STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

VILLAGE OF TARRYTOWN,

Charging Party,

- and –

CASE NO. U-27234

TARRYTOWN PATROLMEN'S BENEVOLENT ASSOCIATION, INC.,

Respondent.

BOND SCHOENECK & KING, PLLC (CHRISTOPHER T. KURTZ, of counsel) for Charging Party

JOHN M. CROTTY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions by the Tarrytown Patrolmen's Benevolent Association (PBA) to a decision[1] by an Administrative Law Judge (ALJ) on an improper practice charge filed by the Village of Tarrytown (Village), dated November 26, 2006, alleging that the PBA violated §209-a.2(b) of the Public Employees' Fair Employment Act (Act) when it submitted to interest arbitration a demand, as amended, for a "Bill of Rights" proposing the establishment of certain guidelines for the Village's conduct of interrogations of PBA members during official investigations that may lead to any form of charges.

The ALJ concluded that the PBA's demand constituted a prohibited subject of bargaining based on the provisions relating to police discipline contained in

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[1] 40 PERB ¶4540 (2006).

Unconsolidated Laws (Unconsol) §§5711-q(8) and (9) and the Court of Appeals decision in *Patrolmen's Benevolent Association of the City of New York Inc v PERB*[2] (hereinafter *NYCPBA*). The ALJ, therefore, ordered the PBA to withdraw the demand.

EXCEPTIONS

In its exceptions, the PBA asserts that the ALJ misinterpreted both the decision in *NYCPBA* and Unconsol §5711-q.

The PBA contends that the ALJ's interpretation of the Court of Appeals holding in *NYCPBA* is overly broad. Specifically, the PBA argues that the ALJ misinterpreted *NYCPBA* in concluding that a local law, in addition to a special state statute, can render police discipline a prohibited subject of bargaining under the Act. The PBA asserts that the Court's holding in *NYCPBA* with respect to the Town of Orangetown's police collectively negotiated provision was extremely narrow. According to the PBA, the Court's holding was limited to a declaration that the challenged disciplinary arbitration clause was unenforceable due to the provisions of Rockland County Police Act (RCPA)[3] thereby affirming the permanent stay of arbitration issued below.[4] The PBA claims that the Court's decision did not determine or discuss whether RCPA rendered disciplinary interrogation procedures for police a prohibited subject of bargaining under the Act.

In addition, the PBA asserts that the ALJ erred in concluding that the text of Unconsol §5711-q(9) precluded negotiations regarding pre-charge disciplinary investigations by Village executive officials. The PBA contends, *inter alia*, that the term

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[2] 6 NY3d 563, 39 PERB ¶7006 (2006).

[3] L 1936, c 526, as amended by L 1946, c 940.

[4] *Town of Orangetown v Orangetown PBA*, 18 AD3d 879, 38 PERB ¶7507 (2d Dept 2005).

"investigation" in Unconsol §5711-q(9) applies only to the powers of the Village's legislative body to conduct investigations. In addition, it argues that the power and authority to conduct a disciplinary "investigation" under Unconsol §5711-q(9) is inapplicable to interrogative questioning prior to issuance of disciplinary charges.

Finally, the PBA claims that the ALJ's decision is inconsistent with prior Court of Appeals precedent including *New York City Transit Authority v Public Employment Relations Board*[5] (hereinafter *NYCTA*) where the Court held that a public employee does not have an inherent right under the Act to have an employee organization representative present at an interrogation but that the right to such representation may be obtained through collective negotiations.

The Village supports the ALJ's decision, citing to *NYCPBA* and other appellate precedent holding that special state statutes can render local police disciplinary procedures a prohibited subject of bargaining. In addition, the Village relies upon the text and legislative history of Unconsol §5711-q.

Following receipt of the PBA's exceptions, the Board requested that the parties file supplemental briefs on the question of whether the recent amendment to the Act,[6] creating an improper practice for denying employee organization representation during certain questioning by an employer, impacts the question of negotiability of the PBA's demand.

Based upon our review of the record and our consideration of the parties' arguments, we grant the PBA's exceptions, in part, but affirm the ALJ's decision that the PBA's bargaining proposal constitutes a prohibited subject of bargaining.

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[5] 8 NY3d 226, 40 PERB ¶7001 (2007).

[6] Section 209-a.1(g) of the Act; L 2007, c 244.

FACTS

In lieu of a hearing, the parties agreed to a stipulated record limited to the following: the Village's improper practice charge alleging a violation of §209-a.2(b) of the Act; the at-issue PBA proposal attached to the charge; the PBA's answer; an agreement that the proposal is not a unitary demand; and a letter from the PBA withdrawing various components of its proposal with the exception of the PBA's interrogation proposal. The proposal, as amended, which relates to establishing certain guidelines for the interrogation of PBA member is fully set forth in the ALJ's decision and therefore need not be repeated here.

DISCUSSION

In 1939, the Legislature repealed a 1936 law[7] relating to the establishment and operation of village police departments in Westchester County and recodified its content as twenty-two provisions in the Village Law.[8] Among those provisions were Village Law §§199-q and 199-r establishing the administrative structure for village police departments as well as the procedures for the discipline and discharge of Westchester County village police officers.[9] In 1972, the Legislature enacted a special law "Special Provisions for Village Police Departments Law" (hereinafter VPDL) that transferred all of the 1939 provisions in the Village Law relating to Westchester County village police

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[7] L 1936, c 103.

[8] L 1939, c 300; Village Law §§199-j-199-ee.

[9] The ALJ and PBA inadvertently misidentified the applicable special state statute in the present case as the Westchester County Police Act (WCPA). The WCPA is a different statute, originally enacted in 1936, and applicable to towns within Westchester County. *See,* L 1936, c 104, as amended, L 1941, c 812; *Gizzo v Town of Mamaroneck*, 36 AD3d 162, 39 PERB ¶7527 (2d Dept 2006), *mot lv den,* 8 NY3d 806 (2007); *Town of Greenburgh v Police Assn of the Town of Greenburgh*, 94 AD2d 771, 16 PERB ¶7510 (2d Dept 1983), *mot lv den*, 60 NY2d 551 (1983).

departments to the Unconsolidated Laws, including those relating to police discipline.[10] At the same time, the Legislature enacted a new general Village Law disciplinary provision: Village Law §8-804.[11]

Unconsol §5711-g(8) grants Westchester County village board of trustees or a municipal board general administrative responsibilities over village police departments. Unconsol §5711-q(8) states:

> Administration. The board of trustees or municipal board acting as police commissioners of any village, may make, adopt and enforce rules, orders and regulations for the government, discipline, administration and disposition of the police department of such village, and the members thereof. Any such rules and regulations or any amendment thereto shall be in written form and a copy of the same distributed to each member of the police department and posted in a conspicuous place in the police headquarters.

The scope of the powers and authority of the Village board of trustees or municipal board regarding discipline is set forth in Unconsol §5711-q(9) that provides in part:

> "[t]he board of trustees or municipal board shall have power and is authorized to adopt and make rules and regulations for the examination, hearing, investigation and determination of charges, made or preferred against any member or members of such police force, but no member or members of such police force shall be fined, reprimanded, removed or dismissed until written charges shall have been made and preferred against him or them, nor until such charges have been investigated, examined, heard and determined by such board of trustees or municipal board in such manner, procedure, practice, examination and investigation as such board may by such rules and regulations from time to time prescribe, except that the trial of such charges shall not be delegated and must be heard before the full board of trustees or full municipal board, or a majority of the members

[10] L 1972, c 891.

[11] L 1972, c 892; Village Law §8-800-§8-804.

> of either of such boards, and the affirmative vote of a majority of such members shall be necessary to a conviction on any such charges.

The primary issue raised by the PBA's exceptions is whether the VPDL renders the PBA's interrogation proposal a prohibited subject of bargaining under the holding in *NYCPBA*. Following a careful review of relevant statutes and appellate precedent, we conclude that the PBA's interrogation proposal is a prohibited subject of bargaining.

In *NYCPBA*, the Court held that when a special state law, that pre-existed Civil Service Law (CSL) §§75 and 76, specifically commits the discipline of police officers to local government officials, New York's public policy favoring strong disciplinary authority over police officers outweighs New York's "strong and sweeping policy"[12] supporting collective negotiations under the Act.

The Court in *NYCPBA* concluded that the public policy underlying two late 19th century enactments by the State Legislature granting the New York City Police Commissioner control over police discipline, the adoption of a New York City Charter provision in 1897 and the enactment of a New York City code provision in 1873, rendered discipline a prohibited subject under the Act.[13] In addition, the Court concluded that the Legislature's enactment of the RCPA in 1936 granting Rockland County town boards' power and authority over police discipline outweighed the presumption of

[12] *City of Watertown v New York State Pub Empl Rel Bd*, 95 NY2d 73, 78, 33 PERB ¶7007 at 7014 (2000).

[13] 6 NY3d at 570, 573-574.

negotiability of police discipline under the Act with respect to Rockland County towns.[14]

At the same time, the Court expressly reaffirmed *Auburn Police Local 195 v Helsby (Auburn)*[15] which holds that a bargaining proposal to modify local government police disciplinary procedures under CSL §75 is a mandatory subject of bargaining under the Act. The Court distinguished *Auburn* based on language contained in CSL §76(4) which states that CSL §§75 and 76 did not modify preexisting laws.

In reaching its holding in *NYCPBA,* the Court cited to and relied upon four earlier Appellate Division decisions: *Town of Greenburgh v Police Association of the Town of Greenburgh*[16](hereinafter *Greenburgh*); *Rockland County Patrolmen's Benevolent Assn v Town of Clarkstown*[17](hereinafter *Clarkstown*); *City of New York v MacDonald*[18]

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[14] As an administrative agency, PERB is duty bound to follow the Court's holding in *NYCPBA.* We note, however, that in reaching its decision, the Court did not discuss or analyze the provisions or legislative history of the Act including the 1967 and 1969 Taylor Committee Reports. *Cf. NYCTA*, 8 NY3d at 233. Neither the Act's definition of "public employee" in §201(7)(a) of the Act nor the Act's legislative history draws a distinction between police officers and other public employees with respect to the subject of negotiations. The text and legislative history of various later amendments to the Act providing for public interest arbitration panels to resolve police negotiation disputes strongly suggests a New York public policy favoring the negotiability of police disciplinary procedures like other working conditions. See, Act, §§209.2 and 4(c)(v). For example, it is notable that although the Legislature excluded the subject of disciplinary procedures from consideration during interest arbitrations for a few specific police units, it did not prohibit negotiations on the topic for those units. *See,* Act, §§209.4(e), (f) and (g).

[15] 62 AD2d 12, 11 PERB ¶7003 (3d Dept 1978) *affd,* 46 NY2d 1034, 12 PERB ¶7006 (1979).

[16] *Supra,* note 9.

[17] 149 AD2d 516, 22 PERB ¶7516 (2d Dept 1989).

[18] 201 AD2d 258, 27 PERB ¶7503 (1s Dept 1994).

(hereinafter *NYC); and City of Mount Vernon v Cuevas*[19] (hereinafter *Mt. Vernon*).

In *Greenburgh,* the Second Department vacated an interest arbitration award that granted various negotiation demands for Town of Greenburgh police officers including one allowing Town police officers to have the option of having disciplinary charges determined by an arbitrator or the town board. The Second Department vacated the award on the grounds that police discipline constituted a prohibited subject based on the Westchester County Police Act[20] (hereinafter WCPA). The WCPA, like the RCPA, granted town boards or boards of police commissioners in Westchester County the power and authority over police discipline.

The First Department's decision in *NYC* concluded that police discipline is a prohibited subject of bargaining based on the same New York City Charter provision relied upon by the Court in *NYCPBA.* In *Mount Vernon,* the Third Department concluded that a municipal police disciplinary procedure for that city is a prohibited subject based on the State Legislature's enactment of the City of Mount Vernon's City Charter[21] in 1922 that provides the City's Commissioner of Public Safety with the power and authority over police discipline.

In its exceptions, the PBA contends that the ALJ's articulation of the holding in *NYCPBA* is overbroad because the ALJ inferred that the duty to negotiate discipline under the Act can be preempted by any preexisting local law, rather than a special state law, relating to employee discipline. We agree. As the Court expressly held: "police discipline *may* not be a subject of collective bargaining under the Taylor Law *when the*

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[19] 289 AD2d 674, 34 PERB ¶7038 (3d Dept 2001).

[20] L 1936, c 104, as amended, L 1941, c 812.

[21] L 1922, c 490.

Legislature has expressly committed disciplinary authority over a police department to local officials."[22] (Emphasis added) We find that to mean that only special state legislation, enacted prior to CSL §§75 and 76, granting specific local officials the power and authority over police discipline, can preempt police discipline negotiations under *NYCPBA.*

We reject, however, the PBA's claim that the Court's conclusions with respect to the RCPA in *NYCPBA* are limited to the unenforceability of the disciplinary arbitration clause. The Court's repeated favorable references to *Clarkstown* demonstrates that it agreed with the Second Department's holding that the RCPA renders the subject of police discipline a prohibited subject of bargaining for Rockland County towns. Second, the Court, in concluding that disciplinary interrogation procedures for New York City police constituted a prohibited subject of bargaining, did not draw a distinction between the content of the RCPA and the special state legislation delegating police discipline to the New York City Police Commissioner. Therefore, contrary to the PBA's argument, the Court in *NYCPBA* did not draw a distinction between the negotiability of police disciplinary procedures and procedures to investigate police misconduct that can lead to discipline.

We next turn to the PBA's exceptions premised on claims that the VPDL does not render its police interrogation proposal a prohibited subject. Contrary to the PBA's argument, VPDL commits executive power and authority relating to police discipline to a village board of trustees or municipal board. The statute specifically defines Village boards of trustees or municipal boards as police commissioners empowered to

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[22] 6 NY3d at 570.

establish and enforce police disciplinary rules and regulations.[23] The VPDL grants village police commissioners similar power and authority over police discipline to those granted to the New York City Police Commissioner under the special state legislation examined in *NYCPBA*.

Furthermore, we reject the PBA's argument that the use of the term "investigation" in Unconsol §5711-q(9) is inapplicable to pre-charge disciplinary interrogations. The VPDL delegates to village boards of trustees or municipal boards acting as police commissioners authority to establish and enforce rules and regulations with respect to police disciplinary investigations. The statutory provision cannot be reasonably construed as limiting statutory authority to conduct investigations only after the issuance of disciplinary charges.

We also reject the PBA's reliance on the Court's decision in *NYCTA*.[24] Relying on the text and history of legislation following the enactment of the Act, the Court in *NYCTA* held that employee organization representation during an interrogation is not an inherent right under the Act. The PBA relies upon the following *dicta* in the *NYCTA* decision to argue that the Court ruled that representation during an interrogation is a mandatory subject for all public employees under the Act:

> Of course, employees may seek such representation in collective bargaining; in doing so, they are protected by the Taylor Law's provision in Civil Service Law §203, that they shall have the right...to negotiate collectively with their public employers in the determination of their terms and conditions of employment.[25]

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[23] Unconsol §§5711-q(2), (4), (8) and (9).

[24] *Supra,* note 5.

[25] 8 NY3d at 233, 40 PERB at 7003.

Contrary to the PBA's argument, we do not construe the above quoted *dicta* as constituting a modification or limitation of the Court's holding in *NYCPBA* regarding the negotiability of police discipline in certain political subdivisions subject to preexisting special state statutes.

Although the VPDL was enacted subsequent to the Act, as well as CSL §§75 and 76, it constitutes a mere non-substantive recodification of the 1939 Village Law provisions. The authority and power over police discipline granted to Westchester County village boards of trustees or municipal boards remained the same as in the 1939 provisions and are equivalent to the powers granted town boards under the WCPA and RCPA. An examination of the VPDL's legislative history reveals that it is silent on the question of negotiability of village police discipline in Westchester County.[26] Therefore, based upon the Court's holding and reasoning in *NYCPBA*, we find that the VPDL renders the PBA's proposal a prohibited subject of bargaining.[27]

Finally, we examine the ALJ's decision in the context of the recent amendment to the Act establishing an improper employer practice for the denial of employee organization representation, in certain circumstances, during questioning by an employer. Section 209-a.1(g) of the Act states that it is an improper practice for an employer:

> to fail to permit or refuse to afford a public employee the right, upon the employee's demand, to representation by a representative of the employee organization, or the designee of such organization, which has been certified or recognized under this article when at the time of questioning by the

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[26] Bill Jacket, L 1972, c 891.

[27] In contrast, Village Law §8-804, originally acted in 1972, is a general law which does not predate CSL §§75 and 76 and therefore does not render police discipline a prohibited subject of bargaining under *NYCPBA.*

> employer of such employee it reasonably appears that he or she may be the subject of a potential disciplinary action. If representation is requested, and the employee is a potential target of disciplinary action at the time of questioning, a reasonable period of time shall be afforded to the employee to obtain such representation. It shall be an affirmative defense to any improper practice charge under paragraph (g) of this subdivision that the employee has the right, pursuant to statute, interest arbitration award, collectively negotiated agreement, policy or practice, to present to a hearing officer or arbitrator evidence of the employer's failure to provide representation and to obtain exclusion of the resulting evidence upon demonstration of such failure. Nothing in this section shall grant an employee any right to representation by the representative of an employee organization in any criminal investigation.

In light of the text and legislative history of this 2007 amendment to the Act, we believe that it was solely aimed at overturning the Court's decision in *NYCTA* and not the *NYCPBA* decision. Although the amendment, as remedial legislation, is entitled to a liberal construction with respect to the representational rights protected, even a liberal construction is insufficient to outweigh the clear statutory language and explicit legislative purpose for the law.[28] On its face, §209-a.1(g) of the Act does not mandate the negotiability of the subject, but it does permit an employer to defend against a charge by demonstrating that the right to representation during questioning is available based on a negotiated agreement, policy, practice or interest arbitration award. Furthermore, the Senate sponsor's memorandum in support of the amendment states that it was specifically aimed at overturning *NYCTA*.[29] In contrast, proposed bills introduced to overturn *NYCPBA* have not become law.[30] Therefore, we conclude that

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[28] McKinneys, Statutes §321.

[29] Bill Jacket, L 2007, c 244.

[30] 2006 NY Assembly Bill A.11178; 2007 NY Assembly Bill A.8139; Governor's Veto Message, Veto #96 (2007).

§209-a.1(g) of the Act does not transform the PBA's proposal from a prohibited to a mandatory subject of bargaining.

Based on the foregoing, we grant the PBA's exceptions, in part, but affirm the ALJ's decision sustaining the Village's improper practice charge.

IT IS, THEREFORE, ORDERED that the charge is hereby sustained and the PBA is directed to withdraw Demand #15 from interest arbitration.

DATED: December 14, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 338, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Petitioner,

-and-

CASE NO. C-5728

TOWN OF KORTRIGHT,

Employer,

-and-

LOCAL 76B, AMALGAMATED INDUSTRIAL UNION, IUE, AFL-CIO,

Incumbent.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

[1] The incumbent bargaining agent, Local 76B, Amalgamated Industrial Union, IUE, AFL-CIO, has disclaimed any interest in representing the existing bargaining unit.

IT IS HEREBY CERTIFIED that the Local 338, International Brotherhood of Teamsters has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Town of Kortright highway employees.

Excluded: All elected officials, seasonal employees and employees who work an average of less than 21 hours per week.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Local 338, International Brotherhood of Teamsters. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: December 14, 2007
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member