

an amendment on August 16, 2006. By a decision, dated August 22, 2006, the Director determined that the amendment did not cure the deficiencies and dismissed the charge.

PERB's Rules of Procedure are published in the New York Compilation of Codes, Rules and Regulations (NYCRR), Title 4, Chapter VII and are available on-line at www.perb.state.ny.us. In addition, with her copy of the Director's decision, Davis received an extract of PERB's Rules of Procedure.<sup>1</sup> The extract contains those parts of the Rules which describe how exceptions to a decision of the Director are to be filed with the Board. Specifically, the extract contains the instruction that a party filing exceptions must also file "proof of service of copies of such exceptions and brief upon each party." The extract also contains the definition of the term "party" to include "any person, organization or public employer named in a charge."

**Discussion**

Section 213.2(a) of PERB's Rules of Procedure, which was included in the extract from the Rules provided to Davis, requires a party filing exceptions to also serve those exceptions on all other parties within the same fifteen working day period for the filing of exceptions and, in addition, to file proof of such service with the Board. A charging party is charged with knowledge of the Rules, particularly in light of their public availability. Davis's exceptions were not served upon the Corporation within the requisite time period and no proof of service has been filed with the Board.

Timely service upon other parties is a component of timely filing and we will dismiss exceptions that have not been timely served.<sup>2</sup>

The exceptions are, therefore, dismissed and the decision of the Director dismissing the improper practice charge is affirmed.

SO ORDERED.

<sup>1</sup> The extract does not contain the Rule section numbers, but contains the text of §§ 200.5, 200.9, 200.10, 213.2, 213.3, 213.4, 213.5, and 213.6.

<sup>2</sup> *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶ 3037 (2002). See also *City of Albany v Newman*, 181 AD2d 953, 25 PERB ¶ 7002 (3d Dept 1992).

¶39-3032

In the Matter of

**JONES BEACH LIFEGUARD CORPS,**

Petitioner,

and

**STATE OF NEW YORK,**

Employer,

and

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

Incumbent/Intervenor,

and

**NEW YORK STATE LAW ENFORCEMENT OFFICERS UNION, DISTRICT COUNCIL 82, AFSCME, AFL-CIO,**

Intervenor.

In the Matter of

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

Petitioner,

and

**STATE OF NEW YORK,**

Employer,

and

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

Incumbent/Intervenor.

Case Nos. C-5339, C-5443

Before MICHAEL CUEVAS, Chairman; and JOHN T. MITCHELL, Member; November 1, 2006

**INDEX NOS. 33.323, 33.395, 36.34**

An ALJ erred in granting a petition to fragment all lifeguard and public safety officer titles from an existing Security Services Unit, concluded PERB in reversing the ALJ's determination that bargaining units comprised of titles with disparate impasse resolution processes must be fragmented [see 39 PERB ¶ 4014 (2006)]. The Board acknowledged that the availability of distinct impasse resolution procedures and the possibility of a conflict of interest among unit employees were significant factors to consider within the context of an initial uniting determination. However, the PERB declined to view differing impasse resolution procedures as a "bright line" test requiring fragmentation, particularly in instances of a longstanding unit. The Board observed that to fragment a unit with a shared community of interest on the basis of different impasse resolution procedures, presupposed that "meaningful and effective negotiations on behalf of one group of unit members or the other was impossible."

Back reference: 39 PERB 4014

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**Board Decision and Order**

This case comes to us on exceptions of the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) to the decision of the Administrative Law Judge (ALJ) granting, in part, the petition for certification and decertification of the Jones Beach Lifeguards Corps (Lifeguard Corps) in Case No. C-5339, which sought to remove all lifeguard titles from the Security Services Unit (SSU) of the State of New York (State) and to be certified as the exclusive bargaining agent for those titles.<sup>1</sup> NYSCOPBA also excepts to the ALJ's decision with regard to Case No. C-5443, the petition for certification and decertification of the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) which sought to remove certain security officer, safety officer, and other titles<sup>2</sup> from the SSU and to add these titles to the Operational Services Unit (OSU), which CSEA represents. The ALJ issued one decision and determined only that the titles sought to be removed in each petition should be fragmented from the SSU and did not determine the unit in which they should be placed.

**Exceptions**

NYSCOPBA excepts to the ALJ's decision regarding the disposition of each case, alleging a mis-interpretation of the law, particularly the ALJ's conclusion that the difference in impasse resolution procedures available to the titles sought to be fragmented and the remainder of the unit members alone is a sufficient basis for fragmentation and to the ALJ's failure to distinguish the Board's decisions on fragmentation from those involving unit placement/unit clarification or initial uniting. CSEA responds that NYSCOPBA's exceptions are without merit and that the exceptions are procedurally defective.

Neither the State nor Council 82 filed a response to the exceptions.

Based upon our review of the record and our consideration of the parties' arguments, we reverse the decision of the ALJ.<sup>3</sup>

#### Facts

On September 23, 2003, the Lifeguard Corps filed a petition for certification and decertification in Case No. C-5339, seeking to remove the titles of Assistant Chief Lifeguard, Chief Lifeguard, Lifeguard, Lifeguard 2, Supervising Lifeguard (LISPRC), Field Lieutenant of LISPRC Lifeguards, Field Captain of LISPRC Lifeguards, and Area Captain of LISPRC Lifeguards from the SSU represented by NYSCOPBA and to be certified as exclusive bargaining agent for a unit consisting of those titles.

On August 20, 2004, CSEA filed a petition for certification and decertification in Case No.C-5443, seeking to remove certain titles (see footnote 1) from the SSU and add them to the OSU.

In a letter to the parties dated December 17, 2004, the ALJ confirmed, among other issues not here relevant, that with respect to Case No. C-5443: "The petitioner's only basis for the requested fragmentation is conflict of interest based solely on the petitioned-for titles' ineligibility for interest arbitration." With respect to Case No. C-5339, the ALJ advised that "... the following issues will now be addressed: the effect of the fact that the titles petitioned for are not eligible for interest arbitration while others in the present bargaining unit are ... ."

The ALJ then established that the record for the purpose of deciding these issues should consist of the pleadings in each of the cases, the 1999-2003 collective bargaining agreement covering the SSU, and the ALJ's February 23 and December 17, 2004 letters.

In a letter dated March 7, 2004, the ALJ established a revised briefing schedule.<sup>4</sup> The parties filed briefs with the ALJ and the matter

was then decided on the record as established by the ALJ.

#### Discussion

As a matter of procedure, CSEA's response to NYSCOPBA's exceptions that the "Interim Decision" of the ALJ is not an order from which exceptions may be taken must be addressed first as it raises the issue of whether the exceptions are properly before the Board. Section 212.4(h) of PERB's Rules of Procedure (Rules) states: "All motions and rulings made at the hearing shall be part of the record of the proceeding and, unless expressly authorized by the board, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision." Section 213.2 of the Rules states: "Within 15 working days after receipt of a decision, report, order, ruling or other appealable findings or conclusions, a party may file with the board an original and three copies of a statement in writing setting forth exceptions thereto or to any other part of the record or proceedings."

In support of its position that the exceptions should be denied as not expressly authorized by the Board, CSEA cites to *State of New York (Division of Military and Naval Affairs)*.<sup>5</sup> Although in that case CSEA's motion for permission to appeal a similar "interim decision" was granted, the Board did not address the necessity of the motion since it was unopposed.

The purpose of § 212.4(h) of the Rules is to prohibit appeals from motions and rulings made at the hearing. It does not bar appeals from a decision on an ultimate issue of the type that is currently before us. None of the parties disagreed with the ALJ determination to first issue a written decision on the question of fragmentation. An opportunity to appeal to the Board from the ALJ's fragmentation decision might obviate the need for a time-consuming hearing on the placement issue. The policies of the Act are best served by our entertaining these exceptions, and we find the ALJ's decision to be one from which an appeal may be

taken under § 213.2 of the Rules. We further note that CSEA did not make this objection by way of a cross-exception to the ALJ's decision, which would have provided NYSOPBA with an opportunity to respond.<sup>6</sup>

On the issue of fragmentation, we have previously stated that the availability of distinct impasse resolution procedures is a significant and important factor in determining whether a conflict of interest exists among a unit of employees when making an initial uniting determination.<sup>7</sup> However, we did not make the availability of different impasse resolution procedures within a bargaining unit a "bright line" test requiring fragmentation,<sup>8</sup> and we do not do so now.

The perception that a "bright line" test was established seems to derive from a decision of the Director of Public Employment Practices and Representation (Director) in *City of Auburn*<sup>9</sup> where the Director stated:

... [A]ccording to the Board's recently issued decision in *City of Lockport*, 30 PERB ¶ 3049 (October 9, 1997), a unit cannot include both titles that are not entitled to compulsory interest arbitration in the resolution of an impasse in collective negotiations pursuant to § 209.4 of PERB's Rules of Procedure and titles that are eligible for interest arbitration.

However, the Board did not make such a finding. In fact, the Board said,

The Director included the fire chief and the police chief in the at-issue unit. We have long had a practice of establishing separate units of police officers and fire fighters. "Apart from historical reasons, this practice derives from a recognition that policemen and firefighters are not only fundamentally different from everyone else but also that they are different from each other in ways that affect the essence of their labor relations." (Citation omitted) In addition, the police chief, as a member of an eligible police department, and the fire chief, as a member of a fire department, are entitled to compul-

sory interest arbitration in the resolution of an impasse in collective negotiations, pursuant to § 209.4 of our Rules of Procedure. The other employees in the unit found appropriate by the Director are not eligible for such dispute resolution procedures. We have previously decided that "the difference in applicable impasse resolution procedures is a significant and important reason for defining a separate unit for police officers [citing to *Village of Skaneateles*, 16 PERB ¶ 3070 at 3113 (1983)] and firefighters. We find, therefore, that the police chief and fire chief are not appropriately placed in the same unit sought by the petitioner, and the petition is dismissed as to them.<sup>10</sup> Rather than establishing a new "bright line" test, the Board reiterated its prior precedent concerning uniting of police and fire titles, noting that differences in the types of dispute resolution procedures available to different categories of employees are significant and important. However, the Board did not state that these differences alone were dispositive in uniting determinations.

While ALJs have failed to approve the creation of a new unit consisting of various titles that do not have the same impasse resolution procedures or place a newly created title into a unit with impasse resolution procedures different from those available to the new title,<sup>11</sup> the standard for fragmentation of an existing unit differs from that for an initial uniting determination. Historically, we have declined to fragment a long-standing unit, even where we would not have placed the positions sought to be removed in the unit in the first instance.<sup>12</sup> Instead, we have interpreted the Act as requiring as few units as possible so long as each unit is compatible with the joint responsibilities of the public employer and public employees to serve the public.<sup>13</sup>

In an earlier case involving this unit, we reiterated our long-standing policies in deciding uniting questions: "to find appropriate the larg-

est unit permitting effective negotiations" and to refuse to fragment existing bargaining units "in the absence of compelling evidence of the need to do so".<sup>14</sup>

In *Village of Skaneateles*,<sup>15</sup> we specifically held, "While not alone mandating the fragmentation sought by the petitioner, the difference in applicable impasse resolution procedures is a significant and important reason for defining a separate unit for police officers". The Board's decision there demonstrates a more complete understanding of the fragmentation process. The fragmentation process is, in effect, a two-step process. The first is essentially the undoing of the initial uniting determination and the second is the placement of the titles fragmented into a new "most appropriate" unit. Our long-held position that we will fragment only for compelling reasons recognizes that an initial determination of unit appropriateness was made and that thereafter the members of that unit chose an exclusive representative for the purposes of collective negotiations, and are actions that should not be casually set aside. Generally, then, if there has been a history of "meaningful and effective negotiations",<sup>16</sup> we will not grant fragmentation, especially over the objection of the employer.<sup>17</sup>

To fragment a unit, otherwise bound by a shared community of interest, on the basis of a difference in dispute resolution procedures available to some, but not other members of the unit, calls for us to presuppose that "meaningful and effective" negotiations on behalf of one group of unit members or the other is impossible. This is not a factual determination that we can either make on the record before us, or on our historical experience with units so mixed, as this case appears to be the first since *Village of Potsdam*, over twenty years ago, to come to the Board on this issue.

The instant case involves a unit that we created in 1968 on the basis of the community of interest of the various titles that comprise the unit. The Legislature only recently granted interest arbitration as the final step in the impasse resolution process to peace officers employed by the Department of Corrections in

2001. At that time, the unit had a collective bargaining agreement that did not expire until March 31, 2003. The petition in Case No.C-5339 was filed within seven months of the expiration of the agreement so we cannot reach any conclusion about the impact of the interest arbitration legislation on the ability to conduct "meaningful and effective" negotiations merely from the passage of time from the expiration of the agreement to the filing of the petition which effectively barred further negotiations for the unit members sought to be fragmented.

The cases cited in support of the ALJ decision are either initial uniting decisions or otherwise distinguishable. Our holding in *State of New York*,<sup>18</sup> rests solely on the differences in law enforcement duties of the titles at issue, as all titles involved had the same impasse resolution procedures. In that case, once we made the fragmentation decision, we were free to consider available impasse resolution procedures in determining the most appropriate unit. *County of Rockland*<sup>19</sup> is inapposite in that it involved the unit placement of a newly created title and did not involve the fragmentation of an existing unit. Contrary to the ALJ's statement that in *County of Rockland* the Board agreed with the ALJ that "... a difference in applicable impasse resolution procedures was a fundamental dissimilarity warranting unit fragmentation ...",<sup>20</sup> the Board in *County of Rockland* only agreed that it was a "significant and important" factor in unit fragmentation. Accordingly, as in *City of Lockport*, we do not find the difference in available impasse resolution procedures alone to compel the conclusion reached by the ALJ.

Based on the foregoing, we grant NYSOPBA's exceptions and reverse the decision of the ALJ. CSEA's petition, based solely on the argument that a comprised of titles that have disparate impasse resolution processes must be fragmented is dismissed, and the Lifeguard Corps petition is remanded to the ALJ for further processing not inconsistent with this decision.

SO ORDERED.

<sup>19</sup> 35 PERB ¶ 3004 (2002), *aff'g*, 34 PERB ¶ 4021 (2001).

<sup>20</sup> 39 PERB ¶ 4014, at 4050-51 (2006).

<sup>1</sup> New York State Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO intervened as a party in Case No. C-5339.

<sup>2</sup> Those titles are as follows: Campus Public Safety Officer 1, Capital Police Communications Specialist, Capital Police Communications Specialist Trainee, Park Ranger, Parks and Recreation Forest Ranger, Safety and Security Officer 1, Safety and Security Officer 1 Spanish Language, Safety and Security Officer Trainee Spanish Language, Security Hospital Senior Treatment Assistant, Security Hospital Senior Treatment Assistant Spanish Language, Security Hospital Treatment Assistant, Security Hospital Treatment Assistant Spanish Language, Security Officer, Security Officer Spanish Language, Security Services Assistant 1, Security Services Assistant 2, Senior Security Officer, Ski Patrolman 1, Ski Patrolman 2, Ski Patrolman 3, Special Game Protector, Warrant and Transfer Officer.

<sup>3</sup> 39 PERB ¶ 4014 (2006).

<sup>4</sup> The proceedings were delayed due to court proceedings regarding internal NYSCOPBA matters.

<sup>5</sup> 18 PERB ¶ 3084 (1985).

<sup>6</sup> Rules, § 213.3.

<sup>7</sup> *City of Lockport*, 30 PERB ¶ 3049 (1997).

<sup>8</sup> *Village of Potsdam*, 16 PERB ¶ 3032 (1983).

<sup>9</sup> 30 PERB ¶ 4036, at 4088 (1997).

<sup>10</sup> 30 PERB ¶ 3049, at 3113-14 (1997).

<sup>11</sup> *County of Sullivan and Sullivan County Sheriff*, 38 PERB ¶ 4014 (2005), *County of Rockland*, 34 PERB ¶ 4021 (2001).

<sup>12</sup> See *County of Erie and Erie County Sheriff*, 22 PERB ¶ 3055 (1989), *County of Warren*, 21 PERB ¶ 3037 (1988), *Village of Potsdam*, 16 PERB ¶ 3032 (1983).

<sup>13</sup> Act, § 207.1 (c); see *State of New York*, 5 PERB ¶ 3022 at 3043 (1972).

<sup>14</sup> *State of New York (Long Island Park, Recreation and Historical Preservation Commission)*, 22 PERB ¶ 3043 at 3098 (1989).

<sup>15</sup> 16 PERB ¶ 3070 (1983).

<sup>16</sup> *Town of Smithtown*, 8 PERB ¶ 3015 (1975).

<sup>17</sup> *County of Sullivan*, 7 PERB ¶ 3069 (1974).

<sup>18</sup> 34 PERB ¶ 3038 (2001).

## ¶39-3033

in the Matter of

**NEW YORK STATE CORRECTIONAL OFFICERS & POLICE BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

and

**STATE OF NEW YORK (DEPARTMENT OF CORRECTIONAL SERVICES),**

Respondent.

Case No. U-23685

Before MICHAEL CUEVAS, Chairman; and JOHN T. MITCHELL, Member; November 1, 2006

INDEX NOS. 15.42, 43.52, 72.611, 72.665

The PERB dismissed a union's claim that the state department of corrections violated § 209-a.1(d) by announcing that the number of unit "vacation relief" positions would be reduced through attrition and by not posting current vacant positions. The Board found that the parties' past practice in such matters was memorialized in a 1987 agreement and continued in relevant part in the parties' 1996 labor-management agreement which set the number of vacation relief bids at 42. Because the union's charge raised a question of enforcement of the labor management agreement, the PERB concluded it lacked jurisdiction to entertain the matter. However, the Board concluded that a *Herkimer* deferral to the parties' dispute resolution procedures was appropriate. The Board also noted if it were to reach the merits of the charge it would affirm the ALJ's determination that the