
In the Matter of

SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 200UNITED,

Petitioner,

CASE NO. C-6296

- and -

HERKIMER COUNTY COMMUNITY COLLEGE and COUNTY OF HERKIMER,

Joint Employer.

LAW OFFICES OF MAIREAD E. CONNOR, PLLC (MAIREAD E. CONNOR of counsel), for Petitioner

ROEMER WALLENS GOLD & MINEAUX LLP (WILLIAM M. WALLENS of counsel), for Joint Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Herkimer County Community College and the County of Herkimer (Joint Employer) to a decision of the Director of Public Employment Practices and Representation (Director).[1] The Director declined to set aside an election in which the Service Employees International Union, Local 200United (SEIU Local 200United) received a majority of the valid votes cast in a representation election concerning a bargaining unit of employees of the Joint Employer in which SEIU Local 200United was the only employee organization seeking certification.

EXCEPTIONS

The Joint Employer argues that the Public Employment Relations Board (PERB) should change the standard it applies in determining majority support in representation elections where only one employee organization seeks to represent a unit of

[1] 51 PERB ¶ 4003 (2018).

unrepresented employees from PERB's current standard of "a majority of valid votes cast" to a standard requiring "a majority of employees in the bargaining unit." The Joint Employer argues that its position is supported by the language and policies underlying PERB's Rules of Procedure (Rules). The Joint Employer concludes, therefore, that the instant election should be set aside because a majority of the employees in the unit did not cast votes in favor of representation by SEIU Local 200United.

SEIU Local 200United supports the Director's decision and argues that no basis has been demonstrated for reversal.

For the reasons that follow, we affirm the Director's decision.

FACTS

On October 27, 2014, SEIU Local 200United filed a petition seeking, as amended, to represent a unit of unrepresented part-time adjunct faculty employed by the Joint Employer. The Joint Employer filed a response, asserting that the proposed bargaining unit was not the most appropriate unit. A hearing was held on April 20, 2015, and a decision was issued by an Administrative Law Judge (ALJ) on June 5, 2017, defining the unit as follows:

Included: All part-time adjunct faculty.

Excluded: All adjunct faculty who hold any full-time position at the College, and all others.[2]

Thereafter, a secret mail-ballot election was held on November 20, 2017. The Tally of Ballots issued at the conclusion of the count reads, in relevant part:

Number of eligible voters	56
Void ballots	-
Votes cast for "Yes"[3]	19
Votes cast for "No"	9

[2] 50 PERB ¶ 4006 (2017).

[3] Since this was an election involving only one employee organization, the text of the ballot states: "DO YOU DESIRE TO BE REPRESENTED FOR PURPOSES OF COLLECTIVE NEGOTIATIONS BY SEIU LOCAL 200UNITED."

Challenged ballots 1

Accordingly, a majority of the valid votes cast showed support for representation by SEIU Local 200United.

DISCUSSION

As the Director explained, PERB has always applied a "majority of the valid votes cast" standard, regardless of the number of eligible voters who participate in the election, in certifying mail-ballot election results where only one employee organization seeks to represent a unit of unrepresented employees. In *Waverly Central School District,*[4] the employer argued that PERB should not certify an employee organization as the majority representative for a unit unless at least 30% of the eligible voters participated, and the employee organization received a majority of the valid votes cast. The Board rejected that argument, stating:

> We have always certified unions which have garnered a simple *majority of the valid votes cast* in an election. The District asks us to adopt a fundamentally different approach, one rejected by most other labor relations agencies. In refusing to set aside this election, the Director adopted the National Labor Relations Board's (NLRB) decision in *Lemco Construction, Inc.,* which represents the prevailing view of public and private sector agencies throughout the country. We similarly subscribe to the rationale expressed in that decision . . . . Thus, absent evidence that employees were denied a reasonable opportunity to vote, a low voter turnout, by itself, offers no ground upon which to invalidate an election. We believe that this approach best recognizes and accommodates the fundamental purposes of a representation election and the unit employees' right to refrain from voting, while best ensuring the speedy completion of representation proceedings in a manner which is entirely consistent with normal political processes" [Emphasis added and internal footnotes omitted].[5]

The Joint Employer asserts that it is not arguing that low turnout alone justifies a refusal to certify election results. Rather, the Joint Employer argues that "the policy

[4] 25 PERB ¶ 3075 (1992).
[5] Id, at 3154.

underlying § 201.8 of the Rules supports the determination by PERB that where only one employee organization seeks to represent the employees, that [employee organization] should be required to demonstrate the support of at least a majority of the members of the affected unit."[6] Specifically, the Joint Employer points to § 201.8 (c)(1) of the Rules, which provides that, where only one employee organization seeks to represent employees, that employee organization can be certified *without an election* if a majority of employees within the unit have executed a showing of interest which remains current. The Joint Employer argues that the same standard should apply in all elections, including mail-ballot elections involving one employee organization.

In the context of a certification without an election, there is a sound reason for requiring that an employee organization present a showing of interest from a majority of employees within the unit; namely, employees who do not sign a showing of interest may not have had the opportunity to make their views on representation known. In elections, such as a mail-ballot election, by contrast, all employees have the opportunity to participate in the election. Thus, as the Board observed in *Waverly*, where there has been a reasonable opportunity to vote, it may be assumed that employees who refrain from voting are "content to be bound by the result obtained without their participation."[7] Here, the Joint Employer does not argue that a reasonable opportunity for employees to vote was lacking, and there is no reason for us to set aside the election results. Moreover, when as here, there has been a reasonable opportunity to vote, "there is no reason to suspect that the voting pattern, which resulted in a majority of the ballots

[6] Memorandum of Law in Support of Exceptions, at 3.
[7] *Waverly Cent Sch Dist*, 25 PERB ¶ 3075, 3154 (1992). *See also Lemco Construction*, 283 NLRB 459 (1987).

being cast in favor of representation by [SEIU Local 200United], would not have prevailed in an election with more participants."[8]

In sum, we continue to believe that a "majority of the valid votes cast" standard represents the genuine expression of the free choice of voters and

> best recognizes and accommodates the fundamental purposes of a representation election and the unit employees' right to refrain from voting, while best ensuring the speedy completion of representation proceedings in a manner which is entirely consistent with normal political processes.[9]

For the reasons set forth above, we deny the Joint Employer's exceptions and affirm the Director's decision. Accordingly, we have this date certified SEIU Local 200United as the exclusive bargaining agent for the unit found to be appropriate.

DATED: July 27, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[8] *Waverly Cent Sch Dist*, 25 PERB ¶ 3075, at 3154.
[9] Id (internal citations omitted).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 687,

Petitioner,

- and -

CASE NO. C-6496

VILLAGE OF SARANAC LAKE,

Employer,

- and-

SARANAC LAKE POLICE BENEVOLENT ASSOCIATION,

Incumbent/Intervenor.

SATTER LAW FIRM, PLLC (MIMI C. SATTER, of counsel), for Petitioner

ROEMER WALLENS GOLD & MINAUX LLP (WILLIAM WALLENS, of counsel), for Employer

JASON SWAIN, for Incumbent/Intervenor

BOARD DECISION AND ORDER

On December 26, 2017, the Teamsters Local 687 (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the Village of Saranac Lake (employer).

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

Included: All full-time and part-time Police Officers and Sergeants of the Village of Saranac Lake.

Excluded: Chief of Police and all other employees of the Village.

Pursuant to that agreement, a secret-ballot election was held on May 1, 2018, at which a majority of ballots were cast against representation by the petitioner.

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

DATED: July 27, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

In the Matter of

COUNTY OF CHEMUNG and CHEMUNG COUNTY SHERIFF,

Petitioner,

CASE NO. CP-1503

- and -

CHEMUNG COUNTY DEPUTY SHERIFF'S ASSOCIATION, INC.,

Intervenor.

BRYAN J. MAGGS, COUNTY ATTORNEY (MATTHEW J. ROSNO of counsel), for Petitioner

JOHN M. CROTTY, ESQ., for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) filed by the Chemung County Deputy Sheriff's Association, Inc. (Association).[1] The County of Chemung and Chemung County Sheriff (Joint Employer or County) filed a petition for unit clarification pursuant to § 201.2 (b) of the Public Employment Relations Board (PERB's) Rules of Procedure (Rules), seeking a determination that part-time clerks employed in the sheriff's department are encompassed within the scope of the civilian bargaining unit represented by the Association. The ALJ found that part-time clerks working in the sheriff's department and working in the jail properly fall within the scope of the Association's civilian bargaining unit.

EXCEPTIONS

The Association excepts only to the ALJ's finding that part-time clerks working in the jail are encompassed within the scope of the Association's civilian bargaining unit.

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[1] 51 PERB ¶ 4004 (2018).

Because the Association has not excepted to the ALJ's finding that part-time clerks working in the sheriff's department are appropriately included within the Association's civilian bargaining unit, any such exceptions are waived.[2]

For the reasons that follow, we affirm the ALJ's finding that part-time clerks working in the jail are encompassed within the scope of the Association's civilian bargaining unit.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions.

The parties have entered into a Memorandum of Agreement (MOA) for the period of January 1, 2013 through December 31, 2018.[3] The MOA incorporates a prior MOA between the parties for the period of January 1, 2009 through December 31, 2012, as well as a collective bargaining agreement (CBA) for the period of January 1, 2003 through December 31, 2008.

The MOA for the period of January 1, 2009 through December 31, 2012 and the CBA for the period of January 1, 2003 through December 31, 2008 were executed when the Association represented all employees working within the sheriff's department in one combined unit. In 2013, the parties agreed to split the Association's unit into two separate units: one representing civilian employees and another representing non-civilian, law enforcement employees.[4]

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[2] Rules § 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] Joint Ex 1; Joint Ex 1A.
[4] Tr, at 60.

Neither MOA altered the parties' recognition clause or any other language in the CBA that is relevant to this petition.

The recognition clause of the parties' CBA states:

> [t]he employer recognizes the Association as the exclusive bargaining agent for every Chemung County employee in the Office of the Sheriff, and all Communications Operators employed in the Office of Fire and Emergency Management, *with the exception of* the Director of Fire and Emergency Management, Fiscal Manager, Undersheriff, Administrative Assistant II, Confidential Secretary, *employees of the County Jail, except clerical* and non-uniformed court attendants for the purposes of compensation (wages, fringe benefits). Uniformed Court Officers, who are at present contracted employees employed on a part-time basis shall be excluded from representation by the Association.[5]

DISCUSSION

A unit clarification petition seeks only a factual determination as to whether a position is encompassed within the scope of the unit at issue.[6] The Board examines the recognition clause and other contractual language to determine whether a position is properly included in a particular bargaining unit. If it is determined that the contract language is unclear, the practice of the parties is examined to determine the intent of the parties regarding the composition of the bargaining unit.[7]

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[5] Joint Ex 1, CBA, at 1 (emphasis added).
The CBA between the County and the Chemung County Correction Officer's Union (Correction Officer's Union) contains language in its recognition clause, stating that it represents "every Chemung County employee in the County Jail with the exception of the Facility Nurse and clerical personnel for the purposes of compensation (wages, fringe benefits)." ALJ Ex 6.

[6] *Monroe-Wooodbury Cent Sch Dist*, 33 PERB ¶ 3007, 3021 (2000).

[7] *County of Franklin*, 48 PERB ¶ 3025, 3096 (2015), quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 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); *Town of Huntington*, 33 PERB ¶ 3049, 3132 (2000); *Monroe-Woodbury Cent Sch Dist*, 33 PERB ¶ 3007, at 3021.

The Association no longer asserts that the part-time status of clerks is a basis on which to exclude them from the Association's unit. Rather, the Association argues that it does not represent any employees who work in the Jail Division and that their exclusion is clear in the CBA.

Contrary to the Association's argument, we find it clear from the CBA that clerks working in the jail are encompassed within the scope of the Association's civilian bargaining unit.

The parties' recognition clause, stripped of non-relevant language, reads as follows:

> [t]he employer recognizes the Association as the exclusive bargaining agent for every Chemung County employee in the Office of the Sheriff . . . with the exception of . . . employees of the County Jail, except clerical and non-uniformed court attendants for the purposes of compensation (wages, fringe benefits).[8]

In determining whether clerks are included in the Association's civilian bargaining unit, we find that the phrase at issue modifies "employees of the County Jail." That is, all employees of the County Jail are excluded from the Association's unit *except* clerical employees, who are included. This reading of the CBA is strengthened by also looking at the CBA between the County and the Correction Officer's Union, which states that it represents "every Chemung County employee in the County Jail with the exception of the Facility Nurse and clerical personnel." Thus, the two CBAs are consistent with each other—clerks are included in the Association's unit and not in the Correction Officer's Union's unit. Indeed, the Association's reading, in conjunction with the Correction Officer's Union's CBA with the County would yield the illogical result that the clerks in the County

[8] Joint Ex 1, CBA, at 1.

Jail are not within either unit. Moreover, the genesis of the unit shows that the parties intended to split the civilian positions from the law enforcement positions.[9]

The Association argues that the phrase "except clerical and non-uniformed court attendants for the purposes of compensation (wages, fringe benefits)" is an exception to the list of exclusions that brings into the Association's unit clerical employees (who are not employed within the County Jail) for limited representation purposes.[10] We find this reading not to be plausible, given the history of the unit and the language of the recognition clause.

Because we find that it is clear from the contractual language that part-time clerks who work in the County Jail are encompassed within the Association's civilian bargaining unit, we find it unnecessary to examine the practice of the parties to determine the intent of the parties regarding the composition of the bargaining unit.

We affirm the decision of the ALJ and deny the Association's exceptions.

IT IS, THEREFORE, ORDERED that the petition must be, and hereby is, granted.

DATED: July 27, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[9] Tr, at 60; Joint Ex 1.
[10] Brief in Support of Exceptions, at 3.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED FEDERATION OF POLICE OFFICERS, INC., LOCAL 613,

Petitioner,

CASE NO. M2013-153

- and –

COUNTY OF ROCKLAND,

Respondent.

THE SARCONE LAW FIRM, PLLC (JOHN A. SARCONE, III, ESQ., of counsel) for Petitioner

THOMAS E. HUMBACH, COUNTY ATTORNEY (JEFFREY J. FORTUNATO, ESQ., of counsel) for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the United Federation of Police Officers, Inc., Local 613 (Local 613) to a December 16, 2016 letter ruling by the Director of Conciliation (Director) denying Local 613's petition for interest arbitration with the County of Rockland (County).[1] The Director determined that the positions in the unit for which Local 613 sought interest arbitration (undercover investigators employed in the Rockland County District Attorney's office) are not eligible for interest arbitration under § 209.4 of the Public Employees' Fair Employment Act (Act).

EXCEPTIONS

[1] Because of the resignation of then-Member Allen C. DeMarco and the recusal of then-Member Robert S. Hite, the Board has not hitherto had a quorum able to decide this matter.

In its exceptions, Local 613 argues that the undercover investigators it represents are entitled to interest arbitration because they are police officers who are members of the Rockland County police force and members of a police union.

The County filed a response supporting the Director's letter ruling.

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

FACTS

On or about October 13, 2015, Local 613 filed a request for compulsory interest arbitration pursuant to § 209.4 of the Act. After soliciting written submissions from Local 613 and the County, the Director, by letter dated December 16, 2016 advised the parties that he had determined that the positions in the unit are ineligible for compulsory interest arbitration. The letter stated, in relevant part:

> As you know, from the time it was first adopted as an element of the impasse procedure in 1974, interest arbitration in New York has been very strictly interpreted and expansion to cover additional employee groups has been very limited.
>
> After reviewing your written submissions, my determination that the positions in this unit are ineligible for interest arbitration must stand. First, the *undercover investigator* titles are *not included* in the very specific list of titles that were added within district attorney offices. Secondly, . . . these employees are indeed police officers. However, the fact of the matter is that they simply do not meet the criteria that they be members of, ". . . any police force or police department of any county, city, town, village or fire or police district . . . ." (Section 209.4)[2]

DISCUSSION

Section 209.4 of the Act provides that compulsory interest arbitration is available

[2] Id (emphasis in original).

to resolve impasses during collective negotiations between public employers and employee organizations that represent certain groups of employees, including, as relevant here, "officers or members of any organized . . . police force or police department of any county . . ." as well as "detective-investigators, criminal investigators or rackets investigators employed in the office of a district attorney."

The issue to be decided is whether the Director properly concluded that undercover investigators employed in the Rockland County District Attorney's office do not fall within either of these groups of employees. For the reasons given below, we find that he did.[3]

First, we agree with the Director that the undercover investigators at issue are not members of any organized police force or police department.[4] In this respect, we emphasize that the issue is not whether undercover investigators perform similar duties to police officers or are classified as police officers under the New York Criminal

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[3] No party argues that the Director lacked the authority to make this eligibility determination. *Cf. City of Rensselaer*, 49 PERB ¶ 3016, 3064-3065 (2016); *City of Ithaca*, 50 PERB ¶ 3006, 3029 (2017). In any event, the dispute here centers on whether undercover investigators have the right to invoke interest arbitration, clearly an eligibility determination within the Director's authority to decide, subject to the Board's review. *City of Ithaca*, 50 PERB ¶ 3006, at 3029. *Cf. Town of Cicero*, 51 PERB ¶ 3009 (2017) (finding where issue is whether specific proposals violated § 205.6 (a) of the Rules of Procedure, question is one of arbitrability for the ALJ to decide).

[4] Prior to 2007, employees in the "undercover investigator" positions were known as "investigative aides." Ex C to Local 613's Brief in Support of Exceptions. The Board certified the United Federation of Police Officers as the bargaining agent for the unit of investigative aides in the Rockland County District Attorney's office as a separate unit in 2000. *County of Rockland*, 33 PERB ¶ 3000.19 (2000), *affd sub nom. County of Rockland v New York State Pub Empl Relations Bd*, 295 AD2d 790, 35 PERB ¶ 7013 (3d Dept 2002). In the proceedings leading up to the certification, the Assistant Director of Public Employment Practice and Representation found that the aides were not entitled to interest arbitration under § 209.4 of the Act. 32 PERB ¶ 4017, 4043 (1999). The Board, while affirming the Assistant Director's decision, did not discuss the eligibility of aides for interest arbitration. 32 PERB ¶ 3074 (1999). *See also County of Rockland*, 35 PERB ¶ 3004, 3008 (2002) (citing the Assistant Director's decision with approval).

Procedure Law (CPL), which appears to be undisputed.[5] Instead, the issue is whether undercover investigators are part of an organized police force or police department.[6] While Local 613 asserts that undercover investigators are members of the "Rockland County police force,"[7] it has failed to provide evidence that such an entity exists. Local 613 simply asserts that undercover investigators are members of the County's police force because they perform law enforcement/police officer duties, are "entrusted" with their duties by the County, and because the District Attorney's budget comes from the County.[8] Contrary to Local 613's assertion, these facts are not sufficient to demonstrate that undercover investigators are members of an organized County police force. Rather, the municipal organization that these undercover investigators are a part of is the District Attorney's office.

Because the undercover investigators here are employed in the District Attorney's office, they could be covered under the second provision cited above. However, as the Director stated, "undercover investigators" are not among the specified list of titles included in the Act, which is limited to detective-investigators, criminal investigators, or rackets investigators. Absent some textual, structural, or historical policy reason to believe the enumeration of these titles were not intended to be

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[5] *City of New York*, 39 PERB ¶ 3030, 3098 (2006) ("that the [employees] are included within the CPL's definition of a "police officer" would not be sufficient by itself to . . . give the [employees] eligibility for coverage under the Act's compulsory interest arbitration . . . provisions").

[6] *Erie County Sheriff and Erie County*, 7 PERB ¶ 3057, 3094 (1974) (finding deputy sheriff is police officer, but sheriff's department is not police force or police department); *Yates County and Yates County Deputy Sheriff's Assn*, 16 PERB ¶ 8001, 8001 (1982) (same), *confd* 16 PERB ¶ 7006 (1983); *County of Oneida and Oneida County Sheriff*, 20 PERB ¶ 3044, 3090 (1987) (same). *See also Syracuse Hancock Professional Fire Fighters Assn*, 17 PERB ¶ 3105, 3164 (1984) ("[t]he issue presented is not whether these employees perform firefighting duties but whether they are, in the words of the statute, "officers of members of any organized fire department . . . of any . . . city . . ."").

[7] Local 613 letter requesting interest arbitration, at 2.

[8] Local 613 Br in Support of Exceptions, at 2-3.

exclusive, "we cannot by implication supply in a statute a provision which it is reasonable to suppose the Legislature intended intentionally to omit because the failure of the Legislature to include a matter within the scope of an act may be construed as an indication that its exclusion was intended."[9] Here, no such reason exists; the structure and history of the Act's interest arbitration provisions reflect a piecemeal extension of eligibility only to specifically enumerated titles, which have been expanded on a title-by-title basis by the Legislature.[10] Thus, we can only conclude that the exclusive listing of detective-investigators, criminal investigators or rackets investigators in § 209.4 means that the Legislature did not intend to include other titles employed in district attorneys' offices, even if employees in those titles perform similar police or law enforcement duties.

Local 613 argues that these undercover investigators perform the work of police officers and should receive all of the benefits afforded to police officers, including compulsory interest arbitration. Local 613 further argues that denying undercover investigators compulsory interest arbitration defeats the public policy of resolving negotiation impasses between police officers and a public employer by arbitration. While we are not unsympathetic to the policy concerns raised by Local 613, these arguments are properly addressed to the Legislature.[11] Our task is to interpret the Act as enacted by the Legislature and, as enacted and amended over the past quarter-century, it is not susceptible to the conclusion that undercover investigators employed in

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[9] *Diegelman v City of Buffalo*, 28 NY3d 231, 237 (2016), quoting *Gammons v City of New York*, 24 NY3d 562, 570 (2014); *See also* McKinney's Cons. Laws of N.Y., Book 1, Statutes § 74 (codifying common law maxim of *expressio unis est exclusio alterius*).
[10] L 2007, ch 190, (adding rackets investigators) L 1998 ch 641 (adding criminal investigators); L 1990, ch 485 (adding detective-investigators).
[11] *Erie County Sheriff and Erie County*, 7 PERB ¶ 3057, at 3095; *County of Erie and Eric County Sheriff*, 22 PERB ¶ 3055, 3126 (1989).

the District Attorney's office are entitled to compulsory interest arbitration under § 209.4.

Based on the foregoing, we dismiss Local 613's exceptions and affirm the letter ruling of the Director.

DATED: July 27, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

In the Matter of

CITY OF CORTLAND,

Charging Party, **CASE NO. U-35517**

- and -

CORTLAND POLICE BENEVOLENT ASSOCIATION, INC.,

Respondent.

In the Matter of

CORTLAND POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party, **CASE NO. U-35545**

- and -

CITY OF CORTLAND,

Respondent.

COUGHLIN & GERHART, LLP (MARY LOUISE CONROW of counsel), for CITY OF CORTLAND

GLEASON, DUNN, WALSH & O'SHEA (MARK T. WALSH of counsel), for CORTLAND 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 Cortland Police Benevolent Association (PBA).[1] In Case No. U-35517, 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 certain proposals that are not mandatory subjects of negotiation. In Case No. U-35545, the ALJ dismissed the PBA's charge alleging that the City of Cortland (City) violated § 209-a.1 (d) of the Act by submitting certain proposals to interest arbitration that are prohibited subjects of negotiation.

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[1] 50 PERB ¶ 4590 (2017).

EXCEPTIONS

The PBA argues that the ALJ erred in finding that its proposals relating to "Duty Schedule," sick leave, "No Time Off Days," and General Municipal Law (GML) § 207-c are nonmandatory.[2] The PBA argues that the ALJ also erred in finding that the City's proposals relating to the overtime rate and overtime compensation while attending training sessions were not prohibited subjects of bargaining because they contravene the language of the Fair Labor Standards Act (FLSA).[3]

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 provides that a party may raise an objection to the arbitrability of proposals submitted to compulsory interest arbitration on the ground that the subject matter of the proposals is not mandatorily negotiable. Presenting a nonmandatory demand to interest arbitration, over the other party's objection, violates the duty to negotiate in good faith.

Duty Schedule Proposal

The PBA's duty schedule proposal states, in relevant part:

> Add the following language:
>
> Effective on or about June 1, 2016, the City shall implement a work schedule and hours of work which shall consist of permanent "A," "B" and "C" line tours of duty for all police officers (not including Sergeants) assigned to patrol duties as follows:
>
> Tours of Duty
>
> "A" Line 11:00 p.m. to 7:00 a.m.
> "B" Line 7:00 a.m. to 3:00 p.m.
> "C" Line 3:00 p.m. to 11:00 p.m.

[2] PBA Exceptions #1-4, Brief in Support at 2-12.
[3] PBA Exceptions #5-7, Brief in Support at 12-17.

> All police officers who bid for or are assigned to the permanent tours of duty set forth above shall work the following work schedule:
>
> Five (5) consecutive days on, followed by two (2) consecutive days off, followed by Five (5) consecutive days on, followed by two (2) consecutive days off, followed by Four (4) consecutive days on, followed by two (2) consecutive days off, and repeat the cycle.
>
> After the initial implementation, the annual bidding shall commence on or about November 1st through November 30th of each year effective January 1st through December 31st of the following year . . . All bidding shall be by seniority.
>
> In the event there are an insufficient number of volunteers based upon seniority, then the Chief of Police or designee may assign police officers in the inverse order of seniority on a rotating basis to the "A," "C" and "B" lines until the staffing levels determined by the Chief of Police have been achieved. After receipt of all selections and based upon the staffing levels determined by the Chief of Police for all tours of duty as set forth herein, he/she shall provide and/or post the tour of duty granted based on the selections submitted by seniority or assigned involuntarily.
>
> In the event that a vacancy in any tour of duty occurs during the year . . . and the Chief of Police or designee elects to fill that vacancy, he/she shall post the vacancy to be filled . . . providing any police officer with the opportunity to volunteer to fill the vacancy. In the event that there are no volunteers, the Chief of Police or designee may involuntarily assign the least senior police officer, on a rotating basis, depending on the need determined to fill the vacancy. . .
>
> The Chief of Police may involuntarily re-assign an employee to another tour of duty, for a defined operational need, not to exceed sixty (60) consecutive days, on the basis of inverse seniority, on a rotating basis. [4]

The ALJ found this proposal to be nonmandatory because seniority is the sole criterion upon which tour of duty assignments are made, whether during the initial

[4] Petition, Attachment 1, at 7-9.

bidding process or when a vacancy occurs during the year. We affirm this finding.[5]

We have long held that the inclusion of seniority as one of several factors in making assignments is a mandatory subject of negotiations.[6] However, by making seniority the sole basis on which tour of duty assignments are made, the PBA's proposal here infringes too much on the City's right to consider other factors such as qualifications, experience, or areas of expertise when assigning tours of duty.[7] Therefore, we find that the proposal is nonmandatory.

Sick Leave Proposal

The PBA submitted a proposal relating to sick leave that reads as follows:

> Section 5. Sick Leave:
>
> Clarify that employees do not have to provide the nature of illness or injury when reporting sick.

The ALJ found that this proposal was nonmandatory because the proposal would limit the City's ability to determine whether employees are using sick leave for its intended purpose.[8]

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[5] The ALJ also found that the proposal was not converted to a mandatory subject pursuant to *City of Cohoes*, 31 PERB ¶ 3020 (1998), *confirmed sub nom Uniformed Firefighters of Cohoes, Local 2562 v. Cuevas*, 32 PERB ¶ 7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶ 7019 (3d Dept 2000). The PBA has not excepted to this finding. As a result, any such exceptions are waived. Rules of Procedure § 213.2; *See, eg, Lawrence Union Free Sch Dist*, 50 PERB ¶ 3034, 3140 fn. 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).

[6] *PBA*, 37 PERB ¶ 3033, 3100 (2004); *NYCTA*, 22 PERB ¶ 6501, 6502 (1989); *Schenectady PBA*, 21 PERB ¶ 3022, 3050 (1988); *Dutchess County BOCES Faculty Assn, NEA/NY*, 17 PERB ¶ 3120, 3184 (1984), confirmed 122 AD2d 845, 19 PERB ¶ 7018 (2d Dep't 1986); *Niskayuna PBA, Inc*, 14 PERB ¶ 3067, 3184 (1981).

[7] *Compare PBA*, 37 PERB ¶ 3033, at 3100.

[8] The ALJ also found that this proposal was not converted to a mandatory subject pursuant to *City of Cohoes*, 31 PERB ¶ 3020 (1998). Again, the PBA did not file exceptions to this finding and any such exceptions are therefore waived. See fn. 5 above.

We reverse the ALJ and find that the PBA's proposal is mandatorily negotiable. Sick leave is a mandatory subject of bargaining, and the procedures for granting sick leave are also mandatory.[9] While, as the ALJ found, public employers have "the inherent managerial right to establish the standards to determine sick leave abuse and to monitor an employee's use of sick leave under those standards,"[10] requiring employees to participate in the monitoring of employees' use of sick leave is a mandatory subject.[11] A requirement that employees provide information on the nature of their illness or injury in order to avail themselves of sick leave is a mandatory subject because it requires just such employee participation in the monitoring of their use of sick leave. The proposal here does not infringe upon the City's right to set a sick leave abuse standard, and does not by its terms limit the manner by which the City may seek to monitor sick leave abuse.[12]

"No Time Off Days" Proposal

The PBA submitted a proposal regarding "no time off days" that reads as follows:

> NEW Section 9. No Time Off Days:
>
> On the following days employees will not be permitted to utilize leave time:
>
> INSERT DAYS CURRENTLY IN EFFECT
>
> Time worked on No Time Off days shall be paid at overtime rate.

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[9] *Village of Scarsdale*, 50 PERB ¶ 3007, 3035 (2017); *City of New Rochelle*, 47 PERB ¶ 3004, 3011 (2014); *City of New York*, 35 PERB ¶ 3034, 3098 (2002); *Village of Spring Valley PBA*, 14 PERB ¶ 3010, 3016 (1981).

[10] *City of New York*, 40 PERB ¶ 3017, 3069 (2007); *Poughkeepsie City Sch Dist*, 19 PERB ¶ 3046, 3099 (1986).

[11] *Village of Scarsdale*, 50 PERB ¶ 3007, at 3035, citing *Patchogue-Medford Union Free Sch Dist*, 30 PERB ¶ 3041 (1997); and *County of Cortland*, 48 PERB ¶ 3028, 3111-3112 (2014).

[12] As the City did not raise any objection as to the form of the demand in front of the ALJ or in its exceptions, we do not consider whether any such objection would have been meritorious.

> No further days will be designated as no time off except by mutual agreement of the City and PBA.[13]

The ALJ found that this proposal was nonmandatory because it infringed on the City's ability to determine staffing levels.[14] We disagree and reverse the ALJ.

Initially, we find that the PBA's proposal is composed of two separate components. The first is a proposal that officers be paid overtime for any time worked on "no time off days." This proposal, as a demand that seeks additional compensation for work on particular days, is clearly mandatory.[15]

The second component of the PBA's proposal is that the parties agree to the designation of any further "no time off days," that is, days on which employees are not allowed to utilize any accrued leave time they may have. In *City of Albany*,[16] we found that a contractual term which stated that no employees would be allowed to use compensatory time on certain days was a mandatory subject of bargaining.[17] We held that the term there did "nothing more than limit the right of employees to draw from their bank of accrued compensatory leave on [designated days]: a mandatorily negotiable condition on the receipt of paid leave."[18] Similarly here, the PBA's proposal seeks to negotiate the imposition of conditions on employees' receipt of paid leave. As such, the proposal is a mandatory subject of bargaining.

Finding the PBA's proposal here mandatory is consistent with our decision in *City of Watertown*, in which we reviewed and explained:

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[13] Petition, Attachment 1, at 11.
[14] The ALJ also found that this proposal was not converted to a mandatory subject pursuant to *City of Cohoes*, 31 PERB ¶ 3020 (1998). The PBA did not file exceptions to this finding and any such exceptions are therefore waived. See fn. 5 above.
[15] *City of Rochester*, 12 PERB ¶ 3010, 3017 (1979).
[16] 47 PERB ¶ 3016 (2014).
[17] The specific contractual term there read: "No use of compensatory time will be permitted for Christmas Eve and Christmas Day." Id, at 3046.
[18] Id.

> our efforts to balance the interests of employers in ensuring an adequate number of staff on duty to provide public services against the interests of the employees in negotiating their hours of work, including when they may collect the time off that they have earned.[19]

As we explained there, neither side enjoys unfettered discretion. The employer, the City here, must "determine and maintain staffing levels that can fulfill its mission and still accommodate reasonably foreseeable employee absences occasioned by vacations, medical appointments, illnesses or other non-contractual or negotiated circumstances."[20] In sum, requiring the City to negotiate with the PBA over the designation of days on which employees cannot use their accrued time off does not interfere with the City's managerial right to determine its staffing requirements but instead strikes an appropriate balance between the interests of employers and employees.

General Municipal Law § 207-c Proposal

The City objected to Section 10 of the PBA's GML § 207-c proposal as it relates to arbitral review of an employee's claim. This section provides, in relevant part:

> Section 10. Determination Review Procedure
>
> (a) In the event that an employee appeals from a determination of the Chief made pursuant to this policy, the appeal will be heard by one of the following arbitrators in rotating order: [to be agreed upon]. . .
>
> (b) In the case where an employee is appealing the denial of an award of Section 207-c benefits, either as a result of an initial injury or illness or the recurrence of an injury or illness the burden of proof shall be on the employee and will constitute a preponderance of the evidence. In the case where the City has made a determination that the employee is no longer eligible for Section 207-c benefits or that the employee is eligible to work light duty, the burden of proof shall be on the City and shall be by a preponderance of the evidence.

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[19] 47 PERB ¶ 3015, 3043 (2014).
[20] Id.

> (c) The employee may be represented by representative [sic] of his/her choice and may subpoena witnesses. . .A transcript shall be made, the cost of which shall be shared equally between the PBA, or in the event the employee is represented by a representative other than the PBA, the employee and Village. After the hearing, the Arbitrator shall render a determination which shall be final and binding upon all parties. Any such decision of the Arbitrator shall be reviewable only pursuant to the provisions of Article 75 of the Civil Practice Law and Rules. . .[21]

The ALJ engaged in a thorough examination of the Board's case law in this area, which we affirm and do not repeat here. As the ALJ explained, procedures for contesting a public employer's determinations under GML § 207-c are a mandatory subject of bargaining pursuant to *City of Watertown*.[22] Proposals, however, that either on their face or implicitly seek to establish *de novo* binding arbitration procedures to appeal the underlying claim are nonmandatory.[23]

The ALJ found that the PBA's proposal was nonmandatory because it sought *de novo* review of the underlying GML § 207-c claim. In this respect, the PBA conceded in its post-hearing brief to the ALJ that its proposal sought "a *de novo* arbitration to contest a City determination upon a GML § 207-c disability issue that is adverse to a unit employee."[24] The PBA further conceded that such demands are nonmandatory

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[21] Petition, Attachment 1, at 18.
[22] 30 PERB ¶ 3072 (1997), *confd*, 31 PERB ¶ 7013 (Sup Ct Albany County 1998), *reversed*, 263 AD2d 797, 32 PERB ¶ 7016 (3d Dept 1999), *lv granted*, 94 NY2d 751 (1999), 33 PERB ¶ 7003, *revd,* 95 NY2d 73 (2000).
[23] *City of Poughkeepsie*, 33 PERB ¶ 3029, 3079 (2000) (finding that a proposal establishing a *de novo* binding arbitration procedure to appeal the initial determination of GML § 207-a eligibility was nonmandatory); *City of Poughkeepsie*, 36 PERB ¶ 3014, 3041-42 (2003) ("The Association's demands seeking review not of the City's determinations of eligibility, termination of benefits and light duty but of the employees' underlying claims, infringe upon authority vested exclusively with municipalities by the statute"), *affirmed sub nom. Poughkeepsie Professional Firefighters Assn v. PERB*, 16 AD2d 797 (3d Dept 2005), 6 NY3d 514 (2006).
[24] PBA's post-hearing brief, at 16.

pursuant to *City of Poughkeepsie*.[25] The PBA asked the ALJ to disregard the Board's decision in *City of Poughkeepsie*, which the ALJ correctly declined to do.

Between the filing of the post-hearing briefs and the release of the ALJ's decision, the PBA's representative changed. In its exceptions, the PBA no longer asserts that the Board should not apply *City of Poughkeepsie*, and we consider it to have abandoned that argument. The PBA now asserts, however, that its proposal does not seek *de novo* review of a City determination upon a GML § 207-c disability issue.

Initially, having not raised this argument or factual precedent to the ALJ, the PBA may not raise the issue to us for the first time on exceptions.[26] Although the PBA's representative has changed, the PBA did not seek to reopen the record before the ALJ to change its position or present any new arguments. In these circumstances, we find that the PBA has not presented any compelling reasons for us to consider this previously unraised argument for the first time on exceptions.

Even were we to consider this argument, we would find that the proposal here seeks review of the employee's underlying claim and is nonmandatory pursuant to *City of Poughkeepsie*.[27] The PBA's proposal makes no reference to the City's determination and does not recognize the City's right to make the initial determination.[28] Instead, the proposal here, like the proposal found nonmandatory in *City of Poughkeepsie*, seeks arbitration not of the City's initial determination of ineligibility, but of the employee's

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[25] 36 PERB ¶ 3014 (2003).
[26] *See, eg, 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).
[27] 36 PERB ¶ 3014 (2003).
[28] *Compare City of Watertown*, where the PBA demand simply requested that any dispute over the City's initial determination be processed to arbitration pursuant to PERB's Voluntary Dispute Resolution Procedure. The demand was found mandatory because it was a substitute appeal procedure in order to avoid commencing an Article 78 proceeding. 30 PERB ¶ 3072, at 3179-3180.

underlying claim itself. In sum, we find that the PBA's proposal seeks review of the merits of the employee's claim and is a nonmandatory demand for de novo review.

We also affirm the ALJ's finding that the PBA's entire GML § 207-c proposal must be stricken as a unitary demand. As the ALJ found, the PBA's proposal contains a comprehensive statement of intent that demonstrates that the entire proposal is meant to be read as a whole.[29] Because one portion of the demand is nonmandatory and the proposal is a unitary demand, the entire proposal is nonmandatory.[30]

Overtime Rate Proposal

The City submitted an overtime rate proposal which reads as follows:

> Page 2- Section 3: Overtime Rate
>
> Employees covered by this Agreement shall be paid one and one-half (1 1/2) times their regular straight time hourly rate of pay for all authorized overtime hours of work after 15 minutes. Such overtime shall be rounded to the next 30 minutes or top of the hour (emphasis in original).[31]

The PBA objects to the proposal and argues that it is a prohibited subject of bargaining because it conflicts with the FLSA.[32]

Under the FLSA, an employee who works overtime is entitled to be paid "at a rate not less than one and one-half times the regular rate at which he is employed."[33] The term "regular rate" is defined to include "all remuneration for employment paid to . . . the employee," with some listed exceptions.[34]

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[29] The statement of intent states "[t]his policy is intended to provide a procedure to regulate both the application for, the award of, the administration of, and the discontinuation of benefits under section 207-c of the General Municipal Law." Petition, Attachment 1, at 15.
[30] *Highland Falls PBA, Inc*, 42 PERB ¶ 3020, 3072 (2009).
[31] PBA's Improper Practice Charge, at Ex A.
[32] 29 USC § 207.
[33] 29 USC § 207 (a).
[34] 29 USC § 207 (e).

The PBA argues that the "regular straight time hourly rate," called for in the City's proposal, falls below the rate called for in the FLSA because it fails to include items such as longevity and shift differentials, which are provided for in the collective bargaining agreement.

Assuming, as the PBA argues, that the FLSA requires that contractual items such as longevity and shift differentials must be included in the FLSA "regular rate" overtime calculation (a point that the City disputes), we nevertheless agree with the ALJ that the City's proposal does not contravene the requirements of the FLSA. "Regular straight time hourly rate" does not preclude the inclusion of contractual items and does not, on its face, conflict with the FLSA.[35] As a result, we find that the City's proposal was not a prohibited subject of bargaining.

Overtime Compensation While Attending Training Sessions Proposal

The City submitted a proposal relating to overtime while attending training sessions that reads as follows:

> Page 16 – Section 3: OVERTIME COMPENSATION WHILE ATTENDING TRAINING SESSIONS
>
> With the exception of Basic Patrol School, an officer attending any training session on a regularly scheduled day off shall **(*delete – have the option to be paid in cash at the rate of time and one half, or*)** be reimbursed compensatory time at the rate of time and one-half for the normal eight (8) hour work day. Any time worked over the normal eight (8) hour day will be paid for as in "a" above. Compensatory time accumulated in this manner may be taken off by the officer when the schedule permits.[36]

The PBA asserts that the City's proposal is a prohibited subject because it would force employees to accept compensatory time, which it alleges is not permitted under the FLSA.

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[35] We note that we make no finding on whether "regular straight time hour rate" actually includes contractual items such as longevity and shift differentials.
[36] *Id.*

With regard to compensatory time, the FLSA states:

> (1) Employees of a public agency…may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.
>
> (2) A public agency may provide compensatory time under paragraph (1) only –
>
> (A) Pursuant to –
>
> (i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees.[37]

We affirm the ALJ's finding that the language of the City's proposal, which would allow officers to accumulate compensatory time in lieu of overtime compensation, is not prohibited by the language of the FLSA. Indeed, the FLSA clearly contemplates just this type of agreement.

The PBA argues that, absent its agreement, the employer must pay overtime and that submission to interest arbitration, by its nature, demonstrates that it has not agreed that officers attending training will be reimbursed through compensatory time.

This is an issue that the Board has not previously decided. The PBA has not pointed to any court precedent (and our own research has not disclosed any cases) addressing whether an interest arbitration award is an "agreement" recognized within the meaning of the FLSA. We note that an interest arbitration award, while not an agreement "within the meaning of the Act,"[38] can nevertheless serve the same function as an agreement for certain purposes under the Taylor Law. In *Town of Southampton v New York State Public Employment Relations Board*, the Court of Appeals found that an

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[37] 29 USC 207(o).

[38] *Town of Orchard Park*, 29 PERB ¶ 3080, 3189 (1996), citing *City of Niagara Falls*, 23 PERB ¶ 3039 (1990); *Regional Transportation Auth/Regional Transit Service*, 28 PERB ¶ 3007, 3019 (1995).

interest arbitration award was the functional equivalent of an award for determining the *status quo* under the *Triborough* doctrine.[39] In the absence of any precedent compelling us to find that an interest arbitration award is not an agreement recognized under the FLSA, we decline to so find.[40] Finding an interest arbitration award not to be an agreement would be inconsistent with the strong and sweeping policy favoring collective bargaining under the Act concerning employees' terms and conditions of employment and the final resolution of bargaining impasses.[41] In sum, we find that an interest arbitration award is an agreement for purposes of the FLSA. As a result, we find that the City's proposal is not a prohibited subject of negotiation.

The PBA also argues that the proposal is prohibited pursuant to standards set forth by the FLSA because it only allows employees to use compensatory time "when the schedule permits."[42] The FLSA states that employees who have accrued compensatory time "shall be permitted. . .to use such time within a reasonable period after making the request if the use of the compensatory time does not unduly disrupt the operations of the public agency."[43]

We affirm the ALJ's finding that the language "when the schedule permits," does not explicitly controvert the requirements of the FLSA. Therefore, the proposal is not prohibited.

By reason of the foregoing, we affirm the ALJ's findings that the PBA violated § 209-a.2 (b) of the Act when it submitted its Duty Schedule and GML § 207-c proposals

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[39] 2 NY3d 513, 37 PERB ¶ 7001 (2004).
[40] We note that the logical consequence of the PBA's argument would be to preclude the introduction of any proposals, by any parties, relating to compensatory time at interest arbitration.
[41] *See City of Watertown v NYS Pub Empl Relations Bd*, 95 NY2d 73, 78, 33 PERB ¶ 7007 (2000); *Cohoes City School Dist v Cohoes Teachers Assn*, 40 NY2d 774, 778, 9 PERB ¶ 7529 (1976); *City of Watertown*, 47 PERB ¶ 3015 (2014).
[42] PBA's Improper Practice Charge, at Ex A.
[43] 29 USC 207(o)(5).

to interest arbitration. We reverse the ALJ and find that the PBA did not violate § 209-a.2 (b) of the Act when it submitted its Sick Leave and No Time Off Days proposals to interest arbitration. We also affirm the ALJ's findings that the City did not violate § 209-a.1 (d) of the Act by submitting its overtime rate proposal and overtime compensation while attending training sessions proposal to interest arbitration.

IT IS, THEREFORE, ORDERED that the PBA withdraw from interest arbitration its Duty Schedule and GML § 207-c proposals.

DATED: July 27, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member