

## TOWN OF ISLIP



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FROM: Debra A. Hampson, Secretary to the Town Attorney  
Fax Number: 631-224-5573

DATE: April 3, 2009

RE: PERB Decision

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Pursuant to your request, attached please find a copy of the Decision of the Public Employment Relations Board in connection with Town of Islip's financial disclosure form.

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**STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

**LOCAL 237, I.B.T.,**

Charging Party,

-and-

**CASE NO. U-28286**

**TOWN OF ISLIP,**

Respondent.

**MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (BARRY J. PEEK and JEFFREY  
ANBINDER 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 April 14, 2008, Local 237, I.B.T (Local 237) filed an improper practice charge which alleged that the Town of Islip (Town) violated §§209-a.1(a) and (d) of the Public Employees' Fair Employment Act (Act) by unilaterally requiring represented employees holding certain titles to file a financial disclosure form which requires the disclosure of personal financial information. The Town filed an answer which admitted the material allegations of the charge, and raised as affirmative defenses that requiring the filing of the form is a permissive subject of bargaining, timeliness, and that the charge fails to state a violation of §§209-a.1(a) and (d).

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In lieu of a hearing, the parties submitted a stipulated record and thereafter submitted briefs.<sup>1</sup>

### FACTS

Local 237 and the Town stipulated to the following facts in lieu of a hearing:

1. At all times material herein, Local 237 has been the sole and exclusive collective bargaining representative of unionized employees of the Town.
2. Local 237 is a public employee organization within the meaning of §201 of the Civil Service Law.
3. The Town is a public employer within the meaning of §201 of the Civil Service Law.
4. Local 237 is the recognized representative within the meaning of §201 of the Civil Service Law.
5. The Town and Local 237 are parties to a collective bargaining agreement for the blue collar unit covering the period January 1, 2005 to December 31, 2007.
6. The Town and Local 237 are parties to a collective bargaining agreement for the white collar unit covering the period January 1, 2005 to December 31, 2007.
7. Both the blue collar and white collar agreements were in full force and effect at all times relevant to this proceeding.
8. Section 811 of the New York General Municipal Law, entitled Promulgation of Form of Annual Statement of Financial Disclosure: Authority of Governing Body with

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<sup>1</sup> An injunctive relief application was granted by Supreme Court, Albany County, Special Term, September 5, 2008. Subsequent to that date, the parties entered into negotiations and consented to an extension in the processing of this matter. See Act, §209-a.4(d).

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Respect to Persons Subject Thereto, was enacted by the New York State Legislature in 1987.

9. Section 812 of the New York General Municipal Law, entitled Financial Disclosure for Local Elected Officials and Certain Officers and Employee of Counties, Cities, Towns and Villages, was enacted by the New York State Legislature in 1987.

10. Sections 811 and 812 of the General Municipal Law have applied to and governed the Town since the sections were enacted by the State Legislature in 1987. The Town had a population well in excess of 50,000 in 1987 and has continued to have a population well in excess at all times relevant to this proceeding.

11. On December 18, 1990, the Town Board adopted Local Law 4-1990, entitled "Town of Islip Code of Ethics and Financial Disclosure Law,"<sup>2</sup>

12. The Town would have called current Supervisor Phil Nolan to testify at the hearing in this proceeding. Nolan would have testified to the following:

a. In November 2006, Nolan was elected to fill the unexpired term of the prior Town Supervisor. Nolan, a democrat, is the first non-republican Town Supervisor since prior to 1987. In November of 2007, he was elected to his first full four (4) year term as Town Supervisor effective January 1, 2008.

b. Chapter 14 of the Code of the Town of Islip is entitled "Code of Ethics and Financial Disclosure Law." Section 14-17 (A) provides that "All elected and appointed Town officials and officers, as defined in Article III of this local law, ...shall file an annual financial disclosure statement as hereinafter provided...." Article III of Chapter 14, in

<sup>2</sup> See Exhibit 1 of Stipulation of Facts. The Town Code states, in part, that "[t]he enactment of this Code of Ethics and Financial Disclosure Law and the promulgation of a form of annual statement of financial disclosure is expressly intended to constitute an election to opt out of the provisions of General Municipal Law §812. In accordance with the provisions of General Municipal Law §811."

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Section 14-3(B) includes in the definition of "officers" those persons employed by the Town "[w]hose job categories require them to perform acts of discretionary rather than ministerial nature."

c. In order to comply with the requirements of the Town's Code of Ethics and Financial Disclosure Law, Nolan initiated a process to enforce the Financial Disclosure Form requirements upon employees in positions that required and empowered employees to exercise judgment and discretion with respect to the enforcement of federal, state and/or town laws, codes, regulations, ordinances and standards. Nolan has been made aware that Town Supervisors prior to him had not enforced the Town's Code of Ethics and Financial Disclosure Law with respect to Town unionized employees in titles that had such discretionary powers which required them to file Financial Disclosure forms with the Town's Board of Ethics.

d. In January of 2008, Nolan directed the Town Attorney's office to develop a list of the employee titles in the Town empowered to perform "discretionary act[s]" as defined by the Town's Code of Ethics and Financial Disclosure Law.

e. In accordance with Nolan's directive, the Office of the Town Attorney and the Town's Personnel Department jointly developed a list of job titles with the authority to perform "discretionary act[s]" as defined by the Code by reviewing the Civil Service job titles for all Town employees not already required to file Financial Disclosure Forms.

f. The employee job titles on the list all had the discretionary power and authority to issue summonses and take other actions necessary to enforce the Town Code, laws, regulations, ordinances and/or standards, as well as State and Federal Codes and Laws. As such, the individuals in such titles are required by the Town Code of Ethics to file Financial Disclosure Forms.

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g. The list developed at Nolan's direction was then provided to the Town Board.

13. The Town Board passed a resolution filing the list of employees required to comply with the Code of Ethics and Financial Disclosure Law with the Board of Ethics.<sup>3</sup>

14. As a result of the Town Board resolution, the following job titles, which are within either the blue collar or white collar units represented by Local 237, are required to file a Financial Disclosure form, in accordance with the Town's Code of Ethics and Financial Disclosure Law:

- a. Bay Constable
- b. Building Plans Examiner
- c. Building Inspector
- d. Chief Fire Marshal
- e. Chief Harbormaster
- f. Fire Marshal I
- g. Harbormaster
- h. Ordinance Inspector
- i. Park Ranger II
- j. Park Ranger I
- k. Principal Building Inspector
- l. Sanitation Inspector
- m. Senior Town Investigator
- n. Senior Building Investigator
- o. Senior Zoning Inspector
- p. Town Investigator
- q. Zoning Inspector<sup>4</sup>

15. Until the newly constituted Town Board, including Nolan, adopted the resolution referred to in paragraph 13, the requirement in the Town's Code of Ethics and Financial Disclosure Law that a financial disclosure form be filed had not been enforced against the employees in these titles.

<sup>3</sup> See Exhibit 2 of the Stipulation of Facts.

<sup>4</sup> The Civil Service job descriptions for the job titles of the employees in paragraph 14 are attached as Exhibit 3 to the Stipulation of Facts.

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18. By letter dated February 14, 2008, Local 237, Long Island Area Director John R. Burns wrote to Supervisor Nolan regarding the Town requirement that bargaining unit employees comply with the Financial Disclosure Form requirement. Burns demanded bargaining prior to the implementation of the requirement to complete the form.<sup>5</sup> By letter dated March 20, 2008, Town Director of Labor Relations and Personnel Robert H.P. Finnegan responded to Mr. Burns' letter, stating that the Town was willing to discuss the impact of this requirement.<sup>6</sup>

19. The Town has refused to bargain with Local 237 over its decision to require bargaining unit employees in the titles in paragraph 14 of this stipulation file a Financial Disclosure Statement with the Town Ethics Board or the impact of that decision.

#### DISCUSSION

For the reasons set forth below, I find that the Town violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by unilaterally requiring represented employees holding certain titles to file a financial disclosure form which requires the disclosure of personal financial information. Since there is no proof of any interference with a protected right, however, I dismiss that portion of the charge alleging a violation of §209-a.1(a).

In *Board of Education of the City School District of the City of New York v. PERB et. al.*,<sup>7</sup> the Court of Appeals stated that "[t]he obligation under the Taylor Law to bargain as to all terms and conditions of employment is a 'strong and sweeping policy of the

<sup>5</sup> A copy of the February 14, 2008 letter is attached as Exhibit 4 to the Stipulation of Facts.

<sup>6</sup> A copy of Finnegan's letter is attached as Exhibit 5 to the Stipulation of Facts.

<sup>7</sup> 75 NY2d 660, 23 PERB ¶7012, at 7013 (1990).

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*State' (Matter of Cohoes City School Dist. v. Cohoes Teachers Assn, 40 NY2d 774, 778; Board of Educ. v. Associated Teachers of Huntington, 30 NY2d 122, 129).<sup>8</sup> This obligation may be abrogated if "a statute...direct[s] that certain action be taken by the employer, leaving no room for negotiation."<sup>9</sup> A statute may so direct either by its explicit terms or by implication inherent in either the statute or the statutory scheme itself. The Court of Appeals found that PERB's determination that the District violated its duty to bargain by the adoption a work rule requiring the completion of a financial disclosure form was proper. Education Law §2590-g(13) provided that the city board "shall have the power and duty to" prescribe regulations requiring officers and employees and their spouses to disclose any interests, whether direct or indirect, in matters such as the furnishing of supplies, professional services, and the sale or leasing of real estate. The District was also empowered to adopt regulations requiring employees to submit financial reports for themselves and their spouses. According to the provision, the city board shall determine the nature, frequency and extent of the disclosure to be submitted by employees.*

The Court of Appeals held that the imposition of this financial disclosure requirement was a mandatory subject of bargaining, and that Education Law provisions did not exempt the Board of Education from an obligation to bargain. It concluded that negotiations were not prohibited since the statute does not contain a prohibition concerning bargaining, or because its terms are "so unequivocal a directive to take certain action that it leaves no room for bargaining."<sup>10</sup> With regard to whether the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*



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*PERB et al, supra*, applicable. It stated that the City's argument that it was mandated to adopt the requirement at issue pursuant to a statutory mandate. In this case, the GML, was even less persuasive than the argument advanced by the employer in *Board of Education of the City School District of the City of New York v. PERB et al, supra*. The Board stated that the City was neither required by statute or by public policy to adopt the financial disclosure requirements. The financial disclosure requirement was purely discretionary since *Auburn* was a City with less than 50,000 people and, in any event, elected not to be subject to the financial requirements in the GML.<sup>13</sup> The Board also stated that the financial disclosure requirements were narrower than that which was contemplated by GML §812. Since the disclosure requirements may constitute new rules to which disciplinary action applies, they are terms and conditions of employment to which a bargaining obligation applies.

Additionally, in *State of New York (Department of Health)*,<sup>14</sup> the Board affirmed an Administrative Law Judge's (ALJ) decision finding a violation of §209-a.1(d) of the Act when the State implemented a financial disclosure policy requiring employees to disclose any interests they may have in any organizations regulated by the Department of Health (DOH). In rejecting the State's argument that it could act unilaterally because of Executive Law §94(9)(j), the Board, at 3008, stated:

Executive Law §94(9)(j), the claimed source of DOH's authorization to promulgate its disclosure policy, sets forth one of several duties imposed upon the State Ethics Commission. Section 94(9)(j) requires the State

<sup>13</sup> Section 810.1 defines a political subdivision as a "county, city, town or village having a population of fifty thousand or more and shall include a city with a population of one million or more."

<sup>14</sup> 25 PERB ¶3002 (1992).

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Ethics Commission to advise and assist agencies in establishing conflict of interest rules. Even if Executive Law §94(9)(j) were to be read to indirectly authorize DOH to promulgate conflict of interest work rules, it would not be a source of a statutory mandate. Nothing in §94(9)(j) required DOH to promulgate its disclosure policy or any other conflict of interest rule. Rather, DOH's promulgation of its disclosure policy was merely discretionary. The exercise of that discretion is mandatorily negotiable to the extent that the subject matter of the disclosure policy embraces terms and conditions of employment.<sup>15</sup>

Turning to this case, a resolution of this matter, as in *Auburn*, turns upon an examination of the applicable statutory language. Section 811.1(a) states that a governing body of a political subdivision may adopt a requirement for an annual financial disclosure form.<sup>16</sup> In the event that such a form is not adopted by January 1, 1991, then the provisions of §812.3 shall apply.<sup>17</sup> The provisions of that statute state that any political subdivision may elect to remove itself from the provisions of this section and may choose to remove itself from some but not all of the disclosure

<sup>15</sup> See also *City of New York*, 40 PERB ¶13017 (2007) (subsequent history omitted), in which the Board found that Unconsolidated Laws §971(d) did not exempt the City from a bargaining obligation. That statute states:

In the city of New York, the police commissioner, and in the city of Syracuse, the chief of police, shall promulgate duty charts for members of the police force which distribute the available police force according to the relative need for its services. This need shall be measured by the incidence of police hazard and criminal activity or other similar factor or factors. No member of the force shall be assigned to perform a tour of duty in excess of eight consecutive hours excepting only that in the event of strikes, riots, conflagrations or occasions when large crowds shall assemble, or other emergency, or on a day on which an election authorized by law shall be held, or for the purpose of changing tours of duty so many members may be continued on duty for such hours as may be necessary. No member shall be assigned to an average of more than forty hours of duty during any seven consecutive day period except in an emergency or as permitted in this subdivision or for the purpose of changing tours of duty or as otherwise provided for by law.

<sup>16</sup> See Appendix A for text of §811.

<sup>17</sup> See Appendix B for text of §812.3.

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requirements. The Town in this matter elected not to be covered by GML §812.<sup>18</sup> I find that this statutory framework relied upon by the Town in this matter, as in the cases cited above, does not preclude it from bargaining over the requirement that certain employees file a financial disclosure form. As in those cases, the Town had discretion as to whether to impose this requirement, and GML §812 does not compel the Town to adopt this work rule. As such, contrary to the Town's argument, the obligation to bargain is not preempted by the statutory scheme, and the Town had an obligation to bargain prior to imposing this work rule.

The Town also argues that the charge should be dismissed because it enforced the Town Code as required, that the Town Code is less burdensome to the employees than the GML requirements, and that a proper application of the interests involved weighs in favor of a finding that the Town has a management right to unilaterally impose the requirement at issue. A bargaining obligation which exists under the Act, however, can not be superseded by a Town Code. As in *Auburn*, in which the City followed a City ordinance, the fact that the Town followed the local Code does not obviate its obligation to bargain pursuant to a State statute. Additionally, the fact that the form may be less burdensome does not allow the Town to escape from the conclusion that the financial disclosure form requirement constitutes a term and condition of employment. The Court of Appeals and this Board have already ruled that a bargaining obligation exists prior to the imposition of this requirement, and the facts specific to a particular requirement does not change this conclusion.<sup>19</sup> As a final point, I do not find that the facts support

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<sup>18</sup> See Stipulation of Facts, paragraph 11.

<sup>19</sup> *State of New York (Department of Transportation)*, 27 PERB ¶13058 (1994).

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the Town's affirmative defense that the charge is untimely and it is hereby dismissed.

Therefore, for the reasons set forth above, I find that the Town violated §209-a.1(d) of the Act by unilaterally requiring represented employees holding certain titles to file a financial disclosure form which requires the disclosure of personal financial information.

THEREFORE, IT IS HEREBY ORDERED that the Town shall:

1. Immediately rescind and cease enforcement of the directive requiring represented employees holding certain titles to file a financial disclosure form which requires the disclosure of personal financial information;
2. Remove from unit employees' personnel files any reference to or reprimand for not filing a financial disclosure form which requires the disclosure of personal financial information;
3. Make Local 237 unit employees whole for wages and benefits lost, if any, as a result of the promulgation of the directive requiring employees to file a financial disclosure form which requires the disclosure of personal financial information;
4. Sign and post the attached notice in all locations normally used to communicate with employees in the unit represented by Local 237.

Dated at Brooklyn, New York  
This 23rd day of March, 2009



Philip L. Maier  
Administrative Law Judge