STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 687,

Petitioner,

-and- **CASE NO. C-6511**

VILLAGE OF SARANAC LAKE,

Employer,

-and-

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200UNITED,

Incumbent/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 Teamsters Local 687 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, regular part-time, and provisional employees.

Excluded: Police officers, permanent supervisory employees, and temporary seasonal employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 687. 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: October 23, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Petitioner,

-and- **CASE NO. CP-1487**

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

ROBIN ROACH, GENERAL COUNSEL (THOMAS COOK of counsel), for Petitioner

JAMES B. HENLEY, GENERAL COUNSEL (BAIMUSA KAMARA of counsel), for Employer

INTERIM BOARD DECISION AND ORDER

This case comes to us on a motion pursuant to § 213.4 of our Rules of Procedure (Rules) filed by the New York City Transit Authority (NYCTA), seeking leave to file interlocutory exceptions to a January 2018 interim decision by an Administrative Law Judge (ALJ).[1] The ALJ found that hearing officers and senior hearing officers (collectively, hearing officers) at NYCTA are public employees within the meaning of § 201.7 of the Public Employees' Fair Employment Act (Act).[2]

MOTION FOR LEAVE TO FILE INTERLOCUTORY EXCEPTIONS

As we have long held, and recently reaffirmed in *State of New York Unified Court System*, we "will not grant leave to file interlocutory exceptions to non-final rulings and

[1] 51 PERB ¶ 4001 (2018). The motion to file interlocutory exceptions was filed on March 22, 2018; by consent of NYCTA, the response was filed on June 5, 2018.
[2] Two days of hearings were held on July 13, 2016 and August 22, 2016; the case was subsequently transferred to a different ALJ pursuant to § 212.4 (a) of our Rules.

decisions unless the moving party demonstrates extraordinary circumstances."[3] The reasoning underlying the extraordinary circumstances standard stems from our:

> recognition that it is far more efficient for the Board and the parties to await a final disposition of the merits of a charge before examining interim determinations. The improvident grant of leave results in unnecessary delays in the final resolution of the factual and legal issues raised by an improper practice charge or representation petition. As a result, the Board has consistently rejected the majority of requests for permission to file exceptions.[4]

In improper practice cases, we have held that a showing of extraordinary circumstances requires either a showing of "severe prejudice" or that "failure to consider the appeal would result in harm to a party which cannot be remedied by our review of the ALJ's final decision and order."[5] However, "we have been more willing to grant leave to file interlocutory exceptions, especially in cases involving representation petitions, under the extraordinary circumstances standard,"[6] when:

> the issue raised in the motion for leave has important statewide policy or legal implications for the processing of future representation petitions, may help insure procedural certainty in such processing or where our decision may obviate the need for further processing of the petition.[7]

In the instant case, were we to reverse the ALJ's interim decision, the result would be to obviate the need for any further proceedings; the question posed is one of whether the hearing officers are "public employees" under § 201.7 of the Act, and

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[3] 50 PERB ¶ 3042, 3169 (2017).
[4] *Hyde Leadership Charter School*, 47 PERB ¶ 3022, 3063 (2014), quoting *Town of Shawangunk*, 29 PERB ¶ 3050 (1996).
[5] *State of New York (UCS)*, 50 PERB ¶ 3042, at 3170, citing *UFT (Fearon)*, 37 PERB ¶ 3007 (2004); *State of New York (UCS)*, 36 PERB ¶ 3031 (2003); *see also State of New York (Division of Parole)*, 25 PERB ¶ 3007, 3019-3020 (1992), citing *United Univ Professions*, 19 PERB ¶ 3009 (1986).
[6] *Hyde Leadership Charter School*, 47 PERB ¶ 3022, at 3063, quoting *State of New York (Division of Parole)*, 40 PERB ¶ 3007, 3019 (2007).
[7] *Id*.

thereby entitled to the rights afforded by the Act. A negative finding would, simply put, divest us of jurisdiction over the hearing officers, and end the proceedings. Accordingly, we grant the motion to file interlocutory exceptions and proceed to the merits of the exceptions.

EXCEPTIONS

NYCTA has filed three exceptions to the ALJ's determination that the at-issue hearing officers are public employees. First, NYCTA asserts that the ALJ erred in finding no implicit legislative intent in the Public Authorities Law (PAL) that hearing officers are not NYCTA employees at all. In this exception, NYCTA also contends that the ALJ erred in not finding the Legislature's silence probative of such intent by finding that the Legislature excluded individuals from employee status explicitly, not implicitly, and that NYCTA's argument was without statutory foundation.

In its second exception, NYCTA claims that the ALJ erred in finding that the record did not establish that the employment of hearing officers is casual and, therefore, not covered by the Act.

NYCTA's third exception argues that the ALJ erred in relying on PAL § 1209-a.4 (h) which explicitly prohibits NYCTA from using "outside contractors to conduct hearings and appeals." NYCTA contends that the ALJ should have employed the control test of *Bynog v Cipriani Group*,[8] and that she further erred in finding that applying *Bynog* would not have changed the outcome, based on her finding that NYCTA maintains control over the work of hearing officers, directly pays them, and issues to them W-2 federal income tax forms normally issued to employees.

[8] 1 NY3d 193 (2003).

Petitioner District Council 37, AFSCME, AFL-CIO (DC 37), which seeks to have the hearing officers added to its unit, supports the ALJ's interim decision.

For the reasons given below, we affirm the ALJ's interim decision.

FACTS

The facts in this matter are cogently set forth in the ALJ's decision, and are discussed here only to the extent necessary to decide the issues raised by the exceptions. On February 22, 2016, DC 37 filed a unit clarification/unit placement petition seeking a determination that the titles either fall within the scope of the unit of NYCTA employees it represents, or should be placed in its unit.[9] NYCTA opposed the petition on the grounds that the employees sought to be represented are not public employees within the meaning of § 201.7 of the Act, are not encompassed within the scope of DC 37's bargaining unit, and do not share a community of interest with those in the unit warranting their placement in that unit. The ALJ originally assigned to the case held a hearing on July 13 and August 22, 2016, limited to the issue of whether hearing officers are public employees within the meaning of § 201.7 of the Act.

Pursuant to PAL Title 9, enacted in 1953, NYCTA was created as a public benefit corporation. PAL § 1204 sets forth NYCTA's general powers, including the power to "appoint employees and fix their compensation subject to the provisions of the civil service law." PAL § 1210.2 provides that the "appointment, promotion and continuance of employment of all employees of the authority shall be governed by the provisions of the civil service law and the rules of the municipal civil service commission of the city."

In 1984, the Legislature enacted PAL § 1209-a, creating the Transit Adjudication

[9] DC 37 represents a unit of approximately 585 Authority employees in various clerical and professional titles.

Bureau (Bureau). The Bureau is an administrative tribunal within NYCTA that adjudicates non-criminal violations of NYCTA's rules and the City's health and noise codes.

Of critical importance here, PAL § 1209-a.4 (h) provides that the Bureau is empowered:

> [t]o enter into contracts with other government agencies, with private organizations, or with individuals to undertake on its behalf such functions as data processing, debt collections, mailing, and general administration, as the executive director deems appropriate, *except that the conduct by hearing officers of hearings and of appeals may not be performed by outside contractors*.[10]

PAL § 1203-a created the Manhattan and Bronx Surface Transit Operating Authority (MaBSTOA), a public benefit corporation that is itself a subsidiary of NYCTA. PAL § 1203-a.3 (b) provides that MaBSTOA is empowered:

> to appoint officers and employees, assign powers and duties to them and fix their compensation. Said officers and employees shall not become, for any purpose, employees of the city or of the transit authority and shall not acquire civil service status or become members of the New York City employees' retirement system but, shall, for purposes of subparagraph (i) of paragraph three of subsection (c) of section six hundred twelve of the tax law be deemed to be officers and employees of a subdivision of the state.

PAL §§ 1204.5-a and 1203-a.3 permit both NYCTA and MaBSTOA to issue rules of conduct that govern the public's conduct and safety while using transit facilities. A violation of the rules of conduct by the public constitutes a "transit infraction" that may result in the issuance of a notice of violation which, if disputed, is adjudicated by Bureau hearing officers.

NYCTA concedes that hearing officers are "appointed" by NYCTA's president,

[10] PAL § 1209-a.4 (h) (emphasis added).

pursuant to PAL § 1209-a.2. However, hearing officers are required to sign a standard agreement provided by NYCTA, entitled "Temporary Professional Services Retainer Agreement," with a term of one year, subject to annual renewal.[11] The agreement states that the hearing officer is a "consultant" and is providing "temporary legal services." The agreement further provides that NYCTA will "make appropriate withholdings for income tax purposes," and that "it is agreed that the CONSULTANT shall be considered as an Authority employee for payroll income tax purposes only, but not for any other purposes."[12] The agreement is terminable by either party on ten days written notice.

The 38 hearing officers at issue adjudicate notices of violation issued to members of the public. The Bureau provides new hearing officers with one day of training and two manuals, one encompassing the applicable substantive law and one the procedural rules. Senior hearing officers train and supervise hearing officers, review their decisions, and may be involved in interviewing prospective hearing officers. Both hearing officers and senior hearing officers may be selected to sit on the Bureau's appeals board. All hearings and appeals are conducted at the Bureau's offices located in Brooklyn, New York. Hearing officers are required to perform all work for the Bureau at its offices, on NYCTA computers and using software provided by the Bureau. Decisions are required to be finished the same day as the hearing is held, and hearing officers may not leave TAB's [the Bureau's] offices until they have done so. The Bureau's business hours are from 8:00 a.m. to 5:00 p.m., and it schedules hearings between 8:30 a.m. and 2:30 p.m. Hearing officers generally work from 8:30 a.m. to 3:30

[11] NYCTA Exhibits In Support of Motion to File Interlocutory Exceptions, Ex C (3).
[12] *Id* (emphasis in original).

p.m., and can only work later with the Bureau's permission. Hearing officers are prohibited from using their cell phones while working at the Bureau and are admonished if they do so. Hearing officers receive annual performance evaluations which are kept on file, and which may be used in remediating performance issues. They receive no benefits other than their per diem pay, and they are required to account for their time and submit invoices for payment.

DISCUSSION

We affirm the ALJ's finding that the employees in the hearing officer titles are public employees as defined in § 201.7 of the Act. In addition to the reasons relied upon by the ALJ, which we find persuasive, we agree with the ALJ that the express language of PAL § 1209-a.4 (h) is dispositive. Indeed, a contrary finding would be blatantly inconsistent with the express language of PAL § 1209-a.4 (h), which states unequivocally that "the conduct by hearing officers of hearings and of appeals may not be performed by outside contractors."

NYCTA seeks to evade the plain meaning of this provision by asserting that it "means, obviously, that the Executive Director of TAB [the Bureau] cannot contract with a company which employs or would provide Hearing Officers."[13] There is nothing at all obvious about this reading, especially as the language of PAL § 1209-a.4 (h), immediately preceding this exception, empowers the Bureau to "enter into contracts with other government agencies, with private organizations, *or with individuals* . . . ."[14]

As the Court of Appeals has recently reaffirmed, "[t]o resolve questions of statutory interpretation, we . . . rely first and foremost on the plain language of the

[13] NYCTA's Brief in Support of Motion and Exceptions, at 8.
[14] PAL § 1209-a.4 (h) (emphasis added).

statute and canons of statutory interpretation," including that of *ejusdem generis*.[15] As we have described it, under "*ejusdem generis*, a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series."[16] Or, as the Fourth Department has phrased it, *ejusdem generis* means that "when a general word or phrase follows a list of specifics, the general word or phrase will be interpreted to include only items of the same class as those listed."[17]

Here, both under a plain meaning approach, or under *ejusdem generis*, the express inclusion of "individuals" as among those with whom the Bureau is empowered to enter into contracts, necessarily implies that "individuals" likewise fall within the bar of those "outside contractors" prohibited from acting as hearing officers conducting hearings and appeals.[18]

NYCTA has offered no support, in logic or in law, for its importation of an unwritten limitation of a prohibited "outside contractor" to a "company." Individuals can be outside contractors, but outside contractors cannot be hearing officers. Therefore, under PAL § 1209-a.4 (h), hearing officers cannot be "consultants", and PAL § 1209-a.4 (h) provides no basis upon which we can find that the hearing officers are not public employees under the Act on the ground that they are "consultants." Indeed, NYCTA's designation of the hearing officers as "employees for payroll income tax purposes only" and as "appointed" by NYCTA's president, pursuant to PAL § 1209-a.2, suggest that

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[15] *People v Silburn*, 31 NY3d 144, 168 (2018).
[16] *City of Ithaca*, 50 PERB ¶ 3006, 3030 (2017), citing *Matter of Riefberg*, 58 NY2d 134, 141 (1983); *Lend Lease (U.S.) Const. LMB Inc. v Zurich American Ins. Co.*, 136 AD3d 52, 57 (1st Dept 2015); *People v Silburn*, 31 NY3d at 168-169; *see generally*, Statutes, § 239.
[17] *Marinaccio v Town of Clarence*, 151 AD3d 1784, 1789 (4th Dept 2017).
[18] *Id*; see also *People v Silburn*, 31 NY3d at 168-169; *City of Ithaca*, 50 PERB ¶ 3006, at 3030.

NYCTA's agreement with its "consultants" represents an effort to create an appearance of conforming to PAL § 1209-a.4 (h), while effectively flouting its requirements.

While it is true that a "casual employee is, by definition, not a public employee under the Act,"[19] we affirm the ALJ's finding, based on the record before her, that the evidence in this matter does not demonstrate that "the number of hours worked by the hearing officers as a group is so insubstantial that it renders their employment casual."[20]

Finally, we find inapposite NYCTA's reliance on *Bynog v Cipriani Group*, in which the Court of Appeals found that "the plaintiffs, temporary waiters, were not employed by the Cipriani defendants but were independent contractors."[21] As a threshold matter, *Bynog* was a private sector case not governed by the definitions applicable to determine public employment under the Act. Moreover, PAL § 1209-a.4 (h) expressly prohibits the use of "outside contractors" in hearing officer titles, and thus if *Bynog* were applicable and NYCTA had established facts warranting a similar finding here, it would merely establish that NYCTA had violated its own enabling statute by employing independent contractors as hearing officers.[22]

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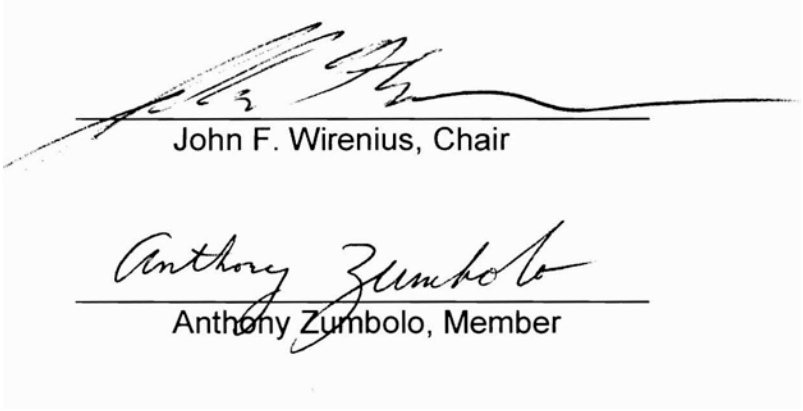
[19] *Mohawk Valley Comm College*, 45 PERB ¶ 3050, 3124 (2012).
[20] 51 PERB ¶ 4001, slip op at pp 11-12, citing, *inter alia*, *Village of Dryden*, 22 PERB ¶ 3035, 3082 (1989). *See generally Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3020 (2008), *confd and modified in part sub nom Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶ 3016 (2009) (substitute bus drivers employed on a per diem basis have "a regularity and continuity of employment sufficient" to demonstrate that they are entitled to representation under the Act) (quoting *Onondaga-Cortland-Madison BOCES*, 23 PERB ¶ 3014 (1990)).
[21] 1 NY3d 193, 199 (2003).
[22] To be clear, we affirm the ALJ's finding that the facts do not support NYCTA's contention to this effect for the reasons stated in her opinion.

We reject the other arguments in NYCTA's exceptions for the reasons given by the ALJ in her well-reasoned decision, and we remand the matter for further proceedings consistent with this decision. [23]

IT IS, THEREFORE, ORDERED, that the motion of the New York City Transit Authority to file interlocutory exceptions to the interim decision is granted, the exceptions are denied, and the matter remanded for further proceedings consistent with this opinion.

DATED: October 23, 2018
Albany, New York



[23] Member Monte A. Klein recused himself from consideration of this case.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party, **CASE NO. U-29047**

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

In the Matter of

DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1359,

Charging Party, **CASE NO. U-29137**

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

In the Matter of

NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party, **CASE NO. U-29179**

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

In the Matter of

NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO,

Charging Party, **CASE NO. U-29409**

- and -

STATE OF NEW YORK (DEPARTMENT OF CIVIL SERVICE),

Respondent.

DAREN J. RYLEWICZ, GENERAL COUNSEL (STEVEN M. KLEIN of counsel), for CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO

ROBIN ROACH, GENERAL COUNSEL (ERICA GRAY-NELSON of counsel), for DISTRICT COUNCIL 37, AFSCME, AFL-CIO, LOCAL 1359

LIPPES MATHIAS WEXLER FRIEDMAN LLP (THIEN-NGA NGUYEN of counsel), for NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.

EDWARD ALUCK, GENERAL COUNSEL (JOHN F. KERSHKO of counsel), for NEW YORK STATE PUBLIC EMPLOYEES FEDERATION, AFL-CIO

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J. LODOVICE of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the State of New York (Department of Civil Service) (State) and a cross-exception filed by District Council 37, AFSCME, AFL-CIO, Local 1359 (DC 37) to a decision and order of an Administrative Law Judge (ALJ).[1] The ALJ found that the State violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it established a schedule of fees for

[1] 50 PERB ¶ 4584 (2017).

promotion/transition examinations (examination fees). These examination fees applied to, among others, employees represented by DC 37, the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA), the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA), and the New York State Public Employees Federation, AFL-CIO (PEF).

EXCEPTIONS

The State filed eight exceptions to the ALJ's decision. The State's first two exceptions argue that the ALJ erred in finding the subject of examination fees to be mandatorily negotiable. According to the State, negotiations over such fees are prohibited or nonmandatory. The State's third exception argues that the ALJ failed to address the specific question directed by the Board on remand and asserts that the examination fees apply to both represented and non-represented employees. The State's fourth exception argues that, because examination fees apply to both represented and unrepresented employees of the State and to other non-State public employers, the subject is nonmandatory. The State's fifth and sixth exceptions assert that the ALJ's finding of a violation and her entire remedial order are contrary to the facts and the law. The State's seventh exception asserts that, if the ALJ's decision is upheld, the Board should clarify that the remedy applies only to CSEA-represented units of State employees within the Institutional Services, Administrative Services, and Operational Services bargaining units. The State's final exception argues that the charges must be dismissed because the Department of Civil Service was not acting as the employer when it established the at-issue examination fees.

DC 37 filed a cross-exception in which it argued that the record does not support the ALJ's finding that examination fees applied to employees employed by the Thruway

Authority, the Canal Corporation, or the Bridge Authority. DC 37 otherwise supports the ALJ's decision.

CSEA and NYSCOPBA support the ALJ's decision and contend that no basis has been demonstrated for reversal.

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

PROCEDURAL HISTORY

A hearing was held on the allegations in these consolidated charges on March 16, 2010. On December 11, 2012, the then-assigned ALJ issued a decision dismissing the charges on the ground that the charging parties had failed to demonstrate a unilateral change in a past practice.[2]

The charging parties and the State filed exceptions, and the Board reversed the ALJ's decision on October 15, 2013.[3] The Board held that the State had a ten-year practice of not charging bargaining unit employees examination fees. The Board remanded the case for a determination of whether the subject of examination fees was a mandatory subject of negotiations and to decide the State's timeliness defense concerning PEF's charge.[4] The Board noted that the ALJ could, at her discretion, reopen the record for purposes of receiving offers of proof and/or additional evidence from the parties "including evidence to resolve an ambiguity in the record: whether the at-issue practice was limited to represented employees or whether the practice and the

[2] 45 PERB ¶ 4620 (2012).
[3] 46 PERB ¶ 3032 (2013).
[4] *Id*, at 3072.

unilateral change were also applicable to non unit employees."[5]

The ALJ reopened the record on a limited basis to address the issues adverted to the Board, and a hearing was held on October 21, 2015. All parties were present and represented by counsel, and all parties filed briefs.

The cases were subsequently reassigned to another ALJ, who issued the decision at issue here. As mentioned above, the ALJ found that the subject of examination fees was mandatorily negotiable. She also found that PEF's charge was untimely filed. No exceptions were filed to this finding. As a result, any exceptions to the ALJ's timeliness finding have been waived.[6]

FACTS

The facts are fully set forth in the ALJs' decisions and the Board's prior decision and are discussed here only as necessary to address the exceptions.

CSEA is the duly certified collective bargaining representative for State employees in the Administrative Services Unit, the Operational Services Unit, and the Institutional Services Unit.[7]

DC 37 is the duly certified collective bargaining representative for State employees in the Rent Regulation Services Unit.[8]

NYSCOPBA is the duly certified collective bargaining representative for State employees in the Security Services Unit.[9]

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[5] *Id*.
[6] Rules of Procedure § 213.2 (b) (4); *see, eg*, *Village of Westhampton Dunes*, 50 PERB ¶ 3035, 3146, n. 8 (2017); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) (citing cases).
[7] 45 PERB ¶ 4620, 4834 (2012), citing Joint Ex 1.
[8] *Id*.

In General Information Bulletin Number 09-01 (Bulletin 09-01) dated March 16, 2009, the State Department of Civil Service (DCS) Director of Staffing Services announced to State department and agency personnel, human resources, and affirmative action offices that DCS would begin assessing fees for the processing of applications for promotion/transition examinations announced on or after March 13, 2009 and administered on or after May 30, 2009.[10]

Following issuance of Bulletin 09-01, the State began assessing examination fees, and all employees in the collective negotiating units represented by the charging parties who applied for such examinations have paid the fees. It is not disputed that the fees were implemented without collective negotiations with the charging parties.

For at least ten years prior to issuance of Bulletin 09-01, the State did not require employees in the collective negotiating units represented by the charging parties to pay examination fees.

Scott DeFruscio, DCS' Director of Staffing Services, testified that Bulletin 09-01 is applicable to "any entity that participates in the examinations given by the Department of Civil Service," which includes New York State executive agencies, the Thruway Authority, the Bridge Authority, and the Canal Corporation.[11] Specifically, with regard to promotion/transition examinations, he stated that the Bulletin applies to both represented and unrepresented (i.e. managerial and confidential) employees working at those participating entities.

Section 50 of the Civil Service Law (CSL) ("Examinations generally"), attached as

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[9] *Id*.
[10] 45 PERB ¶ 4620, at 4835.
[11] Tr, at 15, 17.

an exhibit to the parties' stipulation of facts, states the following, in relevant part

> 5. Application fees. (a) Every applicant for examination for a position in the competitive or non-competitive class, or in the labor class when examination for appointment is required, shall pay a fee to the civil service department or appropriate municipal commission at a time determined by it. Such fees shall be dependent on the minimum annual salary announced for the position, as follows: (1) on salaries of less than three thousand dollars per annum, a fee of two dollars; (2) on salaries of more than three thousand dollars and not more than four thousand dollars per annum, a fee of three dollars; (3) on salaries of more than four thousand dollars and not more than five thousand dollars per annum, a fee of four dollars; and (4) on salaries of more than five thousand dollars per annum, a fee of five dollars. If the compensation of a position is fixed on any basis other than an annual salary rate, the applicant shall pay a fee based on the annual compensation which would otherwise be payable in such position if the services were required on a full time annual basis for the number of hours per day and days per week established by law or administrative rule or order. Fees paid hereunder by an applicant whose application is not approved may be refunded in the discretion of the state civil service department or of the appropriate municipal commission.
>
> (b) Notwithstanding the provisions of paragraph (a) of this subdivision, the state civil service department, subject to the approval of the director of the budget, a municipal commission, subject to the approval of the governing board or body of the city or county, as the case may be, or a regional commission or personnel officer, pursuant to governmental agreement, may elect to waive application fees, or to abolish fees for specific classes or positions or types of examinations or candidates, or to establish a uniform schedule of reasonable fees different from those prescribed in paragraph (a) of this subdivision, specifying in such schedule the classes of positions or types of examinations or candidates to which such fees shall apply; provided, however, that fees shall be waived for candidates who certify to the state civil service department, a municipal commission or a regional commission that they are unemployed and primarily responsible for the support of a household, or are receiving public assistance.[12]

DISCUSSION

As the ALJ found, economic benefits are terms and conditions of employment

[12] Joint Ex 1.

and are, therefore, mandatorily negotiable.[13] We agree with the ALJ that not charging the fee for promotion/transition examinations here was such a mandatorily negotiable economic benefit. State employees would have had to pay the fee to apply for a promotion/transition exam but for the fact that for at least ten years prior to issuance of Bulletin 09-01, the State did not require employees in the negotiating units represented by the charging parties to pay examination fees. We therefore affirm the ALJ's finding that the State was not privileged to unilaterally implement a fee for promotion/transition exams without negotiating with the charging parties, unless one of the defenses offered by the State has merit.

The State first argues that examination fees are a prohibited or nonmandatory subject of bargaining pursuant to CSL § 50.

We find that the subject of examination fees is neither a prohibited nor a nonmandatory subject of bargaining. As the Court of Appeals emphasized in *City of Watertown v New York State Public Employment Relations Board*, the obligation under the Taylor Law to bargain as to all terms and conditions of employment is a "strong and sweeping policy of the State."[14] As the Court went on to explain

> The presumption in favor of bargaining may be overcome only in special circumstances where the legislative intent to remove the issue from mandatory bargaining is plain and clear, or where a specific statutory directive leaves no room for negotiation.

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[13] *See, eg*, *Town of Islip*, 44 PERB ¶ 3014, 3051 (2011), *confd and remanded as to remedy sub nom Matter of Town of Islip v NYS Pub Empl Relations Bd*, 23 NY3d 482, 47 PERB ¶ 7006 (2014), *remanded to ALJ*, 48 PERB ¶ 3002 (2015); *County of Onondaga*,12 PERB ¶ 3035, 3066 (1979), *confd County of Onondaga v NYS Pub Empl Relations Bd*, 77 AD2d 783, 13 PERB ¶ 7011 (4th Dept 1980).

[14] 95 NY2d 73, 78, 33 PERB ¶ 7007 (1990), citing *Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd,* 75 NY2d 660, 667; *Matter of Cohoes City School Dist v Cohoes Teachers Assn,* 40 NY2d 774, 778 (1976).

> To be sure, where a statute clearly forecloses negotiation of a particular subject, that subject may be deemed a prohibited subject of bargaining. Alternatively, if the Legislature has manifested an intention to commit a matter to the discretion of the public employer, negotiation is permissive but not mandatory. Generally, however, bargaining is mandatory even for a subject treated by statute unless the statute clearly preempts the entire subject matter or the demand to bargain diminishes or merely restates the statutory benefits. Absent clear evidence that the Legislature intended otherwise, the presumption is that all terms and conditions of employment are subject to mandatory bargaining.[15]

CSL § 50 contains no express prohibition on bargaining.[16] Nor is the statute "so unequivocal a directive to take certain action that it leaves no room for bargaining."[17] Nor does the statutory language expressly vest the employer with such unilateral discretion to act with respect to the subject of fees as to preempt or foreclose negotiation.[18] Rather, here, as in *Board of Education of the City School District of the*

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[15] *Id* at 78-79, internal citations and quotations omitted.

[16] The State, without providing specific examples, argues that other provisions of the CSL have been amended to "give way and account for collective bargaining rights established under the Taylor Law" and argues that the absence of such an amendment to CSL § 50 means that the Legislature does not intend for collective bargaining to take place. Memorandum in Support of Exceptions, at 5-6, 19-20. In the absence of precise citations to such other provisions of the CSL, we find it impossible to opine on the meaning of such alleged language in other provisions. In general, we do not find it probative that CSL § 50 does not explicitly allow for bargaining under the Taylor Law. The strong and sweeping policy in favor of bargaining would make such an explicit grant of the right to negotiate an unnecessary redundancy.

[17] *Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd*, 75 NY2d 660, 668, 23 PERB ¶ 7012 (1990). *See Webster Cent Sch Dist v Pub Empl Relations Bd of the State of New York*, 75 NY2d 619, 23 PERB ¶ 7013 (1990), for an example of a statute where the Legislature clearly manifested its intention that an action not be subject be subject to collective bargaining. In *Webster*, the Court found the Legislature clearly manifested its intention that school districts' decisions to participate in cooperative educational programs not be subject to collective bargaining with teachers' unions where the statute expressly addressed the subject of job protections for teachers and established a comprehensive package for a school district's decision to contract for a cooperate educational program.

[18] *See, eg, City of New York*, 40 PERB ¶ 3017 (2007) (proposal might be nonmandatory because it could impact the manner and means that police services are provided).

City of New York v New York State Public Employment Relations Board,[19] the State viewed its power to act under the statute as discretionary, and it refrained from acting at all for at least ten years. Again, as the facts make clear, for at least ten years, until the issuance of Bulletin 09-01, the State did not require employees in the collective negotiating units represented by the charging parties to pay examination fees.

Paragraph 6 of CSL § 50 itself gives the DCS wide discretion concerning the examination fees—the DCS may waive fees, abolish fees for specific classes or positions or types of examinations or candidates, or establish a schedule of fees different from those prescribed in paragraph (a) of CSL § 50. The existence of this discretion is what gives the State the ability to bargain over the fees.[20]

The State argues that, because CSL § 50 was enacted before the Taylor Law, we should not expect to see a legislative intent to remove the issue from bargaining.[21] We note that the Court of Appeals made no reference to this consideration in *Schenectady Police Benevolent Association v New York State Public Employment Relations Board*, where the Court considered whether the City of Schenectady's bargaining obligations related to disability leave requirements were preempted by General Municipal Law § 207-c (GML § 207-c). GML § 207-c was enacted in 1961, prior to the Taylor Law's enactment in 1967. Regardless of any chronology

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[19] *Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd*, 75 NY2d at 668.

[20] *See Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd*, 75 NY2d 660, at 668; *County of Westchester*, 33 PERB ¶ 3025, 3069 (2000), 33 PERB ¶ 7016 (2000); *State of New York (Department of Correctional Services—Downstate Correctional Facility)*, 31 PERB ¶ 3065 (1998); *see also State of New York (Office Mental Health-Rochester Psych Ctr)*, 50 PERB ¶ 3032, 3130 (2017) (reaffirming *Downstate Correctional Facility*).

[21] Memorandum on Behalf of the State, at 18-20.

considerations, the Court held that the Taylor Law's bargaining mandate may only be circumscribed by "plain" and "clear" legislative intent or by statutory provisions indicating the Legislature's "inescapably implicit" design to do so. *Schenectady* shows that if the Taylor Law's obligation to bargain is compatible with a statute, bargaining must take place, regardless of when the legislation was passed. As explained above, CSL § 50 leaves room for the bargaining required by the Taylor Law.

The presumption in favor of bargaining can also be overcome by a public policy, embodied in a statute, that is strong enough to justify excluding the subject from collective bargaining. A public policy strong enough to require prohibition would "almost invariably involve an important constitutional or statutory duty or responsibility."[22] For example, the Court of Appeals recently held that "the policy favoring strong disciplinary authority for those in charge of police forces" is sufficient to justify excluding police discipline from collective bargaining.[23] Local control of police discipline is a uniquely weighty public policy concern, narrowly reflected in the statute at issue. Contrary to the State's assertion here,[24] there is no such policy concern attached to setting the application fees for promotion/transition examinations.

The State asserts other reasons to find examination fees non-negotiable, all of which we find not apposite. The fact that the fees apply both to the represented employees at issue here as well as to unrepresented employees not at issue is not a

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[22] *Board of Educ of the City Sch Dist of the City of New York v NYS Pub Empl Relations Bd,* 75 NY2d 660, 667-668, quoting *Port Jefferson State Teachers Assn v Brookhaven-Comsewogue Union Free School Dist*, 45 NY2d 898, 899 (1978).

[23] See *City of Schenectady v NYS Pub Empl Relations Bd*, 30 NY3d 109, 50 PERB ¶ 7006 (2017) (internal citations omitted). *See also Town of Wallkill v CSEA*, 19 NY3d 1066 (2012); 45 PERB ¶ 7508; *PBA of City of New York, Inc v NYS Pub Empl Relations Bd*, 6 NY3d 563, 69 PERB ¶ 7006 (2006).

[24] *See* Memorandum on Behalf of the State, at 22.

reason to find examination fees not to be mandatorily negotiable. The salient issue we are asked to decide is whether examination fees are a term and condition of employment that is, therefore, mandatorily negotiable before the State may make changes to it. As explained above, we find the answer to that question to be in the affirmative. The fact that applicants may consist of other public employees or that other public employers may also charge the examination fee is of no relevance to the charges in front of us.[25] The fees here apply only to current employees. Notably, the examination fee at issue here does not apply to members of the general public, which could change the nature of our analysis.[26]

In *State of New York*, the Board found the payment of an application fee as a prerequisite to participation in open competitive civil service examinations to be a nonmandatory subject of bargaining.[27] In that case, the fee was applicable to both non-employees and State employees, and the employee organization sought for the fee to be discontinued to all applicants. The Board found that, as the impact on State employees was only incidental, the State did not violate its duty to bargain in good faith by unilaterally imposing such a fee. In so holding, however, the Board expressly found that "[t]he exemption of State employees from an application fee requirement . . . would be a financial benefit and a term and condition of employment" and that, had an exemption limited to State employees been sought, "the State would have been

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[25] For this reason, we find no merit to the exception brought by DC 37.

[26] *Compare Newark Valley Cardinal Bus Drivers, NYSUT/AFT/AFL-CIO, Local 4360*, 35 PERB ¶ 3006 (2002), *confd sub nom Newark Valley Cardinal Bus Drivers, NYSUT/AFT/AFL-CIO, Local 4360 v NYS Pub Empl Relations Bd*, 303 AD2d 888, 36 PERB ¶ 7005 (3d Dept 2003); *Buffalo Sewer Auth*, 27 PERB ¶ 3002 (1994); *State of New York (SUNY at Binghamton)*, 19 PERB ¶ 3029 (1986); *State of New York*, 13 PERB ¶ 3099 (1980).

[27] *State of New York*, 13 PERB ¶ 3099 (1980).

obligated to negotiate the matter."[28] The fee at issue in the current case, by contrast, applies only to current employees. Thus, as we held in *State of New York*, the exemption from the fee is an economic benefit that is a term and condition of employment for the State's employees. As such, it is mandatorily negotiable, and the past practice found in our earlier decision therefore is enforceable.

In its exceptions, the State makes the assertion, for the first time, that the charges must be dismissed because the DCS was not acting as the employer when it issued Bulletin 09-01. Having not raised this argument to the ALJ, the State may not raise the issue to us for the first time on exceptions.[29]

With respect to the State's requested modification of the ALJ's remedy, we note that the remedy already applies only to CSEA-represented units of State employees within the Institutional Services, Administrative Services, and Operational Services bargaining units. Those were the employees named in the charge filed by CSEA[30] and are the only CSEA-represented employees at issue in this proceeding. However, CSEA does not specifically object to the State's request and, to avoid any confusion, we have modified the ALJ's order and notice as requested by the State.

Having affirmed the ALJ's findings, IT IS HEREBY ORDERED that the State will forthwith:

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[28] *Id*, at 3159.
[29] *See, eg, Cortland PBA*, 51 PERB ¶ 3014, n. 12 (2018); *DC 37 (Javed)*, 50 PERB ¶ 3028, 3108, n. 15 (2017), citing, *inter alia*, *NYS Thruway Assn*, 47 PERB ¶ 3032, 3100, n. 25 (2014). *See generally City of Poughkeepsie*, 33 PERB ¶ 3029, 3079-3080 (2000); *TWU, Local 100 (Guichard)*, 31 PERB ¶ 3066, 3147 (1998); *Town of New Hartford*, 29 PERB ¶ 3076, 3181 (1996); *Mt Markham Cent Sch Dist*, 27 PERB ¶ 3030, 3073 (1994).
[30] ALJ Ex 3.

1. Cease and desist from requiring unit employees represented by CSEA,[31] DC 37, and NYSCOPBA to pay a fee for promotion/transition examinations;

2. Make unit employees represented by CSEA, DC 37, and NYSCOPBA whole for any fees paid as a result of the State's unilateral implementation of application fees for promotion/transition examinations, with interest at the maximum legal rate;

3. Negotiate in good faith with CSEA, DC 37, and NYSCOPBA; and

4. Sign and post the attached notice at all physical and electronic locations normally used to post notices of information to unit employees.

DATED: October 23, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[31] This order applies only to employees in the Administrative Services Unit, the Operational Services Unit, and the Institutional Services Unit.

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 State of New York (State) represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA),[32] District Council 37, AFSCME, AFL-CIO, Local 1359 (DC 37), and the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) that the State will forthwith:

1. Not require unit employees represented by CSEA, DC 37, and NYSCOPBA to pay a fee for promotion/transition examinations;

2. Make unit employees represented by CSEA, DC 37, and NYSCOPBA whole for any fees paid as a result of the State's unilateral implementation of application fees for promotion/transition examinations, with interest at the maximum legal rate; and

3. Negotiate in good faith with CSEA, DC 37, and NYSCOPBA.

Dated . . . . . . **By . . . . . .**
on behalf of the **State of New York**
(Department of Civil Service)

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.

[32] This notice applies only to employees in the Administrative Services Unit, the Operational Services Unit, and the Institutional Services Unit.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

CASE NO. U-33195

- and -

CITY OF MIDDLETOWN,
Respondent.

DAREN J. RYLEWICZ, GENERAL COUNSEL (STEVEN KLEIN of counsel) for Charging Party

THOMAS, DROHAN, WAXMAN, PETIGROW, & MAYLE, LLP (JUDITH CRELIN MAYLE of counsel) for Respondent

BOARD DECISION AND ORDER

On June 19, 2018, an Administrative Law Judge (ALJ) issued a decision finding that the City of Middletown (City) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) when it laid off Christopher Predmore in retaliation for his testifying on behalf of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) at a disciplinary arbitration.

The ALJ's decision was served on the City on June 22, 2018. The City requested extensions of time in which to file exceptions on June 29, 2018 and July 23, 2018. Both of these requests conformed to § 213.7 of PERB's Rules of Procedure (Rules),[1] and CSEA did not object to either request. The requests were granted on July

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[1] Section 213.7 of our Rules reads as follows:

> A request for an extension of time within which to file exceptions, motions for leave to file exceptions, cross-exceptions, responses and briefs shall be in writing, and filed with the board before the expiration of the required time for filing them, provided that the time during which to request an extension of time may be extended because of extraordinary circumstances. A party requesting an extension of time shall notify all parties of its request and shall indicate to the board the position of each other party with regard to such request.

2, 2018 and July 23, 2018, respectively. According to the second letter approving the City's requested extension, granted by PERB's General Counsel David P. Quinn, the City's exceptions would be considered timely if filed and served on or before August 17, 2018 in accordance with PERB's Rules.

No exceptions were filed and served by August 17, 2018. On August 28, 2018, PERB received two letters from the City requesting an extension of time in which to file exceptions. PERB also received a letter from CSEA, dated August 28, 2018, opposing the City's request.

Section 213.7 of our Rules provides that a request for an extension of time within which to file exceptions must be filed with the Board before the expiration of the required time for filing exceptions. The City's exceptions were due to be filed on or before August 17, 2018, and its request for an extension was not received until August 28, 2018. Therefore, its request does not comply with § 213.7 of our Rules.

The time to request an extension of time to file exceptions may be extended because of "extraordinary circumstances."[2] In its August 28, 2018 letter, the City asserts that its request for an additional extension was late because it initially incorrectly calendared the date that its exceptions were due. It goes on to claim that its error was exacerbated by family obligations and work load. The City argues that these factors are sufficient to demonstrate extraordinary circumstances such that its time to file exceptions should be extended.

Extraordinary circumstances can be established through the presentation of specific and detailed facts "demonstrating that the failure to make a timely request for an extension was not the result of a neglectful error or the burdens from other

[2] *Id*.

obligations."[3] Mere law office failure, such as that which caused the City to miss the filing deadline of August 17, 2018, does not constitute extraordinary circumstances.[4] Nor does a preoccupation with other litigation or simple family obligations constitute extraordinary circumstances.[5] Accordingly, extraordinary circumstances have not been demonstrated here.

IT IS, THEREFORE, ORDERED, that the City's request for an extension of time within which to file exceptions is hereby denied.

DATED: October 23, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[3] *NYSCOBPA (Hunter)*, 42 PERB ¶ 3038, 3137-3138 (2009).
[4] *Compare PEF (Scourakis)*, 44 PERB ¶ 3037 (2011) (finding that while law office failure does not constitute extraordinary circumstances, grant of requested extension constituted a proper application of Board's discretion where exigencies caused by the hospitalization of an immediate family member prevented attorney from seeking a timely extension); *Board of Educ of the City Sch Dist of the City of New York*, 42 PERB ¶ 3037 (2009) (finding extraordinary circumstances demonstrated where District's lack of awareness of decision was result of breakdown in established administrative procedure and not result of any form of neglect, omission, or delay by attorneys).
[5] *See UFT (Thompson)*, 19 PERB ¶ 3049 (1986); *Board of Educ of the City Sch Dist of the City of New York (Barnett)* 16 PERB ¶ 3051 (1983); *UFT (Abramson)*, 13 PERB ¶ 3101 (1980); *Westbury Teachers' Assn (Handy)*, 12 PERB ¶ 3107 (1979).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF WATERTOWN,

Charging Party,

-and-

CASE NO. U-35123

WATERTOWN PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 191, IAFF, NYSFFA,

Respondent.

In the Matter of

WATERTOWN PROFESSIONAL FIREFIGHTERS ASSOCIATION, LOCAL 191, IAFF, NYSFFA,

Charging Party,

-and-

CASE NO. U-35160

CITY OF WATERTOWN,

Respondent.

BOND SCHOENECK & KING, PLLC (TERRY O'NEIL of counsel), for City of Watertown

BLITMAN & KING LLP (NATHANIEL G. LAMBRIGHT of counsel), for Watertown Professional Firefighters Association, Local 191, IAFF, NYSFFA

BOARD DECISION AND ORDER

These cases come to us on exceptions to a decision of the Assistant Director of Employment Practices and Representation (Assistant Director) filed by the City of Watertown (City).[1] In Case No. U-35123, the Assistant Director dismissed a charge alleging that the Watertown Professional Firefighters Association, Local 191, IAFF, NYSFFA (Association) violated § 209-a.2 (b) of the Public Employees' Fair Employment

[1] 51 PERB ¶ 4525 (2018).

Act (Act) by submitting to compulsory interest arbitration certain proposals that are not mandatory subjects of negotiation.[2]

EXCEPTIONS

The City filed eight exceptions to the Assistant Director's decision. The City argues that the Assistant Director erred in dismissing its charge and should have found that the Association's "hazard pay" proposal was not arbitrable.[3] The City also argues that the Assistant Director should have found that the Association proposed to continue the allegedly illegal minimum manning provisions in Articles 5 and 6 of the expired collective bargaining agreement (CBA).[4] Finally, the City argues that the Assistant Director's refusal to hold a hearing constituted reversible error.[5]

The Association supports the Assistant Director's decision and contends that no basis has been demonstrated for reversal.

For the following reasons, we affirm the Assistant Director's decision.

FACTS

The record in this case consists of the pleadings, the 2011-2014 collective bargaining agreement between the parties, an August 26, 2016 letter from the originally assigned Administrative Law Judge (ALJ) to the parties confirming what had been

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[2] In a companion case (Case No. U-35160), the Assistant Director found that the City violated § 209-a.2 (b) of the Act by submitting its "Excessive Sick Leave Users Program" proposal to compulsory interest arbitration and directed the City to withdraw its proposal from interest arbitration. The Assistant Director also dismissed that portion of the charge alleging that the City violated § 209-a.1 (d) of the Act by submitting its wage proposal to interest arbitration. There are no exceptions to either of these findings. As a result, they are not before us and any such exceptions are waived. Rules of Procedure § 213.2; *see, eg, Lawrence Union Free Sch Dist*, 50 PERB ¶ 3034, 3140 n. 20 (2016); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) (citing cases).

[3] Exceptions Nos. 4-6, 8, Brief in Support, at 14-21.

[4] Exceptions Nos. 2-3, 7, Brief in Support, at 5-14.

[5] Exceptions No. 1, Brief in Support, at 21-22.

discussed at the conference, a March 21, 2017 letter from the ALJ to the parties advising that a hearing was not necessary, and a May 3, 2017 letter from the City's attorney to the Association's attorney confirming the City's withdrawal of its objection to an Association proposal.[6]

The Assistant Director determined, after a review of the record, that there were no factual disputes requiring a hearing, and directed the parties to submit briefs. Both parties filed briefs. The City repeatedly disagreed with the Assistant Director's determination that a hearing was not necessary and requested a hearing concerning its assertion that various provisions of Articles 5 and 6 of the expired agreement are illegal job security provisions that cannot be submitted to an interest arbitration panel.[7]

The City objected to the Association's proposal to add a new provision to Article 5 of the agreement, as follows:

> Add Article 5, Section 4 (c) Hazard Pay.
>
> Whenever a shift is staffed with less than 15 men, including the Battalion Chief, those members will receive Hazard Pay. The Hazard Pay will be in the amount equivalent to the entire cost of employing a full time Captain at the salary level of a top grade Captain.[8]

The City asserts that this provision concerns staffing rather than hazardous duty pay and is, therefore, nonmandatory. The Assistant Director found that the Hazard Pay provision is mandatory because it is a monetary demand that ties increased compensation based on safety concerns predicated on the number of employees staffing a shift.

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[6] The record was confirmed in two letters to the parties, dated August 26, 2016 (from the original ALJ), and March 21, 2017 (from the Assistant Director). We have reviewed all of these materials, and the closing briefs submitted to the Assistant Director by the parties.

[7] Specifically, Article 5, §§ 4.a, 4.b, and 8, and Article 6, §§ 1(e) and (f).

[8] Charge in Case No. U-35123, Ex A.

DISCUSSION

First, we affirm the Assistant Director's finding that the Association's "Hazard Pay" proposal is mandatorily negotiable. It deals exclusively with compensation. While the conditions for the hazardous duty pay arise when staffing falls below a certain point, the proposal does not impair the City's ability to set or alter its staffing levels. Moreover, it has long been settled that "demands for premium pay for risks [employees] might encounter if their employer were to exercise managerial prerogatives regarding minimum staffing levels . . . [are] mandatorily negotiable."[9] No basis for distinguishing these cases, or underlying flaw in their reasoning, has been established, and therefore, the proposal is mandatorily negotiable and a proper subject for interest arbitration.

We, like the Assistant Director, find the City's reliance on an ALJ's decision in *City of Niagara Falls*, to be unavailing.[10] We do not find persuasive the City's assertion that the Association's proposal contains a compensation aspect that is "inextricably intertwined" with the nonmandatory subject of staffing.[11] Aside from the fact that the ALJ's decision is not binding on us, the demand submitted in that case both required premium pay when fewer than four firefighters were assigned to a piece of equipment and required that at least four firefighters be assigned.[12] The ALJ in *City of Niagara Falls* found that the union's bargaining proposal "is presented in such a way as to reasonably indicate that both the issue of compensation and manning levels in ladder and engine companies are to negotiated as a single entity," and thus was a unitary

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[9] *Town of Carmel*, 29 PERB ¶ 3026, 3059 (1996), *confd sub nom Matter of Town of Carmel v NYS Pub Empl Relations Bd*, 246 AD2d 791, 29 PERB ¶ 7016 (3d Dept 1996) (citing and reaffirming *Village of Spring Valley*, 14 PERB ¶ 3010 (1981));*see generally Fulton Firefighters Ass'n, Local 3063 IAFF, AFL-CIO (Fulton Firefighters),* 30 PERB ¶ 3012 (1997); *City of Newburgh (IAFF, Local 189)*, 11 PERB ¶ 3087, 3143 (1978).
[10] 36 PERB ¶ 4553 (2003).
[11] Brief Submitted in Support of Exceptions, at 20.
[12] *City of Niagara Falls*, 36 PERB ¶ 4553, at 4697.

demand that contained elements related to staffing, a nonmandatory subject of bargaining.[13] Not so here. The minimum manning provisions the validity of which the City disputes, are *already* embodied in the CBA.[14] Rather, "the demand in issue is not one for a staffing level, but one for a rate of compensation tied to the staffing level fixed by the City," and is thus mandatory.[15]

We next address the City's argument that the Association proposed to continue Articles 5 and 6 in the expired CBA, that it could have shown this had the Assistant Director held a hearing, and that these provisions of the expired CBA should be placed before the interest arbitration panel.

After carefully reviewing the record, we find that the City has not established the need for a hearing or that the Association intended to seek to continue Articles 5 and 6.

Initially, we find that the City did not argue to the Assistant Director that the Association proposed to continue Articles 5 and 6 in the expired CBA. Having not raised the argument below, the City may not now present the argument for the first time to us.[16]

The charge did not allege that the Association made a proposal to continue Articles 5 and 6 in the expired CBA. Instead, after listing the proposals to which the City objects, the charge "objects" to the continuation of these "contract clauses/provisions" which it asserts the Association "seeks to continue" by interest arbitration award or

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[13] Id at 4698.
[14] Art. 5, §§ 4.b and 8. Art. 6, §§ 1(e) and (f).
[15] *City of Fulton*. 30 PERB ¶ 3012, at 3025; see also *Town of Carmel*, 29 PERB ¶ 3026, at 3059; *Village of Spring Valley*, 14 PERB ¶ 3010, at 3016-3017; *City of Newburgh*, 11 PERB ¶ 3087, at 3143.
[16] *Cortland PBA*, 51 PERB ¶ 3014, n. 12 (2018); *DC 37 (Javed)*, 50 PERB ¶ 3028, 3108, n. 15, citing, *inter alia*, *NYS Thruway Assn*, 47 PERB ¶ 3032, 3100, n. 25 (2014). *See generally City of Poughkeepsie*, 33 PERB ¶ 3029, 3079-3080; *TWU, Local 100 (Guichard)*, 31 PERB ¶ 3066, 3147 (1998); *Town of New Hartford*, 29 PERB ¶ 3076, 3181 (1996); *Mt Markham Cent Sch Dist*, 27 PERB ¶ 3030, 3073 (1994).

successor contract.[17] Nowhere else in the record does the City assert that the Association made a proposal to continue Articles 5 and 6 of the expired CBA. In its offer of proof on why a hearing is necessary, the City argued only that it would demonstrate that Article 5, §4 (b) was the equivalent of a no-layoff clause—the City did not contend that the Association had submitted any proposal to continue Articles 5 and 6 in the expired CBA.

Nor did the City raise the argument that the Association proposed to continue Articles 5 and 6 in the expired CBA in its May 15, 2017 brief to the Assistant Director. The City asserted that the Association "[b]y necessary implication" proposed that "any provision it does not seek to amend . . . should be continued."[18] The City went on to assert that this "conclusion is consistent with the position taken by the Union during negotiations where it confirmed that its proposal included the continuation of all CBA terms not specifically proposed to be amended." Neither of these assertions amounts to an allegation that the Association made a specific proposal to continue Articles 5 and 6 of the expired CBA. To confirm a position in bargaining does not amount to a negotiations proposal, and we will not find proposals to be made "by implication." Accordingly, we find that the Assistant Director did not err in finding that neither side made a proposal concerning Articles 5 and 6 of the expired CBA and that there were no material issues of disputed fact requiring a hearing.

Even had the City raised the argument, we find that the Association did not make a proposal for consideration in interest arbitration that the terms in the expired agreement must continue in effect except as modified in negotiations. The Association's proposals for consideration in interest arbitration were specifically

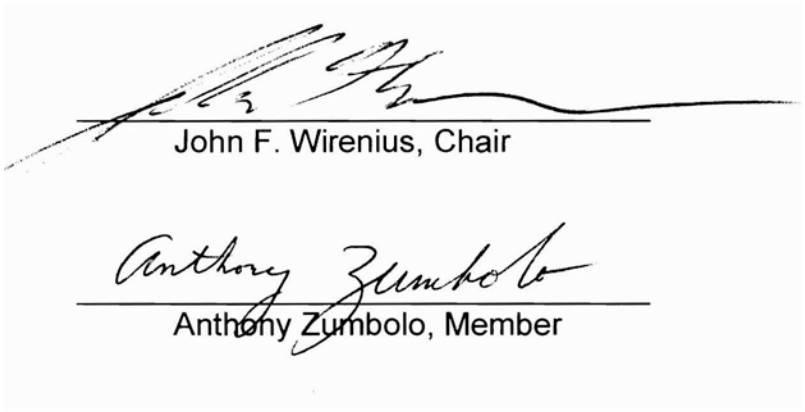
[17] ALJ Ex 1.
[18] Brief Submitted on Behalf of the City, at 6.

included with the City's charge; none sought to continue the terms in the parties' expired agreement.[19] Whether such a proposal was made earlier in the negotiations process is of no consequence, as the only issues before the interest arbitration panel are those listed with the petition for interest arbitration.[20] There is no evidence that could be adduced at a hearing that would change this simple fact. For this additional reason, there was no error in the Assistant Director's decision not to hold a hearing in this matter.

Accordingly, we affirm the Assistant Director's finding that the Association's "hazard pay" proposal was mandatorily negotiable. We find that the remainder of the City's exceptions lack merit.[21]

IT IS, THEREFORE, ORDERED that charge No. U-35123 must be, and hereby is, dismissed.

DATED: October 23, 2018
Albany, New York



[19] ALJ Ex 1, Exhibit A.
[20] See Rules of Procedure § 205.1 (a) (7) (requiring a list of all presently unresolved issues).
[21] Member Monte A. Klein recused himself from consideration of this case.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF BLOOMING GROVE,

Charging Party, **CASE NO. U-35303**

- and -

BLOOMING GROVE POLICE BENEVOLENT ASSOCIATION, INC.,

Respondent.

In the Matter of

BLOOMING GROVE POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party, **CASE NO. U-35324**

-and-

TOWN OF BLOOMING GROVE,

Respondent.

FEERICK LYNCH MacCARTNEY & NUGENT PLLC (BRIAN D. NUGENT of counsel), for Town of Blooming Grove

JOHN M. CROTTY, ESQ., for Blooming Grove Police Benevolent Association, Inc.

BOARD DECISION AND ORDER

These cases come to us on exceptions to a decision of an Administrative Law Judge (ALJ) filed by the Blooming Grove Police Benevolent Association, Inc. (PBA).[1] In Case No. U-35303, the ALJ found that the PBA violated § 209-a.2 (b) of the Public Employees' Fair Employment Act (Act) by submitting to compulsory interest arbitration

[1] 51 PERB ¶ 4526 (2017).

certain proposals that are not mandatory subjects of negotiation. In Case No. U-35324, the ALJ dismissed the PBA's charge alleging that the Town of Blooming Grove (Town) violated § 209-a.1 (d) of the Act by submitting a new proposal to interest arbitration, one that had not been the subject of negotiations prior to the filing of an interest arbitration petition.

EXCEPTIONS

The PBA argues that the ALJ erred in finding that its proposals relating to minimum staffing, W-2 forms for employees receiving General Municipal Law (GML) § 207-c benefits, and discipline were nonmandatory. The PBA argues that the ALJ also erred in finding that the Town's submission to interest arbitration of two-year wage and longevity demands were not new proposals, on the basis that the two-year demands were substantially different from the three-year proposals that the Town presented during negotiations.

For the following reasons, we affirm the ALJ's decision, in part, and reverse, in part.

DISCUSSION

Section 205.6 of our Rules of Procedure (Rules) provides that a party may raise an objection to the arbitrability of proposals submitted to compulsory interest arbitration on the grounds including, but not limited to: (1) that the subject "matter proposed is not a mandatory subject of negotiations;" (2) that it "was not the subject of negotiations prior to the petition;" or that (3) "a matter proposed had been resolved by agreement during the course of negotiations."[2] Presenting a nonmandatory demand to interest arbitration, over the other party's objection, violates the duty to negotiate in good faith.

[2] Rules § 205.6.

Minimum Staffing Proposal

The PBA submitted a proposal relating to minimum staffing requirements which reads as follows:

> Article 6 – Tours of Duty: (pp. 4-6)
>
> NEW F. Minimum Staffing
> There shall be a minimum of three (3) police officers, which may include one (1) one Sergeant, scheduled and working on each [sic] of duty. When an additional employee(s) is required to fill the minimum staffing level, full-time employees shall be offered the opportunity first (1st), using the canvass procedure in Article 5 – Overtime**.**[3]

The Town objected to this proposal as nonmandatory, and the PBA agrees that this proposal is not mandatorily negotiable under a traditional analysis. However, the PBA argues that the *City of Cohoes* conversion theory of negotiability should apply to this proposal, converting it into a negotiable demand.[4]

In *Cohoes*, "the Board held that a bargaining proposal seeking to modify a term in an expired collective bargaining agreement that concerned a nonmandatory subject (there, minimum manning) was converted into a mandatory bargaining proposal."[5] The *Cohoes* Board "reasoned that absent such a conversion, neither party to the bargaining relationship could ever modify the nonmandatory contractual obligation over objection of the other party because the subject of the contractual term and, thus, the demand to modify it were nonmandatory."[6] To prevent this inequity, the Board found that nonmandatory subjects contained within a contract between two parties to a bargaining

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[3] Ex 1; Ex 4, Attachment 1.
[4] *See City of Cohoes*, 31 PERB ¶ 3020 (1998), *confd sub nom Uniform Firefighters of Cohoes v Cuevas*, 32 PERB ¶ 7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶ 7019 (3d Dept 2000), *lv den,* 96 NY2d 711, 34 PERB ¶ 7018 (2001).
[5] *City of Albany*, 47 PERB ¶ 3016, 3046 (2014) (summarizing *Cohoes*, 31 PERB ¶ 3020 (1998)).
[6] *Id*.

relationship are converted into mandatory subjects for purposes of collective negotiations between those parties.[7] Consistent with that public policy, for conversion under *Cohoes*, the bargaining proposal must seek to "alter or delete a topic or category addressed specifically, or at least generally, in the parties' contract," and that topic or category must be itself nonmandatory.[8]

The contract language that the PBA points to here is Article 6 of the collective bargaining agreement (CBA), "Tours of Duty."[9] Article 6 of the CBA establishes four permanent tours of duty and defines the hours for each tour. Article 6 specifically reserves the right to determine staffing levels for bidding each of the permanent tours of duty to the Chief of Police.[10] Also, the Town reserves its right to leave a police officer tour vacancy unfilled at its sole discretion.[11]

The ALJ found that the subject matter of Article 6 related to a mandatory subject of bargaining. We disagree. As the parties here acknowledge, staffing levels is a nonmandatory subject.[12] Indeed, *Cohoes* itself found nonmandatory, and thus converted, a minimum manning provision in the parties' CBA.[13] The language in Article 6 sets forth the chief of police's discretion in determining staffing levels for each of the permanent tours of duty, and the language of the PBA's proposal seeks to modify the chief of police's discretion. As such, the proposal here, as in *Town of Fishkill Police*

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[7] 31 PERB ¶ 3020, at 3039-3040. *See also Town of Yorktown PBA*, 35 PERB ¶ 3017 (2002).
[8] *City of Albany*, 47 PERB ¶ 3017, at 3046, quoting *Town of Fishkill Police Fraternity, Inc.*, 39 PERB ¶ 3035, 3118 (2006).
[9] Ex 5, Attachment, Exhibit A, at pp. 4-6.
[10] *Id.*
[11] *Id,* at 5.
[12] *See, eg*, *City of New York*, 40 PERB ¶ 3017, 3065 (2007); *Johnstown PBA*, 25 PERB ¶ 3085, 3174 (1992); *City of Schenectady*, 21 PERB ¶ 3022, 3050 (1988); *City of White Plains*, 5 PERB ¶ 3008, 3016 (1972).
[13] 31 PERB ¶ 3020, at 3038, 3045, n. 3.

Fraternity, Inc.,[14] seeks the modification of a nonmandatory term in the parties' CBA and is converted to a negotiable subject under *Cohoes*.

GML § 207-c W-2 Forms Proposal

The Town objects to the portion of the PBA's GML § 207-c proposal which states:

> Section 14. Miscellaneous
>
> NEW 4. The Town shall, in accordance with Internal Revenue Service (IRS) regulations, not withhold federal or State income taxes or Social Security and Medicare taxes from a Recipients wages, and shall refund the Recipient for any of these amounts incorrectly withheld, within thirty (30) calendar days of the date of the wage payment in which the amounts were incorrectly withheld. The Town shall provide the Recipient with an annual W-2 statement that does not include Section 207-c benefits as taxable wages and salary.[15]

The ALJ found that "[n]otably, the parties do not dispute that wages earned by an employee who is out of work pursuant to GML § 207-c are not taxable."[16] Neither party excepted to this finding, and we therefore accept it as law of the case for purposes of this decision.

The ALJ found it unclear what the second sentence was asking for but nevertheless found the demand to be prohibited to the extent it was requiring the Town to amend the contents of a Federal tax form or provide employees with a second and different form. We reverse this finding.

Initially, we do not find the second sentence to be unclear. It is simply asking that the Town provide employees with a W-2 form that accurately reflects that wages earned by an employee while that employee is out of work pursuant to GML § 207-c are

[14] 39 PERB ¶ 3035, at 3118.
[15] Ex 1; Ex 4, Attachment 1.
[16] 51 PERB ¶ 4526, at 4606.

not taxable.[17] This obligation logically follows from the fact that the Town agrees that it may not withhold Federal or State income taxes from an employee who is out of work pursuant to GML § 207-c.

Under *City of Cohoes* and its progeny, a demand that seeks to provide a contractual forum in which to remedy alleged violations of employee statutory rights constitutes a mandatory subject of negotiations unless the proposal is inconsistent with public policy.[18] The demand seeks to provide a forum in which to ensure compliance with an employee's statutory right to receive an accurate W-2, a proposition that the Town does not dispute. In this context, the PBA seeks to ensure a remedy for any failure on the part of the Town to perform the ministerial act of complying with the federal requirement that non-taxable wages not be included as taxable income on employees' W-2 forms. As the Board explained in *City of Cohoes*, the Town's lack of discretion does not make such a bargaining demand redundant or nonmandatory, as the inclusion of such a demand in an interest arbitration award would provide a source of additional and different rights and remedies.[19] Although the PBA's proposal is in substance duplicative of the statutory right, submitting it to the interest arbitration panel might result, if the proposal is adopted by the panel and included in the ultimate award,

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[17] The statutory requirement is provided at 26 USC §6501.

[18] 31 PERB ¶ 3020, 3043 (1998), *confd sub nom Uniform Firefighters of Cohoes v Cuevas*, 32 PERB ¶ 7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶ 7019 (3d Dept 2000), *lv den,* 96 NY2d 711, 34 PERB ¶ 7018 (2001). *See also State of New York – Unified Court System*, 41 PERB ¶ 3009, 3058-3059 (2008) ("the effect of *Cohoes* is that the incorporation of a statutory procedure into an agreement may result in contractual obligations on the parties"); *Village of Baldwinsville*, 44 PERB ¶ 3031, 3111 (2011) (finding proposal mandatory where it proposed to grant additional contractual rights and remedies to employees "concerning a plethora of additional categories of anti-discrimination and anti-retaliation rights emanating from federal and state laws").

[19] 31 PERB ¶ 3020, at 3043.

in alternative means of redressing any non-compliance on the part of the Town.

We need not decide today whether more complex matters involving substantive interpretations of the Internal Revenue Code and regulations thereunder might rise to the level of implicating public policy concerns or otherwise be non-arbitrable. The Town has not identified any public policy rendering the issue of providing an additional forum in which to challenge an incorrect statement of the taxable income earned by an employee not arbitrable.[20] The issue of not including GML § 207-c benefits as taxable wages and salary appears to be a straightforward one that does not require any expertise in tax matters, making it appropriate for decision by an arbitrator. Thus, the nature of the demand does not raise policy considerations "significant enough to render [the demand] nonmandatory or prohibited."[21] In the absence of any such public policy proscription, we find that *City of Cohoes* and its progeny apply, and that the demand is, therefore, mandatorily negotiable.

Discipline Proposal

The PBA submitted a proposal related to disciplinary procedures.[22] The Town objected to the proposal, and the ALJ found that the proposal encompassed the prohibited subject of police discipline. We affirm this finding.

Town Law (TL) § 155 commits to towns "the power and authority to adopt and

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[20] Notably, federal courts have held that tax computation issues may appropriately fall within the scope of arbitration provisions. *See McDonnell Douglas Finance Corp v Pennsylvania Power & Light Co*, 858 F2d 825, 832-833 (2d Cir 1988) (enforcing limits of arbitration clause intended to reach only tax issues, excluding non-accounting issues such as fraud and breach of contract); *Duafala v. Globecomm Systems Inc*., 91 F.Supp.3d 330, 336-338 (2015) (challenged accuracy of calculations of Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA), properly deemed to fall within scope of arbitration clause).

[21] *City of Cohoes*, 31 PERB ¶ 3020, 3043 (1998).

[22] *See* 51 PERB ¶ 4526, at 4606 for the full proposal.

make rules and regulations specifically related to police discipline."[23] Accordingly, the subject of police discipline resides with the Town Board and is a prohibited subject of bargaining between the Town and the PBA.[24] The Court of Appeals has squarely addressed this issue and found that TL § 155 removes the subject of police discipline from collective bargaining in these circumstances.[25]

Two-Year Wage and Longevity Proposals

In the Town's response to the SOC's petition for interest arbitration, the Town included language stating that "[f]or the purposes of compulsory interest arbitration, the Town hereby amends its proposals solely to reduce the length of the proposed contract from three (3) years to two (2) years."[26] This resulted in the Town's proposal number 1 (Term of Contract) changing from 3 years to 2 years, and the Town's proposal number 2 (Wages and Longevity) also changing from 3 years (offering zero percent in the first year and 1 percent in each of the next two years) to 2 years (offering zero percent in the first year and 1 percent in the next year). The SOC argues that the two-year wage and longevity demands are improper "new" demands.[27]

The Town's answer asserted that the proposals were proper and were not

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[23] *Town of Wallkill,* 19 NY3d 1066, 1069; 45 PERB ¶ 7508 (2012). Pursuant to this authority, the Town has adopted a resolution entitled "Rules and Regulations Governing Departmental Charges and Discipline of Members of the Town of Blooming Grove Police Department." Ex 11.
[24] *Town of Wallkill,* 19 NY3d 1066.
[25] *Id*. *See also City of New York (Patrolmen's Benevolent Assn)*, 35 PERB ¶ 3034 (2002), *affd sub nom Patrolmens' Benevolent Assn of City of NY, Inc v NYS Pub Empl Relations Bd*, 36 PERB ¶ 7014 (Sup Ct Albany Co 2003), 13 AD3d 879, 37 PERB ¶ 7012 (3d Dept 2004), *affd* 6 NY3d 563, 39 PERB ¶ 7006 (2006); *City of Schenectady v NYS Pub Empl Relations Bd,* 30 NY3d 109, 50 PERB ¶ 7006 (2017).
[26] Ex 8, Exhibit A.
[27] Ex 8.

submitted to the interest arbitration panel in bad faith.[28] Nevertheless, the Town, during the prehearing conference with the conferencing ALJ,[29] attempted to address the SOC's concerns by offering to eliminate the language cited above (essentially withdrawing its new two-year proposal and restoring the three-year proposal that had been the subject of negotiations up to the point of interest arbitration). The conferencing ALJ did not grant the requested amendment, but instead allowed the Town to formally request permission to amend its response from PERB's Director of Conciliation (Director).[30] The SOC objected to the Town's request to the Director.[31] The Town's request to amend specifically notes that its reduction of the three-year demands to the two-year demands was in recognition of the Act's two-year limitation on interest arbitration awards.[32] The Director denied the Town's request to amend on procedural grounds.[33]

We find that the conferencing ALJ erred in not granting the Town's request to amend its response to withdraw its two-year proposals and to return to its three-year demands that the parties had been negotiating throughout the bargaining process.

It is well established that, in the context of a pending improper practice proceeding, the ALJ may allow a party to amend, clarify, or withdraw interest arbitration demands, so long as the change does not result in a new demand or otherwise violate § 205.6 (a) of the Rules.[34] Allowing the Town's amendment here does not result in a new demand and does not otherwise violate § 205.6 (a) of the Rules. Indeed,

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[28] Ex 10.
[29] The matter was subsequently assigned to a different ALJ.
[30] Ex 5.
[31] Ex 6.
[32] *Id,* at 1.
[33] Ex 7.
[34] *See Town of Cicero*, 51 PERB ¶ 3009, 3039 (2018); *Triborough Bridge and Tunnel Authority*, 29 PERB ¶ 3012, 3032 (1996); *Niskayuna PBA, Inc*, 14 PERB ¶ 3067 (1981); *Amherst Police Club, Inc*, 12 PERB ¶ 3071 (1979).

permitting the Town to restore its original three-year proposals simply places before the interest arbitration panel the identical three-year proposals from the Town that the parties had been negotiating throughout the bargaining process.

Here, the conferencing ALJ sent the parties on a fruitless quest to the Director whose role in the interest arbitration process ended as soon as the interest arbitration panel was empaneled. This fault was attributable to neither party, and we grant the requested amendment at this time. As a result, the Town should forward its amended response to the interest arbitration panel for its consideration.[35]

Our disposition of this issue makes it unnecessary for us to decide whether the Town violated § 209-a.1 (d) of the Act by submitting two-year wage and longevity demands after the Town had submitted three-year proposals during earlier bargaining sessions. In the interest of providing future guidance to these and other parties, however, we note that the Town's asserted reason for submitting two-year demands initially—because the interest arbitration panel lacked authority under the Act to issue an award that exceeded two years, absent the parties' consent—lacked merit. Although an arbitration panel may not issue a determination under the Act that exceeds two years, that restriction is expressly a limit on the panel's ability to frame an award, and does not restrict the duration of the parties' proposals to the panel. Simply put, we find that it is not unlawful for a party to submit demands to interest arbitration that exceed two years where, as here, the parties had been consistently negotiating for a contract that exceeded two years.

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[35] *See Town of Cicero*, 51 PERB ¶ 3009, at 3040.

Accordingly, we affirm the ALJ's finding that the PBA violated § 209-a.2 (b) of the Act by submitting its Discipline Proposal to interest arbitration. We reverse the ALJ and find that the PBA did not violate § 209-a.2 (b) of the Act by submitting its Minimum Staffing and GML § 207-c W-2 Forms Proposals. Lastly, we grant the Town's requested amendment to its response to the PBA's petition for interest arbitration and allow the Town to remove the language discussed above.

IT IS, THEREFORE, ORDERED that the PBA withdraw from interest arbitration its Discipline Proposal.

DATED: October 23, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TOWN OF BLOOMING GROVE,

Charging Party, **CASE NO. U-35304**

- and –

BLOOMING GROVE SUPERIOR OFFICER'S COUNCIL,

Respondent.

In the Matter of

BLOOMING GROVE SUPERIOR OFFICER'S COUNCIL,

Charging Party, **CASE NO. U-35323**

-and-

TOWN OF BLOOMING GROVE,

Respondent.

FEERICK LYNCH MacCARTNEY & NUGENT PLLC (BRIAN D. NUGENT of counsel), for Town of Blooming Grove

JOHN M. CROTTY, ESQ., for Blooming Grove Police Superior Officer's Council

BOARD DECISION AND ORDER

These cases come to us on exceptions to a decision of an Administrative Law Judge (ALJ) filed by the Blooming Grove Superior Officer's Council (SOC).[1] In Case No. U-35304, the ALJ found that the SOC violated § 209-a.2 (b) of the Public

[1] 51 PERB ¶ 4528 (2017).

Employees' Fair Employment Act (Act) by submitting to compulsory interest arbitration certain proposals that are not mandatory subjects of negotiation. In Case No. U-35323, the ALJ dismissed the SOC's charge alleging that the Town of Blooming Grove (Town) violated § 209-a.1 (d) of the Act by submitting a new proposal to interest arbitration, one that had not been the subject of negotiations prior to the filing of an interest arbitration petition.

EXCEPTIONS

The SOC argues that the ALJ erred in finding that its proposals relating to training, W-2 forms for employees receiving General Municipal Law (GML) § 207-c benefits, and discipline were nonmandatory. The SOC argues that the ALJ also erred in finding that the Town's submission to interest arbitration of two-year wage and longevity demands were not new proposals, on the basis that the two-year demands were substantially different from the three-year proposals that the Town presented during negotiations.

For the following reasons, we affirm the ALJ's decision, in part, and reverse, in part.

DISCUSSION

Section 205.6 of our Rules of Procedure (Rules) provides that a party may raise an objection to the arbitrability of proposals submitted to compulsory interest arbitration on the grounds including, but not limited to: (1) that the subject "matter proposed is not a mandatory subject of negotiations;" (2) that it "was not the subject of negotiations prior to the petition;" or that (3) "a matter proposed had been resolved by agreement during

the course of negotiations."[2] Presenting a nonmandatory demand to interest arbitration, over the other party's objection, violates the duty to negotiate in good faith.

Training Proposal

The SOC submitted a proposal relating to training requirements which stated:

> Article 14—In-Service Schooling: (p. 12)
>
> Add a new paragraph to read as follows:
> The Town shall provide a minimum of forty (40) hours every year of training to each employee. The training shall consist of the following:

1. Legal Updates
2. Article 35
3. Blood Borne Pathogens
4. Domestic Violence
5. Advanced First Aid

The Town objected to this proposal as nonmandatory, and the SOC agrees that this proposal is not mandatorily negotiable under a traditional analysis. However, the SOC argues that the *Cohoes* conversion theory of negotiability should apply to this proposal, converting it into a negotiable demand.[3]

In *Cohoes*, "the Board held that a bargaining proposal seeking to modify a term in an expired collective bargaining agreement that concerned a nonmandatory subject (there, minimum manning) was converted into a mandatory bargaining proposal."[4] The *Cohoes* Board "reasoned that absent such a conversion, neither party to the bargaining relationship could ever modify the nonmandatory contractual obligation over objection of

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[2] *Id*.
[3] *See City of Cohoes*, 31 PERB ¶ 3020 (1998), *confd sub nom Uniform Firefighters of Cohoes v Cuevas*, 32 PERB ¶ 7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶ 7019 (3d Dept 2000), *lv den* 96 NY2d 711, 34 PERB ¶ 7018 (2001).
[4] *City of Albany*, 47 PERB ¶ 3016, 3046 (2014) (summarizing *Cohoes*, 31 PERB ¶ 3020 (1998)).

the other party because the subject of the contractual term and, thus, the demand to modify it were nonmandatory."[5] To prevent this inequity, the Board found that nonmandatory subjects contained within a contract between two parties to a bargaining relationship are converted into mandatory subjects for purposes of collective negotiations between those parties.[6] Consistent with that public policy, for conversion under *Cohoes*, the bargaining proposal must seek to "alter or delete a topic or category addressed specifically, or at least generally, in the parties' contract," and that topic or category must be itself nonmandatory.[7]

The contract language that the SOC points to here is Article 14 of the CBA, entitled "In-Service Schooling." Article 14 of the CBA defines "In-Service Schooling" as any course of study available to employees when given or sponsored by six specific organizations, but specifically reserves the right to determine when any employee shall be authorized to attend any such course to the discretion of the chief of police, with the approval of the Town Board.[8]

Whether and to what extent training will be provided are nonmandatory subjects.[9] As such, we find that Article 14 of the CBA is a nonmandatory subject of bargaining. The SOC's proposal seeks to alter this nonmandatory subject and is converted to a

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[5] *Id*.
[6] 31 PERB ¶ 3020, at 3039-3040. *See also Town of Yorktown PBA*, 35 PERB ¶ 3017 (2002).
[7] *City of Albany*, 47 PERB ¶ 3017, at 3046, quoting *Town of Fishkill Police Fraternity, Inc.*, 39 PERB ¶ 3035, 3118 (2006).
[8] Ex 5, Ex A, at p. 12.
[9] *PBA*, 37 PERB ¶ 3033 (2004); *New York State Office of Court Administration*, 32 PERB ¶ 3063 (1999).

negotiable subject under *Cohoes*.[10]

GML § 207-c W-2 Forms Proposal

The Town objects to the portion of the SOC's GML § 207-c proposal which states:

> Section 14. Miscellaneous
>
> NEW 4. The Town shall, in accordance with Internal Revenue Service (IRS) regulations, not withhold federal or State income taxes or Social Security and Medicare taxes from a Recipients wages, and shall refund the Recipient for any of these amounts incorrectly withheld, within thirty (30) calendar days of the date of the wage payment in which the amounts were incorrectly withheld. The Town shall provide the Recipient with an annual W-2 statement that does not include Section 207-c benefits as taxable wages and salary.[11]

The ALJ found that "[n]otably, the parties do not dispute that wages earned by an employee who is out of work pursuant to GML § 207-c are not taxable."[12] Neither party excepted to this finding, and we therefore accept it as law of the case for purposes of this decision.

The ALJ found it unclear what the second sentence was asking for but nevertheless found the demand to be prohibited to the extent it was requiring the Town to amend the contents of a Federal tax form or provide employees with a second and different form. We reverse this finding.

Initially, we do not find the second sentence to be unclear. It is simply asking that the Town provide employees with a W-2 form that accurately reflects that wages earned by an employee while that employee is out of work pursuant to GML § 207-c are

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[10] *See Town of Fishkill Police Fraternity, Inc.*, 39 PERB ¶ 3035 (2006).
[11] Ex 1; Ex 4, Attachment 1.
[12] 51 PERB ¶ 4526, at 4606.

not taxable.[13] This obligation logically follows from the fact that the Town agrees that it may not withhold Federal or State income taxes from an employee who is out of work pursuant to GML § 207-c.

Under *City of Cohoes* and its progeny, a demand that seeks to provide a contractual forum in which to remedy alleged violations of employee statutory rights constitutes a mandatory subject of negotiations unless the proposal is inconsistent with public policy.[14] The demand seeks to provide a forum in which to ensure compliance with an employee's statutory right to receive an accurate W-2, a proposition that the Town does not dispute. In this context, the PBA seeks to ensure a remedy for any failure on the part of the Town to perform the ministerial act of complying with the federal requirement that non-taxable wages not be included as taxable income on employees' W-2 forms. As the Board explained in *City of Cohoes*, the Town's lack of discretion does not make such a bargaining demand redundant or nonmandatory, as the inclusion of such a demand in an interest arbitration award would provide a source of additional and different rights and remedies.[15] Although the PBA's proposal is in substance duplicative of the statutory right, submitting it to the interest arbitration panel

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[15] 31 PERB ¶ 3020, at 3043.

might result, if the proposal is adopted by the panel and included in the ultimate award, in alternative means of redressing any non-compliance on the part of the Town.

We need not decide today whether more complex matters involving substantive interpretations of the Internal Revenue Code and regulations thereunder might rise to the level of implicating public policy concerns or otherwise be non-arbitrable. The Town has not identified any public policy rendering the issue of providing an additional forum in which to challenge an incorrect statement of the taxable income earned by an employee not arbitrable.[16] The issue of not including GML § 207-c benefits as taxable wages and salary appears to be a straightforward one that does not require any expertise in tax matters, making it appropriate for decision by an arbitrator. Thus, the nature of the demand does not raise policy considerations "significant enough to render [the demand] nonmandatory or prohibited."[17] In the absence of any such public policy proscription, we find that *City of Cohoes* and its progeny apply, and that the demand, therefore, is mandatorily negotiable.

Discipline Proposal

The SOC submitted a proposal related to disciplinary procedures.[18] The Town objected to the proposal, and the ALJ found that the proposal encompassed the

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[16] Notably, federal courts have held that tax computation issues may appropriately fall within the scope of arbitration provisions. *See McDonnell Douglas Finance Corp v Pennsylvania Power & Light Co*, 858 F2d 825, 832-833 (2d Cir 1988) (enforcing limits of arbitration clause intended to reach only tax issues, excluding non-accounting issues such as fraud and breach of contract); *Duafala v. Globecomm Systems Inc*., 91 F.Supp.3d 330, 336-338 (2015) (challenged accuracy of calculations of Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA), properly deemed to fall within scope of arbitration clause).

[17] *City of Cohoes*, 31 PERB ¶ 3020, 3043 (1998).

[18] *See* 51 PERB ¶ 4526, at 4606 for the full proposal.

prohibited subject of police discipline. We affirm this finding.

Town Law (TL) § 155 commits to towns "the power and authority to adopt and make rules and regulations specifically related to police discipline."[19] Accordingly, the subject of police discipline resides with the Town Board and is a prohibited subject of bargaining between the Town and the PBA.[20] The Court of Appeals has squarely addressed this issue and found that TL § 155 removes the subject of police discipline from collective bargaining in these circumstances.[21]

Two-Year Wage and Longevity Proposals

In the Town's response to the SOC's petition for interest arbitration, the Town included language stating that "[f]or the purposes of compulsory interest arbitration, the Town hereby amends its proposals solely to reduce the length of the proposed contract from three (3) years to two (2) years."[22] This resulted in the Town's proposal number 1 (Term of Contract) changing from 3 years to 2 years, and the Town's proposal number 2 (Wages and Longevity) also changing from 3 years (offering zero percent in the first year and 1 percent in each of the next two years) to 2 years (offering zero percent in the first year and 1 percent in the next year). The SOC argues that the two-year wage and

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[20] *Town of Wallkill,* 19 NY3d 1066.
[21] *Id*. *See also City of New York (Patrolmen's Benevolent Assn)*, 35 PERB ¶ 3034 (2002), *affd sub nom Patrolmens' Benevolent Assn of City of NY, Inc v NYS Pub Empl Relations Bd*, 36 PERB ¶ 7014 (Sup Ct Albany Co 2003), 13 AD3d 879, 37 PERB ¶ 7012 (3d Dept 2004), *affd,* 6 NY3d 563, 39 PERB ¶ 7006 (2006); *City of Schenectady v NYS Pub Empl Relations Bd,* 30 NY3d 109, 50 PERB ¶ 7006 (2017).
[22] Ex 8, Exhibit A.

longevity demands are improper "new" demands.[23]

The Town's answer asserted that the proposals were proper and were not submitted to the interest arbitration panel in bad faith.[24] Nevertheless, the Town, during the prehearing conference with the conferencing ALJ,[25] attempted to address the SOC's concerns by offering to eliminate the language cited above (essentially withdrawing its new two-year proposal and restoring the three-year proposal that had been the subject of negotiations up to the point of interest arbitration). The conferencing ALJ did not grant the requested amendment, but instead allowed the Town to formally request permission to amend its response from PERB's Director of Conciliation (Director).[26] The SOC objected to the Town's request to the Director.[27] The Town's request to amend specifically notes that its reduction of the three-year demands to the two-year demands was in recognition of the Act's two-year limitation on interest arbitration awards.[28] The Director denied the Town's request to amend on procedural grounds.[29]

We find that the conferencing ALJ erred in not granting the Town's request to amend its response to withdraw its two-year proposals and to return to its three-year demands that the parties had been negotiating throughout the bargaining process.

It is well established that, in the context of a pending improper practice proceeding, the ALJ may allow a party to amend, clarify, or withdraw interest arbitration demands, so long as the change does not result in a new demand or otherwise violate

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[23] Ex 8.
[24] Ex 10.
[25] The matter was subsequently assigned to a different ALJ.
[26] Ex 5.
[27] Ex 6.
[28] *Id,* at 1.
[29] Ex 7.

§ 205.6 (a) of the Rules.[30] Allowing the Town's amendment here does not result in a new demand and does not otherwise violate § 205.6 (a) of the Rules. Indeed, permitting the Town to restore its original three-year proposals simply places before the interest arbitration panel the identical three-year proposals from the Town that the parties had been negotiating throughout the bargaining process.

Here, the conferencing ALJ sent the parties on a fruitless quest to the Director whose role in the interest arbitration process ended as soon as the interest arbitration panel was empaneled. This fault was attributable to neither party, and we grant the requested amendment at this time. As a result, the Town should forward its amended response to the interest arbitration panel for its consideration.[31]

Our disposition of this issue makes it unnecessary for us to decide whether the Town violated § 209-a.1 (d) of the Act by submitting two-year wage and longevity demands after the Town had submitted three-year proposals during earlier bargaining sessions. In the interest of providing future guidance to these and other parties, however, we note that the Town's asserted reason for submitting two-year demands initially—because the interest arbitration panel lacked authority under the Act to issue an award that exceeded two years, absent the parties' consent—lacked merit. Although an arbitration panel may not issue a determination under the Act that exceeds two years, that restriction is expressly a limit on the panel's ability to frame an award, and does not restrict the duration of the parties' proposals to the panel. Simply put, we find

[30] *See Town of Cicero*, 51 PERB ¶ 3009, 3039 (2018); *Triborough Bridge and Tunnel Authority*, 29 PERB ¶ 3012, 3032 (1996); *Niskayuna PBA, Inc*, 14 PERB ¶ 3067 (1981); *Amherst Police Club, Inc*, 12 PERB ¶ 3071 (1979).
[31] *See Town of Cicero*, 51 PERB ¶ 3009, at 3040.

that it is not unlawful for a party to submit demands to interest arbitration that exceed two years where, as here, the parties had been consistently negotiating for a contract that exceeded two years.

Accordingly, we affirm the ALJ's finding that the SOC violated § 209-a.2 (b) of the Act by submitting its Discipline Proposal to interest arbitration. We reverse the ALJ and find that the SOC did not violate § 209-a.2 (b) of the Act by submitting its Training and GML § 207-c W-2 Forms Proposals. Lastly, we grant the Town's requested amendment to its response to the SOC's petition for interest arbitration and allow the Town to remove the language discussed above.

IT IS, THEREFORE, ORDERED that the SOC withdraw from interest arbitration its Discipline Proposal.

DATED: October 23, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member