STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Charging Party,

CASE NO. U-28429

- and -

TOWN OF ISLIP,

Respondent.

MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (BARRY J. PEEK AND RANDI M. MELNICK of counsel), for Charging Party

BOND, SCHOENECK & KING, PLLC (ERNEST R. STOLZER and AMY M. CULVER of counsel), for Respondent

DECISION OF ADMINISTRATIVE LAW JUDGE

On June 18, 2008, Local 237, International Brotherhood of Teamsters (Local 237) filed an improper practice charge alleging, as amended, that the Town of Islip (Town) violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally discontinued a practice of assigning a Town vehicle to certain bargaining unit members, initially raised the matter during negotiations, but then withdrew the proposal, and refused to bargain the impact of said action. The Town filed an answer denying a violation of the Act. A hearing was held on July 1, 2009, at which the parties were represented. Both parties filed briefs.

FACTS

Local 237 alleges that there exists a practice within the Town whereby several

employees have been issued a Town-owned vehicle on a 24 hour a day, seven day a week (24/7) basis to drive to and from work and for use during the workday for the performance of work duties.[1] That practice, according to the charge was altered when the Town, on April 29, 2008, unilaterally changed its vehicle policy, and denied vehicle assignments to approximately 45 employees. Said policy was put into effect on June 9, 2008.

Local 237 is the bargaining agent for blue collar and white collar employees of the Town, both of whom are represented in this action. According to a Town vehicle policy dated September 15, 1990, a permanent vehicle was assigned to employees who are on call 24 hours a day.[2] Although there was no evidence introduced to indicate that this aspect of the policy was ever enforced. Written authorization of "the Supervisor" was required although there was no evidence introduced to indicate that this aspect of the policy was ever enforced. It further provides that necessary repairs and maintenance of the vehicles are arranged through the Town. Lastly, the policy indicates that personal or other unauthorized use of a Town vehicle will result in disciplinary action. An accompanying mileage record form, revised August 31, 1989, clearly contemplates round trips between work and an employee's residence.

On April 29, 2008, that policy was changed with the Town's adoption of a new Town vehicle policy which limited permanent vehicle assignments to three classes of employees:

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[1] Employees in the following titles were specifically identified in the charge: Ordinance Inspector (Division of Code Enforcement), Principal Clerk (Purchasing Department), Real Property Appraiser II and III (Town Assessor's Office), Assessment Assistant and Senior Assessment Assistant (Town Assessor's Office), and Clerk Typist (Assessors Office).

[2] Charging Party's Exhibit 3.

elected officials, those who are required to be available 24/7 to respond to an "emergency crisis" within the Town and employees who work at multiple sites.[3] The policy identifies "a limited number of instances" where employees will be assigned a Town vehicle on a permanent basis and may take it home. Again, assignments must be approved by "the Supervisor."

Local 237 alleges that the changed policy significantly reduces the number of employees eligible for permanent vehicle assignments and, in fact, resulted in 45 members losing the use of a Town vehicle on a "permanent" basis.[4] Instead, those employees are now required to arrange transportation to and from work privately and have use of "pool" vehicles from their reporting location during the work day. Indeed, in a June 6, 2008 letter from Labor Relations Director Robert Finnegan to Local 237, it states that "approximately 45 members of your organization will be shifted from taking a Town vehicle home to utilization of a pool vehicle located at their reporting location" and attributes the change to a "revision" of existing policy.[5]

The fleet management policy outlines a "fleet reform program."[6] It identifies "Phase 1" as "Sweeping Town Policy" and has as its first three objectives: to establish a Town vehicle assignment policy, to cut ten percent of the fleet immediately, and to continue a moratorium on fleet expansion. It also includes a graph which depicts 155 vehicles

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[3] Charging Party's Exhibits 10 and 11. The policy also places a moratorium on fleet expansion.

[4] Eighty employees in all were affected, 50 of whom are unit members.

[5] Charging Party's Exhibit 12.

[6] Charging Party's Exhibit 11.

"Before Adoption of 2008 Fleet Policy" and 83 vehicles "After Adoption of 2008 Fleet Policy," representing a 46 percent decrease achieved from the elimination of 72 take-home vehicles. Another chart shows a "vehicle to employee ratio" and indicates that the Town, under its former practice, had one vehicle per 1.4 employees, compared to Suffolk County's six employees per vehicle.[7] A further document embodied within the policy document introduces a new form for recording vehicle usage.[8]

The April 9, 2008 resolution of the Town board approved putting into place a "comprehensive plan for an overall fleet/vehicle policy for the Town" with implementation in three phases over a two year period.[9] The stated goals included reducing "take home vehicles." Identifying phase one as "the issue of the assignment of Town vehicles," the Town board reiterated its "agreed upon goal of fiscal savings by reducing the present size of the Town's vehicle fleet by ten (10%) percent."

The evidence also established that the parties were engaged in negotiations in 2007 and the Town proposed elimination of the "to and from home" vehicle use.[10] Prior to the onset of impasse, the Town withdrew the proposal from the table. John Burns, Local 237's negotiator and Long Island area director, testified that since December 2007 through

[7] It elaborates that the Town had, under its past practice, 648 vehicles for 944 employees, compared to Suffolk County's 988 vehicles for 5,877 employees.

[8] This new reporting device was not alleged as a separate aspect of the charge.

[9] Charging Party's Exhibit 11.

[10] One of the Town's proposals was identified as "Vehicle Use/Reimbursement" and highlighted the issue of Town vehicles driven to and from work. Charging Party's Exhibits 14 and 15.

fact finding there was no discussion about the use of vehicles for commuting purposes and that since the change was announced, the Town has refused Local 237's demands to negotiate.

In support of its case, Local 237 presented three witnesses, the first of whom was Town Assessor, Ronald Devine.[11] He testified that when he hired employees in the titles of Assessment Director, Senior Assessment Assistant, Appraiser II and Appraiser III, they were told they would be assigned vehicles for work use on a 24/7 basis and gasoline would be provided from Town pumps. He clarified that while the vehicles could be used for commutation, they could not be used for personal reasons such as transportation of family members.[12] The employees were charged an income assessment of $3.00 per day for IRS reporting purposes. Entered into evidence were several memos from Devine to the payroll manager regarding employee vehicle assignments for commutation. Devine identified a number of employees who had car assignments for 15, 20 or more than 20 years prior to the Town's June 2008 action to take the vehicles away.

Devine said that as of 1999 he had authority to assign vehicles, although he could not recall from whom that came. He said it was a practice carried over from the prior Assessor when he took the post.[13] While Devine did not believe that he had been told by

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[11] Levine testified under subpoena.

[12] There was no evidence presented in this case regarding abuse of vehicle use restrictions, nor was such a claim made.

[13] Entered into evidence were memoranda from, or brought to the attention of, the Deputy Commissioner of Public Works, the Commissioner of Public Works and the Executive Assistant to the Comptroller regarding vehicle assignments. Charging Party's Exhibits 4 and 5.

the Town Supervisor that employees were to be assigned vehicles, he testified that he does not know of any employee who was ever disciplined for using a Town vehicle to commute nor was he ever told, prior to April 2008, to stop making the assignments. There is also no evidence that at any time the Town Supervisor or a designee either provided written authorization for the widespread assignments or ordered them to stop.

A second witness, Peter Kletchka, who is a Project Supervisor in the Department of Public Works, explained that in 2000 he was advised by Deputy Commissioner Donald Caputo that a vehicle was available to him on a 24/7 basis for commuting and official use.[14] He was then a Traffic Technician II. Caputo explained that Kletchka was provided the benefit because of his seniority in the division and his title. He was also provided with a magnetic employee card and a key to fuel the vehicle from the Town gas pumps. The Town Fleet Management Division handled all repairs and maintenance and actually notified employees periodically of the schedule for that.

Kletchka said that he had a Town vehicle without interruption for eight years until he was advised, in 2008, to turn in the keys and remove all personal items. From the time of the initial assignment until 2008, he had never been advised of any limits on the length of time that the vehicle would be in his possession. He now has access to a Town vehicle during the work day, but cannot take it home and had to purchase a second car for commutation purposes.

Finnegan appeared as the Town's sole witness and confirmed that the 2008 Town

[14] Kletchka also testified pursuant to a subpoena.

Board action resulted in "shifting from commuter cars to pool cars."[15] He prepared a list of 28 members of Local 237 who would be affected. Finnegan noted that Local 237 members who are 24/7 responders or assigned to multiple sites still have vehicle assignments. On cross-examination, however, Finnegan acknowledged that within the Assessor's Office, even people assigned to multiple sites had their vehicles taken away. He also acknowledged that he had no knowledge of Town policy or procedure regarding vehicle assignments prior to the fall of 2007 when his relationship with the Town began.[16]

Finnegan said that the Town changed its position on the use of Town vehicles during the negotiations process when, on December 14, 2007, it took its proposal off the table and announced that it had no obligation to bargain since a change in policy was "our right under existing administrative procedures and the ethics policy."[17] On cross-examination, he elaborated that he advised the Town that the issue of vehicle assignments is not a mandatory subject of bargaining. He also defended the action as a revision to existing policy in the Town's administrative code, rather than adoption of a new policy or a change in practice. He added that the policy adopted in April 2008 merely makes a distinction between the categories of employees entitled to permanent vehicle assignments. Finnegan also denied the assertion that the Town refused to negotiate with Local 237 after the policy change in April 2008. He said that materials submitted to factfinding referenced the Town vehicles resolution, but claimed to not know if that was

[15] Transcript, p. 83.

[16] His employment actually began in February 2008, but in the fall of 2007 he functioned as Town historian, without pay, assisting the Director of Labor Relations.

[17] Transcript, p. 91.

presented as an issue for the factfinder to rule upon. He also said that negotiations took place after the instant charge was filed, then clarified that those had to do with settlement of the claim.

DISCUSSION

It is well-established that the provision of employer-owned vehicles to employees for personal use is a mandatory subject of bargaining[18] and that unilateral discontinuation of a past practice involving a mandatory subject of negotiation gives rise to a §209-a.1(d) violation of the Act.[19]

To properly analyze an alleged violation of the law of past practice, the specific nature and extent of the practice in question must be considered. To prove a past practice a party must demonstrate that the practice was unequivocal and continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue.[20] A practice which is title-specific does indeed create an enforceable right.[21]

The evidence in this case established a practice whereby numerous Local 237 employees were assigned a vehicle for work use and commutation on a 24/7 basis. They were advised of this either at the time of hire or as vehicles became available. Town policy also provided for the Town to assume gas expenses and have its own fleet division

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[18] *County of Nassau,* 26 PERB ¶3040 (1993), *affd, County of Nassau v. PERB,* 215 AD2d 381, 28 PERB ¶7011, (2d Dep't 1995).

[19] *County of Nassau,* 13 PERB 3095, at 3153 (1980).

[20] *County of Nassau,* 24 PERB ¶3029, at 3058, *affg in part* 24 PERB ¶4523 (1991).

[21] *County of Nassau,* 35 PERB ¶3036, at 3104 (2002).

handle maintenance and repairs. That the practice was longstanding is also established by testimony which revealed assignments in excess of 20 years. As such, the evidence meets the burden of demonstrating a practice which was unequivocal and which continued uninterrupted for a period long enough to create a reasonable expectation among unit members that the practice would continue. The record also establishes that the practice was not to require written authorization of the Town Supervisor for permanent assignments to be made.

While the Town is correct that case law requires, as part of the "unequivocal" element of the past practice analysis, that the employer have knowledge of the practice, I reject the Town's contention that Local 237's proof failed in this regard. Employer knowledge may be shown through evidence of direct negotiations or actions which conditioned, ratified or acquiesced in the practice.[22] In this case, Town payroll records and vehicle assignment letters clearly reveal the existence of the practice. This case is different from one such as *County of Nassau,*[23] where employer records failed to indicate vehicle assignments and vehicle usage reports neglected to show that cars were being used for commutation. Here, in addition to providing the vehicles and documenting their permanent assignment, the Town issued employee cards and keys to access Town gas tanks, and scheduled maintenance and repairs through its fleet division. In fact, the Town's fleet management policy document contains extensive graphs and charts detailing the extent of employee usage of Town vehicles and specifically identifies 155 "take home"

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[22] *County of Nassau,* 37 PERB ¶3014, at 3042 (2004).

[23] *County of Nassau,* 36 PERB ¶4541 (2003).

vehicles.[24]

Testimony also established that no employee has ever been disciplined for using a vehicle to commute to and from work or even been advised to stop doing so. In *County of Nassau,*[25] the sheriff expressly told a supervisor that a vehicle available during work could not be taken home by an employee and his undersheriff ordered the employee to stop using the vehicle for personal travel. In the instant matter, the Town Assessor and, in some cases, the Deputy Commissioner authorized the use, the Payroll Manager acquiesced in it, and the Town Supervisor never ordered it to stop. The absence of proof that the Town Supervisor actually authorized the assignments is not fatal to Local 237's case since the Board has ruled that authority depends on more than supervisory status, and rather looks to the totality of the circumstances.[26] As Local 237 contends, the vehicle assignments and use were open and notorious and the assertion of the Town, unsupported by any witness testimony or documentary evidence, that the practice was not authorized lacks credibility and is rejected. The fact that the Town also proposed during negotiations to change the practice and engaged in a lengthy Board presentation as to its effects demonstrates its knowledge of how its vehicle use policy was being implemented over the course of many years.

I also reject the Town's assertion that its action of April 2008 was a mere modification or clarification of its existing vehicle policy and not a "change" in practice.

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[24] Charging Party's Exhibit 11.

[25] *County of Nassau, supra,* note 24, at p. 4653.

[26] *County of Nassau,* 37 PERB ¶3014, at 3042 (2004).

The fact is that the policy implemented in April 2008 resulted in a change in practice which had the effect of discontinuing the assignment of vehicles to dozens of Local 237 members. In fact, as evidenced by documentary evidence, that was its stated goal.[27] Finnegan is also incorrect in his assessment that management had a right to change its position on the use of Town vehicles pursuant to its administrative code and ethics policy. To the extent he is arguing a theory of reversion, which was not pleaded as an affirmative defense, the argument fails to understand the critical distinction between an instrument of negotiations and a unilaterally created policy to which a bargaining agent never had the opportunity to agree. Reversion applies to collectively negotiated agreements and theorizes that an employer has the right to revert to mutually agreed upon terms therein despite a past practice to the contrary.[28] The theory is inapplicable under the circumstances at hand.[29]

Turning to Local 237's claim that the Town refused to negotiate the impact of the change, its proof fails to establish a violation.[30] The law distinguishes between decisional bargaining and bargaining the impact of a decision.[31] It directs that where an employer

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[27] *See* Charging Party's Exhibit 11.

[28] *Maine-Endwell Cent Sch Dist,* 15 PERB ¶3025 (1982), *aff'g* 14 PERB ¶4625 (1981); *see also Board of Educ of the City Sch Dist of the City of New York,* 42 PERB ¶3019 (2009), *affg,* 41 PERB ¶4575 (2008).

[29] The collectively negotiated agreement between the parties is silent on the issue of permanent vehicle assignments.

[30] This claim, though asserted in the charge, was neither argued in Local 237's opening statement nor addressed in its brief.

[31] *County of Nassau (Police Dept),* 27 PERB ¶3054 (1994).

has the management right to act unilaterally, the effect or impact of that action is still subject to negotiations. In order to prove a violation in this regard, the charging party must show that negotiations regarding impact were specifically demanded, and that such demand was ignored or rejected.[32]

Here, Local 237's proof fails to establish that it made a demand to bargain impact and that that was rejected.[33] The only evidence introduced at hearing was that the Town has never agreed to Local 237's demands to negotiate since the charge was filed. That assertion, even if true, is insufficient under the standards of the law to find an impact bargaining violation.

The last element of the §209-a.1(d) aspect of the charge which must be addressed is that which alleges that the Town engaged in bad faith bargaining by withdrawing its vehicle use proposal from negotiations and then essentially implementing its terms. In *Southampton Police Benevolent Association,* [34] PERB first defined the duty to negotiate in good faith as requiring that both parties approach the negotiating table with a sincere desire to reach an agreement. As such, "good faith" is a matter of intent and the Board directed a consideration of overall conduct to make such an assessment.

Local 237 argues that bad faith occurred in this case when the Town failed to submit its vehicle proposal to fact finding and simply implemented the change it had

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[32] *County of Nassau (Police Dept),* 40 PERB ¶4554 (2007).

[33] In fact, in his June 6, 2008 letter to Local 237 attaching a copy of the newly adopted vehicle use policy, Finnegan offers to meet to address its impact. Charging Party's Exhibit 12.

[34] 2 PERB ¶3011 (1969); *see also County of Wayne,* 14 PERB ¶3092 (1981).

originally sought through negotiations. According to Local 237, the Town's original proposal, allegedly clarified in negotiations to change the policy, shows that it regarded the item as a mandatory subject of negotiations and, when it did not get the desired response through negotiations, simply chose to act unilaterally. Such action, opines Local 237, exhibited a complete disregard for the bargaining process and the Town effectively refused to bargain or did so in bad faith. On this record, however, I cannot draw such a conclusion.

Finnegan testified that the Town changed its position at the December 14, 2007 bargaining session, based on its belief that it had the management right under its administrative procedures and ethics policy to unilaterally change the vehicle policy. Indeed, negotiation notes from that day indicate the withdrawal and the assertion of right.[35] Burns' testimony did not contradict Finnegan's, but merely claimed that Burns was present for only "most" of the sessions and did not recall the December 2007 meeting or the Town's withdrawal of its proposal.

Based on the limited evidence regarding the Town's conduct during negotiations and Finnegan's testimony, which was supported by negotiation notes, I conclude that there is not sufficient evidence for a finding of bad faith. The Town's withdrawal of a proposal based on a changed belief that it did not need to negotiate the issue and implementation of the change it sought is not, in and of itself, enough to sustain a violation. That Finnegan was incorrect in his advice to the Town is inconsequential in this

[35] Employer's Exhibit 4. This exhibit relates to the white collar bargaining unit; however, Finnegan testified that the Town took the same position in the blue collar negotiations also held that day.

analysis, absent a showing that he acted intentionally to provide wrong information.

Regarding the subsection (a) violation, the evidence does not support the claim.[36] The Act prohibits a public employer or its agents from deliberately interfering with, restraining, or coercing public employees in the exercise of their protected rights to join, form and participate in an employee organization for the purpose of depriving them of such rights.[37] The Act requires that an employer act "deliberately" in order for a violation to be found.[38] In some cases, where conduct is so inherently destructive of protected rights as to have a chilling effect on employees, a violation can be found without a showing of intent.[39] In the instant matter, there was neither proof of intent by the Town to interfere nor does its action rise to the level that justifies the finding of a *per se* violation.

On the basis of the foregoing, I find that the Town violated §209-a.1(d) of the Act when it changed its past practice of assigning vehicles. The impact bargaining claim, the bad faith bargaining claim, and the alleged subsection (a) violation, are dismissed in their entirety.

THEREFORE, the Town is hereby ordered to:

1. Forthwith restore the vehicle assignments for commutation between home and work to those unit members who enjoyed the benefit;

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[36] Again, though alleged in the charge, this was not pursued by Local 237 in its opening argument or brief.

[37] *City of Salamanca,* 18 PERB ¶3012 (1985).

[38] *Greenburgh #11 Union Free Sch Dist,* 33 PERB ¶3018 (2000).

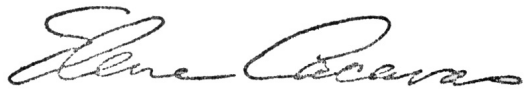
[39] *Id.*

prior to April 4, 2008;

2. Forthwith make whole unit employees for the extra expenses incurred as a result of the unilateral withdrawal of the 24/7 vehicle assignment(s), if any, together with interest at the maximum legal rate; and

3. Sign and post the attached notice at all locations customarily used to post notices to unit employees.

Dated at Brooklyn, New York
this 1st day of March, 2010



Elena Cacavas
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 Town of Islip, in the unit represented by Local 237, International Brotherhood of Teamsters, that the Town will forthwith:

1. Restore the vehicle assignments for commutation between home and work, to those unit members who enjoyed the benefit prior to April 4, 2008;

2. Make whole unit employees for the extra expenses incurred as a result of the unilateral withdrawal of the 24/7 vehicle assignment(s), if any, together with interest at the maximum legal rate.

Dated . . . . . . **By . . . . . .**
On behalf of the **Town of Islip**

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.