STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

POLICE BENEVOLENT ASSOCIATION OF THE POLICE DEPARTMENT OF THE COUNTY OF NASSAU, INC.,

Charging Party,

CASE NO. U-23999

-and-

COUNTY OF NASSAU,

Respondent.

SOLOMON RICHMAN GREENBERG P.C. (HARRY GREENBERG and ROBERT J. BURZICHELLI of counsel), for Charging Party

RAINS & POGREBIN, P. C. (CRAIG L. OLIVO and TERENCE M. O'NEIL of counsel), for Respondent

DECISION OF ADMINISTRATIVE LAW JUDGE

On January 17, 2003, the Police Benevolent Association of the Police Department of the County of Nassau, Inc. (Association) filed an improper practice charge which, as processed, alleged that the County of Nassau (County) violated §209-a.1(d)[1] of the Public Employees' Fair Employment Act (Act) by unilaterally discontinuing the assignment of a car for commuting purposes to officers assigned to the Applicant

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[1]The Director declined to process specifications in the charge alleging a violation of §§209-a.1 (a), (b) and (c) of the Act.

Investigations Unit (AIU). The County filed an answer which, as amended, denied the material allegations of the charge.

A hearing was held before me on May 12, 2003. Both parties filed briefs on or before August 19, 2003.

FACTS

Deputy Inspector Allen McGovern was called as a witness on behalf of the Association. He began employment with the police department in 1972, and was assigned as commanding officer of the AIU in March 1989. Eleven officers are assigned to the AIU and are responsible for performing background investigations of police officers, deputy sheriffs, correction officers and police department employees.

In a memorandum dated November 27, 2002, McGovern memorialized the policies which had been in existence since 1989 concerning the assignment of cars at the AIU.[2] According to the memorandum, chief of support William Willet told McGovern in March 1989 that all members of the unit were authorized to take an assigned vehicle home after work. The memorandum further states that McGovern was advised in 1992 by the deputy chief of support that Commissioner Kane, the then current commissioner, was changing the policy. According to the new policy, an officer Cresswell, who was transferred back to the AIU at that time, would be the last person assigned a vehicle, and all members hired after 1992 would be able to use the vehicle at work, or if necessary, and would be permitted to take home a vehicle "only when it was necessary." In November 2002, McGovern had a conversation with deputy inspector

[2]Charging Party's Exhibit 1.

Lorraine Hannon, who stated that only the commanding officer and deputy commanding officer could have assigned vehicles, and that the cars would then be utilized as pool vehicles. This policy would not be implemented until McGovern was transferred from the AIU.

McGovern testified that he informed officers during their interview and orientation process that cars were to be taken home only if necessary for business purposes. He further testified that it was the sergeants' responsibility to enforce the policy. In 1999, an officer was disciplined for taking a car home in contravention of the policy and he was thereafter no longer assigned a vehicle.[3]

Paul Schaefer has been employed by the County as a police officer since 1994, and was assigned to the AIU in October 2000. Schaefer testified that, during his initial orientation with McGovern in October 2000, he and other officers were told that they would be assigned a car, and no mention was made of any conditions relating to the use of the vehicle. Schaefer was assigned a car shortly after this conversation, and used it to commute to and from work. Schaefer also testified that everyone in the unit had been assigned a car, and that he and the other officers used their assigned vehicles for commuting.[4] He testified that McGovern told the unit members that they could take the car home if they had an investigation either at the end or the beginning of their tour.[5]

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[3]Transcript, pp. 85-86, 88.

[4]Transcript, pp. 16-17.

[5]Transcript, p. 34.

Schaefer testified that he continuously had the use of a car since he began work in the unit. He further testified that the officers work a 12:00 p.m. to 9:00 p.m. shift, and need a car to perform investigations. The only limitation on vehicle usage of which he was aware was that an employee could not take a car home if he would be on vacation for more than 4 days. This limitation is set forth in a command administrative order dated July 30, 2002 which also states that "Vehicles shall not be used for personal business at any time. No members are authorized a take-home car with the exception of Sgt. Spateralla and PO Cresswell. All other vehicles may be used only when conducting departmental business."[6] Despite this order, Schaefer testified that the officers were still able to take the cars home.

Schaefer testified that McGovern discussed the vehicle issue at almost every meeting with the unit members. At times he would state that they are unauthorized, that the officers should take a case file with them when using the car, and that the person to be investigated should live near the investigating officer. Schaefer also testified that McGovern told him that he should have a file with him to be used as "cover" if he was using the car, and that the officers should take a file with them whether or not they were working on the case.[7]

In December 2002, McGovern was replaced as the commanding officer by sergeant Spateralla, who instituted a car pool system. Pursuant to this system, one car is assigned to two investigators, and officers are no longer able to take vehicles home

[6] Charging Party's Exhibit 2.

[7] Transcript, pp. 42-44.

with them for commuting purposes.[8]

DISCUSSION

For the reasons set forth below, I dismiss the charge in its entirety since I do not find that the practice of allowing vehicles to be used for commuting was unequivocal or that unit members had a reasonable expectation that it would continue.

The Board has long held that the availability of a car for personal use constitutes a term and condition of employment.[9] In order to demonstrate that the assignment of a vehicle in this matter constitutes a past practice, the Association must demonstrate that the practice "was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances [citation omitted] to create a reasonable expectation among the affected unit employees that the [practice] would continue".[10] The Board recently defined "unequivocal" as being "clear and unambiguous; expressed in full and definite terms; carrying no implication of future change. (citation omitted)"[11] I find that unit members used cars for commuting since 1989, and continued to do so after the policy was changed in 1992. The practice in this matter, however, was not unequivocal, and it, therefore, could not give rise to a reasonable expectation that it would continue. Schaefer testified that McGovern told unit members that their assigned vehicles could

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[8] Transcript, p. 20.

[9] *County of Nassau*, 26 PERB ¶3040 (1993) (subsequent history omitted).

[10] *County of Nassau*, 24 PERB ¶3029, at 3058, *aff'g* 24 PERB ¶4523 (1991). *See also, City of Peekskill*, 35 PERB ¶3016 (2002); *Bellmore Union Free Sch. Dist.*, 34 PERB ¶3009 (2001).

[11] *Sherburne-Earlville Cent. Sch. Dist.*, 36 PERB ¶3011, at 3031 (2003).

be taken home if they had investigations to perform either at the end or the beginning of their tour. This testimony as to the conditional nature of the practice is consistent with McGovern's testimony that he informed unit members during the interview and orientation process that they could take cars home with them only when necessary for business purposes. Since the use of the vehicles was contrary to this condition, and unit members were nevertheless aware of this condition, using the vehicles for commuting was neither clear nor definite, and can not give rise to a reasonable expectation that it would continue.

Schaefer also testified that McGovern told unit members that the use of the cars for commuting was unauthorized, and that he should have a file with him to be used as "cover" if he was using the car. McGovern did not controvert these statements during his testimony. I find that the unit members were aware that the assignment of the cars was contrary to policy, and that this awareness demonstrates that the practice was not unequivocal. This knowledge on the part of the unit members also precludes a finding that they had a reasonable expectation that the practice would continue.

For the reasons set forth above, I dismiss the charge in its entirety.

Dated at Brooklyn, New York
this 29th day of September, 2003

Philip L. Maier
Administrative Law Judge

The following is an extract of PERB's Rules of Procedure, 4 N.Y.C.R.R. Parts 200-215. Any party filing exceptions or other papers with the Board should consult the Rules of Procedure to ensure compliance with all requirements.

Exceptions to Decision of Director; Exceptions to Administrative Law Judge's (ALJ) Decision and Recommended Order; Action by Board

(a) Within 15 working days after receipt of the decision of the Director or the decision and recommended order of the ALJ, a party may file with the Board an original and three copies of a statement in writing setting forth any exceptions thereto, and a separate original and three copies of a brief in support thereof, together with proof of service of copies of such exceptions and brief upon each party.

(b) The exceptions shall:

(1) Set forth specifically the questions of procedure, fact, law or policy to which exceptions are taken;

(2) Identify that part of the decision or order to which objection is made;

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(1) Set forth specifically the questions of procedure, fact, law or policy to which exceptions are taken;

(2) Identify that part of the decision or order to which objection is made;

(3) Designate by page citation the portions of the record relied upon; and

(4) State the grounds for exceptions. An exception to a ruling, finding, conclusion or recommendation which is not specifically urged is waived.

Cross-Exceptions

Within seven working days after receipt of exceptions, any party may file an original and three copies of a response thereto, or cross-exceptions and a separate brief in support thereof, together with proof of service of copies of these documents upon each party to the proceeding. Within seven working days after receipt of cross-exceptions, any party may file an original and three copies of a response thereto, together with proof of service of a copy thereof upon each party to the proceeding.

Request for Extension of Time

A request for an extension of time within which to file exceptions and briefs shall be in writing, and filed with the Board at least three working days before the expiration of the required time for filing, provided that the Board may extend the time during which to request an extension of time because of extraordinary circumstances. A party requesting an extension of time shall notify all the parties to the proceeding of its request and shall indicate to the Board the position of each other party with regard to such request.

Objection to Certification Without Election

A written objection to the Director's determination that an employee organization should be certified without an election may be filed within five working days after receipt of the Director's determination. A party may file a response to the objection within five working days after its receipt of the objection. The objection and any response must be served on all parties.

Oral Argument Before the Board

If a party desires to argue orally before the Board, a written request with reasons therefor shall accompany the exceptions filed, the response thereto, or the cross-exceptions filed. The Board may grant such a request; it may also direct oral argument on its own motion.

Board Action

(a) Upon receipt of the case, the Board may adopt, modify or reverse the Director's or ALJ's decision or order.

(b) Unless a party files exceptions to the decision and recommended order of the Director or ALJ within 15 working days after receipt thereof, the decision and any accompanying order will be final, except that the Board may, on its own motion, decide to review any remedial action recommended within 20 working days after receipt by the parties of the decision and recommended order.

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Party

The term "party", as used in PERB's Rules of Procedure, means any person, organization or public employer filing a charge, petition or application under the Act or these Rules; any person, organization or public employer named as a party in a charge, petition or application, filed under the Act or these Rules; or any other person, organization or public employer whose timely motion to intervene in a proceeding has been granted.

Working Days

The term "working days", as used in PERB's Rules of Procedure, shall not include a Saturday, Sunday or legal holiday.

Filing; Service

(a) The term "filing", as used in PERB's Rules of Procedure, shall mean delivery to the Board or an agent thereof, or the act of mailing to the Board, or deposit with an overnight delivery service for overnight delivery.

(b) The term "service", as used in PERB's Rules of Procedure, shall mean delivery to a party or the act of mailing to a party, or deposit with an overnight delivery service for overnight delivery.

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NOTICE TO PARTIES

Judicial Appeal of Board Orders.

A party may appeal a final order of the Board by filing with the court and serving the necessary parties the pleadings and papers required by Article 78 of the New York Civil Practice Law and Rules (CPLR) and New York Civil Service Law (CSL) §213 within thirty days after service of the Board's order. The Board's "filing" and "service" definitions (above) do not govern the filing and service requirements of the CPLR or CSL, which are covered by the terms of those statutes. Failure to comply with a final order of this agency will result in an enforcement proceeding in New York Supreme Court pursuant to CSL §213.

(12/98)