone call from Sims which

[1] P. 6 of the exceptions.

lasted less than five minutes. Sims told him that he was one of the five teaching assistants who would receive $500, but would have to sign an acknowledgement of such receipt. Keiter and the other four teaching assistants scheduled to get $500 each refused to accept the money, finding it "laughably low."

On the other hand, Compagnon had a conversation with a teaching assistant in the English Department at Binghamton, Susan McGee (t. 281). She told him about the discussions among the teaching assistants:

> There was a small group, which I think she told me three to five TAs, who were strongly against the change... There were (sic) a group – there was a group of TAs a bit larger than that, five to ten I think she said, who were actually in favor of it and the rest – it would have been the majority of the TAs – really did not want to do anything to rock the boat and they – you know, they would just as soon let things go as the way they were going.
>
> Q. Did she explain at all why the group that was in favor of the change was in favor of it?
>
> A. It – it had to do with being a teacher of record. Not all teaching assistants are teachers of record.... (t. 283)
>
> and a teacher of record would, you know, basically be in charge of the class and it would look better on their resume.... and, you know, they were acting more as a professor would. So, there were those who liked that aspect –
>
> Q. Okay.
>
> A. – of this. And apparently the – the policy change would have or potentially – I don't

> know if it did, but – provided more opportunities for the TAs to be teachers of record. (t. 284)

This testimony indicates the five unit employees to whom SUNY was prepared to pay $500 each in settlement of the charge rejected that money because they found the amount of the money insufficient, and many, if not most, of the other affected unit employees were pleased to perform the at issue assigned extra work without extra compensation because they believed that it would enhance their career prospects. In either case, GSEU appears to have acted in good faith.

There being no proof of bad faith, arbitrariness or discrimination[2] in GSEU's settling the 2005 charge, which allowed that charge to be administratively dismissed, we affirm the ALJ's decision in this regard.

DATED: February 28, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

[2] *CSEA v PERB and Diaz*, 132 AD2d 430, 20 PERB ¶7024 (3d Dept. 1987), *aff'd on other grounds*, 73 NY2d 796, 21 PERB ¶7017 (1988).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CANANDAIGUA FIREFIGHTERS ASSOCIATION, LOCAL 2098, IAFF,

Charging Party,

CASE NO. U-29660

- and -

CITY OF CANANDAIGUA,

Respondent.

CHAMBERLAIN D'AMANDA (MATTHEW J. FUSCO of counsel), for Charging Party

BOND, SCHOENECK & KING, PLLC (TERRY O'NEIL and HOWARD M. WEXLER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on a motion to reopen filed by the Canandaigua Firefighters Association, Local 2098, IAFF (Association) pursuant to our decision of November 30, 2011, conditionally dismissing the Association's improper practice charge against the City of Canandaigua (City).[1] That decision deferred all but one allegation to the parties' contractual arbitration procedure. The remaining allegation, regarding the testing of fire hydrants, was dismissed outright on jurisdictional grounds. The Association does not seek to reopen that dismissal.

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[1] 44 PERB ¶3047 (2011).

By decision of September 10, 2010, Administrative Law Judge Jean Doerr determined, as relevant here, that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act)

> when it unilaterally transferred the exclusive bargaining unit work of driving and operating City owned fire trucks, pumpers, ladder trucks and other vehicles operated by the fire department, the regular day-to-day duties involved in the maintenance of the fire stations and grounds, the testing and cleaning of fire apparatus and equipment in the fire houses,...fire inspections, and firefighting services involving the work at-issue herein in the Town of Canandaigua.[2]

In so finding, Judge Doerr rejected a City claim that the parties' contractual management rights clause, Article 2, constituted a waiver of "the right to negotiate the unilateral transfer".[3] Judge Doerr dismissed the Association's claims regarding the abolition of the position of captain, the assignment of that position's duties to other unit members, the elimination of automatic unit member response to certain emergency calls and the response to emergency calls by a volunteer firefighter.

In our decision of November 30, 2011, we explained the basis for the deferral, finding that it was not clear

> whether the first two sentences of Article 12 of the [parties' collective bargaining] agreement constitute consent by the Association to the City's unilateral alteration of non-contractual past practices by issuing general or special orders or by the revision of Fire Department Rules. Inasmuch as nothing in the record or in the parties' briefs or arguments assist us in making or rejecting such a conclusion, rather than attempting to resolve the jurisdictional questions by either deciding them on the basis of the record before us, or reversing the remainder of the ALJ's decision and remanding the case for further evidence, we hereby choose to defer this matter to the parties'

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[2] *City of Canandaigua*, 43 PERB ¶4585, 4891 (2010). The citation to this case at footnote 1 of our November 30, 2011 decision was in error, referring to another improper practice charge between these parties.

[3] At 4890.

> negotiated grievance arbitration procedure in accordance with Herkimer County BOCES [20 PERB ¶3050 (1987)]. We also note that the charge's allegations concerning performance of fire inspections, and maintenance and cleaning of the fire stations, grounds, equipment and apparatus appear to raise questions under Articles 16 and 22 of the agreement relevant both to our jurisdiction and the merits of the charge. It is, therefore, appropriate that we defer all these issues to arbitration in order to avoid wasteful duplication of effort.[4]

According to the arbitrator's April 15, 2013 decision, the City, relying on the three-day filing period under the parties' collective bargaining agreement, raised both during the grievance process and at arbitration, a defense that the grievances were untimely filed. It asserted that any of the Association's claims that were not continuing violations should be dismissed on that basis, although, according to the arbitrator, it conceded that all but two allegations[5] were continuing violations. Further, the City argued that the remedy for any violations found by the arbitrator be limited to three days before the grievances were filed. Noting that the two grievances were filed on December 5, 2011, and concerned various actions in "late 2009 and early 2010",[6] the arbitrator accepted the City's timeliness argument, stating that he lacked "authority to determine whether or not the City violated the [collective bargaining agreement] from the date of the commencement of the continuing violations to three...days prior to the

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[4] At 3140.

[5] Through a typographical error in the arbitration award only one of the two is described by the arbitrator: "all but the abolition of the Fire Inspector position and the (sic) are continuing violations" (p.14). It appears from the rest of the arbitrator's award that the second allegation is a claim under Article 22 of the parties' collective bargaining agreement regarding the agreement between the City and the Chesire Volunteer Fire Department.

[6] Arbitrator's award, p.12.

filing of the grievances"[7] and that he had "no authority to determine or direct...a remedy for any violations of the [collective bargaining agreement] which occurred more than three...days prior to the filing of the two grievances".[8]

Deferral to parties' contractual arbitration procedures is not appropriate where a party raises procedural obstacles to the resolution of the grievance.[9] It follows that continuing deferral under those circumstances is likewise not appropriate. Even assuming, *arguendo*, that the City is correct in its assertion that the arbitrator, despite his statement above, made determinations on the substance of the grievance allegations,[10] the City's timeliness defense prevented the completion of the grievance process by blocking the imposition of a remedy covering the time period grieved. The purpose of the waiver of a timeliness defense for deferral purposes is to allow the parties a contractual forum for the grievance(s) to be fully heard and remedied. PERB will not exercise its discretion to defer or continue deferral to a contractual forum if the responding party then can or does procedurally block a full remedy for violations found there. The City's assertion in its response in opposition to the Association's motion, repeated in the arbitrator's award, that, when the parties were before the Board, it was not asked and never promised not to raise timeliness during the grievance process is without merit. What is relevant is not whether a responding party can raise a timeliness

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[7] *Id.* at p.15.

[8] *Id.* at p.14.

[9] *See, e.g., Town of Carmel,* 29 PERB ¶3073 (1996) (subsequent history omitted).

[10] Including the two allegations which the City claimed, without reservation, to be time-barred.

defense,[11] but whether it preserves its right to raise it or, in this case, does in fact raise it. Such a defense is in direct opposition to the purpose of deferral.

Here, the City having raised a timeliness defense during the grievance and arbitration process, the above-referenced case is reopened,[12] with the exception of the allegation regarding the testing of fire hydrants, which, as stated above, is not part of the Association's motion.

While the City addressed the substance of the arbitrator's award in its response to the Association's motion, the Association did not, requesting, instead, to file a brief in the event its motion was granted.

As the arbitrator's award and the City's response in opposition to the Association's motion indicate that certain issues have either been resolved or were not pursued, the Association is directed to file a statement with this Board within two weeks of receipt of this decision, with copy to the City, confirming the allegations remaining for determination here. The City may file a response thereto, with copy to the Association, within two weeks of receipt of the Association's statement. Following review of the parties' submissions, a briefing schedule will be set.

DATED: February 28, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

[11] Indeed, if a party could not raise it, there would be no issue regarding waiving it.

[12] Based on this determination, we need not address at this time the arbitrator's determination that certain allegations were not covered by the parties' collective bargaining agreement and, therefore, reserved to PERB.

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-1327

- and -

COUNTY OF MONROE,

Employer.

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

HARRIS BEACH PLLC (WILLIAM Q. LOWE of counsel), for Employer

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO ("CSEA") to a decision of an Administrative Law Judge ("ALJ") in a unit clarification/placement proceeding that CSEA initiated pursuant to § 201.2 (b) of PERB's Rules of Procedure. The ALJ held that the title "nurse manager" employed by the County of Monroe ("County") within the Monroe County Hospital ("MCH") is neither encompassed within nor properly placed into CSEA's bargaining unit of full-time County employees. The ALJ reasoned that the title is not encompassed within CSEA's bargaining unit because it is allocated to grade 17, whereas the parties' contractual recognition clause limits inclusion in the unit to County employees at grade 16 and below. Treating the position as unrepresented, the ALJ

held that the title is not appropriately placed into CSEA's unit because of the inherent conflicts between the nurse managers' "significant supervisory functions" and the interests of the employees in CSEA's unit whom the nurse managers supervise.

EXCEPTIONS

Although CSEA does not contest the ALJ's conclusion that the title "nurse manager" is not encompassed within the scope of its bargaining unit, it argues that the ALJ erred in not placing the title into the unit. It emphasizes that the title had been in its unit for many years as a grade 13, and, therefore, it contends that there is no reason to exclude it now. In support it relies on testimony by its unit president, Patricia Hill, a licensed practical nurse at the MCH, who stated that she has seen no change in the supervisory duties of the nurse managers over the years. CSEA also argues that the supervisory functions that nurse managers perform do not warrant their exclusion from the unit and that any conflicts that might arise can be resolved pursuant to CSEA's internal procedures.

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

Having carefully reviewed the record and after consideration of CSEA's exceptions and both parties' arguments, we affirm the decision of the ALJ in all respects.

FACTS

The record fully supports the ALJ's findings of fact.

MCH consists of three large buildings divided into 16 units that are operated 7 days per week, 24 hours per day, in three daily shifts. Each unit varies in size from 28

to 44 beds and is staffed by 23 to 25 full-time employees and 6 to 8 part-time or per diem employees. There is one nurse manager for each of the 16 units. Each has sufficient autonomy over their work schedules to enable them to be responsible for all three shifts on their unit. The nurse managers report to two assistant directors of nursing, Ruth Dorrough and Jeff Schwertfeger, who, in turn, report to Joseph Moore, the director of nursing at MCH.

According to Moore, soon after he arrived at MCH in 2000, he eliminated two bargaining unit supervisory titles between the assistant directors and the nurse managers. After 2004, Moore gradually assigned nurse managers additional administrative and supervisory duties, including those previously performed by the abolished positions. Moore characterized the development of the nurse managers' duties as an "evolution." During the period of this evolution, the nurse managers were in CSEA's bargaining unit as grade 13 positions.

On September 23, 2011, Moore sent a memorandum to Brayton Connard, director of the Monroe County Department of Human Resources, requesting the reclassification of the nurse manager position. Connard assigned the task of investigating Moore's request to Terry Vittore, associate technician in the County's Department of Human Resources. Consistent with hundreds of other such investigations she has conducted, Vittore testified that she compared the duties of the nurse managers to other supervisory positions within MCH because those positions offered better comparability than other supervisory positions employed by the County in other departments. According to Vittore, the duties of two supervisory positions,

Cardiopulmonary Services Manager and Medical Social Work Manager, both grade 17s, were sufficiently similar to those of the nurse managers to warrant reclassifying the nurse manager position to grade 17. Vittore's recommendation was accepted and included in the County's 2012 budget. Thereafter, the job description for nurse manager was revised and adopted by the County Civil Service Commission on July 9, 2012.

The reclassification of the nurse manager position from group 13 to group 17 resulted in the removal of the position from CSEA's bargaining unit pursuant to the parties' recognition clause, which defines the unit as including employees in pay groups 16 and below.

Nurse managers are responsible for the units to which they are assigned. They oversee the day to day operations on the units, including the quality of work performed by subordinate LPNs and RNs in CSEA's bargaining unit. They are responsible for scheduling and approving or disapproving leave requests based on operational needs. They conduct performance evaluations, which are placed into the nurses' personnel files. They are responsible for monitoring time and attendance and performance infractions and for issuing associated counseling and disciplinary notices, and they are required to provide evidence on behalf of the County at any related hearings. Notices of discipline involving suspension or termination are first reviewed by Moore and human resources, and then issued by the nurse manager.

Under Moore's general oversight, nurse managers interview and hire candidates for nursing positions. Their hiring decisions are subject to final approval by the Department of Human Resources. Newly hired employees are placed on one year

probation. The nurse managers conduct a six-month formal written performance evaluation of the probationary employee, and then a 12-month evaluation. Following that, the nurse managers recommend whether the probationary period has been satisfactorily completed or should be continued.

Nurse managers are involved in the process of developing and implementing hospital and nursing policies and procedures. They sit on the hospital- wide policy and procedure committee which is chaired by the associate director of MCH. The hospital-wide committee addresses issues across all departments at MCH and deals with everything from visiting hours to emergency response procedures. Similarly, nurse managers sit on the nursing policy and procedure committee which generally meets once a month. The nursing committee, chaired by Schwertfeger, reviews standing policies, and develops new policies as new devices or new products are introduced. Policy changes or new policies or procedures that come from this committee are subject to Moore's approval. Nurse managers also sit on the quality improvement committee and clinical committees to discuss infection control, skin or wound care and nursing education.

Although Moore testified that he has assigned increasing supervisory and administrative responsibilities to nurse managers since he became director of nursing, Patricia Hill, a registered nurse at MCH, testified that she has not observed an increase in the amount of supervisory authority exercised by nurse managers since she began at MCH in 2007.

Robert Leonard, CSEA's labor relations specialist for the Monroe County unit,

testified that, pursuant to CSEA's policy, whenever there are divergent interests between a supervisory employee and a rank and file employee within CSEA's unit concerning conflicting grievances, CSEA assigns to each, upon request, a CSEA representative. Each representative is then directed not to discuss the case with the other. He testified that he has not encountered such a situation among employees in CSEA's bargaining unit.

DISCUSSION

Because the parties' recognition clause expressly limits inclusion in CSEA's bargaining unit to those at grade 16 and below, the ALJ correctly concluded that the nurse managers, at grade 17, are not encompassed within the scope of the unit.[1] Therefore, she properly treated the title as unrepresented and appropriately applied the uniting criteria under § 207.1 of the Act.[2]

In reviewing the ALJ's conclusion that the nurse managers are not appropriately placed into CSEA's bargaining unit because of the nature and level of their supervisory duties, we emphasize that we are limited to the record before us.[3] In that regard, we agree with the ALJ that the record fully establishes that nurse managers supervise County employees represented by CSEA within the MCH. Indeed, the record reveals

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[1] *See, e.g., Monroe-Woodbury Cent Sch Dist*, 33 PERB ¶ 3007 (2000).

[2] *See, e.g., General Brown Cent Sch Dist*, 28 PERB ¶ 3065, at 3149 (1995).

[3] *See, Featherstone v Franco*, 95 NY2d 550 (2000); *Lippman v New York State Pub Empl Relations Bd.*, 296 AD2d 199 (3d Dept 2002); *Margolin v Newman*, 130 AD2d 312 (3d Dept 1987), appeal dismissed 71 NY2d 844 (1986).

no duties performed by nurse managers other than their supervisory and administrative responsibilities. Finally we note that the nurse managers, as supervisors, are entitled to representation under the Act.[4]

Relying on *County of Genesee*,[5] CSEA argues that the nurse managers should be placed into its bargaining unit. There, the employer objected to a proposed separate bargaining unit of ten head nurses and supervising nurses on administrative convenience grounds under § 207.1 (c) of the Act. Specifically, the employer objected to the proliferation of bargaining units that would result from a separate unit of head nurses and supervising nurses. Balanced against the employer's administrative convenience objection was the petitioner's claim that a separate unit was most appropriate because the supervisory duties of the head nurses and supervising nurses created a conflict of interest that militated against their inclusion in the existing unit of over 200 other employees. The Board observed: "The question is whether the supervisory duties and responsibilities of either or both the head nurses and supervising nurses are of a nature and level 'significant' enough to create a reasonable likelihood that a combined unit will create conflicts of interest and outweigh the strong community of interest arising from a common professional status and mission." Emphasizing that the relevant analysis is "highly fact specific," the Board held that the titles were appropriately included in the unit. It held that the employees share a community of

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[4] *Lippman v New York State Pub Empl Relations Bd., supra*, note 3; *Uniondale Union Free School District v Newman*, 167 AD2d 475, 476 (2d Dept 1990), *affd* 77 NY2d 809 (1991).

[5] 29 PERB ¶ 3068 (1996).

interest with rank and file employees that were not overcome by their supervisory duties. The Board reasoned that the head nurses and supervising nurses did not "have a supervisory role in hiring, discharge, promotion or grievance administration" as would enable them to significantly affect the terms and conditions of employment of those whom they supervise.

Here, in contrast to *County of Genesee*, the County objects to the inclusion of nurse managers in CSEA's bargaining unit. Moreover, as the ALJ accurately emphasized, nurse managers "interview and hire candidates, issue notices of discipline, and testify at step three grievance hearings and grievance arbitrations on behalf of MCH." Likewise, as the ALJ again correctly observed, "they evaluate probationary employees and make recommendations as to whether the probationary period should or should not be continued." We find that, in addition to their scheduling and time and attendance oversight, these supervisory duties necessarily effect terms and conditions of employment to a greater degree than those of the head nurses and supervising nurses in *County of Genesee*.

Furthermore, the record before us reveals no indicia of a strong community of interest between nurse managers and other employees in CSEA's bargaining unit. Although the record indicates that CSEA represents "supervisors" in other departments, it is devoid of evidence concerning the nature or level of their supervision.

Moreover, nurse managers are allocated to a civil service grade that is higher than all other employees in CSEA's bargaining unit, and their supervisory duties are at a level comparable to other unrepresented supervisors within MCH. Indeed, all similarly

situated County supervisors at grade 17 or above are unrepresented. That CSEA or any other employee organization has not sought to represent a separate bargaining unit of County supervisors at grade 17 and above does not warrant the inclusion of nurse managers in CSEA's unit of employees at grade 16 and below. Put another way, contrary to CSEA's argument to us, the largest unit that can provide effective and meaningful representation would be a County-wide supervisory unit that includes nurse managers. That no such unit exists at this time does not permit CSEA to cherry pick among supervisory titles for inclusion in its unit.

Hill's testimony that she has not observed any changes in the supervisory duties of nurse managers since 2007 when, as grade 13s, they were in CSEA's unit is unpersuasive. Without more, her observation is too subjective to suggest that they should be placed into CSEA's bargaining unit. Compared to the specificity of Moore's and Vittore's testimony regarding the evolution and current status of the nurse managers' supervisory and administrative functions, Hill's testimony was properly discounted by the ALJ.

Finally, Leonard's testimony regarding CSEA's internal procedure to address conflicts between supervisors and rank and file unit members is unavailing. The conflicts about which Leonard testified appear to address competing interests concerning terms and conditions of employment that can arise when unit employees vie over benefits under contract grievances. The procedures do not address conflicts that arise when a supervisor is acting on behalf of the County against the interests of rank and file unit employees. Generally, it would be inappropriate for CSEA to interfere with

the nurse managers' supervisory responsibilities in such matters.[6]

By reason of the foregoing, the decision of the ALJ is affirmed, and the petition is hereby dismissed.

DATED: February 28, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

[6] *See, e.g., East Greenbush Cent Sch Dist*, 17 PERB ¶ 3083 (1984).