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November 21, 2006

Louis Giampaglia
NYS Correctional Officers and Police
Benevolent Association, Inc.
102 Hackett Boulevard
Albany, NY 12210

Re: PERB Case No. U-23685 (Improper Practice Charge re: Greene C.F. -- Vacation Relief)

Dear Lou:

I enclose a copy of the PERB Board's decision. The Board denies NYSCOPBA's exceptions but modifies the ALJ's decision by conditionally dismissing the charge and allowing NYSCOPBA to pursue any contractual remedies it may have. While this sounds hopeful, in fact there are no effective contractual remedies, as the State's ability to unilaterally amend a local labor/management agreement after meeting in good faith with local union representatives is well- established and, in fact, was conceded by NYSCOPBA at the hearing.

The Board also notes that, had it actually reached the merits of the case, it would have found that the State's action was not negotiable because it involves a non-mandatory subject of bargaining.

I am disappointed that the Board did not accept our argument that vacation relief is not so much a job category as it is a means of assigning employees to cover the jobs of vacationing officers. Be that as it may, however, the Board has spoken.

Call me if there are any questions about this decision.

Very truly yours,

William F. Sheehan
WFS/dac
Enclosure
cc: NYSCOPBA Mid-Hudson Region Office
David Viddivo, Chief Sector Steward, Greene C.F.
NYSCOPBA Grievance Department

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STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NEW YORK STATE CORRECTIONALOFFICERS & POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

CASE NO. U-23685

- and -

STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL SERVICES),

Respondent.

SHEEHAN GREENE CARRAWAY GOLDERMAN & JACQUES LLP (WILLIAM F. SHEEHAN of counsel), for Charging Party

WALTER J. PELLEGRINI, GENERAL COUNSEL (MICHAEL N. VOLFORTE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) to a decision of an Administrative Law Judge (ALJ) dismissing its improper practice charge which alleged that the State of New York (Department of Correctional Services) (State) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the practice and procedure by which corrections officers were assigned to perform

vacation relief functions at Greene Correctional Facility.

EXCEPTIONS

NYSCOPBA excepts to the ALJ's decision, arguing that the ALJ erred by finding that the subject-matter of NYSCOPBA's charge is a nonmandatory subject of negotiations and by noting that the matter might appropriately be dismissed or deferred because of lack of jurisdiction. The State supports the ALJ's decision and argues that the charge should be dismissed for lack of jurisdiction.

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

FACTS

The facts are set forth in the ALJ's decision[1] and are repeated here only as necessary to address the exceptions.

Greene Correctional Facility (Greene) is a medium/maximum security facility operated by the Department of Correctional Services (DOCS). Of the 430 correction officers assigned to Greene, 113 officers make up the "resource pool". Officers assigned to the resource pool fall into three categories: vacation relief officers, training relief officers and various/various resource officers. Correction officers in the resource pool are responsible for filling-in for correction officers who are absent due to vacations, sick or military leave, or other short or long-term absences.

Vacations are taken in two-week blocks of time. Vacation bids are made in

[1] 39 PERB ¶4571 (2006).

October of each year. Once the vacation bids are scheduled, the staffing lieutenant posts the vacation vacancies every two weeks during the year. Vacation relief officers are given the first opportunity to bid on filling vacation slots. If there are not enough vacation relief officers to fill all of the upcoming vacations in a two-week period, the various/various resource officers are assigned to any unfilled vacation slots.

NYSCOPBA and the State are parties to a 1999-2003 collective bargaining agreement which provides, in relevant part, at section 25.4:

> Any arrangement which is the subject of a memorandum of understanding, letter of understanding or joint meeting minutes shall not be altered or modified by either party without first meeting and discussing with the other party at the appropriate level in a good faith effort to reach a successor agreement. Any alterations or modifications to a written local labor/management agreement as described in this section may occur no sooner than five days after such meeting and discussion and subsequent written notification of the changes received by the other party. Implementation of such alterations or modifications shall not occur without adherence to the procedures herein described.

Pursuant to section 25.4, a labor/management agreement was entered into at Greene on October 9, 1987, setting the number of vacation relief bids at 42. That agreement was revised by a subsequent labor/management agreement on June 4, 1996, but the number of vacation relief bids remained at 42.

In the fall of 2001, the parties met to discuss issues related to vacation relief positions. At that time, NYSCOPBA was aware of DOCS' requirement that the resource pool at each correctional facility be comprised of 50% various/various resource officers,

25% bid shift and 25% bid shift and squad (vacation relief officers). The resource pool at Greene did not comply with the 50-25-25 requirement, as the vacation relief officers made up more than 25% of the resource pool. In August 2002, local managment made a proposal to NYSCOPBA to bring Greene into compliance but the proposal was rejected by NYSCOPBA. Thereafter, management at Greene determined to reduce the number of vacation relief officer positions by attrition. As a result, in August 2002, five vacant vacation relief officer positions were not offered for bid, thereby reducing the number of vacation relief officer positions to 37. The instant charge was then filed.

DISCUSSION

The ALJ opined in a footnote that the June 1996 labor/management agreement might be characterized as "an agreement of any kind", as defined in §205.5 (d) of the Act, which would divest PERB of jurisdiction or at least warrant a jurisdictional deferral, pursuant to *Herkimer County BOCES*.[2] She did not reach the jurisdictional issue because of her dismissal of the improper practice charge on the merits.

In *City of Albany*,[3] we held that:

> we are obliged to [reach the jurisdictional] issue because it concerns our power to entertain the remaining unilateral change allegation. Pursuant to §205.5(d) of the Act, the Legislature has made clear that it is not within our power to either entertain alleged contract violations or enforce a collective bargaining agreement.

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[2] 20 PERB ¶3050 (1987).

[3] 25 PERB ¶3006, at 3020 (1992).

We need to first address the jurisdictional defense raised by the State because it brings into question our power to hear the charge.[4] Section 205.5(d) of the Act denies PERB jurisdiction over alleged violations of an agreement between an employer and an employee organization that do not otherwise constitute improper practices. This section of the Act is triggered if an agreement is a reasonably arguable source of right to a charging party with respect to the actions complained of in its improper practice charge.[5]

NYSCOPBA argues that there was a long-standing practice in effect before the 1996 labor-management agreement that required that there be an adequate number of vacation relief officers to cover all vacations taken by correction officers in the facility and that it is the State's change in that practice that is the basis of the charge, not alterations in the labor-management agreement. The State argues that the 1996 labor-management agreement and its 1987 predecessor are agreements within the meaning of §205.5 (d) of the Act and that PERB is thereby divested of jurisdiction to hear this charge. The ALJ also opined that the labor-management agreement was an "agreement of any kind" which we might not have jurisdiction to enforce.

The 1996 labor-management agreement and its predecessor, the 1987 labor-management agreement, set the number of vacation relief officers at 42. It is the State's

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[4] *State of New York (DOH)*, 25 PERB ¶3038 (1992). *Cf, State of New York (DOCS-Elmira Corr Fac)*, 39 PERB ¶3004 (2006).

[5] *State of New York--Unified Court System*, 25 PERB ¶3035 (1992); *County of Nassau*, 24 PERB ¶3029 (1991).

decision not to post five vacant vacation relief officer positions for bid that prompted the instant charge to be filed. It is not a change in a past practice, as NYSCOPBA attempts to characterize the State's action, but a change in an existing agreement that actually forms the basis of the improper practice charge. The parties' practice, whatever it was before 1987, was memorialized in an agreement in 1987 that was continued, in relevant part, in the 1996 labor-management agreement.[6]

A determination of whether the State breached that agreement is not within our jurisdiction given the limitations set forth in §205.5(d) of the Act. NYSCOPBA argues that the agreement is no longer in effect as the State repudiated the agreement by failing to post the five vacant vacation relief officer positions. A meritorious repudiation claim arises only in "extraordinary circumstances" in which a party to the contract denies the existence of an agreement or acts in total disregard of the contract's terms without any colorable claim of right.[7] The State has not denied the existence of an agreement; indeed, it asserts that there is an agreement and that it has acted according to the terms of the agreement

We, therefore, determine that NYSCOPBA's improper practice charge raises a question of enforcement of the labor-management agreement over which PERB has no

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[6] Transcript, pp. 37-38.

[7] *State of New York (SUNY College at Potsdam)*, 22 PERB ¶3045 (1989); *Monticello Cent School Dist*, 22 PERB ¶3002 (1989); *Connetquot Cent School Dist*, 21 PERB ¶3049 (1988); *City of Buffalo*, 19 PERB ¶3023 (1986); *Copiague Union Free School Dist*, 13 PERB 3081 (1980).

jurisdiction. However, the parties have, by their 1999-2003 collective bargaining agreement, created a procedure for resolving disputes arising from the alterations or modifications of agreements reached by labor-management committees. We find that it is appropriate, therefore, under our decisions in *Herkimer County BOCES*, *supra*, and *Town of Carmel*[8] to defer to the parties' collective bargaining agreement the dispute that has arisen from the allegation that the State "altered" the number of vacation relief officers set forth in the parties' 1987 and 1996 labor management agreements.[9]

Were we to reach the merits of the charge, which has been the subject of other improper practice charges,[10] we would affirm the ALJ's decision. Relying on the Board's decision in *Town of Blooming Grove* (hereafter, *Blooming Grove*)[11], the ALJ found that the State was privileged to determine that there would be fewer employees at Greene designated as vacation relief officers. In *Blooming Grove*, we held that it is an employer's prerogative to determine the number of employees that it needs, in each job category, but that the means that the employer then utilizes to determine which employees are assigned to meet staffing needs in each category must be bargained. The ALJ, therefore, held that the State's action was not negotiable as it had not altered the procedure used for the assignment of vacation relief bids, but had simply decided

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[8] 29 PERB ¶3073 (1996).

[9] *See*, *State of New York (DOCS)*, 30 PERB ¶4601 (1997). *But see*, *State of New York (DOCS-Franklin Corr Fac)*, 38 PERB ¶4519 (2005).

[10] *See*, *State of New York (DOCS-Elmira Corr Fac)*, *supra* note 4;

[11] 21 PERB ¶3032 (1988).

that there would be fewer vacation relief officers in the resource pool from which those vacancies were filled.

NYSCOPBA argues that vacation relief is not a job category but rather a means of assigning employees and that *Blooming Grove* is inapposite. It characterizes the charge as dealing with the method by which employees are selected to perform work, a mandatory subject of negotiations.[12] We do not agree.

The fact that only those correction officers in the job category of vacation relief officer or various/various resource officer are eligible for assignment to vacation relief vacancies demonstrates that vacation relief officer is a job category and that vacation relief vacancies are the assignments. The ALJ correctly noted that while the State had changed the number of vacation relief officers, the order of assignment and the assignment procedures applicable to the remaining vacation relief officers and others in the resource pool had remained unchanged. As there has been no change in method or means of making vacation relief assignments or in the job categories eligible for such assignments, there is no violation of §209-a.1(d) of the Act.

Based on the foregoing, we deny NYSCOPBA's exceptions and, as modified, affirm the decision of the ALJ.

For the reasons set forth above, the charge is conditionally dismissed subject to

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[12] *See City of White Plains*, 5 PERB ¶3008 (1972).

a motion to reopen in accordance with our decision herein.[13] SO ORDERED.

DATED: November 8, 2006
Albany, New York

Michael R. Cuevas, Chairman

John T. Mitchell, Member

[13]*New York City Transit Auth (Bordansky)*, 4 PERB ¶3031 (1971).