STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 294,

Petitioner,

-and- **CASE NO. C-6461**

TOWN OF STEPHENTOWN,

Employer,

-and-

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Incumbent.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;[1]

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

IT IS HEREBY CERTIFIED that the Teamsters Local 294 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative

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[1] This unit has been represented by the United Public Service Employees Union, which notified PERB, by letter dated August 7, 2017, that it disclaims any interest in further representing the unit.

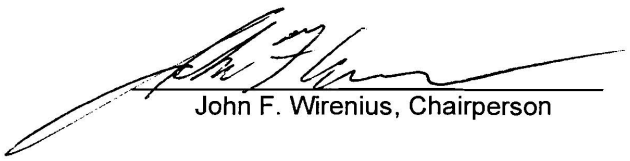
for the purpose of collective negotiations and the settlement of grievances.

Included: Motor Equipment Operators Light, Motor Equipment Operators Heavy, and Mechanics in the Highway Department.

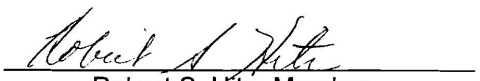
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 21, 2018
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

51 PERB ¶3000.02

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CLARKSTOWN PBA,

Petitioner,

-and- **CASE NO. C-6468**

TOWN OF CLARKSTOWN,

Employer,

-and-

ROCKLAND COUNTY PBA,

Incumbent/Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

IT IS HEREBY CERTIFIED that the Clarkstown PBA has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All police officers employed by the Town of Clarkstown Police Department, from the rank of Patrolman to Lieutenant.

Excluded: Captains, Chief of Police, School Crossing Guards, Auxiliary Police, and all civilian employees of the department.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Clarkstown PBA. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 21, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

51 PERB ¶3000.03

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTER LOCAL 294,

Petitioner,

-and- **CASE NO. C-6476**

TOWN OF PETERSBURGH,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board in accordance with the Public Employees' Fair Employment Act and the Rules of Procedure, and it appearing that a negotiating representative has been selected;

Pursuant to the authority vested by the Public Employees' Fair Employment Act;

IT IS HEREBY CERTIFIED that the Teamsters Local 294 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All Truck Drivers, Equipment Operators, and the Deputy Highway Superintendent.

Excluded: All others.

FURTHER, IT IS ORDERED that the above named public employer shall

negotiate collectively with the Teamster Local 294. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: February 21, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

In the Matter of

NASSAU BOCES EDUCATIONAL ADMINISTRATORS ASSOCIATION,

Charging Party,

- and -

CASE NO. U-34160

BOARD OF COOPERATIVE EDUCATIONAL SERVICES OF NASSAU COUNTY,

Respondent.

BRACKEN MARGOLIN BESUNDER LLP (PATRICIA M. MEISENHEIMER of counsel), for Charging Party

INGERMAN SMITH, L.L.P. (MICHAEL G. McALVIN & DIANA M. CANNINO of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Nassau BOCES Educational Administrators Association (Association) to a decision and order of an Administrative Law Judge (ALJ).[1] The ALJ dismissed an improper practice charge alleging that the Board of Cooperative Educational Services of Nassau County (BOCES) violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally terminated a practice of paying educational administrators represented by the Association their unused annual leave upon their separation from BOCES for reasons other than retirement.

EXCEPTIONS

The Association filed seven exceptions to the ALJ's decision. The Association

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[1] 50 PERB ¶ 4508 (2017).

argues that the ALJ incorrectly concluded that the Association agreed to eliminate the past practice of paying both retiring and resigning unit members the value of their unused annual leave during negotiations for the 2005-2009 agreement between the parties.[2] The Association argues that the contract language in the 2005-2009 agreement, combined with extrinsic evidence, show that the parties never agreed to change the existing practice.[3]

Pursuant to § 213.3 of PERB's Rules of Procedure, the Board requested the parties to submit additional briefs addressing the effect of the Memorandum of Agreement dated March 31, 2014 (MOA)[4] in terms of the duty satisfaction defense raised by BOCES. BOCES argues that the MOA shows that the parties negotiated the circumstances under which employees who departed from service would receive their unused annual leave and that the parties agreed that employees who left employment with BOCES for reasons other than retirement would not receive payment for their unused annual leave. The Association, on the other hand, argues that the MOA is ambiguous and does not support BOCES' duty satisfaction defense.

For the reasons given below, we affirm the ALJ's dismissal of the charge.

FACTS

The ALJ's decision contains facts detailing the history of agreements between the parties and their bargaining history. Because we find that this case can be decided based solely on the terms of the MOA dated March 31, 2014, the agreement in effect at the time of the change, we do not summarize or rely on these other facts.

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[2] Exc 1, 5-7.
[3] Exc 2-4.
[4] Jt Ex 5.

On March 31, 2014, the parties signed a memorandum of agreement (MOA) providing for a successor agreement with a term of 2011 to 2016. The 2011-2016 MOA provides, at § D:

> 1. Section 5.1 shall be amended to provide that effective June 30, 2014, unit members may accumulate annual leave days from year to year, up to a maximum of forty-four (44) days.
>
> 2. The last sentence of Section 5.1, beginning with, "all payments," shall be deleted and replaced with the following:
>
> *Upon resignation for the purpose of retirement, under the New York State Teachers' Retirement System or the New York State Employees' Retirement System, unit members shall be paid the cash equivalent value of up to forty (40) accumulated annual leave days at a per diem rate of 1/240th of his or her annual salary. In the event of the death of the unit members while in service, the aforesaid cash value of accumulated annual leave days shall be paid to his or her estate* [italics in the original].[5]

Prior to September 10, 2014, BOCES had a practice of paying unit members who retired or resigned from BOCES the per diem value of up to forty (40) days accumulated but unused vacation days in the employee's regular vacation leave day account. Beginning on September 10, 2014, BOCES refused to make these payments to unit members who resigned from BOCES for reasons other than retirement. Retirees continue to receive the payment.

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[5] Joint Ex 5.

Section 5.1 of the 2005-2009 contract stated that:

> All payments made for leave days shall be made by the employer in the form of a non-elective Section 403(b) Internal Revenue Code account contribution for the benefit of the retiring employee.

Joint Ex 3, at p. 15. The parties entered into a successor agreement with a term of 2009 to 2011 which left this language unchanged.

DISCUSSION

In order to successfully establish the affirmative defense of duty satisfaction, the burden rests with the respondent to plead and prove that it satisfied its duty to negotiate a particular subject based on negotiated terms that are reasonably clear.[6] Duty satisfaction occurs when a specific subject has been negotiated to fruition and may be established by contractual terms that either expressly or implicitly demonstrate that the parties reached accord on that specific subject.[7] We will consider extrinsic evidence, such as negotiations history and/or a past practice, only where the agreement is reasonably clear but susceptible to more than one interpretation.[8]

We find that BOCES has met its burden of demonstrating that it satisfied its duty to bargain over the subject of payment of accumulated annual leave to departing unit employees through the language in the 2011-2016 MOA. This agreement provides that "upon resignation for purposes of retirement . . . unit members shall be paid the cash equivalent value of up to forty (40) accumulated annual leave days . . . ." The MOA also provides that, in the event of the death of a unit member while in service, the cash value of accumulated annual leave days "shall be paid to his or her estate."

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[6] *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, 3089 (2014), quoting *Dutchess Cmty College*, 46 PERB ¶ 3009, 3016 (2013).

[7] *Id*; *State of New York (Racing and Wagering Bd)*, 45 PERB ¶ 3041, 3106 (2012), *affd sub nom Kent v. Lefkowitz*, 46 PERB ¶ 7006 (Sup Ct Albany County 2013), *revd*, 119 AD3d 1208, 47 PERB 7003 (3d Dept 2014), *revd and Board decision reinstated,* 27 NY3d 499, 49 PERB ¶ 7005 (2016); *State of New York (Workers Compensation Board)*, 32 PERB ¶ 3076, 3177-3178 (1999).

[8] *Racing and Wagering Bd*, 45 PERB ¶ 3041, at 3106, citing *Shelter Island Union Free Sch Dist*, 45 PERB ¶ 3032 (2012). *See also State of New York (State University of New York at Buffalo)*, 50 PERB ¶ 3001, 3004 (2017) ("Where the contractual language is ambiguous or does not itself resolve the inquiry, any bargaining history that would tend to evidence the parties' understanding can establish duty satisfaction").

The contract provides for the circumstances under which accumulated annual leave will be paid—either upon retirement or death while still employed. By enumerating the circumstances under which accumulated annual leave will be paid, the clear implication is that leave will not be paid in other circumstances, such as when an employee resigns for purposes other than retirement. We find that the 2011-2016 MOA comprehensively addresses the parties' agreement with respect to the subject of the payment of accumulated annual leave.[9] Because the terms of the MOA are reasonably clear and not susceptible to more than one interpretation, we do not examine extrinsic evidence such as bargaining history.

Based upon the foregoing, we find that BOCES did not violate § 209-a.1 (d) of the Act because it satisfied its duty to negotiate with the Association concerning the payment of accumulated annual leave to departing unit employees. For this reason, it is unnecessary for us to address the remaining exceptions filed by the Association.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: February 21, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

[9] *Racing and Wagering Bd*, 45 PERB ¶ 3041, at 3106.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

COMMANDING OFFICERS ASSOCIATION OF LONG BEACH, NY,

Charging Party,

CASE NO. U-33449

- and -

CITY OF LONG BEACH,

Respondent.

AVALLONE & BELLISTRI, LLP (ROCCO G. AVALLONE, of counsel), for Charging Party

BOND, SCHOENECK & KING, PLLC (TERRY M. O'NEIL and EMILY E. HARPER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed on behalf of the Commanding Officers Association of Long Beach, NY (COA) and cross-exceptions filed by the City of Long Beach (City) to a decision by an Administrative Law Judge (ALJ) dismissing the COA's improper practice charge under § 209-a.1 (e) of the Public Employees' Fair Employment Act (Act).[1] The ALJ found that the City was obliged to apply the terms and conditions of the expired agreement negotiated prior to the fragmentation of the employees at issue into the separate unit now represented by the COA. The ALJ nonetheless dismissed the charge "because police discipline is a prohibited subject of bargaining," and, thus, "the grievance and arbitration provision in the expired [] agreement should not be

[1] 48 PERB ¶ 4532 (2015).

applied to the COA."[2]

EXCEPTIONS

The COA excepts to the ALJ's finding that the grievance and arbitration provisions of the expired collective bargaining agreement were null and void as to non-disciplinary issues. It further contends that the ALJ's finding that discipline was a prohibited subject as to the employees at issue was in error, because the provision of the City Charter upon which the ALJ based her finding was enacted in 1989, not in 1922, when the City Charter was initially promulgated. As that provision was enacted subsequent to the effective date of the Act, the COA contends that police discipline remains a mandatory subject of bargaining within the City of Long Beach.

The City cross-excepts to the ALJ's finding that the City is under an obligation to apply the provisions of the expired collective bargaining agreement to the members of the fragmented unit.

FACTS

The parties stipulated to the relevant facts, which are set out in full in the ALJ's decision, and summarized here only as relevant to deciding the exceptions. Prior to April 12, 2013, lieutenants in the Long Beach Police Department were represented by the Patrolmen's Benevolent Association of the City of Long Beach, Inc.(PBA). Upon expiration of the PBA agreement in June 2008, the PBA initially negotiated with the City on behalf of all titles it represented, including the lieutenants.

The City and the PBA engaged in negotiations for a successor agreement on behalf of all titles it represented until the COA filed its petition to sever from the PBA on

[2] Id, at 4625.

September 23, 2011. The petition was granted, and COA was certified as the representative of the Lieutenants at issue here on April 12, 2013.[3]

On June 14, 2013, the COA filed a grievance alleging that the City violated the expired PBA agreement with respect to overtime. After the grievance was not resolved at either Step I or Step II of the expired agreement, the COA invoked the expired agreement's arbitration provisions. On August 22, 2013, Martin Ellenberg was appointed to serve as the arbitrator of the overtime grievance.[4]

On November 12, 2013, the City and the COA met at Long Beach City Hall before Arbitrator Martin Ellenberg and reached a tentative agreement subject to ratification by the City Manager and the Police Commissioner. On or about November 14, 2013, a proposed stipulation of settlement was forwarded by counsel of the COA to Corey Klein, the City's Corporation Counsel.

Subsequently, Klein advised Rocco Avallone, the counsel for the COA, that the tentative agreement reached on November 12, 2013, had not been ratified or otherwise approved by the City Manager and Police Commissioner.

The City raised the issue of arbitrability for the first time at the hearing before Arbitrator Ellenberg on March 5, 2014. The City has taken the position that as a newly certified union, the City's only obligation to the COA was to continue the terms and conditions of employment (*status quo*), which does not include the right to arbitrate

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[3] *City of Long Beach*, 46 PERB ¶ 3000.02 (2013).

The composition of the PBA unit has not significantly changed. The only change in the PBA unit is that seven lieutenant positions making up the COA unit have been removed from the PBA unit. Approximately 63 members have remained in the PBA unit throughout the time relevant to the charge.

[4] COA Exceptions Brief at 1; City Brief in Response to Exceptions and in Support of Cross Exceptions at 7.

grievance disputes. The City has taken the position that it has no obligation to apply the expired collective bargaining agreement with the PBA to the COA unit.

Later, the COA filed another grievance, challenging a disciplinary determination by the Commissioner, on March 5, 2014.[5] The City argued in response to that grievance that the provisions in the expired PBA agreement purporting to cover police disciplinary matters were unenforceable as the subject is a prohibited subject of negotiation in Long Beach.[6]

The City has processed grievances, but denied the COA unit members the right to appeal grievances and/or disciplinary determinations to arbitration. The contract negotiations between the COA and the City are ongoing. At no time has the COA engaged in any conduct in violation of § 210 (1) of the Act.

DISCUSSION

The City's first principal contention is that the *status quo* rights of a group of employees as to whom a bona fide representation question exists is limited to the preservation of "terms and conditions of employment." The City argues that this limitation is in place from the filing of the petition until the parties reach a collective bargaining agreement. The City's argument is based primarily on the Board's decision in *County of Clinton*,[7] but it also draws upon *Avon Central School District*[8] and *Village of Suffern*.[9]

In *County of Clinton*, the Board affirmed a decision of the then-Director of Public

[5] Jt Ex 22.
[6] Jt Ex 23.
[7] 19 PERB ¶ 3048 (1986), *affg* 19 PERB ¶ 4516 (1986), *annulled sub nom Evangelisto v Newman*, 19 PERB ¶ 7021 (Sup Ct Albany Co 1986).
[8] 36 PERB ¶ 3032 (2003).
[9] 38 PERB ¶ 3020 (2005).

Employment Practices and Representation, finding that when titles have been fragmented from a bargaining unit, the incumbent employees in those titles are no longer entitled to coverage under the collective bargaining agreement negotiated by their former union. Accordingly, the Director found, and the Board affirmed, that the employer does not violate § 209-a.1 (e) of the Act, also known as the "Triborough Amendment," by refusing to continue the terms and conditions of the collective bargaining agreement. Such employees' status quo rights would be limited to a charge alleging a violation of § 209-a.1 (d) of the Act by unilaterally changing terms and conditions of employment, as defined under the Board's "Triborough Doctrine," which antedated the Triborough Amendment.[10]

The City further contends that the right to arbitration cannot be deemed a "term and condition of employment" under the Triborough Doctrine, but can only be continued under the Triborough Amendment. This argument finds support in early cases such as *Port Chester-Rye UFSD*,[11] itself based on the Appellate Division, Second Department's decision in *Board of Education of the City School District of the City of Poughkeepsie v Poughkeepsie Public School Teachers Assn.*[12] Adhering to *Poughkeepsie's* finding that, under the Act, "[t]he contract having expired, the provision for arbitration was no longer in effect," the Board found in *Port Chester-Rye UFSD* that arbitration is purely a creature of contract, and not itself a term and condition of employment that can form a

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[10] *County of Clinton*, 19 PERB ¶ 3048, at 3102, n 6; *see generally Triborough Bridge & Tunnel Auth*, 5 PERB ¶ 3037 (1972).
[11] 10 PERB ¶ 3079, 3135 (1977).
[12] 44 AD2d 598, 599, 7 PERB ¶ 7504 (2d Dept 1974). Both *Port Chester-Rye UFSD* and *Board of Education of the City School District of the City of Poughkeepsie* were decided before the Triborough Amendment was enacted.

component of the status quo under the Triborough Doctrine.[13]

Aside from the quite salient fact that the Board's decision in *County of Clinton* was annulled by the Supreme Court, Albany County in *Evangelisto v Newman*,[14] we find the reasoning of both the Director and of the Board in that case fundamentally unsound as to both of its premises, and we generally agree with the strictures of the Supreme Court in annulling the decision.

The City concedes that the *Evangelisto* court "correctly opined that the [smaller unit's] decision to sever themselves from the . . . original unit should not affect the rights of the larger, [original] unit." [15] Thus, the City itself rejects the first major premise of *County of Clinton*—that the change in unit composition effectively terminates the contract as to *all* members, both the original unit and the new unit fragmented therefrom. We agree with the City's rejection of this prong of *County of Clinton*, but do not stop there.

Rather, we find persuasive the *Evangelisto* court's observation that:

> If the consequence of a group of employees forming a separate bargaining unit is that they, and the remaining employees of the bargaining unit left, are no longer entitled to the benefits of the agreements for which they bargained, said employees have in effect been denied their right to "form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing"[16]

We share the *Evangelisto* court's concern that the policies of the Act are not served by a rule that heavily burdens the exercise of fundamental rights enshrined in

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[13] *Port Chester-Rye UFSD*, 10 PERB ¶ 3079, at 3135, citing *Poughkeepsie*, 44 AD2d at 599, 7 PERB ¶ 7504, at 7509.
[14] 19 PERB ¶ 7021 (1986).
[15] City Br at 17.
[16] 19 PERB ¶ 7021, at 7028, quoting Act, §§ 200, 202.

the Act by "allow[ing] employees to form or participate in separate bargaining units," but only "at the expense of losing all of the benefits of an agreement for which they previously bargained."[17] We find that *County of Clinton*, by reducing the *status quo* rights of employees as a direct consequence of their decision to exercise their § 202 rights impermissibly penalizes employees for exercising those rights, and treat this already annulled and manifestly erroneous decision as "a derelict on the waters of the law."[18]

Moreover, the City's contention that grievance arbitration should be excluded from the *status quo* applicable to *any* employees cannot survive examination. The Appellate Division decision in *Poughkeepsie*, itself the foundation upon which *Port Chester-Rye UFSD* and its progeny rest, turns on a reading of the Act that antedates the enactment of the Triborough Amendment.[19] Specifically, the Supreme Court opinion in *Poughkeepsie*, adopted by the Appellate Division, found that "[t]he

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[17] Id.

[18] *Lambert v People of the State of California*, 355 US 225, 245 (1957) (Frankfurter, J., dissenting). We note that this result accords with our strong preference that "a statute should only be construed to require the forfeiture of one statutory right as the price of exercising another when such a reading is compelled by the statutory text or other evidence that so harsh a result was intended." *City of Ithaca*, 49 PERB ¶ 3030, 3097 (2016). To the extent that the use of the phrase "terms and conditions of employment" in the decisions relied upon by the City, particularly *Avon Cent Sch Dist* and *Village of Suffern*, can be read to assume that the *status quo* rights for employees while a *bona fide* question does not encompass all the terms of an expired agreement until a new agreement is negotiated," as provided by § 209-a.1 (e) of the Act, we overrule those decisions. We note in particular that *Avon* appears to be founded upon a misunderstanding of the court's decision in *Evangelisto*, and, in any event, is not consistent with the policies of the Act, as explained above. In *Village of Suffern*, as the employees at issue were unrepresented, no expired collective bargaining agreement existed to define the *status quo*.

[19] *Board of Educ City Sch Dist, City of Poughkeepsie v Poughkeepsie Public Sch Teachers Assn*, 75 Misc2d 931, 6 PERB ¶ 7518 (Sup Ct Dutchess County 1973), *affd* 44 AD2d 598, 7 PERB ¶ 7504 (2d Dept 1974).

Legislature would not have provided a thorough and detailed procedure for the resolution of deadlocks in negotiation if it had intended to permit the judicial imposition of an expired agreement upon the parties."[20] After canvassing the provisions of the Act as it then stood and the intent of the Legislature, the court concluded that "[t]o declare that an agreement continues beyond its stated expiration date would run counter to the plan and upset the balance between public employers and employees which has been established by the statute."[21]

However, the enactment of the Triborough Amendment in 1982 upended that analysis and that foundation, declaring it an improper practice for a public employer "to refuse to continue *all the terms* of an expired agreement until a new agreement is negotiated," unless the employee organization has violated the anti-strike prohibitions of § 210 of the Act.[22]

In the wake of the Triborough Amendment's passage, its effects have encompassed the arbitration of claims under expired collective bargaining agreements; indeed, such arbitration under expired agreements distinguishes our policy on jurisdictional deferral from our policy on merits deferral.[23] In sum, the jurisprudential

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[20] 75 Misc2d at 933, 6 PERB ¶ 7518 at 7541.
[21] 75 Misc2d at 934, 6 PERB ¶ 7518 at 7541-7542.
[22] 2 Laws 1982, ch 668, eff. July 29, 1982 (emphasis added).
[23] *See, eg*, *Schuyler Co v Schuyler Co Highway Unit, L 649*, 80 AD3d 1140, 1141-1142 (3d Dept 2011); *City of Utica v Zumpano*, 241 AD2d 962 (4th Dept 1997). Even where stays of arbitration under expired collective bargaining agreements have been granted in recent years, they have been premised on the nonmandatory or prohibited nature of the specific issue to be submitted to arbitration, and not on the ground that the expiration of the underlying agreement has extinguished the right to arbitrate. *See City of Yonkers v Yonkers Fire Fighters, L 628*, 20 NY3d 651, 657 (2013) ("Because no successor CBA was negotiated in the present case, the Triborough Law would apply, and the CBA's terms would be continued, unless contradicted by statute. Here, however, the part of the CBA that required noncontributory plans is rendered unlawful

underpinnings of *Port Chester-Rye UFSD* and *Poughkeepsie* have been swept away by the contrary public policy declaration of the Legislature in the Triborough Amendment.[24] As with *County of Clinton*, we overrule *Port Chester-Rye UFSD*, recognizing both it and *Poughkeepsie* as "solitary islands in a stream of contrary opinion,"[25] or, more charitably, as superseded by public policy findings enshrined in subsequent legislative enactment.

The ALJ dismissed the charge "because police discipline is a prohibited subject of bargaining [and, therefore] the grievance and arbitration provision in the expired PBA agreement should not be applied to the COA." As a threshold matter, we note that this ground does not apply to the non-disciplinary overtime grievance at issue here. For the reasons we have given above, the COA is entitled, at a minimum, to bring non-disciplinary arbitrations pursuant to the expired collective bargaining agreement which establishes the status quo between the City and the employees now represented by the COA. Therefore, the ALJ's decision must be reversed as to that grievance.

As to the disciplinary grievance, the City has asserted that police discipline is a prohibited subject of bargaining in the City of Long Beach. The status of police discipline as a mandatory or prohibited subject of bargaining has been significantly reshaped by the Court of Appeals in a series of decisions rendered over the last

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by Article 22 of the Retirement and Social Security Law . . ."). Our oft-applied merits deferral policy, explicitly permits deferral to arbitration proceedings brought pursuant to expired collective bargaining agreements, while denying jurisdictional deferral in similar circumstances. *See, eg, State of New York (SUNY Health Science Ctr of Syracuse*), 30 PERB ¶ 3019, 3041-3042 (1997); *County of Westchester*, 44 PERB ¶ 3020 (2011) (reaffirming policy).

[24] *City of Utica*, 241 AD2d at 962; see also *City of Yonkers*, 20 NY3d at 657.

[25] *Nanopierce Techs, Inc v Southridge Capital Mgmt LLC*, 2003 WL 22052894, at *4 (SDNY Sept 2, 2003) (Sand, J.).

decade. Originally, in *Auburn Police Local 195 v Helsby*,[26] a case involving police discipline, the Court of Appeals affirmed the Appellate Division's order finding the subject negotiable. That result stood until 2006, when the Court of Appeals issued its decision in *Patrolmen's Benevolent Association of the City of NY v NYS Public Employment Relations Board (PBA v PERB)*, which sharply limited *Auburn*'s holding:

> In general, the procedures for disciplining public employees, including police officers, are governed by Civil Service Law §§ 75 and 76 which provide for a hearing and an appeal. In *Auburn*, a case involving police discipline, the Appellate Division rejected the argument that these statutes should be interpreted to prohibit collective bargaining agreements "that would supplement, modify or replace" their provisions (62 A.D.2d at 15, 404 N.Y.S.2d 396), and we adopted the Appellate Division's opinion (46 N.Y.2d at 1035–1036, 416 N.Y.S.2d 586, 389 N.E.2d 1106). Thus, where Civil Service Law §§ 75 and 76 apply, police discipline may be the subject of collective bargaining.
>
> But Civil Service Law § 76(4) says that sections 75 and 76 shall not "be construed to repeal or modify" preexisting laws, and among the laws thus grandfathered are several that, in contrast to sections 75 and 76, provide expressly for the control of police discipline by local officials in certain communities.[27]

In *Town of Wallkill v Civil Service Employees Association, Inc*,[28] the Court of Appeals "extended [*PBA v PERB*] to a local law regarding police discipline, where the local law was adopted pursuant to authority granted by Town Law § 155, itself a general law enacted prior to Civil Service Law §§ 75 and 76."[29]

Most recently, the Court found that "[t]he Taylor Law's general command

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[26] 46 NY2d 1034, 1035-1036 (1979).
[27] 6 NY3d 563, 573 (2006).
[28] 19 NY3d 1066 (2012).
[29] *City of Schenectady v NYS Pub Empl Relations Bd*, 30 NY3d 109, 115 (2017) (characterizing *Wallkill*).

regarding collective bargaining is not sufficient to displace the more specific authority granted by the Second Class Cities Law," and "[t]hus, our decisions in *Matter of Patrolmen's Benevolent Assn* and *Matter of Town of Wallkill* control, and police discipline is a prohibited subject of bargaining in Schenectady."[30] The Court specifically found that, despite its express supersession clause, "[t]he Second Class Cities Law has not been expressly repealed or superseded by the legislature nor was it implicitly repealed by the enactment of the Taylor Law in 1967."[31]

Our analysis is constrained by this line of cases.

The Charter of the City of Long Beach was adopted by the New York State Legislature in 1922.[32] Article 4 of the Charter is entitled "Police Department," and the first provision of this article, § 44 provides that "[t]he mayor shall be the commissioner of police of the City of Long Beach. He shall have charge of the police department."[33]

Section 47 of the Charter, as enacted by the New York State Legislature in 1922,

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[30] *City of Schenectady*, 30 NY3d at 115-116.
[31] *City of Schenectady*, 30 NY3d at 116-117.
[32] L 1922, ch 635. The parties provided a printout of §§ 44, 47, and 48 of the Charter, as amended. (Jt Ex 24). The joint exhibit is unclear as to the legislative history of these sections, not specifying whether the current text of § 44 remains as originally enacted or has been amended, notes that the text of § 47 was amended in 1989 without specifying in what manner, and noting that the text of § 48 remains as originally enacted in 1922. Additionally, although the City argues from § 49 of the Charter, Joint Exhibit 24 does not include it, though it is included as part of Exhibit B to the COA's Brief in Support of Exceptions. To resolve the various arguments from the legislative history of the Charter made by the parties, we only rely on Joint Exhibit 24 and the COA's Exhibit B to establish the current text of the relevant sections of the Charter. We take administrative notice of the official text of the 1922 Charter in McKinney's 1922 Session Laws of New York 1922, vol 1, pp 1965-1699. *See generally State v Green*, 96 NY2d 403, 408, n 2 (2001) (legislative history appropriate subject of judicial notice); *Gessin v Throne-Holst*, 134 AD3d 31, 35 (2d Dept 2015) (notice of Session Laws not dependent on motion, as tribunals "already 'required, without request, to take judicial notice of the Constitution, the public statutes and the common law of the forum'") (quoting Jerome Prince, *Richardson on Evidence* § 2-301 at 46-47 (Farrell, ed.) (11th Ed 1995).
[33] Id, § 44.

provides that "[t]he powers and duties of the commissioner which shall be performed and exercised as herein provided and in accordance with the laws of the state and the ordinances of the city," includes that the commissioner "shall assume and exercise supervision of the police department and make all proper rules for the government and discipline thereof."[34]

Section 48 of the 1922 Charter, entitled "Appointment of Commissioner of Police," provides in pertinent part that:

> The mayor may, with the approval of the council, and when in the opinion of the mayor the growth of the city justifies his act, appoint a commissioner of police who shall have all the powers and assume all the responsibilities of the mayor while acting as commissioner of police as provided in this act."[35]

Section 49 of the 1922 Charter, relied upon by the City, provides for the appointment by the mayor, with the approval of the city council, of a deputy commissioner "during the sickness, absence or other temporary inability of the mayor to perform the duties of his office."[36] The deputy commissioner may exercise all of the powers of the mayor with respect to the police department, "except that the deputy commissioner shall not have the authority to change any general rule or regulation or to

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[34] Id, § 47(a). The COA argues, based on the admittedly confusing legislative history information provided by Jt Ex 24, that this section did not exist in the 1922 Charter, and is a product of the amendment noted at the bottom of the section. This is incorrect. We take administrative notice that the 1922 version of this section, as printed in the Session Laws, is substantially identical to the current version, and that the 1989 amendment by the enactment of Local Law No. 2, § 2, only adds subsection (o), which grants the police commissioner power, consistent with § 209 (m) of the General Municipal Law, to contract with other police departments of other local governments situated within the County of Nassau for mutual assistance. This section has no bearing on the status of discipline as a mandatory or prohibited subject of negotiation.

[35] L. 1922, Ch 635, § 48.

[36] Id, § 49.

make appointments or to dismiss any member of the department."[37]

Under the rubric created by *PBA v PERB*, *Wallkill*, and *Schenectady*, it is clear that the police discipline is a prohibited subject of discipline in Long Beach. Section 47 (a) of the 1922 Charter, a statute passed by the Legislature, commits the "supervision of the police department and mak[ing] all proper rules for the government and discipline thereof" to the City. Moreover, as the City correctly argues, the withholding of the power in § 49 of the Charter to "make appointments or to dismiss any member of the department" from the deputy commissioner implies that the mayor (or commissioner) has such power. This statute predates the Taylor Law and, pursuant to the decisions of the Court of Appeals, the specific grant of authority to the City was not displaced by the Taylor Law's general command regarding collective bargaining. Accordingly, we affirm the ALJ's dismissal of the charge to the extent the COA seeks to enforce the collective bargaining agreement's provisions regarding police discipline. We reverse the ALJ's dismissal of the charge as it relates to the overtime grievance, and find that the City violated §§ 209-a.1 (d) and (e) of the Act by refusing to process the overtime grievance to arbitration.

IT IS, THEREFORE, ORDERED that the City:

1. Process the grievance concerning overtime to arbitration;
2. Restore the status quo by resuming the processing to arbitration of non-disciplinary grievances upon receipt of a demand or request for arbitration on behalf of employees currently represented by the Commanding Officers Association of Long Beach, NY where such grievances are cognizable under the

[37] Id.

collective bargaining agreement between the City of Long Beach and the Patrolmen's Benevolent Association of the City of Long Beach, Inc. that expired in June 2008; and

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

DATED: February 21, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

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 County of Sullivan & Sheriff of Sullivan County, in the unit represented by the Sullivan County Patrolmen's Benevolent Association, that the County will forthwith

1. Process the pending grievance concerning overtime to arbitration; and

2. Restore the status quo by resuming the processing to arbitration of non-disciplinary grievances upon receipt of a demand or request for arbitration on behalf of employees currently represented by the Commanding Officers Association of Long Beach, NY where such grievances are cognizable under the collective bargaining agreement between the City of Long Beach and the Patrolmen's Benevolent Association of the City of Long Beach, Inc. that expired in June 2008.

Dated . . . . . . **By . . . . . .**
On behalf of the **City of Long Beach**

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.

In the Matter of

SULLIVAN COUNTY PATROLMEN'S BENEVOLENT ASSOCIATION,

Charging Party,

CASE NOS. U-33531 & U-33640

- and -

COUNTY OF SULLIVAN & SHERIFF OF SULLIVAN COUNTY,

Respondent.

THE TUTTLE LAW FIRM (JAMES B. TUTTLE of counsel), for Charging Party

ROEMER WALLENS GOLD & MINEAUX LLP (EARL T. REDDING of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the County of Sullivan and Sheriff of Sullivan County, a joint employer (together, County) to a decision and order of an Administrative Law Judge (ALJ). [1] The ALJ found that the County violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally terminated a practice of allowing employees represented by Sullivan County Policemen's Benevolent Association (Association) to elect to earn compensatory time in lieu of overtime wages.[2]

EXCEPTIONS

In its exceptions, the County argues that the ALJ erred by finding that the Association established that a past practice existed whereby bargaining-unit members

[1] 49 PERB ¶ 4535 (2016).

[2] The ALJ dismissed an allegation that the County also violated § 209-a.1 (d) of the Act by unilaterally ceasing a practice of applying unit members' charges to compensatory time towards hours worked for purposes of calculating overtime. No party excepted to this dismissal. As a result, any exceptions to the ALJ's finding have been waived. Rules of Procedure § 213.2 (b) (4); *see, eg*, *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) (citing cases).

were allowed to earn compensatory time in lieu of overtime wages. Assuming that such a practice existed, the County argues that ending the practice did not violate the Act because it satisfied its duty to negotiate over the issue and that it was simply reverting to the terms of the parties' negotiated agreement. Finally, assuming that County's actions did violate the Act, the County argues that a make-whole remedy is inappropriate because there is no showing that any employees lost wages or benefits as a result of the change.

Based on our review of the record and consideration of the parties' arguments, we reverse the decision of the ALJ.

FACTS

The Association called as its only witness Edward Clouse, a Sergeant who has been employed by the County Sheriff's Department for more than 19 years. Clouse testified that "compensatory time" is earned by working overtime–that is, more than 80 hours in a two-week pay period–and can later be charged as compensatory time off from work. Rather than being earned at a straight rate, however, compensatory time and overtime wages are both earned at one and a half times the amount of time worked.[3] Clouse testified that when he began working at the Department in 1995, unit members were not earning compensatory time.[4]

Pursuant to a Memorandum of Agreement (MOA) signed in 1998, the parties agreed to add a new section to their collective-bargaining agreement (CBA) which established an "overtime bank" for each unit member.[5] The new provision, Section 407, read, in relevant part:

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[3] Tr, at p. 38.
[4] Tr, at p. 26.
[5] Joint Ex 13.

> Prior to May 1st for the calendar year 1998, and prior to January 1st of each year thereafter, employees may elect in writing to have all overtime worked during the ensuing year placed in an overtime bank, which bank shall be paid in full to the employees in the last payroll period in June and in the last payroll period in December. An employee may withdraw money or an equivalent amount of time at any time during the year upon written notification to and approval by the Sheriff.[6]

Clouse testified that Section 407 was a "pilot program" that "never got legs" and never worked.[7] In a subsequent, undated MOA, the parties agreed to "Delete Section 407. . . ."[8] Clouse signed the MOA as Association President and testified that it was likely executed in late 2001.[9]

Clouse testified that at the time the MOA deleting Section 407 was signed, the "intention and purpose" of the County was to eliminate the ability of unit members to earn compensatory time.[10] He further testified, however, that after the overtime bank program was ended, a "time owed" practice "continued within our department."[11] Under this practice, the equivalent of compensatory time was earned by unit members, monitored by a payroll clerk as "time owed," but not listed on employee paychecks or pay stubs.[12] "Time owed" continued to be earned and monitored in this way for several years, up until 2005 or 2006, when compensatory time began to be identified on unit members' pay stubs.[13]

There was no difference between the "time owed" system and the "compensatory time" system other than the fact that time owed was not reflected on unit members'

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[6] *Id*.
[7] Tr, at pp. 26-27.
[8] Joint Ex 14.
[9] Tr, at p. 28. The County does not dispute Clouse's dating of the MOA to 2001.
[10] Tr, at p. 43.
[11] *Id.*
[12] *Id.*
[13] Tr, at p. 30.

paychecks or pay stubs, while compensatory time was.[14] This system continued until 2011 – approximately 13 years after the contractual right to compensatory time was terminated.

Blake Muthig, the Chief of Patrol who is responsible for overseeing operations of the Sheriff's Patrol Division, testified that he learned that unit members were accruing and using compensatory time when he began working for the County in 2011, but that he "put an end to it" [15] when he issued a memorandum on April 9, 2014.[16] The memorandum indicated that "[a]ll overtime worked shall be compensated as overtime. Compensatory Time is no longer permitted to be earned or accrued and will not be approved."[17] Since issuance of Muthig's memorandum, unit members have not been allowed to earn compensatory time at the time and a half rate in lieu of cash payment for overtime.

The parties introduced correspondence related to a grievance filed by the Association in 2010.[18] The grievance alleged that the County violated Section 407 of the parties' agreement by failing to honor a unit employee's compensation time payout. The County denied the grievance, finding no contractual basis for such a payment and noting that Section 407 had been deleted from the agreement.[19]

The parties introduced the then-current CBA between the County and the Association dated January 1, 2010—December 31, 2017.[20] Article IV of that CBA, "Work Year, Work Day, Work Week, and Overtime," includes § 402, "Overtime," which

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[14] Tr, at p. 32.
[15] Tr, at p. 50.
[16] Joint Ex 6.
[17] *Id.*
[18] Joint Ex 15.
[19] *Id*.
[20] According to the County, this CBA was ratified but not fully executed. County Brief in Support of Exs, at 4.

provides as follows:

> (a) Except as provided in Section 401, all employees shall be compensated at time and one-half for all hours in excess of forty (40) hours per week. All employees shall receive straight time pay for all hours up to forty (40) per week.
>
> (b) The Employer shall make a good faith effort to pay for overtime on the date of payment of issuance of the payroll check in the payroll period next succeeding the payroll period during which such overtime was earned.[21]

Other sections within Article IV address overtime. Section 401(b) provides that any employee who is required to work more than 261 days in a year (or more than 262 days in a leap year), "shall be paid compensation at overtime rates as provided in Section 402."[22] Section 403 credits vacation, personal leave, sick leave[,] and holidays" as "time worked for the computation of overtime," with the proviso that "the hours off on such day shall not be deemed overtime when combined with hours worked during the days next succeeding such day off."[23]

The CBA contains no definition of "compensation." However, Article III, "Compensation," consists of seven sections, providing for the salary scale,[24] "other payments,"[25] a salary differential for detectives,[26] payments for employees who acquire additional educational degrees approved by the Employer,[27] the salary received upon promotion,[28] a $1,000 stipend for a certified firearms instructor and a certified teletype

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[21] Joint Ex 2, § 402.
[22] Joint Ex 2, § 401 (b).
[23] Joint Ex 2, § 403, referencing *Id* § 1303 (b), to determine the employee's actual holiday.
[24] Jt Ex 2, § 301.
[25] *Id*, § 302 (including the abolition of longevity payments, but including previously accrued longevity as part of the base pay of employees).
[26] *Id*, § 303.
[27] *Id*, § 304.
[28] Jt Ex 2, § 305.

operator, [29] and the payment by the County of expenses for the care and upkeep of any dogs deployed to the K-9 unit.[30]

DISCUSSION

It is well established that "the issue of election by a bargaining unit member of compensatory time off in lieu of overtime compensation is a mandatory subject of negotiation," and thus could give rise to a past practice.[31] In order to establish an enforceable past practice, a charging party must demonstrate that the practice at issue was unequivocal and continued uninterrupted for a period of time sufficient under the circumstances to give rise to a reasonable expectation among the affected unit members that the practice would continue.[32]

We agree with the ALJ that the Association has carried its burden of proof in demonstrating what would normally constitute an enforceable past practice in the circumstances here. First, Clouse's unrefuted testimony and the documentary evidence show that unit members could elect to earn compensatory time in lieu of overtime wages continuously from 1998, when the "pilot program" was implemented, until 2014, when the County unilaterally ended the practice. Although the practice had its origin in Section 407 of the 1998 MOA, it continued as a non-contractual practice long after Section 407 was deleted from the agreement.

Second, in its exceptions, the County obliquely suggests that the Sheriff and/or the County did not know of the practice of allowing unit members to earn compensatory

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[29] *Id*, § 306.
[30] *Id*, § 307. Section 307 allows the dog's handler to purchase the dog for $1 should the Sheriff retire the dog.
[31] *Village of Mamaroneck*, 22 PERB ¶ 3029, 3072 (1989).
[32] *Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012, 3046-3047 (2007), *confd sub nom Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 95 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *confd*, 21 NY3d 255, 46 PERB ¶7008 (2013). *See also State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3020 (2017).

time in lieu of overtime wages.[33] However, the extended period of the practice alone constitutes circumstantial evidence sufficient to establish prima facie proof of the employer's knowledge.[34] Moreover, while the payroll clerk informally tracked hours initially, in 2005 or 2006, the practice changed so that compensatory hours appeared on unit members' paystubs and were thus processed and tracked directly by the County. The Sheriff also testified that he learned of the practice when he was hired in 2011, yet he took no action to end the practice until 2014. Under these circumstances, the County cannot plausibly claim that it lacked knowledge of the practice.

Third, the County points to the 2010 grievance to argue that it did not condone the practice of unit members earning compensatory time. We reject this argument. The issue in the 2010 grievance was whether an employee could cash in compensatory time, not the propriety of a unit member electing to *earn* compensatory time. That is, while the County took the position that there was no contractual basis for allowing unit members to cash in compensatory time, it did not take the position that unit members were not allowed to earn compensatory time. Thus, the 2010 grievance does not apply to the issue before us.

Accordingly, we find that there existed a cognizable past practice by which unit employees could elect to receive overtime compensation in either compensatory time or cash wages.

However, we reach a different result as to the County's arguments that it satisfied its duty to negotiate over unit members' ability to earn compensatory time and was simply reverting to the terms of the parties' negotiated agreement. Duty satisfaction, of which contract reversion is a particular form, can be found where a party points to

[33] *See* County's Brief in Support of Exc, at 5-7, 9.
[34] *Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012, at 3047.

"contractual provisions that either expressly or implicitly demonstrate that the parties had reached accord on the specific subject" at issue, and establish a "basis for finding that the specific subject had been "negotiated to fruition."[35] We note, as we have consistently done, that "prior Board decisions interpreting other contract language [are] generally not probative to determining a duty satisfaction, contract reversion or waiver defense in a subsequent case involving different parties and contracts."[36]

When an employer and employee organization have reached an agreement with respect to a specific subject following negotiations, a party may unilaterally end an inconsistent past practice, without violating the Act, by reverting to the terms of the negotiated provision of the agreement.[37] The burden "rests with the respondent to prove a contract reversion defense through negotiated terms that are reasonably clear on the specific subject at issue."[38] If an agreement is reasonably clear but susceptible to more than one interpretation, extrinsic evidence, such as negotiation history and/or a past practice, is admissible to determine the intent of the parties.[39]

As this standard strongly implies, contract reversion does not require an explicit repudiation of the past practice in the contract itself.[40] Such an explicit repudiation would, of course, eliminate ambiguity, but the Board's cases have not raised the

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[35] *State of New York (OMH-Rochester Psy Cent)*, 50 PERB ¶ 3032, 3129-3130 (2017); *County of Nassau*, 48 PERB ¶ 3014, 3051 (2015); *see generally Orchard Park Central School District*, 47 PERB ¶ 3029, 3089 (2014); *New York City Transit Auth*, 41 PERB ¶ 3014, 3076 (2008).
[36] *State of New York (SUNY Buffalo)*, 50 PERB ¶ 3001, 3004 (2017), quoting *County of Nassau*, 48 PERB ¶ 3014, 3051 (2015).
[37] *City of Watertown*, 47 PERB ¶ 3015, 3041 (2014), quoting *Springs Union Free Sch Dist*, 45 PERB ¶ 3040, 3102 (2012) (footnotes omitted). *See also Shelter Island Union Free Sch Dist*, 45 PERB ¶ 3032, 3075-3076 (2012); *New York City Transit Auth*, 41 PERB ¶ 3014, 3076 (2008).
[38] *Id.*
[39] *Id*.
[40] *See, eg, City of Albany*, 41 PERB ¶ 3019, 3091 (2008).

standard beyond a finding that the contractual provision be reasonably clear on the specific subject at issue. Thus, where a contractual provision, or interlocking contractual provisions, evidence that the parties have comprehensively negotiated a subject, the employer may revert to the contract and eliminate an inconsistent past practice on the same subject.[41] Again, it bears noting that this analysis is completely consistent with our analysis in duty satisfaction cases, as contract reversion is merely a specific application of that principle to particular circumstances.[42]

Such was the case in *Springs Union Free School District*, which involved a past practice, lasting at least five years, where employees who chose not to attend an annual staff luncheon were released in the mid-morning for the workday without charging their leave balances.[43] The Board found contract reversion based on two contractual provisions, one setting out the workday schedules, including start and end times, as well as breaks, and the other setting forth the applicable provisions for excused absences including sick leave, personal leave, bereavement leave, and child care leave.[44]

The collective bargaining agreement at issue here, like that in *Springs Union Free School District*, and, for that matter, like that in *State of New York (Racing & Wagering Board)*, addresses overtime and compensation for overtime in specific and comprehensive terms. Section 402 (a) provides that overtime "shall be compensated at time and one-half for all hours in excess of forty (40) hours per week," and is

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[41] *Springs Union Free Sch Dist*, 45 PERB ¶ 3040, at 3102; *see also State of New York-Unified Court System*, 26 PERB ¶ 3013, at 3025 (1993).
[42] *See, eg, State of New York (Racing & Wagering Bd)*, 45 PERB ¶ 3041 (2012), *affd sub nom Kent v Lefkowitz*, 46 PERB ¶ 7006 (Sup Ct Albany County 2013), *revd other grounds*, 119 AD3d 1208, 47 PERB ¶ 7003 (3d Dept 2014), *confd, Kent v Lefkowitz*, 27 NY3d 499, 506, 49 PERB ¶ 7005 (2016); *State of New York (SUNY Buffalo)*, 50 PERB ¶ 3001, 3004 (2017).
[43] *Id* at 3099.
[44] *Id* at 3102; *see also Village of Mt. Kisco*, 43 PERB ¶ 3029 (2010).

immediately followed by § 402 (b)'s express provision that "[t]he Employer shall make a good faith effort to pay for overtime on the date of payment of issuance of the payroll check in the payroll period next succeeding the payroll period during which such overtime was earned." Likewise, § 401 (b) provides that any employee who is required to work more than 261 days in a year (or more than 262 days in a leap year), "shall be *paid compensation at overtime rates* as provided in Section 402." Section 403 credits vacation, personal leave, sick leave, and holidays as "time worked for the computation of overtime," but does not allow the hours off on such days to be deemed overtime when combined with hours worked during the days next succeeding such day off. Moreover, while the CBA contains no express definition of "compensation," the entirety of Article III, entitled "Compensation," addresses monies paid to or on behalf of employees. Nowhere in Article III, or anywhere else in the CBA, is compensatory time mentioned.

We find that these provisions, taken as a whole, reflect that the parties negotiated comprehensively as to overtime, agreeing that overtime was to be exclusively compensated in monetary remuneration, thereby "implicitly demonstrat[ing] that the parties had reached accord" precluding the election by a bargaining unit member of compensatory time off in lieu of overtime compensation.[45]

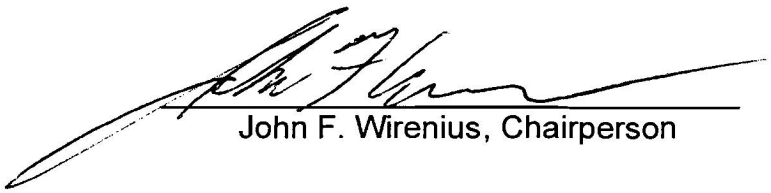
Were we to find the contractual provisions at issue ambiguous, the resort to parol evidence, particularly the bargaining history between the parties, strengthens our conclusion. Clouse unequivocally testified, and the documentary evidence establishes, that compensatory time was first provided and then terminated by the parties' entering

[45] *Kent v Lefkowitz*, 27 NY3d 499, at 506; s*ee also State of New York (Racing & Wagering Bd)*, 45 PERB ¶ 3041, at 3106-3107; *State of New York (SUNY Buffalo)*, 50 PERB ¶ 3001, at 3004.

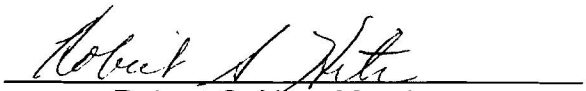
into written agreements. His testimony, and the documents, would not in and of themselves negate the creation of a past practice, but they do corroborate that the parties' intent was to fully embody their agreement as to overtime in a comprehensive writing.

Accordingly, we reverse the ALJ's decision, and find that the charge herein must be, and hereby is, dismissed.

DATED: February 21, 2018
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

51 PERB ¶3003 **STATE OF NEW YORK**
B/R 50-4510 **PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

CHURCHVILLE-CHILI PROFESSIONAL ASSOCIATION, LOCAL #5021,

Charging Party, **CASE NO. U-34202**

- and -

CHURCHVILLE-CHILI CENTRAL SCHOOL DISTRICT,

Respondent.

NANETTE RODGERS, LABOR RELATIONS SPECIALIST, for Charging Party

LYNDA M. VANCOSKE, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Churchville-Chili Central School District (District) to a decision of an Administrative Law Judge (ALJ), finding that that the District violated §§ 209-a.1 (a), (b), and (c) of the Public Employees' Fair Employment Act (Act).[1] The ALJ found that the District violated the Act by issuing a "Complaint Investigation Memo" and a "Counseling Memo" to Cynthia Skirment, President of the Churchville-Chili Professional Association, Local #5021 (Association), reprimanding Skirment for the manner in which she spoke to an Association member.

EXCEPTIONS

The District filed four exceptions. The District argues that it did not violate the Act by issuing the "Complaint Investigation Memo" and "Counseling Memo" to Skirment because: (1) Skirment was not engaged in protected activity when she communicated

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[1] 50 PERB ¶ 4510 (2017).

with the Association member; (2) the District was motivated by a legitimate business reason when it issued the memos to Skirment; and (3) the memos issued to Skirment did not constitute discipline. The District's fourth exception argues that the ALJ committed procedural error by holding a hearing in this matter.

The Association supports the decision of the ALJ and contends that no basis has been demonstrated for reversal.

Based on our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions.

Skirment has been employed with the District for over 25 years and currently holds the position of Computer Support Assistant at the District's Fairbanks Road Elementary School. She is also the Association's President; a position she has held since 2010. Karen Candelaria was employed by the District from June 28, 2013 to November 26, 2015, in the job title of Principal Secretary, Office Clerk II, on a provisional basis at the District's main office. Candelaria's employment with the District ended due to her inability to pass the Office Clerk II civil service exam. While employed by the District, Candelaria was a member of the Association.

On or about May 15, 2014, Skirment received an email from Candelaria, advising Skirment that she had recently taken a civil service test and asking if, "under the union contract," she would get a raise if she passed the test.[2] Candelaria sent another email to Skirment on or about August 11, 2014, advising her that she had recently failed the

[2] Charging Party's Ex 1.

civil service examination applicable to her official title of Principal Secretary, Office Clerk II. In relevant part, Candelaria asked Skirment whether or not it would be possible, under "our contract," to become permanent in that title by taking and passing an upcoming Office Clerk III civil service test.[3]

The parties dispute whether Skirment responded to these emails. Skirment testified that she responded to Candelaria's queries by telephone within a few days.[4] Candelaria's testimony, though not entirely consistent about the number of communications with Skirment, suggests that she never received an answer to the questions she posed in her emails.[5] This discrepancy, however, is not central to the case. The main dispute here concerns a telephone exchange between Skirment and Candelaria on September 4, 2014.

The parties dispute what occurred during the September 4 conversation. According to Skirment, she called Candelaria to follow up on their earlier conversations.[6] She advised Candelaria to contact the District's human resources department for further guidance on her queries.[7] According to Skirment, their conversation ended on a pleasant note.[8]

Candelaria described the September 4 conversation very differently, testifying that she and Skirment "just started talking about me not passing the test" and that Skirment stated that "I wasn't supposed to be in that position any longer and why was I still there" and "[s]omething to the effect that I should have been walked out already and

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[3] Charging Party's Ex 2.
[4] Tr, at 28, 34.
[5] *See* 50 PERB ¶ 4510, at 4532 (ALJ's analysis of Candelaria's testimony), and Tr, at 153-154, where Candelaria testified that she did not recall ever receiving answers to her questions.
[6] Tr, at 38.
[7] Tr, at 39.
[8] *Id*.

that I shouldn't trust HR."[9] Candelaria testified that she found Skirment's comments to be extremely upsetting.[10] Thereafter, Candelaria told one of her co-workers, June Mead, about what had occurred. Mead testified that somewhere in the time-frame of August or September of 2014, Candelaria had called her and "was upset that she failed the test."[11] She further indicated that during that same time-frame, Candelaria told her that Skirment "kept calling her . . . wondering when she was going to leave the position or if they told her when her last day was going to be."[12] Mead testified that she advised Candelaria to inform the District's human resources department about what had occurred.

On September 5, 2014 Candelaria called Larry Vito, the District's Assistant Superintendent of Human Resources, to lodge a complaint regarding the September 4 call with Skirment. According to Vito, Candelaria complained about being "harassed" by Skirment "specifically related to her position" in a September 4, 2014 telephone conversation, during which Skirment allegedly asked Candelaria "why are you still there?" and then made reference to another employee who had been "walked out" previously for not passing a civil service test.[13]

The District subsequently assigned Allison Marley, a Labor Relations Specialist employed with Monroe 2 – Orleans BOCES, to conduct an investigation of Candelaria's complaint. Marley conducted interviews with Candelaria, Skirment, Mead, and Joyce Yacono, an employee in the District's human resources department. Marley testified that in assessing the situation, "based on all the interviews . . . [she] found Candelaria

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[9] Tr, at 126.
[10] *Id*.
[11] Tr, at 58.
[12] Tr, at 59.
[13] Tr, at 196.

to be more credible than Skirment"[14] and therefore recommended the issuance of a counseling memo to Skirment, which was intended to serve as a "corrective measure."[15]

On or about January 14, 2015, Vito issued two memos to Skirment which read as follows:

> **Complaint Investigation Memo**
>
> The purpose of this memo is to summarize the results of an investigation conducted in response to a complaint filed with the District, against you, on or about September 5, 2014. The District conducted a thorough investigation, performing multiple interviews of four District employees as well as yourself. The interviews were concluded on October 15, 2014.
>
> The investigation concluded that although you did not subject your co-workers to a hostile work environment under a legal analysis, you did subject your co-worker to a categorically hostile and intimidating work environment that was both unprofessional and inappropriate. The investigation found that you did make a comment to the Middle School Executive Principal's Secretary to the effect "are you still here?" and then told the Secretary not to trust the District Administration or Human Resources Department with regard to the secretary's Civil Service status. As a result of the investigation, you will receive a counseling memorandum regarding appropriate work place behaviors.[16]
>
> **Counseling Memo**
>
> On September 4, 2014 in a telephone conversation(s) [sic] you had an interaction with the Middle School Executive Principal Secretary, and made remarks to the effect was she still there [sic]. There was an ongoing Civil Service issue with this employee that potentially threatened the removal from her position. You also made a comment to the effect to distrust District Office and Human Resources in advisement of those matters [sic].
>
> The comments made to the secretary were inappropriate and disparaging. You admitted in the investigation that you do not know and understand Civil Service law. I expect as a result that you do not give out or provide advisement of such information. Additionally, your manner of delivering the "information" to the secretary was abrasive and offensive.

[14] Tr, at 174.
[15] Tr, at 176.
[16] Joint Ex1.

> The comments you made violate the District's core belief to treat staff with respect, dignity and honesty. Further, your comments toward the secretary do not foster a welcoming and nurturing environment that the District strives to create. You have engaged in similar behavior in the past as detailed in counseling memos dated December 10, 2013 and January 28, 2011. Therefore, if there is a similar reoccurrence of this behavior in the future, the District will pursue disciplinary action.[17]

Skirment denied the material allegations contained within each of the above referenced memos, including those relating to her alleged comments to Candelaria, specifically; "are you still there?" or telling Candelaria "to distrust [the] District Office and Human Resources in advisement of [related civil service] matters."[18]

DISCUSSION

We first address the District's argument that the ALJ committed procedural error by holding a hearing in this matter. In support of this exception, the District argues that the Association's offer of proof "failed to show any indication" that the District violated the Act.[19]

The charge and offer of proof alleged that Skirment's phone call with Candelaria constituted protected activity because Skirment was acting in her role as Union president and that the District issued an official reprimand to Skirment because of this activity.[20] These facts, if proven, would be sufficient to prove a violation of the Act. Moreover, Skirment denied the underlying facts as asserted by Candelaria, thus drawing into question the reasonableness of the District's basis to believe the events upon which the memoranda were founded. As a result, we find that the ALJ did not abuse his discretion in holding a hearing in this matter.

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[17] Joint Ex 2.
[18] Joint Ex 2.
[19] Memo of Law in Support of Exceptions, at 23.
[20] ALJ Ex 4.

We now move to the substantive merits of the ALJ's findings and the District's exceptions.

It is well established that "consultation with a union representative about terms and conditions of employment falls within the Act's protection."[21] A union official's right to give advice to unit members "as to matters affecting them as employees"[22] is protected by the Act, and "[t]he reprimand of an employee because, as a union official, he advises a fellow employee as to what he believes his rights to be constitutes interference with a protected right and a violation of § 209-a.1 (a)."[23]

We agree with the ALJ that Skirment was, at all relevant times, acting in her capacity as Association president and was engaged in protected activity when she spoke with Candelaria. Skirment's telephone call to Candelaria was prompted by Candelaria's emails requesting guidance on her rights under the contract, specifically

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[21] *Cayuga-Onondaga BOCES*, 32 PERB ¶ 3079, 3186 (1999); *see also Binghamton City Sch Dist*, 22 PERB ¶ 3034, 3080 (affirming ALJ's finding that generally "discussions between the president of an employee organization and unit members concerning events which affect terms and conditions of employment are protected by the Act") (1989); *Comsewogue Union Free Sch Dist*, 15 PERB ¶ 3018 (1982); *City of Newburgh*, 11 PERB ¶ 3108, 3176 (1978), *confd sub nom City of Newburgh v Newman,* 70 AD2d 362, 12 PERB ¶ 7020 (3d Dept 1979).

The District argues that, to be protected, activity must stem from the collectively-negotiated agreement, be related to a pending claim, or have been part of a symbolic campaign against the employer for allegedly failing to comply with the employer's policy. Memo of Law in Support of Exceptions, at 8. This artificially restricted vision of protected activity finds no support in our decisions, or in the policies of the Act. As the Board has made clear, whether employee activities are protected under the Act requires an evaluation of the totality of all relevant circumstances to determine simply whether the conduct has "some relationship with forming, joining, or participating in an employee organization." *See County of Tioga*, 44 PERB ¶ 3016, 3061 (2011); *Village of Scotia*, 29 PERB ¶ 3071 (1996). Indeed, *Cayuga-Onodaga BOCES* expressly deemed protected just the kind of consultation and seeking of advice regarding workplace issues as at issue here, in a context outside of the collective bargaining agreement, a prospective charge, or a symbolic campaign against the employer. 32 PERB ¶ 3079, at 3186.

[22] *City of Newburgh*, 11 PERB ¶ 3108, at 3176.

[23] *Comsewogue Union Free Sch Dist*, 15 PERB ¶ 3018, at 3030; *Cayuga-Onondaga BOCES*, 32 PERB ¶ 3079, at 3186.

whether Candelaria would get a raise "under the contract" if she passed the civil service test and whether it would be possible, under "our contract," to become permanent in her title by taking and passing a different civil service test.[24] These queries were clearly addressed to Skirment in her role as Association president, and Skirment's responses were also clearly given in the same role.

We further find that the District's conduct–questioning and counseling a union president about private internal union communications–was inherently destructive of Skirment's § 202 rights. As the Board held in *City of Newburgh*, invading the confidentiality of internal union communications "tends to inhibit the employees from seeking the advice of their union representatives as to matters affecting their interests and similarly to deter the representatives from proffering advice, if sought."[25] That is, "questioning by responsible representatives of an employer as to private internal union affairs . . . interferes with the full measure of the protected right of organization and representation accorded by the Taylor Law."[26]

The fact that one participant in the conversation (Candelaria) complained to the District about Skirment's conduct does not change our analysis. As discussed above, Skirment was acting in her role as Association president, not as an employee or agent of the District. As a result, any misconduct by Skirment did not occur in the course of her employment or job duties, and the District had no authority to dictate to Skirment how she should conduct herself in her capacity as union president. Absent a nexus to her role as an employee of the District, the District has no right to interfere with the

[24] Charging Party Ex 1 and Ex 2.
[25] 11 PERB ¶ 3108, at 3176.
[26] *Id.*

behavior of the president of an employee organization acting in the latter capacity.[27]

As in *City of Newburgh*, we find that the District's conduct inherently undermined and interfered with Skirment's ability to fulfill her representational duties and was a per se violation of the Act, regardless of the District's motive.[28] Thus, even if the District issued the Counseling Memo to Skirment in furtherance of its concern for maintaining civility in interactions among coworkers, its conduct nevertheless violated the Act. Because the District's conduct was inherently destructive of § 202 rights, a rebuttable presumption has been established that the District's conduct was undertaken for the purpose of depriving Skirment of her § 202 rights, and the burden shifts to the District to "destroy the presumption by sufficient proof to the contrary."[29]

We note that the ALJ found Skirment to be a more credible witness than Candelaria and that he credited Skirment's account of the September 4 conversation. While we see no reason to disturb this demeanor-based finding, we also find no evidence that the District did not believe Candelaria's contrary account when it conducted its investigation. As a result, we shall assume, for purposes of deciding the exceptions, that the District reasonably believed Skirment made comments "to the effect" of "are you [Candelaria] still here?" and not to trust the District Administration or Human Resources Department with respect to Candelaria's Civil Service status, as claimed by the District in the "Complaint Investigation Memo" and "Counseling Memo"

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[27] *Cf State of New York (Dept of Health and Roswell Memorial Institute)*, 26 PERB ¶ 3072, 3136 (1993).
[28] 11 PERB ¶ 3108, at 3176. *See also UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *Town of Hempstead*, 19 PERB ¶ 3022 (1986).
[29] *Greenburgh #11 Union Free Sch Dist*, 33 PERB ¶ 3018, 3048-3049 (2000).

issued to Skirment.[30]

Even assuming that Skirment made these remarks, we find that the District has not produced evidence sufficient to rebut the presumption that it acted to deprive Skirment of her § 202 rights.[31]

Statements made by an employee engaged in protected activity, even if inaccurate, do not lose the protection of the Act unless the statements "indicate an intent to falsify or maliciously injure the respondent."[32] There is no evidence whatsoever in the record that Skirment's statements were made with an intent to falsify or maliciously injure the District. Skirment's comments were made in a private setting to one other employee who was a member of the bargaining unit. While the comments may have been insensitive, they were not so far beyond the pale as to lose the protection of the Act.[33] Our case law "clearly emphasizes the breadth of protection afforded by the Act to employee speech and the expression of opinion regarding employment issues."[34] Thus, even assuming that the District could legitimately discipline or subject Skirment to other adverse personnel action on the basis of

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[30] Joint Ex 1 and 2.

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

[32] *Plainedge Public Schools*, 13 PERB ¶ 3037, 3056 (1980) (quoting *Walls Mfg Co v NLRB*, 321 F2d 753 (DC Cir 1963), cert den 375 US 923 (1963). *See also State of New York (Division of Parole)*, 41 PERB ¶ 3033 (2008); *Binghamton City Sch Dist*, 22 PERB ¶ 3034 (1989) (finding statement that district official had lied at arbitration hearing protected); *Comsewogue Union Free Sch Dist*, 15 PERB ¶ 3018, at 3030 (finding union representative's recommendation that employee ignore employer directive to be protected).

[33] *Cf Village of Endicott*, 47 PERB ¶ 3017 (2014) (affirming ALJ's finding that conduct lost the protection of the Act due to "the public setting, presence of other employees, and impact on Hrustich's authority as Fire Chief").

[34] *Village of Scotia*, 29 PERB ¶ 3071, 3170 (1995).

We also reject the District's assertion that Skirment's comments were so "disruptive" as to lose the protection of the Act. There is no showing of such "disruption" as would lose Skirment the protection of the Act. *Compare State of New York (Division of Parole)*, 41 PERB ¶ 3033 (2008) *with East Meadow Union Free Sch Dist*, 48 PERB ¶ 3006 (2015).

confidential internal union communications, it could not do so here, where Skirment's comments remained within the protected ambit of the Act.[35]

We next address the District's argument that it did not violate the Act because the "Complaint Investigation Memo" and "Counseling Memo" did not constitute "discipline." In support of this argument, the District cites a number of cases finding that a "counseling memorandum," as opposed to a "formal reprimand," is not sufficient to trigger the hearing requirements of § 3020-a of the Education Law.[36]

We, like the ALJ, find the District's argument unpersuasive. Memos such as the ones at issue here, which do not impose formal discipline, may nevertheless constitute an adverse employment action that is cognizable under the Act, because:

> Matters placed into a permanent personnel file may well have an effect upon an employee's future advancement, outside employment and career prospects. Therefore, the placement into such file of certain documents which directly and materially reference and pertain to an employee's exercise of protected Taylor Law activities, is likely to have a chilling effect upon the employee's exercise of those activities.[37]

Moreover, the "Counseling Memo" states that "if there is a similar reoccurrence of this behavior in the future, the District will pursue disciplinary action,"[38] making it clear that District viewed the "Counseling Memo" as the first step in a progressive disciplinary system.

The cases cited by the District construe the requirements of the Education Law,

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[35] *Id.*
[36] The District cites *Holt v Bd of Educ of the Webutuck Cent Sch Dist*, 52 NY2d 625 (1981); *Tomaka v Evans-Brant Cent Sch Dist,* 107 AD2d 1078 (4th Dept 1985); *CSEA v Southold Union Free Sch Dist,* 204 AD2d 445 (2d Dept 1994); *Heslop v Bd of Educ for Newfield Cent Sch Dist,* 191 AD2d 875 (3d Dept 1993).
[37] *Board of Educ of the City Sch Dist of the City of New York (Barnett)*, 17 PERB ¶ 3046, 3073 (1984).
[38] Joint Ex 2.

and are simply not applicable to cases decided under the Act.[39] As explained above, "[t]he reprimand of an employee because, as a union official, he advises a fellow employee as to what he believes his rights to be constitutes interference with a protected right and a violation of § 209-a.1 (a)."[40]

In sum, we affirm the ALJ's finding that the District violated §§ 209-a.1 (a) and (c) of the Act. With respect to the ALJ's finding that the District's conduct also violated § 209-a.1 (b) of the Act, the District's statement of exceptions and brief in support say that it "takes exception to ALJ O'Donnell's holding that the District violated §§ 209-a.1 (a), (b), and (c)."[41] The District has not, however, stated the grounds for its exception or presented any arguments for finding the ALJ's analysis to be incorrect with respect to the alleged violation of § 209-a.1 (b). We are simply unable to discern any arguably meritorious basis asserted to support the District's challenge to the ALJ's decision. As a result, we find that the exceptions to the ALJ's finding on this allegation are deficient under § 213.2 (b) of our Rules of Procedure. In the absence of any exceptions that conform to our Rules, we affirm the ALJ's finding that the District's conduct violated § 209-a.1 (b) of the Act.

IT IS, THEREFORE, ORDERED that the City shall:

1. Cease and desist interfering with and/or discriminating against Association President Cynthia Skirment for exercising her protected right to communicate with unit employees as part of her representational duties;
2. Immediately rescind and remove the "Complaint Investigation Memo" and the "Counseling Memo," both dated January 14, 2015, from any files, physical or

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[39] *Comsewogue Union Free Sch Dist*, 15 PERB ¶ 3018, at 3030.
[40] *Id*, at 3030.
[41] Statement of Exceptions, at 1; Memo of Law in Support, at 2.

electronic, in the custody or control of the District, its officers, agents or employees, including Skirment's permanent personnel file, and any documents referring thereto; and

3. Sign and post the attached notice at all physical and electronic locations normally used by the District to post communications to unit employees.

DATED: February 21, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

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 Churchville-Chili Central School District (District) in the unit represented by the Churchville-Chili Professional Association, Local #5021 (Association) that the District will forthwith:

1. Stop interfering with and/or discriminating against Association President Cynthia Skirment for exercising her protected right to communicate with unit employees as part of her representational duties; and

2. Immediately rescind and remove the "Complaint Investigation Memo" and the "Counseling Memo," both dated January 14, 2015, from any files, physical or electronic, in the custody or control of the District, its officers, agents, or employees, including Cynthia Skirment's permanent personnel file, and any documents referring thereto.

Dated . . . . . . **By . . . . . .**
on behalf of the **CHURCHVILLE-CHILI CENTRAL SCHOOL DISTRICT**

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.

In the Matter of

AMALGAMATED TRANSIT UNION, LOCAL 1342,
Charging Party,

CASE NO. U-34273

- and -

NIAGARA FRONTIER TRANSIT METRO SYSTEM, INC.,
Respondent.

LAW OFFICES OF TERRY M. SUGRUE & ASSOCIATES, LLP (TERRY M. SUGRUE of counsel), for Charging Party

DAVID M. STATE, GENERAL COUNSEL (WAYNE R. GRADL of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Niagara Frontier Transit Metro System, Inc. (Metro) to a decision of an Administrative Law Judge (ALJ), finding that Metro violated §§ 209-a.1 (a) and (b) of the Public Employees' Fair Employment Act (Act).[1] The ALJ found that certain actions taken by Metro's Labor Relations Specialist, James Thorpe, violated the Act. These actions included Thorpe's advising representatives of the Amalgamated Transit Union, Local 1342 (ATU) as to the duties of Vincent Crehan, ATU President, and ATU's Executive Board under the ATU International Constitution and General Laws, advising ATU Executive Board members that they should not follow the ATU President's directions, and having the ATU President removed from a meeting while requiring other ATU representatives to remain.

EXCEPTIONS

Metro filed four exceptions to the ALJ's decision. Its first exception argues that

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[1] 50 PERB ¶ 4509 (2017).

Thorpe's actions do not violate the Act because his comments constituted "mere talk" which did not include any threats or actual impediments to ATU acting in its representative capacity. Metro's second exception asserts that Thorpe properly had Crehan removed from a meeting because of Crehan's disruptive behavior. Metro's third exception contends that it could properly require ATU representatives to remain in the meeting because those representatives were Metro employees and Metro was paying for the time of employee-attendees. Finally, Metro's fourth exception argues that the ALJ improperly found Thorpe's statements to be inherently coercive. Metro maintains that Thorpe's comments were unaccompanied by any threat or promise of benefit and did not rise to the level of an improper practice.

ATU supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as far as is necessary to address the exceptions.

Crehan has been the President/Business Agent of the ATU unit since 1996. Prior to that, Crehan was employed as a bus operator. He retired from Metro on March 1, 2014. Crehan is also a non-voting member of the NFTA Board of Commissioners. Throughout his tenure as ATU President, Crehan has been ATU's lead negotiator and chief spokesman, and has generally handled all serious disciplinary matters concerning unit employees.

Thorpe, a retired military officer, is a Labor Relations Specialist with Metro and is responsible for resolving labor issues between Metro and the 13 unions which represent

its employees.

March 30, 2015 Disciplinary Hearing

On March 30, 2015,[2] a termination hearing was held for a bus operator represented by the ATU. Present at the meeting were the employee, ATU Executive Board Member Kevin Kline and ATU Vice President Jeffrey Richardson. Present as Metro's representatives were Thorpe, Operations Manager Steve Scime, and Station Manager Mike Pilarski.

At the meeting, Thorpe began explaining the proceeding to the employee and told him that Metro had offered a return to work agreement to allow him to keep his employment, but that Crehan would not accept it. The employee whispered to Kline that this appeared to be a personal dispute between Thorpe and Crehan. Kline stated that Thorpe was holding up a resolution for the employee due to his personal conflict with Crehan. After Thorpe asked the employee to step out of the room, Thorpe slapped his hand on the table, stood up from his chair, pointed at Kline and said "you're f------ right, this is personal."[3] Thorpe then began saying that the ATU Executive Board should not listen to Crehan. As recalled by Richardson, Thorpe told them:

> . . . we shouldn't have to listen to [Crehan] as a union board. You know, you don't have to listen to him. The days of dictatorship with him telling you guys personally what you have to do is over . . . that you are his boss, he is not your boss. He is not the chief negotiator – where does it say that he's the chief negotiator?[4]

Thorpe then handed out highlighted copies of a portion of the ATU International Constitution and General Laws,[5] which he had brought with him to the meeting, and told

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[2] All dates are in 2015 unless otherwise noted.
[3] Tr, at pp. 47-48 (Kline).
[4] Tr, at p. 117 (Richardson).
[5] The ATU International's Constitution and General Laws are distinct from ATU Local 1342's Local Constitution or Bylaws.

Kline and Richardson that the Executive Board has the authority to make a decision on settling the matter, not Crehan. He began reading the highlighted text regarding the duties of the President and the Executive Board, continuing even after the representatives informed him that they knew what was in their union's bylaws and disputed Thorpe's assertions.

Thorpe then stated that if the return to work offer on the table was not acceptable, he would modify it by reducing the "last chance" time frame to one year if the ATU agreed to drop three matters from a list of active grievances and improper practice charges, which he handed to them. Kline and Richardson advised Thorpe that they would have to bring that offer back to the Executive Board and their President, and Thorpe again questioned why they had to take the matter to Crehan, reasserting that the Board had the authority to make the final decision, not Crehan. Thorpe went on to state that all "last chance" return to work agreements from then on would be two year agreements, and that "all return to work agreements and everything else would go through him from now on, and [Crehan] wasn't going to be able to dictate the terms and conditions of agreements with [Metro] anymore."[6] After again explaining that they were not authorized to enter into such an agreement on their own, Richardson made a phone call to Crehan, and thereafter polled the Executive Board by telephone, which agreed to accept Metro's original settlement offer rather than the alternative.

Crehan testified as to his authority as ATU president, explaining that under the bylaws he has authority to sign any agreement, but that he has always taken agreements which would affect more than one person or affect a change in policy back to the Executive Board for consideration and recommendation and, thereafter, to the membership at their next meeting. Kline confirmed that the practice is for all

[6] Tr, at p. 53 (Kline).

agreements go through Crehan as President and Chairman of the Board, and then to the full Executive Board for a vote before Crehan signs them. The Executive Board can, and has, overruled Crehan's decisions. Further, the membership can override the Board's vote, including any decision as to whether to take a matter to arbitration. Richardson further explained that Thorpe's statements regarding the Executive Board's authority to act, based simply on his reading of the ATU International Constitution, were not accurate, since the union operates in accordance with its local bylaws as well and, moreover, that Thorpe refused to acknowledge that Crehan was their chief negotiator and a member of the Executive Board.

April 21, 2015 Meeting

A meeting was scheduled by Metro for April 21, with managers and ATU representatives, on the issue of operator texting while driving. The meeting followed a television news report several months prior where a Metro bus operator who appeared to be texting while driving was filmed. Thorpe had been directed to gather information on texting while driving and research how other transportation authorities were handling the problem.

Metro's Operator Performance Improvement Guidelines, which had been negotiated between Metro and the ATU in 2001, set out defined penalties for listed infractions. Although the guidelines do not specifically list texting, they do address use of a cell phone, i.e., "operating or displaying personal entertainment or communications equipment, except during lunch."[7] That infraction falls within the four-step disciplinary process, and texting had previously been treated as falling into this category. Following the news report and its research on the issue, Metro wanted to specifically address texting within the performance guidelines and to change its classification from a four-

[7] Joint Ex 10.

step to a one or two-step process. According to Louis Giardina, Manager of Labor Relations and Thorpe's supervisor, the purpose of the meeting was not to negotiate the change, but "to advise and discuss" with the union the information it had gathered and what Metro was planning to do.[8] Giardina did not expect the ATU to agree, and anticipated that it would likely file a grievance over the change.

Metro directed certain employees who are ATU representatives - Executive Board members Kline, Muhammed Ali, and Marty Smith, and Steward Demetrious Evans - to attend the meeting. Metro also invited Crehan to the meeting.

Thorpe began the meeting at the scheduled time with a power point presentation which identified the purpose of the meeting as "to discuss the impact of texting while driving and identify the appropriate course of action to discourage such action by our operators."[9] The stated "problem" at issue was "to identify the level of severity for progressive discipline should an operator text and drive."[10] Thorpe's prepared presentation covered the dangers of texting while driving, the media scrutiny, the options that Metro had considered to address the issue, and its "recommendation" to "implement a Two Step Discipline" for the offense.[11] Since texting while driving was unlawful under NYS Vehicle and Traffic Law,[12] Thorpe asserted that it was Metro's position that it could fire an employee on a first offense under the existing disciplinary guidelines, as an illegal action, but was seeking the ATU's agreement to add it to the guidelines as a new two-step discipline. Thorpe's notes for the final slide, which contained simply the word "Decision" with a question mark underneath it, stated "1. Ask the Executive Board members for their opinion. 2. Identify whether or not they seek to

[8] Tr, at p. 292 (Giardina).
[9] Joint Ex 7, p. 2.
[10] *Id*, p. 3.
[11] *Id*, p. 4 and 22.
[12] NYS Motor Vehicle Law §§ 1225-c and d.

concur with the recommendation. 3. Thank everyone for their patience and attention."[13]

Crehan joined the meeting about 10 minutes into the presentation and asked what the purpose of the meeting was and why the ATU representatives were there. Thorpe restarted his presentation from the beginning and initially responded that he wanted Crehan to listen to the presentation and he would answer questions afterward. Crehan continued to ask what the purpose of the meeting was and whether or not it was negotiations, stating that the ATU was not prepared to negotiate at that time. Crehan further stated that if they were trying to negotiate the texting issue, it was already covered under the performance guidelines and a change would have to be negotiated.

Thorpe initially ignored Crehan's questions, then told Crehan to stop interrupting him several times, stating that he was disrupting the meeting with his "childish behavior" and if he did not stop he would have him removed.[14] As Crehan continued to ask if they were there for negotiations, Thorpe responded:

> . . . we might be. . . when we're done with these discussions, we might end up in negotiations on this and you can agree to bring it from a four-step to a two-step, but if you don't want to agree to that then we will infer it as a breaking the law, and fire people immediately under a one-step.[15]

The meeting then deteriorated into an argument, with insults and name-calling by both Crehan and Thorpe. Crehan reminded Thorpe that he was the union's business agent and chief negotiator, and told the other ATU representatives that the issue was negotiable and that they did not have to agree to it in the meeting—that they could fight the change. At that point, Thorpe began challenging Crehan's authority and his position as chief negotiator. He stated that Crehan was not the ATU's "chief negotiator,"[16] and

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[13] Joint Ex 7, p. 23.
[14] Tr, at pp. 66–67 (Kline).
[15] Tr, at p. 154 (Crehan).
[16] Tr, at p. 335 (Antholzner).

told the ATU officers: "you don't have to listen to Crehan. Why are you listening to him?"[17] Crehan responded: "what are you talking about Jimmy? . . . What are you going to do? Pull out our - your - bylaws again from the International?"[18] In response, Thorpe did distribute highlighted portions of the ATU International Constitution and General Laws, which he had with him at the meeting.

When Thorpe started reading the document, Crehan told him that he did not need to explain the union bylaws to them, and stated that he had asked Metro to have him stop that conduct. Thorpe's response to Crehan was: "You are a nobody. You are nothing but an old retired bus driver."[19] Crehan responded: "What are you, Jimmy? What are you Jim-Boy? . . . you are third in command at HR."[20] During this exchange, Crehan asked Thorpe if he could call him "Jimmy," and Thorpe said he could refer to him as "Lieutenant Colonel James Thorpe."[21] Crehan testified that he responded: "well, if you don't want to call me President, . . . then you can call me Commissioner, I guess,"[22] referring to his status on the NFTA Board of Commissioners. Thorpe responded "I don't see you as a commissioner. You are a non-voting member and your term will be expiring soon and you will be off the Board."[23]

Crehan admitted that at that point he was very upset, tore the bylaws in half, and told Thorpe that it was totally inappropriate for him to try to convince the ATU Board members that they did not have to listen to him. Crehan testified that he felt threatened, and asked each of the Board members and the Steward whether they were supporting him, to which they all responded affirmatively. At that point, Thorpe stated: "Why do

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[17] Tr, at p. 155 (Crehan).
[18] *Id.*
[19] Tr, at p. 156 (Crehan); Tr, at p. 72 (Kline).
[20] *Id*.
[21] Tr, at p. 157 (Crehan); Tr, at p. 72 (Kline).
[22] Tr, at p. 157 (Crehan).
[23] *Id*.

you follow him? That's why you lose grievances and PERB charges."[24] Crehan then announced that he was calling his attorney, and proceeded to do so.

Thorpe told Crehan that he could not be on the phone in his meeting, and that if he stayed on the phone he would have him thrown out. Thorpe then called NFTA police dispatch, stating that he needed to have a "retired operator" removed from a meeting. A copy of the NFTA dispatch call made by Thorpe, submitted for the record as a joint exhibit, reads that Thorpe stated to dispatch:

> I need to have a retired operator escorted from the property. I've got Vince Crehan disrupting a meeting and he won't remain silent, and consequently, he's now on the phone, yacking with his lawyer.[25]

Crehan then stated that if he had to leave, all of the ATU representatives were leaving, to which Thorpe said that the others are on work time and are staying. In his testimony, Thorpe recalled saying: "Mr. Crehan, you can leave any time you want. Everybody else is on company time and will remain."[26] When the police officers came to the door Crehan voluntarily left with them, and told the others as he left that they did not have to respond, only listen. A recording of the tape from the NFTA police officers' body cameras recorded Thorpe as saying "I need him out, please…He was obnoxious in front of everybody," to which Crehan responds: "unbelievable… we're willing to negotiate, but not at this time, and they're throwing me out. I'm the chief negotiator. So, you defer all the questions to me, okay?"[27]

As the NFTA police officers escorted Crehan out of the room, Thorpe said to the

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[24] Tr, at p. 72 (Kline); Tr, at p. 155 (Crehan).
[25] Joint Ex 21, p. 1.
[26] Tr, at pp. 476-77 (Thorpe). Thorpe further stated that the ATU representatives were in attendance as "employees, first and foremost, and that's why they were there. They also happen to be members of that union," but then acknowledged that they were invited because they were the ATU representatives. Id.
[27] Joint Ex 22, pp. 1-2.

ATU representatives: “that's why you are getting six zeros,"[28] referring to Metro’s then-current wage proposal in their ongoing contract negotiations.

After Crehan left, Thorpe again asked why they listen to Crehan, stating that he is a retired bus operator who has lost any management support he once had, using obscenities at least three times “when he went on his little tirade.”[29] After Thorpe returned to the subject of texting, Kline asked about the possibility of a three-step process, and Thorpe responded: "you are either going to accept the . . . two-step proposal, or they're going to fire [the employee] for unlawful conduct as a one-stepper."[30] Kline reiterated that they could not negotiate without their full Executive Board, and Board member Smith asked if they could have time to take the issue to their meeting on May 8. Thorpe agreed to hold off until that date.[31]

DISCUSSION

The ALJ found that:

> Thorpe’s actions in attempting to instruct and, in fact, dictate to ATU officers and representatives the manner in which the ATU should be conducting its business and representing its members constitutes intentional, deliberate interference with ATU operations, and interference with ATU unit employees’ representational rights protected under §§ 202 and 203 of the Act.[32]

For the reasons given below, we affirm the ALJ’s finding that Thorpe’s statements and actions in passing out the ATU’s International Constitution on March 30

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[28] Tr, at p. 493 (Ali); Tr, at pp. 74-75 (Kline). “Six zeros” referred to zero wage increases the first six years following the expired agreement.
[29] Tr, at p. 76 (Kline).
[30] Tr, at p. 78 (Kline).
[31] A separate improper practice charge, Case No. U-34515, was filed by the ATU on August 20, 2015, alleging a violation of §§ 209-a.1 (a), (d) and (e) of the Act by Metro’s unilateral change to the performance improvement guidelines. As the parties agreed that the matter was arguably covered by the terms of the parties’ agreement, that charge was conditionally dismissed on January 7, 2016, pending the outcome of the related grievance arbitration proceeding.
[32] 50 PERB ¶ 4509, at 4526.

and April 21 were unlawful attempts to interfere with the internal workings of ATU in violation of § 209-a.1 (b) of the Act. The ALJ thoroughly reviewed Thorpe's actions, and we agree with her conclusion that Thorpe's actions evidenced a clear intention to undermine Crehan's authority both as ATU President and as the ATU's chief negotiator.[33]

Section 209-a.1 (a) defines as an improper practice "for a public employer or its agents deliberately to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section two hundred two for the purpose of depriving them of such rights." As we have recently reaffirmed, it is well established that § 209-a.1 (a) of the Act "broadly and generally prohibits employer actions which interfere with respect to any issue affecting their employment relationship, whether or not that subject embraces a mandatory subject of negotiation."[34]

Section 209-a.1 (b) of the Act similarly declares it improper for a "public employer or its agents deliberately to dominate or interfere with the formation or administration of any employee organization for the purpose of depriving [public employees] of [their rights guaranteed in § 202]."[35] We have long held that the term "interference" in subsection (b) is "designed to prevent a public employer from meddling in the internal affairs of the organization or trying to control it."[36] Moreover, we have also recently reaffirmed that "the prohibition in § 209-a.1 (b) is directed to conduct by a public

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[33] *See id.*
[34] *State of New York (Dept of Corrections and Community Supervision)*, 50 PERB ¶ 3037, 3157 (2017).
[35] Id, quoting *Monroe BOCES No. 1*, 28 PERB ¶ 3068, 3157 (1995).
[36] Id, quoting *County of Rockland (Rockland County Community College)*, 13 PERB ¶ 3089, 3143 (1980).

employer which would compromise the independence of an employee organization that represents or seeks to represent its employees."[37]

Under these well-established principles, we emphasize that the designation of a union's chief negotiator is an internal union matter and that an employer violates § 209-a.1 (b) of the Act by attempting to influence this designation.[38] While a violation of this section does not require a finding of anti-union animus, or specific motive, evidence must be adduced of circumstances in which the employer's actions necessarily have the effect of interfering with fundamental rights.[39] Here we adopt the ALJ's finding ample evidence that such was the case. In particular, we reject Metro's argument that Thorpe's statements were lawful because there were "no threats or actual impediments to the Charging Party acting in accordance with established union procedures." The fact that Thorpe was not successful in his attempts to derail ATU's normal procedures does not make his attempt lawful.[40] As we recently clarified, our cases stating that "an attempt by one party to control the selection of the other party's representative might constitute a violation of the Act" is better understood as establishing that "such an attempt, successful or not, generally *would* constitute a violation."[41]

We also find that Thorpe's statements were in fact coercive, in violation of § 209-a.1 (a) of the Act. An employer violates § 209-a.1 (a) of the Act where its statements are "intended or likely to coerce employees to relinquish rights guaranteed by the Taylor

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[37] Id, quoting *County of Onondaga*, 14 PERB ¶ 3029, 3051 (1981) (editing marks and internal quotation marks omitted).
[38] *See State of New York (Dept of Corrections and Community Supervision)*, 50 PERB ¶ 3037, at 3157.
[39] Id, at 3159 n. 70, citing *Monroe BOCES No. 1*, 28 PERB ¶ 3068, at 3158.
[40] *Greenburgh #11 Union Free Sch Dist*, 33 PERB ¶ 3018, 3049 (2000).
[41] *State of New York (DOCCS)*, 50 PERB ¶ 3037, at 3157.

Law."[42] An employer's representatives "are entitled to express opinions regarding the merits" of the subject at issue "so long as they do not do so in a coercive manner nor subvert the authority of the [Union' s] negotiators."[43] The speaker's subjective intent or the recipient's subjective reaction to the employer's statements is not relevant. The test is a purely objective one, and we examine only whether a reasonable employee would view the statements as threatening or coercive in the context in which the statements are delivered.[44]

We find that a reasonable employee would have viewed Thorpe's statements as both coercive and as meddling in the ATU's internal affairs by subverting Crehan's authority as the ATU's chief negotiator, in the contexts of the individual grievances at issue and also with respect to the terms and conditions of employment for unit employees as a whole. Thorpe explicitly and repeatedly questioned Crehan's status as ATU's lead negotiator and attempted to persuade ATU representatives not to follow Crehan's direction or even consult with Crehan. Moreover, Thorpe also stated on multiple occasions that ATU would receive better treatment if its representatives abandoned their support for Crehan. For example, Thorpe stated that Crehan was the reason "why you lose grievances" and "why you are getting six zeros," thus literally offering employees better treatment if they stopped supporting Crehan.

We reject Metro's argument that Thorpe's actions constituted "mere talk" about Thorpe's personal opinion and that Thorpe's statements were "merely the expression of

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[42] *Buffalo City Sch Dist*, 49 PERB ¶ 3028, 3087 (2016), quoting *City of Albany,* 17 PERB ¶ 3068, 3107 (1984), *confd sub nom Buffalo Teachers' Federation, Inc. v NYS Pub Empl Relations Bd*, 153 AD3d 1643, 50 PERB ¶ 7005 (4th Dept 2017).
[43] *City of Albany*, 17 PERB ¶ 3068, at 3106. *See also Buffalo City Sch Dist*, 49 PERB ¶ 3028, at 3088; *County of Monroe*, 43 PERB ¶ 3025, 3097 (2010), *confd sub nom Monroe Co v NYS Pub Empl Relations Bd*, 85 AD3d 1439 (3d Dept 2011); *Town of Huntington*, 26 PERB ¶ 3073, 3140 (1993).
[44] *Buffalo City Sch Dist*, 49 PERB ¶ 3028, at 3087; *Town of Greenburgh*, 32 PERB ¶ 3025, 3054 (1999).

an opinion by a lower level management representative." Thorpe was responsible for resolving issues between Metro and ATU, among Metro's other unions, and Thorpe settled grievances on a regular basis. In this context, Thorpe's attempt to persuade ATU members to abandon their support of ATU's president take on an even more coercive and ominous tone. Thorpe's statements clearly crossed the line from lawful opinion to an unlawful coercive attempt to subvert Crehan's authority as ATU's president and chief negotiator.

We also agree with the ALJ that Thorpe's actions in having Crehan removed from the April 21 meeting, while requiring other ATU representatives to stay, likewise evidenced an intent to interfere both with the internal workings of ATU as well as employees' exercise of their protected rights.

Initially, we reject Metro's attempt to characterize the April 21 meeting as simply a "presentation on operational issues to pertinent personnel on Company time."[45] The meeting was not open to all Metro employees, but only to employees who were also ATU representatives and Crehan, as ATU President, was specifically invited. It is clear from Thorpe's notes on the presentation and his comments during the meeting that Metro's purpose was not simply to present information on the dangers of texting and driving or even to simply articulate the merits of its position on the proper discipline for drivers caught texting while driving.[46] At a minimum, Thorpe sought a response to Metro's proposal from the ATU representatives. Not only was Metro presenting its proposed solution to the "problem" of the proper discipline to be imposed, but Thorpe stated that if ATU did not agree to its solution (treating the infraction as a two-step discipline), then Metro would implement an alternative, more severe discipline (simply

[45] Metro Brief in Support of Ex, at 10.
[46] There is no allegation that simply requiring ATU representatives to attend the meeting violated the Act and that issue is therefore not before us.

discharging employees on the ground that they allegedly engaged in an unlawful act). Through this threat, Metro was clearly attempting to obtain ATU's acquiescence to its preferred solution.[47] The meeting cannot be characterized as simply a "presentation" on "operational issues," as urged by Metro. Rather, the meeting became an attempt to force ATU to relinquish its right to bargain over changes to terms and conditions of employment, under the threat that Metro would unilaterally impose a less employee-friendly alternative.[48]

In these circumstances, we agree with the ALJ that requiring ATU representatives to stay at the meeting after Crehan's removal violated the Act. Such action clearly interfered with employees' right to be represented by their chosen lead negotiator and spokesperson. Depriving the ATU of their leadership while requiring that ATU Executive Board members express "their opinion" and "whether or not they seek to concur with the recommendation"[49] and threatening that "you are either going to accept the . . . two-step proposal, or they're going to fire [the employee] for unlawful conduct as a one-stepper"[50] necessarily interferes' with employees' §§ 202 and 203 right to be represented by the ATU.

As for Crehan's removal from the meeting, we agree with the ALJ that Crehan's ejection was not justified. It is well-established that the Act protects a broad range of employee speech because "the labor relations process must tolerate robust debate of

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[47] *See* Tr, at 467-469.
[48] *See Buffalo City Sch Dist*, 49 PERB ¶ 3028 (2017), *confd sub nom Buffalo Teachers' Federation, Inc. v NYS Pub Empl Relations Bd*, 153 AD3d 1643, 50 PERB ¶ 7005 (4th Dept 2017).
[49] Joint Ex 7, p. 23.
[50] Kline testimony, Tr, at p. 78.

employment issues, even if occasionally intemperate."[51] Although the meeting deteriorated into an unproductive exchange of personal insults between Crehan and Thorpe, we do not find that Crehan lost the protection of the Act through his conduct. Rather, our review of the record suggests that Thorpe was attempting to deliberately goad Crehan into losing his temper by, for example, refusing to answer Crehan's reasonable questions about the purpose of the meeting and challenging Crehan's authority and position as chief negotiator. When this tactic was successful, Thorpe then seized on the opportunity to deprive ATU of its chief negotiator and spokesperson. Not only that, but, after Crehan was removed, Thorpe continued his attempts to undermine Crehan's authority as ATU president. Thorpe's actions clearly interfered with employees' right to be represented and was also an unlawful attempt to interfere with ATU's internal administration.

In sum, for the reasons given above, we affirm the ALJ's finding that Thorpe's statements and actions on March 30 and April 21, including advising representatives of ATU as to the duties of Crehan and ATU's Executive Board, advising ATU Executive Board members that they should not follow Crehan's directions, and having Crehan removed from a meeting while requiring other ATU representatives to remain, violated §§ 209-a.1 (a) and (b) of the Act.

IT IS, THEREFORE, ORDERED that the City shall:

1. cease and desist from the following:

    a. refusing to recognize the authority of the duly elected ATU President/Business Agent as the ATU's chief negotiator;

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[51] *Village of Scotia*, 29 PERB ¶ 3071, 3170 (1996), *confd and modified as to remedy sub nom Village of Scotia v NYS Public Empl Relations Bd*, 241 AD2d 29, 31 PERB ¶ 7008 (3d Dept 1998). *See also Town of Greenburgh*, 32 PERB ¶ 3025, 3054 (1999); *Binghamton City Sch Dist*, 22 PERB ¶ 3034, 3080 (1989); *Plainedge Pub Sch*, 13 PERB ¶ 3037, 3056 (1980).

b. directing ATU Executive Board Members and Stewards as to their rights and obligations under the ATU Constitution and General Laws;

c. dictating to ATU representatives the manner in which the ATU should be conducting its internal decisions related to the settlement of disciplinary matters and/or negotiations with Metro; and

d. denying the ATU's choice of representative in meetings.

2. sign and post the attached notice at all physical and electronic locations normally used to communicate with employees represented by the ATU.

DATED: February 21, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

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 Niagara Frontier Transit Metro System, Inc. (Metro) represented by the Amalgamated Transit Union, Local 1342 (ATU) that Metro will:

1. not refuse to recognize the authority of the duly elected ATU President/Business Agent as the ATU's chief negotiator;

2. not direct ATU Executive Board Members and Stewards as to their rights and obligations under the ATU Constitution and General Laws;

3. not dictate to ATU representatives the manner in which the ATU should be conducting its internal decisions related to the settlement of disciplinary matters and/or negotiations with Metro; and

4. not deny the ATU's choice of representative in meetings.

Dated . . . . . . **By . . . . . .**
on behalf of **Niagara Frontier Transit Metro System, Inc.**

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.

In the Matter of

HELEN E. WEST,

Charging Party,

CASE NO. U-34933

- and -

UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondent,

- and -

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Employer.

HELEN E. WEST, *pro se*

ADAM S. ROSS, GENERAL COUNSEL (ORIANA VIGLIOTTI of counsel), for Respondent

KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS (KELLIE TERESE WALKER of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Helen E. West to a decision and order of an Administrative Law Judge (ALJ) dismissing her improper practice charge.[1] In her charge, West alleged that the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) violated §§ 209-a.2 (b) and (c) of the Public Employees' Fair Employment Act (Act) when a UFT representative told West that he

[1] 50 PERB ¶ 4567 (2017).

would not assist her with respect to her claim that she was injured on the job while she was employed by the Board of Education of the City School District of the City of New York (District). The ALJ dismissed the alleged violation of § 209-a.2 (b) of the Act because West, as an individual employee, lacks standing to allege such a violation. The ALJ granted the UFT's motion to dismiss the alleged violation of § 209-a.2 (c) of the Act, finding that the UFT had no duty to represent West at the time she filed the charge.

EXCEPTIONS

West excepts to the ALJ's decision and asserts, with little specificity, that her "whole entire case should be reevaluated from the beginning." Neither the UFT nor the District filed a response to West's exceptions.

Based on our review of the record, we affirm the ALJ's decision and dismiss the charge.

FACTS[2]

West was employed by the District as a probationary teacher for the 2008-2009 school year at Public School (PS) 386x. West also taught a "BELL" program at PS 377x during the summer of 2011. The current improper practice charge is the third that West has filed against the District and the UFT. In the prior two cases, the ALJ dismissed the charges, and both decisions were affirmed by the Board.[3]

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[2] These facts are based on West's charge and amended charges and her offer of proof.

[3] The ALJ's decision regarding the first improper practice charge is located at 45 PERB ¶ 4561 (2012). The Board denied West's request for an extension of time to file exceptions at 46 PERB ¶ 3001 (2013). The ALJ's decision regarding the second improper practice charge is located at 46 PERB ¶ 4545 (2013). The Board affirmed the ALJ's decision and found, among other things, that the UFT did not have a continuing duty to represent West with respect to her inquiries made close to three years following the end of her employment with the District. 46 PERB ¶ 3034 (2013).

In the current charge, received by PERB on March 23, 2016, West alleged that she was "submitting this paperwork in an effort to get help in filing this claim for an on the job injury." In a later amendment to the charge, West clarified that she approached the District and the UFT in July and September of 2015 for help with her claim, and that Tom Bennett of the UFT told West on September 22, 2015, that "[h]e was not going to help me."[4] West's charge alleges that she again approached Tom Bennett requesting help on March 29, 2016, and that Bennett again declined to assist her.

DISCUSSION

We affirm the ALJ's ruling dismissing the charge on three separate grounds.

First, the charge is untimely. Section 204.1(a) of our Rules of Procedure (Rules) requires an improper practice charge to be filed within four months of when the charging party knew or reasonably should have known of the conduct that forms the basis for the alleged improper practice.[5] Here, West alleges that the UFT told her it would not assist her in filing a claim for an on-the-job injury on September 22, 2015. In order to be timely, West's charge would need to have been filed, at the latest, by January 22, 2016. Because West's charge was not filed until March 23, 2016, it concerns conduct that occurred outside the four-month filing period set by our Rules. West cannot extend the filing period by repeating a request that has already been refused.[6] Also, the fact that West may have received additional information in March of 2016 associated with her

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[4] Amended charge, received in PERB's Albany Office on April 7, 2016.

[5] *See, eg, District Council 37 (Bacchus)*, 50 PERB ¶ 3013, (2017); *UFT (Davis)*, 50 PERB ¶ 3014 (2017); *New York State Thruway Auth*, 40 PERB ¶ 4533 (2007); *Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072 (1995).

[6] *See CSEA (Metzger)*, 50 PERB ¶ 3026, 3100 (2017); *NYCTA (Rosado)*, 37 PERB ¶ 3036 (2004); *UFT (Paul)*, 23 PERB ¶ 3038, 3077 (1990).

charge does not restart or extend her time for filing an improper practice charge.[7] West did not need this additional information to know that the UFT was not going to assist her.[8]

Second, West has not provided any reasons for us to disturb the ALJ's conclusion that the UFT had no obligation to represent West in March of 2016. West was not a public employee at that time, and, therefore, the UFT owed her no duty of fair representation. As the ALJ correctly found, West was not challenging her severance from employment and did not maintain any connection to her employment, as required by *Westchester County Correction Officers' Benev Assn (Bartolini)*.[9] West did not seek the UFT's assistance with the events giving rise to the current charge until at least 5 years after her employment with the District ended. We agree with the ALJ that this request came too long after West's employment ended to impose any representational obligation on the UFT.[10]

Third, even if the UFT owed some duty of representation to West, the UFT was not required to assist West in filing a claim for her on-the-job injury. The duty of fair representation does not include an obligation by an employee organization to pursue a

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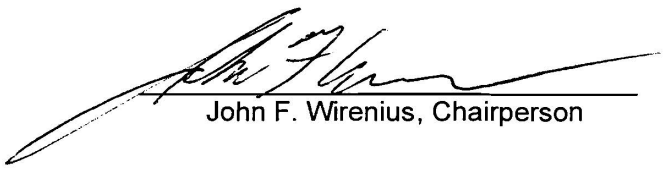
[7] *State of New York (Office of Children and Family Services) (Leone)*, 50 PERB ¶ 3039 (2017); *State of New York (Office of Alcoholism and Substance Abuse Services)*, 32 PERB ¶ 3036 (1999), citing *County of Schoharie*, 30 PERB ¶ 3055 (1997).
[8] *Westchester County Correction Officers' Benev Assn (Bartolini)*, 30 PERB ¶ 3075, 3184 (1997).
[9] 30 PERB ¶ 3075 (1997).
[10] As the Board explained in *Bartolini*, a contrary result would expose unions, and on many occasions employers, to potential liability years after the events in issue took place and years after the departure of employees from the bargaining unit represented by the union. Such a result "is clearly inconsistent with the policies of the Act which favor the prompt initiation and resolution of allegations of statutory impropriety." *Id*, at 3184.

non-contractual legal claim on behalf of a unit member unless that employee organization has represented other unit members in similar proceedings.[11] West has not alleged, and the record does not reflect, that the UFT has represented other unit members in non-contractual administrative proceedings for on-the-job injuries.

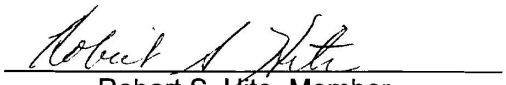
Finally, we decline to reexamine West's prior improper practice charges. Those charges were fully litigated and subjected to the Board's review, as reflected in the Board's decisions, which are now final and binding.[12] No basis for reargument or renewal of those cases has been asserted, and we decline to reopen closed matters absent a compelling reason to do so.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, dismissed in its entirety.

DATED: February 21, 2018
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

[11] *See UFT (Morrell)*, 44 PERB ¶ 3030 (2011); *United Steelworkers (Buchalski)*, 43 PERB ¶ 3002 (2010); *PEF (Hartner)*, 15 PERB ¶ 3066 (1982).
[12] *See, eg, City of Schenectady*, 26 PERB ¶ 3025 (1993).

51 PERB ¶3006 **STATE OF NEW YORK**
B/R 50-4547 **PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

BUFFALO COUNCIL OF SUPERVISORS AND ADMINISTRATORS,

Charging Party, **CASE NO. U-35166**

- and –

BUFFALO CITY SCHOOL DISTRICT,

Respondent.

LIPSITZ GREEN SCIME CAMBRIA LLP (RICHARD D. FURLONG of counsel), for Charging Party

NATHANIEL J. KUZMA, GENERAL COUNSEL (SHAUNA L. STROM of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Buffalo City School District (District) and cross-exceptions filed by the Buffalo Council of Supervisors and Administrators (BCSA) to a decision of an Administrative Law Judge sustaining in part and dismissing in part an improper practice charge filed by the BCSA.[1] In her decision, the ALJ found that the District had committed direct dealing in violation of § 209-a.1 (a) of the Public Employees' Fair Employment Act (Act), but had not interfered with the administration of the BCSA in violation of § 209-a.1 (b) of the Act.

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[1] 50 PERB ¶ 4547 (2017).

EXCEPTIONS

The District's 14 exceptions[2] to the ALJ's decision effectively boil down to three contentions. First, the District contends that the ALJ erred in finding that Carl Paladino, then a member of the Board of Education of the City School District of the City of Buffalo (BOE),[3] engaged in direct dealing by promising that disciplinary charges against a BCSA member would be favorably resolved if the member cooperated in a District investigation into alleged fraud.[4] The District argues that the ALJ erred in finding that Paladino further engaged in direct dealing by threatening the BCSA member with potential criminal indictment if he refused Paladino's offer.[5] Finally, the District claims that the ALJ erred in finding that Paladino's actions were properly imputable to the District.[6]

In its cross-exceptions, the BCSA excepts to the ALJ's finding that the District did not violate § 209-a.1 (b) of the Act when Paladino offered that the District would drop disciplinary charges against a BCSA member if he would cooperate with the District "to take down BCSA's President Crystal Barton and others."[7]

For the reasons given below, we affirm the ALJ's decision.

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[2] Although the District's exceptions are numbered 1 through 15, exception no. 14 simply states that "Excepts to the determination at page 11 that finds that," and abruptly concludes.

[3] Subsequent to the submission of the District's Exceptions and the BCSA's cross-exceptions, Commissioner of Education MaryEllen Elia issued a decision removing Paladino from the Board. *Application of Board of Education of the City School District of the City of Buffalo*, 57 Ed Dept Rep, Decision No. 17,147 (August 17, 2017).

[4] Exception Nos. 2, 3, 4, 5, 7, 10, 11, and 12.

[5] Exception Nos. 2, 5, and 6.

[6] Exception Nos. 1, 7, 8, 9, 10, 11, 13, and 15.

[7] BCSA Cross-Exceptions at 1.

FACTS

Casey Welch-Young (Young) was suspended from his position as principal at East High School in October 2015, and on March 10, 2016 was served with disciplinary charges pursuant to Education Law § 3020-a seeking to terminate his employment. Young was charged with failing to ensure mandated referrals of students for certain services, improperly granting course recovery credit, and conferring diplomas on students who failed to satisfy the graduation criteria. The charges were signed by Superintendent Kriner Cash and approved by unanimous vote of the nine members of the Board of Education (BOE), including Paladino, on March 9, 2016. Notice of each BOE members' individual vote on the four charges against him was included along with Young's copy of the charges.

Young sought representation by the BCSA, which filed a denial and a demand for a hearing on his behalf, in accordance with the parties' agreed upon disciplinary procedure. Those charges were pending throughout the relevant time period, and, indeed, as of the date of the ALJ's decision.

Young testified that he received a voicemail from Paladino, which he returned, leaving a message for Paladino, and a telephone call on Sunday, April 10, 2016, in which Paladino asked if he could stop at Young's home for a few minutes to talk to him. Young agreed, and Paladino arrived shortly thereafter with his teenage daughter. Although Young had guests at his home for dinner at the time, he and Paladino met privately in the living room.

According to Young's testimony, Paladino opened the conversation by stating that "he was not there as a board member, that he was there because [Young] was

going to be indicted," and went on to say "we'll offer you immunity for your charges if . . . you work with us on what's going on in the District."[8] According to Young, Paladino also said a "we know there was cheating going on."[9] Young testified that Paladino "told me I needed to get a criminal attorney, and I needed to have my criminal attorney contact [District General Counsel] Betz right away."[10] When Young denied that any cheating had gone on, Paladino said: "if you can't help us, then I'm [going to] go to the next person. And the first person that comes to us is going to get immunity."[11]

Young further testified that:

> [Paladino] said my career doesn't have to end like this. He's here because I seem like a good guy and he's reaching out to me. I'm earnest. And he—he didn't believe . . . that I saw anything wrong with what I was doing. I explained to [Paladino] that there was no cheating going on at East, there hasn't been any cheating going on at East. [Paladino] then went on to say that there were a group of teachers that were going to testify that I had forced them to . . . forge documents.[12]

According to Young, Paladino said he believed others were involved, naming BCSA President Crystal Barton, who is also Principal at McKinley High School, Carlos Alvarez, Principal at International Preparatory High School, Associate Superintendent David Mauricio, and Chief of Staff Darren Brown. Young further testified that Paladino "wanted me to corroborate that there had been some cheating going on amongst those people and myself. And he repeatedly said that I would be offered immunity for

[8] Tr, at p. 25.
[9] Id.
[10] Tr, at p. 32.
[11] Id.
[12] Tr, at pp. 26-27.

the charges against me."[13] Young testified that Paladino did not differentiate between disciplinary or criminal charges, but rather "just kept [saying] 'charges.' Now, in my mind, you know, my only concern with this debacle that's going on is my—my job, you know, those charges."[14]

Young denied that there had been any fraudulent reporting, and told Paladino that the District office was looking at the wrong set of numbers, and attempted to explain why. According to Young, Paladino responded that they needed someone in the central office who could explain the numbers, *i.e.*, "connect the dots"[15] and, in response, Young offered to come in to the office and assist. Young testified that he thought that if he worked with Paladino, that his "problem goes away,"[16] and "that I'd be in the clear."[17] He stated that "I actually thought . . . for about a week I kind of held on thinking I was [going to] get some sort of call to go downtown and look at some school data."[18] Far from claiming that he had been threatened, Young testified that "it was a very civil, personal conversation. I felt like I had someone looking out for me."[19] After the meeting ended, Young offered Paladino and his daughter food, which they declined, and they left.

The ALJ found that Paladino's recall of the details of the meeting was not as specific as Young's. He failed to recall certain facts offered by Young, including whether he had mentioned any names of other District personnel, although he stated

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[13] Tr, at p. 30.
[14] Tr, at pp. 56, 57.
[15] Tr, at p. 33.
[16] Tr, at p. 57.
[17] Tr, at p. 68.
[18] Tr, at p. 68.
[19] Tr, at p. 57.

that it was possible that he had.[20] When asked at the hearing what the reason was for initiating contact with Young, Paladino testified that he "went to him to see if he would consider flipping on those that encouraged him to perform the acts which were described in the charges."[21] As Paladino explained:

> I said to [Young] that I believe that there were others that inspired him to violate the rules of the [District], and I asked him if he'd be willing to speak to the authorities about that.[22]

When asked to specify what "rules" he was referring to, Paladino responded "the rules that [Young] was charged with violating," as set forth in his disciplinary charges.[23] Paladino further testified that:

> I said to him . . . it's a shame that, you know, he is taking the heat for others, if that's the case. And he should think about his career and, you know, his career could probably be reestablished if he -- if he came forward.[24]

In regard to Young's career "as a principal,"[25] Paladino testified that if Young came forward:

> I would think that the authorities would treat him in a fair way in—in the charges that had been brought against him.[26]
>
> That I would expect that the authorities would give him some kind of a good mark or whatever if he—if he—if he turned and he brought evidence against those that encouraged him to do this.[27]

Asked to clarify this testimony, Paladino explained that his reference to "the authorities"

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[20] Tr, at pp. 76-77. Paladino also did not recall phoning Young at any time prior to going to his home, or having his daughter with him. Tr, at p. 74.
[21] Tr, at p. 73.
[22] Tr, at p. 75.
[23] *Id.*
[24] Tr, at p. 76.
[25] *Id.*
[26] Tr, at p. 79.
[27] Tr, at p. 81.

in that statement was to federal authorities, specifically, the anti-corruption unit of the Federal Bureau of Investigation (FBI).[28] Paladino further testified that his reason for approaching Young was "to open an investigation by the FBI into the corruption at the [District]."[29] Paladino testified that he had said to Young:

> That I would be happy to introduce him to people at the FBI so as to have them consider . . . opening up an investigatory file on this, what I believe was corruption in jiggling numbers, okay, and trying to improve the graduation numbers of the students at the East High School.[30]

Paladino acknowledged that no federal charges were pending against Young, and that he was not aware of any ongoing law enforcement investigation concerning Young or East High School, but asserted that his statement to Young "had nothing to do with the [District] charges."[31] Paladino also testified that it was a short conversation which was strictly business, that he did not recall Young responding to his request, but that he asked Young to consider what he had said.

Paladino further testified that he had no conversations on this matter with any BOE members prior to this meeting, that he had no authority to act on the BOE's behalf, and had made no promises or threats to Young. Additionally, Young had no follow-up conversations regarding this exchange with Paladino, any other BOE member, or the Superintendent. No evidence was adduced by either party of any statement on this matter from any other BOE member or District representative.

DISCUSSION

The District excepts to the ALJ's crediting Young's testimony over Paladino's in

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[28] Tr, at p. 82.
[29] Tr, at p. 90.
[30] Tr, at pp. 82-83.
[31] Tr, at pp. 79-80.

certain respects, and in her finding certain undisputed testimony more relevant than other, equally undisputed, testimony. As to the former, we have "long held that credibility determinations by an ALJ are generally entitled to great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect."[32] The ALJ found Young's testimony to be more credible where it diverged from Paladino's because it was "more straightforward[] and detailed in comparison to Paladino's, which was vague as to both the details of events surrounding the meeting and of the conversation itself." Here, as in *State of New York (DOCCS)*, the District "simply asserts that its [witness is] credible; no objective reason compelling a conclusion that the ALJ's finding them not to be" has been adduced.[33]

The District's other exceptions to the ALJ's factual recitation concern the speculative nature of the political climate of the BOE, and in particular the level of influence of Paladino among the other BOE members. We agree with the District that these factual statements, though accurately reflecting Young's testimony, do not carry much if any probative weight. However, we also find that they are not integral to deciding this matter.

In order to state a claim that an employer has violated § 209-a.1 (a) of the Act by

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[32] *State of New York (DOCCS)*, 50 PERB ¶ 3037, 3154 (2017) (quoting *Village of Scarsdale*, 50 PERB ¶ 3007, n. 51 (2017) (quotation and editing marks omitted); *see also Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014) (*quoting Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019, *confirmed and modified in part sub nom Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶ 3016 (2009), quoting *County of Nassau*, 24 PERB ¶ 3029 (1991); *see also County of Tioga*, 44 PERB ¶ 3016, at 3062; *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977)).

[33] 50 PERB ¶ 3037 at 3154-3155.

direct dealing, "an employee organization must allege sufficient facts that an employer impermissibly bypassed the employee organization for the purpose of negotiating or attempting to negotiate with an employee or a group of employees aimed at reaching an agreement on the subject under discussion."[34] Unlike other employee speech directed to employees, direct dealing need not be coercive in nature, because direct dealing is by its very nature "aimed at impeding negotiations or subverting the fundamental rights of employees to organization and representation under the Act."[35]

Paladino's approach to Young, entirely bypassing the BCSA, which represented Young in the disciplinary charges, led Young to quickly agree to provide information to the District in return for "immunity" from the charges against, and the salvaging of his threatened career. Young reasonably believed that he would receive favorable treatment, the withdrawal of the charges, by reaching a separate agreement with Paladino, thus bypassing the BCSA and subverting Young's right to representation. Thus, in the instant case, the application of these well-established principles leads to the conclusion that, if Paladino's conversation with Young is, in fact, attributable to the District, it constitutes direct dealing in violation of § 209-a.1 (a) of the Act.

In another case involving the same parties, the Board addressed the question of when the statements of an individual member of the BOE may be attributed to the BOE. After rejecting the notion that it is sufficient that the member "was acting as a member of the Board of Education to attribute the alleged violations of the Act to the District," we

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[34] *Dutchess Community College*, 41 PERB ¶ 3029, 3129 (2008), citing *County of Cattaraugus*, 8 PERB ¶ 3062 (1975); *City of Schenectady*, 26 PERB ¶ 3047 (1993); *Town of Huntington*, 26 PERB ¶ 3034 (1993); *CUNY*, 38 PERB ¶ 3011 (2005).

[35] This distinguishes the line of cases relied upon by the District including *Buffalo City Sch Dist*, 49 PERB ¶ 3028, at 3087-3088, citing *Town of Greenburgh,* 32 PERB ¶3025, 3054 (1999) (notes, citations and editing marks omitted).

went on to reject "unduly narrow application of agency principals to disclaim responsibility for the statements."[36] Rather, we explained that:

> While we find that there must be some agency relationship between an individual board member and a board of education to impute the member's statement to the Board, the authorization need not be explicit, as the District seems to argue. For example, a board member may act with apparent or implied authority without express authorization of the full board of education. Thus, a board of education may violate the Act when a single member, although not expressly authorized by the board, credibly threatens to do everything in her power to terminate employees who exercise protected rights under the Act, if the board fails to issue a prompt, equally credible, repudiation of such threats.[37]

We find that Paladino was acting with apparent authority as an agent of the District. Although Paladino both told Young and testified that he was not acting on behalf of the District, Paladino was a duly elected member of the BOE, and had participated in that capacity in the unanimous vote supporting the charges against Young, a fact of which Young was aware by that information's inclusion with the charges served on him.

Paladino's use of "we" and his offer of immunity "for your charges" only make sense if relating to the charges under § 3020-a of the Education Law. Paladino's status as a duly elected member of the BOE constitutes the only record evidence of any capacity in which he could have made any Young offer of "immunity" to any charges, and, in fact, the § 3020-a charges were the only charges pending against Young. The fact that, as Paladino frankly testified, he was unaware of any criminal investigation, state or federal, that would relate to Young, strengthens Young's reasonable

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[36] *Buffalo City Sch Dist*, 48 PERB ¶ 3001, 3005-3006 (2015).
[37] *Buffalo City Sch Dist*, 48 PERB ¶ 3001, at 3006.

assumption that he was acting on behalf of the BOE, despite Paladino's disclaimer. Likewise, the fact that Paladino urged Young to retain a criminal defense attorney, but to have that attorney call the District's counsel, not any prosecutorial authority, further would have conveyed to a reasonable employee in Young's situation that Paladino was acting within his official capacity as a member of the BOE and with the apparent authority of the BOE.[38]

The District's reliance on our prior decision finding that Paladino's statements in an e-mail to BCSA unit members were not attributable to the District is not persuasive here. In that prior matter, Paladino's statements impugned both the management of the District and his fellow members of the BOE, and were swiftly disavowed by the BOE President.[39] Both on their face, and by the swift disavowal by the President, the statements at issue were clearly solely attributable to Paladino alone. Here, by contrast, Paladino had been part of a unanimous BOE in voting the charges against Young, and his use of "we" and "us" in conveying the offer to resolve those charges and his urging Young to obtain counsel and to have his attorney reach out to the District's counsel, support our finding that he was acting with apparent authority.

Finally, we affirm the ALJ's finding that Paladino's inclusion of BCSA President Crystal Barton, who is also Principal at McKinley High School, as among those whom he suspected as "cheaters" is insufficient, absent more, to establish interference in violation of §209-a.1 (b). In view of her inclusion with Carlos Alvarez, Principal at

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[38] *See County of Nassau*, 48 PERB ¶ 3023, 3087 (2015); *Sachem Cent Sch Dist*, 6 PERB ¶ 3014, 3035 (1973) ("When a negotiator comports himself throughout the course of negotiations in a manner that indicates that he has such authority, the adverse party is entitled to rely upon the existence of this apparent authority"); *see also City of Schenectady*, 26 PERB ¶ 3038 (1993).

[39] *Buffalo City Sch Dist*, 48 PERB ¶ 3001, at 3005.

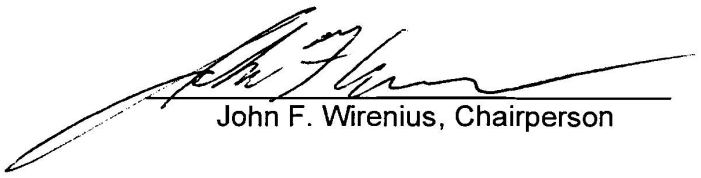
International Preparatory High School, Associate Superintendent David Mauricio, and Chief of Staff Darren Brown, and the absence of any evidence as to why she was included, the testimony fails to establish that Paladino sought to target her in her capacity as BCSA President. In the absence of any evidence tending to establish that Paladino's actions were a deliberate attempt to interfere with the administration of the BCSA, or "to compromise the independence of an employee organization that represents or seeks to represent its employees," the ALJ correctly dismissed the charge to the extent it alleged a violation of § 209-a.1 (b).[40]

Accordingly, the ALJ's decision is affirmed.

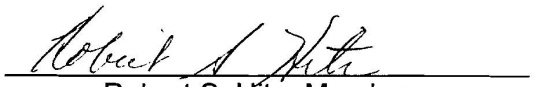
IT IS, THEREFORE, ORDERED that the District and its Board of Education members:

1. Cease and desist from bypassing the BCSA and engaging in direct dealing with unit employees with respect to pending disciplinary charges; and
2. Sign and post the attached notice at all physical and electronic locations normally used to communicate with BCSA unit.

DATED: February 21, 2018
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

[40] *See State of New York (DOCCS)*, 50 PERB ¶ 3037, 3157 (2017).

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 Buffalo City School District represented by the Buffalo Council of Supervisors and Administrators (BCSA) that the Buffalo City School District and its Board of Education members:

will not bypass the BCSA and engage in direct dealing with unit employees in regard to pending disciplinary charges.

Dated . . . . . . **By . . . . . .**
on behalf of the **BUFFALO CITY SCHOOL DISTRICT**

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.

In the Matter of

JOHN MOONEY and BRIAN BURKE,

Charging Parties, **CASE NO. U-35767**

- and -

NEW YORK CITY TRANSIT AUTHORITY and TRANSPORT WORKERS UNION, LOCAL 100,

Respondents.

JOHN MOONEY, *pro se* and BRIAN BURKE, *pro se*

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Brian Burke and John Mooney to a decision of the Director of Public Employment Practices and Representation (Director) dismissing their improper practice charge.[1] In the initial charge, Burke and Mooney alleged that the New York City Transit Authority (NYCTA) violated §§ 209-a.1 (a), (b), (c), (d), (f) and (g) of the Public Employees' Fair Employment Act (Act) and that the Transport Workers Union, Local 100 (TWU) violated § 209-a.2 (c) of the Act. The details of the charge alleged that:

> NYCTA has failed to schedule, in three cases, or decide, in two cases, five (5) separate grievances, attached, thus depriving Grievants remedy or enforceable protections and benefits under the contract. By failing to exhaust administrative remedy Grievants are blocked from Court Remedy. Justice delayed is Justice denied. One Grievance is over two years old, two are one year old and all are requested for immediate arbitration. Two Grievances (Burke's Grievance for 2015 pay & Mooney's et al.) have had a Step II with no timely Decision and the other three had no scheduled hearing despite continued importuning by Local 100.

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[1] 50 PERB ¶ 4556 (2017).

Attached to the charge were copies of what appear to be the grievances referenced by the Charging Parties.

Mooney and Burke were advised that the charge was deficient because, among other things, no facts were alleged to arguably establish a violation of §§ 209-a.1 (a), (b), (c), (f) and (g), or § 209-a.2 (c) of the Act and because individuals lack standing to allege a violation of § 209-a.1 (d) of the Act. The Director also sought clarification on whether Mooney and Burke were filing as two *pro se* individuals or whether TWU was also a party.

Mooney and Burke filed an amendment on June 8, 2017, alleging that NYCTA violated §§ 209-a.1 (a) and (c) of the Act and that TWU violated § 209-a.2 (c) of the Act. The details of the amended charge allege that:

> On Monday April 10, 2017 Dhondup Gyaltsen of TWU Local 100 Grievance & Discipline Department sent an official email to Rebecca Mallay and Thomas Latimer to schedule three Step II Grievances (TWU #'s 50591, 2, 3, see attached). NYCTA, acting Arbitrarily, Discriminatorily and in Bad Faith has chosen to not comply with this reasonable, required Demand. On Monday, March 27, 2017 a Step II Grievance Hearing for Grievance CI-2015-0548 (TWU #46374, see attached) was held at 2 Broadway by Hearing Officer Ryan O'Connor and no Decision rendered through today. On January 24, 2017, a Step II Hearing for Grievance CI-2016-0876 was held at 2 Broadway with Lorain Bey and no Decision was rendered through today, i.e. additional Arbitrary, Discriminatory, Bad Faith conduct by NYCTA.

In addition, attached to the amended charge were copies of several emails referenced in the above details, as well as a letter from TWU's "Grievance and Discipline Department," dated March 13, 2017, notifying Charging Party Burke that his grievance had been scheduled for a Step 2 hearing on March 27, 2017. In response to the Director's request for clarification on the identity of the charging parties, Mooney and

Burke added "acting *pro se*" after both of their names on the charge.

The Director found that the amended charge failed to correct the deficiencies of the earlier charge, and she dismissed the charge in full.

EXCEPTIONS

Burke and Mooney filed exceptions to the Director's decision. With respect to the allegations against NYCTA, Burke and Mooney argue that the charge alleges sufficient facts of "unwarranted, discriminatory, and [] retaliatory adverse job action(s)" such that the Director should have processed the charge and assigned the case to an Administrative Law Judge.[2] With respect to the allegations against TWU, Burke and Mooney argue that, although TWU has sent official requests to schedule hearings, "this is apparently insufficient for remedy or proper contract enforcement" and that TWU must remain a party in order for the Board to properly award damages.[3]

Neither NYCTA nor TWU filed a response to Burke and Mooney's exceptions.

Based on our review of the record and our consideration of the Charging Parties' arguments, we affirm the Director's decision and dismiss the charge.

DISCUSSION

Initially, we emphasize that our review of the Director's decision is limited to the record as it existed before the Director.[4] Facts and documents that are presented to us for the first time on exceptions cannot be considered by us in reviewing the correctness

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[2] CP Exceptions #1-5, at 2-9.
[3] CP Exceptions #6 & 7, at 9-12.
[4] *TWU (Ayala)*, 50 PERB 3017, 3074 (2017); *CSEA (Brewster)*, 50 PERB ¶ 3027 (2017); *Mt Pleasant Cottage UFSD*, 50 PERB ¶ 3002, 3009, n. 12 (2017); C*SEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016); *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶ 3012, 3031 (1992); *Board of Cooperative Educational Services of Sullivan County*, 14 PERB ¶ 3101, 3170-3171 (1981).

of the Director's decision. For this reason, we do not consider the facts and documents presented by Burke and Mooney for the first time as part of their exceptions. These facts and documents include a document entitled "Opposition to Motion to Dismiss Affirmation and Memorandum of Law and Attachments" in Case #15-cv-1481 in United States District Court for the Eastern District of New York, which was attached to Burke and Mooney's exceptions. Additionally, in their exceptions, Burke and Mooney quote language which they assert is from a contract between NYCTA and TWU and an apparent assertion that NYCTA is refusing to process the grievances at issue in retaliation for Burke's filing of prior charges with PERB.[5] Only in extraordinary circumstances such as the discovery of new evidence which could not reasonably have been discovered in proceedings before the Director would we consider such evidence or arguments. No such extraordinary circumstances have been established here.[6]

We next address Burke and Mooney's allegation that NYCTA violated §§ 209-a.1 (a) and (c) of the Act by failing to schedule and/or decide five grievances. We affirm the Director's finding that the charge and amended charge failed to allege facts sufficient to indicate a violation of the Act.

Several provisions of the Act are relevant to our analysis. Section 203 of the Act grants public employees the:

> right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their terms and conditions of employment, and the administration of grievances arising thereunder.

Section 204.1 of the Act empowers public employers to recognize employee

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[5] CP's Exceptions, at 4.

[6] *CSEA (Brewster)*, 50 PERB ¶ 3027, 3106 (2017); *CSEA (Reese)*, 25 PERB ¶ 3012, 3032, n. 1 (1992); *New York City Transit Auth*, 23 PERB ¶ 3016, 3034 (1990); *Buffalo Professional Firefighters Assn, Inc (Summers)*, 22 PERB ¶ 3040, 3094 (1989).

organizations "for the purpose of negotiating collectively in the determination of, and administration of grievances . . . ." Section 204.2 of the Act provides that where an employee organization has been certified or recognized, it shall be the exclusive representative of employees in the bargaining unit and requires the public employer to negotiate collectively with the employee organization "in the determination of, and administration of grievances . . . ."

Together, these provisions mean, as the Director found, that an employer's duty regarding the administration of grievances is generally owed to the recognized or certified employee organization, not to individual employees in the bargaining unit.[7] Thus, individual employees, such as Burke and Mooney, lack standing under the Act to challenge an employer's refusal to process a grievance, without more.[8]

An individual employee would, however, be able to challenge an employer's failure to process a grievance if the employer was improperly motivated or was acting in a discriminatory fashion due to activities protected by § 202 of the Act. Such a claim might make out a violation of § 209-a.1 (a) and/or (c) of the Act.

In the current case, we agree with the Director that the charge and amended charge do not allege facts sufficient to support an allegation that NYCTA refused to process the grievances at issue on the basis of improper motivation or discrimination.

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[7] *See also State of New York (State University of New York – Downstate Medical Center)*, 19 PERB ¶ 4557, 4620 (1986); *City of Buffalo (Fire Department)*, 17 PERB ¶ 4529, 4560 (1984); *Randolph Cent Sch Dist*, 10 PERB ¶ 3073, 3127 (1977).

[8] The Director found that TWU was not a charging party, and there are no exceptions to this finding. As a result, any such argument has been waived and is not before us. Rules of Procedure § 213.2 (b) (4); *see, eg*, *Buffalo Sewer Auth*, 50 PERB ¶ 3020, 3083, at n 2 (2017); *City University of New York*, 48 PERB ¶ 3021, 3071 (2015); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n 5 (2014); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Wallkill*, 42 PERB ¶ 3006 (2009).

Although the charge states that NYCTA acted "Arbitrarily, Discriminatorily and in Bad Faith [sic]", such conclusory assertions, with no supporting facts, are not sufficient to state a violation of the Act.[9] As explained above, to the extent that Burke and Mooney assert additional facts in their exceptions that might arguably establish a violation of §§ 209-a.1 (a) and (c) of the Act, we cannot consider them, as these facts were not presented to the Director and are not part of the record in this proceeding.

Finally, we address the allegation that TWU breached its duty of fair representation in violation of § 209-a.2 (c) of the Act. We affirm the Director's dismissal of the charge because the charge fails to set forth facts even arguably establishing that TWU has breached its duty of fair representation.

The Board has often reaffirmed that "to establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization's conduct or actions are arbitrary, discriminatory or founded in bad faith."[10] As we have previously explained, the courts have:

> reject[ed] the standard . . . that "irresponsible or grossly negligent" conduct may form the basis for a union' s breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an

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[9] *See, eg, TWU (Waters)*, 49 PERB ¶ 3026, 3083 (2016); *Nassau Community College Federation of Teachers (Staskowski)*, 42 PERB ¶ 3007, 3022 (2009); *State of New York (Division of Parole)*, 27 PERB ¶ 3016, 3039 (1994).

[10] *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016), *quoting UFT (Cruz)*, 48 PERB ¶ 3004, 3010, *petition denied, Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct NY Co 2015) (internal quotation and editing marks omitted), *quoting UFT (Munroe*), 47 PERB ¶ 3031, 3095 (2014), *petition denied*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (*quoting CSEA* (*Bienko)*, 47 PERB ¶ 3027, 3082-3083 (2014)); *see District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).

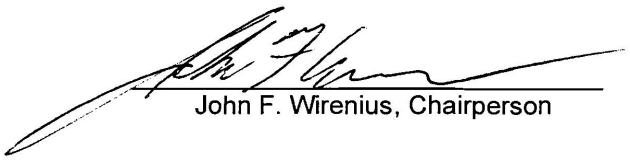
improper practice by the union.[11]

Burke and Mooney have neither expressly alleged nor provided any basis upon which we could conclude that TWU has acted in a way that is arbitrary, discriminatory or founded in bad faith. Indeed, the only facts alleged in the charge and amended charge concerning TWU are that TWU engaged in "continued importuning" to get grievance hearings scheduled and that TWU sent an "official email" to NYCTA requesting that Step II grievances be scheduled. That is, the facts alleged show that TWU acted in support of moving the grievances at issue forward, and there is simply no basis to conclude that TWU engaged in any arbitrary, discriminatory or bad-faith conduct sufficient to violate the duty of fair representation. As a result, we affirm the Director's dismissal of this aspect of the charge for failure to allege facts indicating a violation of the Act.

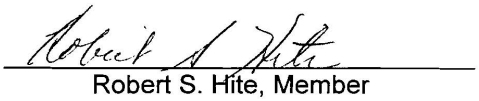
Based upon the foregoing, we deny the exceptions, affirm the decision of the Director, and dismiss the charge.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: February 21, 2018
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

[11] *Id.*; *see also Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, 3026 (2014) (*quoting CSEA, L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).