STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Charging Party,

CASE NO. U-28160

- and -

STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL SERVICES),

Respondent.

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

MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (GARY SIMPSON of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the State of New York (Department of Correctional Services) (State) to a decision by the Assistant Director of Public Employment Practices and Representation (Assistant Director), on an improper practice charge filed by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) concluding that the State violated §§209-a.1(a) and (g) of the Public Employees' Fair Employment Act (Act) when it denied NYSCOPBA representation of a probationary correction officer during questioning by a Department of Correctional Services (DOCS) Office of Inspector General (OIG) investigator on

January 28, 2008 about the attempted suicide of an inmate under the correction officer's immediate supervision at the Great Meadow Correctional Facility.[1]

EXCEPTIONS

In its exceptions, the State advances a number of legal arguments to support its contention that the NYSCOPBA-represented probationary employee was not entitled to representation under §209-a.1(g) of the Act including: a) probationary employees are not covered by §209-a.1(g) of the Act because they cannot be the subject of potential disciplinary action; b) the purpose of §209-a.1(g) of the Act was to grant representational rights only to those employees who are subject to Civ Serv Law §75 disciplinary procedures or who are subject to disciplinary procedures under a collectively negotiated agreement; c) federal precedent is irrelevant to a proper interpretation of the rights granted by §209-a.1(g) of the Act; and d) an interpretation of §209-a.1(g) of the Act that recognizes representational rights to probationary employees is an impairment of the State's contractual rights in violation of Article 1, §10 of the United States Constitution.

In addition, the State contends that the Assistant Director erred in concluding that it violated §§209-a.1(a) and (g) of the Act on the grounds that: a) the correction officer did not explicitly request representation on January 28, 2008; b) at the time of the questioning, it did not reasonably appear that the correction officer was a potential subject or target of disciplinary action; c) the questioning of the correction officer by DOCS OIG does not establish that he was a potential subject of discipline; d) the Assistant Director improperly placed the burden of proof on the State to demonstrate

[1]42 PERB ¶4552 (2009).

that the correction officer was not the subject of potential disciplinary action at the time of questioning; and e) the denial of representation during employer questioning of a public employee does not constitute a violation of §209-a.1(a) of the Act. Finally, the State excepts to the Assistant Director's proposed remedial order.

Based upon our review of the record, and our consideration of the parties' arguments, we affirm the Assistant Director's decision and order, in part, but reverse her finding that the State violated §209-a.1(a) of the Act, and modify the proposed remedial order.

FACTS

Article 8 of the collectively negotiated agreement (agreement) between the State and NYSCOPBA includes a negotiated disciplinary procedure in lieu of the procedures and remedies contained in Civ Serv Law §§75 and 76. Section 8.1 of the agreement states:

> Discipline shall be imposed upon employees otherwise subject to the provisions of Section 75 and 76 of the Civil Service Law only pursuant to this Article, and the procedure and remedies herein provided shall apply in lieu of the procedure and remedies prescribed by such sections of the Civil Service Law which shall not apply to employees.[2]

The agreement's Bill of Rights expressly grants unit members the right to NYSCOPBA representation during an interrogation if it is contemplated that the employee will be served with a notice of discipline pursuant to Article 8. In addition, the Bill of Rights prohibits the State's use of a statement or admission made by a unit employee during

[2] Joint Exhibit 1, pp. 25-26.

an interrogation if an employee's contractual right to NYSCOPBA representation is denied.[3]

Section 9.7 of the DOCS employee manual sets forth a specific protocol for employees to follow when responding to inmate suicides and attempted suicides:

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[3] In relevant part, the Bill of Rights states that:

> (C) No employee shall be requested to sign a statement of an admission of guilt to be used in a disciplinary proceeding under Article 8 without having Union representation.
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> (G) An employee shall be entitled to Union representation at an interrogation if it is contemplated that such employee will be served a notice of discipline pursuant to Article 8 of this Agreement. Such employee shall not be required to sign any statement arising out of such interrogation.
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> (H) Except as provided below, any statements or admissions made by an employee during such and interrogation without the opportunity to have Union representation may not be subsequently used in a disciplinary proceeding against that employee.
>
> (I) If representation is requested by the employee and if such representation is not provided by the Union within a reasonable period of time, the Employer may proceed with the interrogation.
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> (K) Any employee who is subject to questioning by his/her Department's Inspector General's Office shall, whenever the nature of the investigation permits, be notified at least 24 hours prior to the interview.

Joint Exhibit 1, pp. 6-7.

> In cases of suicide or attempted suicide, the physician and supervising officer will be notified immediately. If an inmate is found hanging, he/she will be taken down immediately and first aid administered until medical arrives. In case of death, all precautions will be taken to preserve evidence of the manner of death.[4]

Jason Chagnon (Chagnon) commenced employment as a DOCS correction officer in May 2007. On January 28, 2008, Chagnon had not completed the probationary period applicable to his position. On that date, he was assigned to the Great Meadow Correctional Facility and worked the 3:00 p.m. – 11:00 p.m. shift in the Special Housing Unit. (SHU). SHU houses approximately 30 inmates, and Chagnon was the primary correction officer responsible for their direct care, custody and control. A second correction officer was assigned to the locked SHU console, but he was not permitted to leave the console unless all the gates were closed, and he was relieved by another officer.

While making his rounds during the second hour of his shift, Chagnon observed an inmate in a cell with a sheet tied around his neck and attached to the cell bars, in an apparent suicide attempt. Without entering the cell, Chagnon made two unsuccessful attempts at getting a verbal response from the inmate by calling his name and kicking the cell. Thereafter, the console officer contacted medical staff. A short time later, a sergeant and another officer arrived at SHU, and they entered the inmate's cell with Chagnon. While in the cell, the sergeant ordered Chagnon to open a small sliding gate in the front of the cell to permit the cutting of the sheet attached to the inmate's neck.

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[4] The text of the DOCS employee manual provision is set forth in a DOCS counseling memorandum in the record. Joint Exhibit 5.

The inmate was then transferred to the facility hospital by security staff and died three days later.[5]

At approximately 7:30 p.m. on January 28, 2008, Chagnon was relieved of his SHU duties, and directed to prepare a memorandum describing the events relating to the inmate's suicide attempt for the facility's superintendent. Later, Chagnon and other DOCS employees on duty at the time of the attempted suicide were placed in an office together, and they were directed not to discuss the incident until DOCS OIG investigators arrived to question them.

DOCS OIG is responsible for investigating cases of possible employee misconduct or violations of law by staff and inmates. Although the Bill of Rights states that, in general, employees are to receive 24 hours notice before being questioned by DOCS OIG, it is undisputed that such notice was not provided in the present case because of the exigencies associated with an investigation into an attempted inmate suicide.[6]

Following their arrival at the facility on the evening of January 28, 2008, DOCS OIG investigators separately questioned at least five NYSCOPBA represented employees, including Chagnon. With the exception of Chagnon, each correction officer, including a sergeant who had not completed his promotional probationary period, was permitted NYSCOPBA representation during the questioning.[7]

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[5] Joint Exhibits 2 and 3.

[6] Transcript, pp. 104, 106, 120.

[7] Transcript, pp. 97, 99-100, 123-124.

At approximately midnight, a DOCS OIG investigator met with Chagnon and his NYSCOPBA shop steward for the purpose of questioning Chagnon about the suicide attempt. Prior to the meeting, the DOCS OIG investigator had reviewed the memorandum that Chagnon had prepared for the facility superintendent, and was aware that Chagnon was the first employee to discover the inmate.

At the commencement of questioning, Chagnon was asked to state his name and seniority date. After learning of Chagnon's seniority date, the investigator informed Chagnon that he was not entitled to continued NYSCOPBA representation during questioning because he was still on probation. In response, the shop steward stated that Chagon had a right to NYSCOPBA representation during the questioning based upon a newly enacted law. During his testimony, the investigator acknowledged that in response to the shop steward's question about whether Chagnon was going to be disciplined, the investigator stated: "I couldn't make that determination. It's not my decision."[8] The investigator also admitted that the shop steward explicitly requested that Chagnon be permitted to have NYSCOPBA representation during the questioning.[9]

The investigator asked Chagnon and the shop steward to leave the room to afford him the opportunity to telephone his supervisor with respect to the shop steward's reference to the newly enacted law.[10] Following the investigator's unsuccessful efforts at reaching a supervisor, Chagnon and the shop steward returned and were informed

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[8] Transcript, pp. 114-115.

[9] Transcript, pp. 113, 137.

[10] At the time, the DOCS OIG investigator was unaware that §209-a.1(g) of Act had been enacted. Transcript, p. 115.

that Chagnon would be questioned without NYSCOPBA representation. As a result, the shop steward was not present during the questioning of Chagnon, which lasted approximately 30 minutes and focused on the content of his earlier memorandum about the suicide attempt. Chagnon testified that during the questioning, he again requested employee organization representation. In contrast, the investigator testified that the only request for representation was made by the shop steward.[11] According to the investigator, NYSCOPBA representation was denied to Chagnon because he was on probation, and probationary employees are not subject to discipline.

Pending completion of the DOCS OIG investigation, Chagnon was placed on administrative leave with pay for three weeks, effective February 15, 2008. Under the terms of the leave, Chagnon was prohibited from leaving his home during normal work hours. Following issuance of the DOCS OIG investigatory report, he returned to work. On March 22, 2008, he was formally counseled for violating §9.7 of the DOCS employee manual based upon his delays after discovering the suicide attempt.[12] Specifically, Chagnon was counseled for failing to immediately cut the ligature used by the inmate, remove the inmate from the cell, and provide the inmate with first aid aimed at saving his life.

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[11] Transcript, pp. 24, 113.

[12] Joint Exhibit 5. In addition, the counseling memorandum referenced a 2007 memorandum from the DOCS Deputy Commissioner for Correctional Facilities that stated, in part: "Therefore, prompt action can mean the difference between life and death. If the first individuals who respond to the scene of a health care emergency, such as an inmate hanging, are security staff, they can not await the arrival of medical staff before CPR and other first aid measures are started."

DISCUSSION

This case presents the Board with its first opportunity to examine the breadth of the representation rights, and the employer's affirmative defense, afforded under §209-a.1(g) of the Act.[13] Therefore, prior to examining the State's specific exceptions from the Assistant Director's decision, it is appropriate to review the background, text and legislative history of §209-a.1(g) of the Act.

A. Background, Text and Legislative History of §209-a.1(g) of the Act

In *New York City Transit Authority v New York State Public Employment Relations Board*[14] (hereinafter *NYCTA*), the Court of Appeals reversed a Board decision[15] finding a violation of §§209-a.1(a) and (c) of the Act when an employer denied an employee's request for employee organization representation during an investigatory interview that may have reasonably led to disciplinary action. In reversing the Board, the Court of Appeals held that §202 of the Act did not grant public employees an inherent statutory right to representation similar to the right that was recognized in *NLRB v J Weingarten, Inc*[16] (hereinafter *Weingarten*) for private sector employees under §7 of the National Labor Relations Act (NLRA).[17]

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[13] L 2007, c. 244.

[14] 8 NY3d 226, 40 PERB ¶7001 (2007).

[15] 35 PERB ¶3029 (2002).

[16] 420 US 251 (1975).

[17] 29 USC §157.

In construing §202 of the Act, the *NYCTA* Court compared it with two other statutes: §7 of the NLRA and Civ Serv Law §75. It reasoned that, unlike §7 of the NLRA, §202 of the Act does not grant public employees the right to "engage in concerted activities for . . . mutual aid or protection," a right relied upon by the United States Supreme Court decision in *Weingarten* when it determined that private sector employees had the right to representation during employer questioning. In addition, the *NYCTA* Court cited the statutory language and related legislative history of the 1993 amendment to Civ Serv Law §75.2, which granted an explicit right to representation during employer questioning of an employee who is subject to Civ Serv Law §75 disciplinary procedures.[18] It concluded that the Legislature's inclusion of an explicit

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[18] Civ Serv Law §75.2 states, in relevant part, that:

> An employee who at the time of questioning appears to be a potential subject of disciplinary action shall have a right to representation by his or her certified or recognized employee organization under article fourteen of this chapter and shall be notified in advance, in writing, of such right. A state employee who is designated managerial or confidential under article fourteen of this chapter, shall, at the time of questioning, where it appears that such employee is a potential subject of disciplinary action, have a right to representation and shall be notified in advance, in writing, of such right. If representation is requested a reasonable period of time shall be afforded to obtain such representation. If the employee is unable to obtain representation within a reasonable period of time the employer has the right to then question the employee. A hearing officer under this section shall have the power to find that a reasonable period of time was or was not afforded. In the event the hearing officer finds that a reasonable period of time was not afforded then any and all statements obtained from said questioning as well as any evidence or information obtained as a result of said questioning shall be excluded, provided, however, that this subdivision shall not modify or replace any written collective agreement between a public employer and employee organization negotiated pursuant to article fourteen of this chapter.

statutory right to such representation in Civ Serv Law §75.2 demonstrated that §202 of the Act did not grant an implicit representational right.

In direct response to the *NYCTA* decision, the Legislature amended the Act in 2007 by adding §209-a.1(g) to create a new improper employer practice, and a related affirmative defense to such a charge. In amending the Act, however, the Legislature did not amend §§202 or 203 to reference a right to employee organization representation during employer questioning when it reasonably appears that the employee may be a potential subject of discipline.

Section 209-a.1(g) of the Act states that it is an improper employer practice

> 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 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.

In order to demonstrate a violation of §209-a.1(g) of the Act, a charging party must prove, by a preponderance of evidence, that: a demand for representation was made by a public employee; the employer failed to permit or refused to afford the employee organizational representation during questioning by the employer; and at the time of the employer's questioning, it reasonably appeared that the employee may have been the subject or target of potential disciplinary action.

In drafting §209-a.1(g) of the Act, the Legislature did not distinguish between an employer questioning an employee during an interrogation, interview, meeting or any other particular setting. Furthermore, it placed a relatively low threshold for an entitlement to representation by conditioning it upon a request for representation and a reasonable appearance that the employee may be the subject or target of potential discipline.

The legislative history of the provision supports the conclusion that, as remedial legislation aimed at overturning the result in *NYCTA*, §209-a.1(g) of the Act "is entitled to a liberal construction with respect to the representational rights protected."[19] In his memorandum in support of the bill, Assembly member Peter J. Abbate, Jr., the primary Assembly sponsor, stated that the purpose of the legislation was to overturn *NYCTA* by extending to public employees the representational rights of private sector employees as interpreted in *Weingarten,* and thereby eliminating any "uncertainty and disagreement over the question to the benefit of public employees, unions and public employers alike who will be freed from exposure to potentially costly and disruptive litigation."[20]

Governor Spitzer expressed a similar rationale in his approval statement of the legislation:

> In approving this bill, and in finding that allowing such representation is a good practice both for finding the truth and for protecting employee's rights, I am following the

[19] *Tarrytown PBA*, 40 PERB ¶3024 at 3104 (2007); *State of New York (DOCS) (Biegel),* 42 PERB ¶3013 (2009); *McKinney's Statutes* §321.

[20] L 2007, c. 244, Bill Jacket, p. 8.

> position previously adopted by the Public Employment Relations Board ("PERB") and the United States Supreme Court, as well as the practice adhered to by most public employers, and currently set forth in the Civil Service Law.[21]

Unlike other improper practices defined in §§209-a.1 and 2 of the Act, however, the Legislature codified an affirmative defense to a charge alleging a violation of §209-a.1(g) of the Act, which states:

> 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.

In his approval statement, Governor Spitzer explained the genesis and purpose of this affirmative defense:

> [C]ontrary to the assertions of some of the bill's opponents, *this bill does not give an employee "two bites at the apple"* - i.e., allow the employee to argue for exclusion of evidence based on the violation of a right to representation in an internal disciplinary proceeding, and then again before the PERB. Indeed, the bill was amended at my insistence to eliminate that problem, by making it a defense to an improper practice charge before PERB when the employer has a policy or practice of allowing an employee to demonstrate a violation of this right before an arbitrator or hearing officer. *Thus, so long as an employee is provided with the chance to prove that this right was violated, and to exclude evidence if it has been, there can be no improper practice charge.*[22] (emphasis added)

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[21] Governor Spitzer's Approval Memorandum No. 10, *supra* note 21 at p. 3.

[22] *Supra* note 21.

Governor Sptizer's approval statement supports the conclusion that the affirmative defense was the result of a legislative compromise, and was crafted to ensure that an employee covered by the Act would have only a single forum in which to obtain relief for an alleged violation of a right to employee organization representation during employer questioning.

Under the affirmative defense, a respondent can defeat a charge alleging a violation of §209-a.1(g) of the Act by pleading and proving that the at-issue employee had a right to: a) employee organization representation during such questioning under a separate "statute, interest arbitration award, collectively negotiated agreement, policy or practice; and b) seek a ruling from a hearing officer or arbitrator to exclude evidence stemming from the employer's failure to permit employee organizational representation during the questioning.

Finally, §209-a.1(g) of the Act expressly excludes the right to employee organization representation "in any criminal investigation."[23]

We next examine the State's exceptions to the Assistant's Director's decision finding that an employer can violate §209-a.1(g) of the Act by denying employee organizational representation during questioning of a probationary employee.

B. Exceptions Challenging the Applicability of §209-a.1(g) to Probationary Employees

In drafting §209-a.1(g) of the Act, the Legislature granted representational rights to a "public employee," a phrase defined in §201.7(a) of the Act as "any person holding

[23] *See also*, *City of Rochester*, 37 PERB ¶3015 (2004), *reversed*, *City of Rochester v Pub Empl Rel Bd*, 15 AD3d 922, 38 PERB ¶7003 (4th Dept 2005) *lv denied*, 4 NY3d 710, 38 PERB ¶7008 (2005).

a position by appointment or employment in the service of a public employer...." While §201.7(a) of the Act excludes various positions from that definition, those exclusions are not premised upon an individual's civil service jurisdictional classification, form of civil service appointment, the degree of tenure protections, or whether a competitive class employee has satisfied the applicable probationary period.[24]

Based upon the definition of the phrase "public employee" in the Act, we conclude that §209-a.1(g) of the Act was intended to grant representational rights and the improper practice procedure to all public employees covered under the Act including those holding probationary, provisional and temporary appointments under the Civil Service Law,[25] subject to the affirmative defense that the employee has equivalent protections from a legal source external to the Act. Our conclusion is fully consistent with the purpose of §209-a.1(g) of the Act, as established by its text and legislative history.

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[24] In contrast, the rights to representation under Civ Serv Law §75.2 are limited to those classes of employees identified in Civ Serv Law §§75.1(a)-(e).

[25] Civ Serv Law §§63, 64 and 65. Contrary to the State's assertion the legislative history does mention probationary employees. Memorandum on Behalf of the State of New York, p. 38. In its memorandum in opposition to the legislation, the Governor's Office of Employee Relations stated:

> The bill does not differentiate between types of public employees. Probationary employees do not have tenure rights, thus rights to a disciplinary hearing if they fail probation and are thus terminated. However, as this bill is silent on the subject, this would be the first intrusion by unions into the probationary status of employees.

L 2007, c. 244, Bill Jacket, *supra* note 20 at p.28.

Prior to the enactment of §209-a.1(g) of the Act, it was well-settled that probationary employees can be subjected to discipline for misconduct or incompetence. In *County of Wyoming,*[26] the Board ordered the reinstatement of a probationary employee who had been terminated for purported misconduct, which the Board concluded was pretextual under the Act. In reaching our decision, we stated:

> The termination of a probationary employee's public employment must, therefore, implicate the protections afforded by the Act to trigger PERB's jurisdiction. It is in this area of discipline and/or termination of probationary employment that questions about the Act's coverage have arisen.[27]

Similarly, the courts have repeatedly recognized that probationary employees can be terminated for engaging in misconduct during the probationary period.[28]

Therefore, we are not persuaded by the State's argument that the representational rights granted by §209-a.1(g) of the Act are inapplicable to probationary employees because they are not subject to Civ Serv Law §75 disciplinary procedures. While §209-

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[26] 34 PERB ¶3042 (2001).

[27] *Supra* note 26 PERB ¶3042 at 3101. *See also*, *Council 82, AFSCME, AFL-CIO (Waldmiller),* 27 PERB ¶3040 (1994) (employee organization did not breach its duty of fair representation by failing to challenge the termination of a probationary correction officer for misconduct).

[28] *Garcia v Bratton*, 90 NY2d 991 (1997) (affirming the termination of a probationary police officer, without a hearing, for misconduct at a homicide scene); *Vetter v Board of Education,* 14 NY3d 729 (2010) (upholding termination of a probationary school teacher based upon allegations of misconduct by his employer; *Matter of Campbell (State of New York)*, 37 AD3d 993 (3d Dept 2007) (affirming the termination of a State employee for misconduct who had been returned to probationary status pursuant to a prior disciplinary settlement). *See also*, *Dillon v Safir*, 270 AD2d 116 (lst Dept 2000) (probationary police officer terminated for use of excessive force; *Cade v Health and Hospitals Corp*, 15 AD3d 179 (lst Dept 2005) (provisional employee subjected to termination for misconduct).

a.2(g) of the Act utilizes the phrase "the subject of a potential disciplinary action," we do not interpret the use of that phrase as demonstrating a legislative intent to limit the provision's coverage to only those employees who are subject to "disciplinary action" under Civ Serv Law §75. The adoption of the State's argument would render §209-a.1(g) of the Act superfluous, and would nullify the Legislature's effort to ensure *Weingarten*-type rights for all public employees under the Act.

There are notable differences between §209-a.1(g) of the Act and Civ Serv Law §75.2 that support our conclusion that the Legislature intended the scope of the right to representation to be broader under the Act. The denial of representation constitutes an improper practice under §209-a.1(g) of the Act when it "reasonably appears" that an employee is either the "target" or the "subject" of potential disciplinary action. However, the right to representation attaches under Civ Serv Law §75.2 only when it "appears" that the employee is the "subject" of potential disciplinary action.[29]

Furthermore, the State's statutory construction argument aimed at excluding probationary employees from coverage under §209-a.1(g) of the Act is contradicted by 4 NYCRR §4.5(j), a subdivision of the State Civil Service regulations for probationary employees, which states:

> Removal during probationary term:
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> Nothing contained in this section shall be construed to limit or otherwise affect the authority of an appointing authority, at anytime during the probationary term, to remove a probationer for *incompetency or misconduct, under section*

[29] At the same time, §209-a.1(g) of the Act does not require an employer to provide the employee with advance written notice of his or her right to representation as is required under Civ Serv Law §75.2.

> *75 of the Civil Service Law or an agreement* negotiated between the State and an employee organization pursuant to article 14 of such law. (emphasis added).

Under this regulation, a probationary employee can be terminated for misconduct or incompetence, prior to the expiration of the minimum period of probation, through Civ Serv Law §75 disciplinary procedures or procedures under a negotiated agreement.[30] In contrast, a probationary employee can be terminated without the employer following those disciplinary procedures at any time between the minimum and maximum periods of probation.[31]

In its answer, the State did not plead as an affirmative defense that the regulation provided Chagnon with a source of right external to the Act; therefore the defense is waived.[32] Additionally, the record does not support the conclusion that, at the time of the questioning on January 28, 2008, Chagnon was still in his minimum period of probation. As a result, it is unnecessary for us to determine whether the civil service regulation can form the basis for an affirmative defense under §209-a.1(g) of the Act.[33]

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[30] *See, Tuller v Cent Sch Dist No. 1 of the Towns of Conklin*, 40 NY2d 487, 492 (1976); New York State Department of Civil Service State Personnel Management Manual, 2010 Probation, §221.

[31] 4 NYCRR §4.5(a).

[32] ALJ Exhibit 2; *City of Oswego*, 41 PERB ¶3011 (2008).

[33] In addition, we do not have to determine whether, prior to questioning a probationary employee during the minimum period of probation, an employer is required to provide the probationary employee with the written notice of the right to representation set forth in Civ Serv Law §75.2.

In its exceptions, the State also challenges the Assistant Director's reliance upon federal private sector precedent. Consistent with §209-a.6 of the Act, however, private sector case law is a permissible reservoir of persuasive, but not binding, authority in determining improper practice charges. Federal precedent can be valuable when interpreting and applying §209-a.1(g) of the Act because the Legislature intended to extend to all public employees under the Act representational rights similar to those found under *Weingarten*. However, in reaching our decision today, we have not relied upon such precedent.

Finally, we examine the State's contention that recognition of representational rights for probationary employees under §209-a.1(g) of the Act constitutes an impairment of its contractual rights in violation of Article 1, §10 of the United States Constitution.[34] The State's constitutional argument is premised upon the undisputed fact that probationary employees in the NYSCOPBA unit are not covered by Article 8 of the parties' agreement, and therefore, they are not entitled to the related contractual right of NYSCOPBA representation during an interrogation. Based on the agreement's silence with respect to organizational representation of probationary employees during employer questioning, we find no merit to the State's argument that the application of §209-a.1(g) of the Act to probationary employees substantially impairs any right granted it by the parties' agreement. Indeed, Article 1, §10 does not constitute a constitutional

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[34] *See*, *Buffalo Teachers Federation v Tobe*, 464 F.3d 362 (2d Cir 2006), *cert den*, 550 US 918 (2007); *Condell v Bress*, 983 F.2d 415 (2d Cir 1993); *Association of Surrogates and Supreme Court Reporters Within City of New York v State of New York*, 940 F2d 766 (2d Cir 1991).

limitation on the power of the Legislature to expand the rights of employees such as ensuring that all employees covered by the Act are entitled to employee organizational representation during employer questioning.

C. Exceptions Challenging the Finding that §209-a.1(g) of the Act was Violated by Denying Representation to Chagnon

Pursuant to §209-a.1(g) of the Act, the right to employee organizational representation during questioning by an employer is triggered by a request for such representation by the employee.

Chagnon appeared for questioning by the DOCS OIG investigator along with a NYSCOPBA shop steward, who provided Chagnon representation during the preliminary questioning. The shop steward left the questioning only after unsuccessfully asserting to the investigator that Chagnon was entitled to continued representation. There is no evidence in the record that Chagnon objected to the shop steward's representation or objected to continued representation.

Although Chagnon did not explicitly request NYSCOPBA representation at the outset of the questioning, while the shop steward was present, his conduct demonstrates that he requested representation both before and during the questioning. He appeared at the questioning with his shop steward, he permitted the shop steward to represent him during the initial questioning, and he consented to the shop steward's continued advocacy in support of his representation.[35]

[35] Therefore, we need not remand the case for the resolution of the conflicting testimony as to whether Chagnon explicitly requested NYSCOPBA representation after the questioning recommenced without the presence of his shop steward.

Next, we turn to the State's exception challenging the Assistant Director's finding that, at the time of questioning by the DOCS OIG, it reasonably appeared that Chagnon was a potential subject or target of disciplinary action.

In determining this question, we consider the totality of the circumstances including the reasonableness of the employee's subjective perception, which may have precipitated the request for representation. Although an employee's perceptions are relevant to our inquiry, our primary focus is on objective facts in the record. Those facts include: the subject matter and context of the questioning; the verbal and written statements by the employer prior to the questioning; the verbal exchange between the employer representative and the employee; the timing and venue of the questioning; and the treatment of other employees similarly situated. This list is not intended to be exhaustive, but it underscores the importance of clarity in communications, and in purpose, by an employer at the outset and during the questioning of an employee.

It must be emphasized, however, that employee organization representation under §209-a.1(g) of the Act will not attach, in most situations, to verbal interactions with an employee during a meeting or discussion that is limited to counseling, training, evaluations, and updates on job assignments. For example, the right to representation will not ordinarily attach to a supervisory meeting with a probationary employee to discuss his or her status and progress.[36] However, when a meeting or a discussion metamorphosizes into questioning about an employee's conduct or omissions in a

[36] *See,* 4 NYCRR §4.5(b)(5)(iii).

context that makes it reasonably appear that the employee may be a potential subject or target of discipline, representation rights of §209-a.1(g) of the Act can attach.

In the present case, the record contains overwhelming objective evidence that at the time that Chagnon was questioned it reasonably appeared that he was a potential subject or target of discipline. The focus of the DOCS OIG investigation related to an attempted suicide by an inmate under Chagnon's direct care and control, an event of major significance and ramifications for the correctional institution and the inmate. Indeed, the DOCS employee manual contains a directive mandating a particular response to such incidents: the immediate extrication of an inmate found hanging, along with the immediate provision of first aid.

The DOCS OIG investigator arrived at the facility within hours of the incident to commence the investigation.[37] Prior to questioning Chagnon, the investigator had read Chagnon's earlier memorandum to the superintendent, which indicated that Chagnon delayed entering the cell, cutting the sheet attached to the inmate's neck, and providing the inmate with first aid. On its face, Chagnon's memorandum suggests that his actions in response to the suicide attempt may have violated the mandates of the DOCS employee manual, which would render him a potential subject or target of discipline. In addition, the fact that the investigator permitted NYSCOPBA representation at the outset of the questioning of Chagnon demonstrates that the investigator viewed Chagnon as a potential subject of discipline. Furthermore, during the meeting with

[37] The State does not argue that the DOCS OIG investigator was conducting a criminal investigation when he questioned Chagnon, and there is no evidence in the record to support such an argument. As noted, employee organizational representation under §209-a.1(g) of the Act does not apply to a criminal investigation.

Chagnon and the shop steward, the investigator reinforced the potential for discipline by stating that he was not the person who would be determining whether to proceed with disciplinary action.

Contrary to the State's contention, the fact that other NYSCOPBA employees were permitted representation during questioning that night is relevant to determining whether Chagnon was also a potential subject or target of discipline. Those other employees had a contractual right to be represented during an interrogation only when DOCS contemplated serving a notice of discipline under the parties' agreement. There is no evidence in the record to find that Chagnon was less vulnerable to potential disciplinary culpability than the other employees questioned regarding the response to the suicide attempt.

Finally, we reject the State's claim that the Assistant Director misapplied the applicable burden of proof. The charging party has the burden of proving by a preponderance of evidence the elements necessary to demonstrate a violation of §209-a.1(g) of the Act. The fact that the Assistant Director was not persuaded by the State's evidence aimed at demonstrating that Chagnon was not a potential subject of discipline does not constitute a misapplication of the burden of proof.

Based upon the foregoing, we affirm the Assistant Director's conclusion that the State violated §209-a.1(g) of the Act by denying NYSCOPBA representation to Chagnon during questioning on January 28, 2008.

D. Exception Challenging the Finding that §209-a.1(a) of the Act was Violated

When the Legislature enacted §209-a.1(g) of the Act, it chose not to amend §202 of the Act despite the *NYCTA* Court's conclusion that §202 did not grant public employees an inherent right to representation during investigatory questioning by an employer, resulting in the reversal of our decision finding a violation of §§209-a.1(a) and (c) of the Act.

Based upon *NYCTA*, and the Legislature's failure to amend §202 of the Act, we conclude that the mere denial of employee organizational representation during questioning does not constitute a violation of §209-a.1(a) of the Act. As a result, we reverse the Assistant Director's finding that the State violated §209-a.1(a) of the Act when it denied such representation to Chagnon.

E. Exception Challenging the Proposed Remedial Order

In its exceptions, the State challenges the Assistant Director's proposed remedial order asserting that it is inappropriate based upon the law and facts in the present case. In particular, it objects to that portion of the proposed remedial order directing the immediate removal and destruction of all documents in its possession relating to that portion of the January 28, 2008 questioning of Chagnon when he was denied NYSCOPBA representation.

Pursuant to §205.5(d) of the Act, PERB is granted broad remedial make-whole authority to order a party to cease and desist from engaging in an improper practice, and to order such affirmative action that will effectuate the policies of the Act, including

ordering the reinstatement of employees with or without back wages.[38]

In the present case, the evidence reveals that Chagnon was denied NYSCOBPA representation based upon an employer policy of denying such representation to probationary employees even when, at the time of questioning, it reasonably appears that the employee may be the subject of discipline, and despite the enactment of §209-a.1(g) of the Act. Therefore, we affirm the breadth of the Assistant Director's proposed remedial order mandating the State to permit, upon the employee's demand, representation of a DOCS probationary employee in the NYSCOPBA represented unit when at the time of questioning it reasonably appears that he or she may be the subject of potential disciplinary action. We, however, have modified the wording of the remedial order to track the provisions of §209-a.1(g) of the Act.

In *County of Monroe,*[39] we applied our authority to remedy improper practices by ordering an employer to, *inter alia*, destroy the results of a poll conducted of unit members, and to take all steps reasonably necessary to ensure such destruction. The Assistant Director, in the second numbered paragraph of her proposed remedial order, has recommended a similar remedy of mandating the State to remove and destroy documents that were prepared utilizing information obtained during that portion of the January 28, 2008 questioning when Chagnon was unrepresented. Following our review, we affirm that portion of the proposed remedial order but modify it to require the State to remove and destroy all documents maintained by the State, including

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[38] *County of Erie*, 43 PERB ¶3016 (2010).

[39] 43 PERB ¶3025 (2010).

documents in Chagnon's personnel history file and the DOC OIG's investigatory notes, memoranda, email, and reports, which may contain information obtained from Chagnon during the January 28, 2008 questioning while unrepresented.

Next, we examine that portion of the Assistant Director's proposed order requiring the State to reconsider its March 22, 2008 counseling, and the subsequent "suspension" with pay of Chagnon. The record reveals that Chagnon was not suspended, but rather was placed on an administrative leave with pay pending completion of the State's investigation. His placement on administrative leave may have resulted in the extension of his probationary period pursuant to 4 NYCRR §4.5(f), thereby delaying the date of his permanent appointment. Therefore, we have amended the Assistant Director's proposed order accordingly. Finally, we affirm the remainder of the Assistant Director's proposed remedial order but modify the posting requirement consistent with our recent precedent.[40]

Based upon the foregoing, we affirm the Assistant Director's decision finding that the State violated §209-a.1(g) of the Act, reverse the finding that it violated §209-a.1(a) of the Act, and modify the recommended remedial order.

IT IS THEREFORE ORDERED that the State:

1. permit, upon the employee's demand, representation for a DOCS probationary employee in the NYSCOPBA represented unit when at the time of questioning it reasonably appears that he or she may be the subject or target of potential disciplinary action;

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[40] *County of Monroe*, *supra* note 39; *Town of Wallkill*, 43 PERB ¶3026 (2010).

2. immediately remove and destroy all documents maintained by the State, including documents in DOCS personnel records, correction officer Jason Chagnon's personnel history folder, and in DOCS OIG's investigatory notes, memoranda, email, and reports, which may contain information that was obtained during the January 28, 2008 questioning of Chagnon without representation;
3. reconsider the March 22, 2008 counseling of correction officer Jason Chagnon without regard to the information obtained during the January 28, 2008 questioning of Chagnon without representation;
4. reconsider the placement of correction officer Jason Chagnon on administrative leave with pay without regard to the information obtained during the January 28, 2008 questioning without representation, and, if appropriate, modify his date of permanent appointment;
5. sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: September 21, 2010
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE
NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD
and in order to effectuate the policies of the
NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Department of Correctional Services) in the unit represented by the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) that the State of New York (Department of Correctional Services) will:

1. permit, upon the employee's demand, representation for a DOCS probationary employee in the NYSCOPBA represented unit when at the time of questioning it reasonably appears that he or she may be the subject or target of potential disciplinary action;

2. immediately remove and destroy all documents maintained by the State, including documents in DOCS personnel records, correction officer Jason Chagnon's personnel history folder, and in DOC OIG's investigatory notes, memoranda, email, and reports, which may contain information that was obtained during the January 28, 2008 questioning of Chagnon without representation;

3. reconsider the March 22, 2008 counseling of correction officer Jason Chagnon without regard to the information obtained during the January 28, 2008 questioning of Chagnon without representation;

4. reconsider the placement of correction officer Jason Chagnon on administrative leave with pay without regard to the information obtained during the January 28, 2008 questioning without representation, and, if appropriate, modify his date of permanent appointment.

Dated . . . . . **By** . . . . . .
on behalf of
State of New York (Department of Correctional Services)

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.