

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**NEW YORK STATE LAW ENFORCEMENT OFFICERS
UNION, COUNCIL 82, AFSCME, AFL-CIO, LOCAL 2841,**

Charging Party,

CASE NO. U-27105

- and -

CITY OF ALBANY,

Respondent.

**ENNIO J. CORSI, GENERAL COUNSEL (MARIA B. MORRIS of counsel),
for Charging Party**

**JOHN J. REILLY, CORPORATION COUNSEL (TARA B. WELLS of counsel),
for Respondent**

DECISION OF ADMINISTRATIVE LAW JUDGE

On October 2, 2006, the New York State Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO, Local 2841 (Council 82) filed with PERB an improper practice charge alleging that the City of Albany (City) violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by, on or about June 4, 2006, unilaterally revising a work rule entitled "Use of Alcohol Off-Duty" to add an eight-hour prohibition on consumption. The City filed an answer asserting that the subject matter of the charge is not a mandatory subject of bargaining and that the City acted "for legitimate and valid business reasons".¹ A hearing was held on May 23, 2007 at which a stipulation of facts previously entered into by the parties in the instant case was placed

¹While the answer includes in the latter affirmative defense the assertion that "updating and amending the subject provision...falls within Article 24 of the Collective Bargaining Agreement, Management Rights", no evidence was presented on that point, including the referenced contract language.

on the record and further factual stipulations were presented by the parties to complete the record.² Both parties were represented by counsel and have filed briefs.

FACTS

The work rule at issue is Article 14.1.15 of the City police department's operating procedures, entitled "Discipline – Rules of Conduct". The change in the rule was announced in a May 31, 2006 memorandum to "[a]ll unit/station commanders" from the City's chief of police, Tuffey. It replaced that portion of the rule prohibiting the off-duty consumption by unit employees of "intoxicating beverages" which "renders [them] unfit to report...for their next regular tour of duty" with one which prohibits consumption of such beverages within eight hours of reporting for such tours of duty. The memorandum also states that the new version is "effective 12.01 AM, Sunday, June 4, 2006" and orders "[s]upervisors" to give copies of the revised version to "all personnel". The remainder of the work rule, prohibiting unit employees' off-duty consumption of such beverages "to the extent that it results in the impairment, intoxication, obnoxious or offensive behavior which discredits them or the department", remains in effect.

By letter dated June 22, 2006, Council 82's general counsel, Corsi, requested that Tuffey meet to "discuss" the change, noting that it "is a mandatory subject of bargaining and...its unilateral implementation is a violation of the [Act]," and asking that Tuffey "consider suspending the policy pending our discussion and negotiation of the

²The stipulation consists of a written document entitled "Joint Stipulation of Facts", which is in the record as Administrative Law Judge (ALJ) Exhibit No.3; a portion of a March 1, 2007 letter from the City's attorney containing a factual offer in the instant case (ALJ Exhibit No.4); and statements agreed to by the parties on the record on the date of the hearing.

matter". A meeting was held on July 17, 2006, but, while the change was discussed, Tuffey, the parties stipulate, "refused to negotiate the issue".

In relation to the City's defense, the parties stipulated that the change "was implemented to avoid incidents wherein officers would come to work not fully fit for duty, impaired, under the influence of intoxicating substances and/or with alcohol on their breath"; that before implementing the change Tuffey "consulted with medical professionals regarding blood alcohol levels and implemented the eight-hour ban based upon that consultation"; that "the public expects that the police officers employed to protect them would not be permitted to engage in activity that would impair or affect their judgment"; and that "other professions such as airline pilots have stricter restrictions".

DISCUSSION

Restriction placed on employees' off-duty conduct by a public employer is generally a mandatory subject of bargaining.³ The City, in essence, argues that the at-issue restriction relates to its mission. As stated in *State of New York – Unified Court System, supra*:

the fact that a work rule relates to an employer's mission does not, in and of itself, permit the employer to act unilaterally. The employer must first show an "objectively demonstrable need to act in furtherance of its mission" and the action taken must not significantly or unnecessarily intrude on the protected interests of the employees.⁴

³*Ulster County Sheriff*, 27 PERB ¶¶3028 (1994); *Local 589, Intl Assn of Fire Fighters, AFL-CIO*, 16 PERB ¶¶ 3030 (1983). See also *State of New York – Unified Court System*, 40 PERB ¶¶4597 (2007) (appeal pending).

⁴Citing to *County of Montgomery*, 18 PERB ¶¶3077, at 3167 (1985).

Here, the record is devoid of evidence of either. While alcohol inebriation upon reporting for duty is obviously mission-related, there is no evidence on the record that the prior rule was ineffective, necessitating a new, more restrictive rule.⁵ Indeed, there is no record evidence regarding what may have prompted the at-issue memorandum. In the absence of such evidence, no finding of a mission-related need to act can be made.⁶ Even assuming a need to act had been proven by the City on this record, it could not be found that the City chose the least intrusive means to meet that need as there is no evidence that the 8-hour window established by the City is the time period necessary to achieve the at-issue fitness for duty.⁷ The mere fact that medical professionals were consulted prior to promulgation of the rule is not to the contrary.⁸

While not raised in its answer, the City, relying on *Patrolmen's Benevolent Association of the City of New York, Inc. v. New York State Public Employment*

⁵See, e.g., *County of Montgomery, supra*; *State of New York – Unified Court System, supra*.

⁶See *State of New York – Unified Court System, supra*, for an example of proffered evidence of need to regulate off-duty conduct, including two off-duty incidents, which was found insufficient.

⁷Regarding the relationship between an employer work rule and fitness for duty, see, e.g., *City of White Plains*, 18 PERB ¶¶3074 (1985) (height/weight requirement).

⁸As there is no evidence that the 8-hour window decided upon by the City was an adoption of the recommendations of these “medical professionals,” the effect of following professional recommendations need not be considered here nor the type of proof which might be necessary to establish a defense based thereon, such as the identity of those consulted, their expertise and qualifications, the relationship between any recommendations received and the consensus of other experts in the relevant field, and the nature of the communications between the professionals and the employer, including the scope and/or limits of the inquiry from the employer to the professionals, the information given to the professionals, and the scope of and limits to their responses.

Relations Board, 6 NY3d 536, 39 PERB ¶7006 (2006), and the reference in the instant charge to discipline as a consequence of an employee's violation of the new rule, argues in its brief that the Second Class Cities Law, with its references at §§133 and 141 to discipline of police officers and enforcement of the rules and regulations of a police department, defeats the charge. It is appropriate to address this argument because it concerns the mandatory or nonmandatory nature of the subject matter of the charge. The Second Class Cities Law is a general law, not a special law. Therefore, it is not "legislation specifically commit[ting] police discipline to the discretion of local officials,"⁹ as required by *Patrolmen's Benevolent Association of the City of New York, Inc. v. New York State Public Employment Relations Board*, *supra*, in order to statutorily supersede the collective bargaining obligations of the Act.¹⁰

Based on the above, I find that the City violated §209-a.1(d) of the Act by its unilateral promulgation of a work rule which prohibits unit employees' consumption of "intoxicating beverages" within eight hours of reporting for their regular tours of duty.

THEREFORE, IT IS ORDERED that the City forthwith: (1) rescind the work rule prohibiting unit employees' consumption of "intoxicating beverages" within eight hours of reporting for their regular tours of duty; (2) restore the prior practice regarding the off-duty consumption of "intoxicating beverages" in relation to reporting for their regular

⁹*Patrolmen's Benevolent Association of the City of New York, Inc. v. New York State Pub Emp Rel Bd*, *supra*, at 7008.

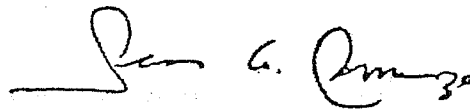
¹⁰*Tarrytown Patrolmen's Benevolent Assn, Inc.*, 40 PERB ¶3024 (2007).

Based on this determination, I need not consider whether the at-issue action of the City is otherwise distinguishable from the police disciplinary issues covered by the court's holding in that case.

tours of duty; (3) make whole any unit employees against whom the eight-hour prohibition has been applied since its May 31, 2006 promulgation until such time as the work rule is rescinded, including expunging their personnel records of any reference thereto, with, as applicable, interest at the maximum legal rate; and (4) sign and post notice in the form attached at all locations normally used by it to post written communications to unit employees.

Dated in Albany, New York

This 27th day of February, 2008



Susan A. Comenzo
Administrative Law Judge

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 City of Albany in the unit represented by New York State Law Enforcement Officers Union, Council 82, AFSCME, AFL-CIO, Local 2841 that the City of Albany will forthwith:

1. rescind the work rule prohibiting unit employees' consumption of "intoxicating beverages" within eight hours of reporting for their regular tours of duty;
2. restore the prior practice regarding the off-duty consumption of "intoxicating beverages" in relation to reporting for their regular tours of duty; and
3. make whole any unit employees against whom the eight-hour prohibition has been applied since its May 31, 2006 promulgation until such time as the work rule is rescinded, including expunging their personnel records of any reference thereto, with, as applicable, interest at the maximum legal rate.

Dated

By
on behalf of City of Albany

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.