STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and- **CASE NO. C-6564**

COUNTY OF SARATOGA and SARATOGA COUNTY SHERIFF,

Employer,

-and-

SARATOGA COUNTY SHERIFF OFFICERS ASSOCIATION, INC.,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

A representation proceeding having been conducted in the above matter by the Public Employment Relations Board (PERB) 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 United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named

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[1] This unit has been represented by the Saratoga County Sheriff Officers Association, Inc., which notified PERB, by letter dated July 30, 2019, that it supports the petition and disclaims any interest in further representing the unit.

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: Civil Clerk, Commissary Clerk, Cook, Correction Officer, Desk Officer, Desk Sergeant, I.D. Officer, Correction Sergeant, Correction Lieutenant and Correction Officer Part-Time.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the United Public Service Employees Union. 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: November 6, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

YONKERS FIREFIGHTERS, LOCAL 628, IAFF, AFL-CIO,

Charging Party,

CASE NO. U-34936

-and-

CITY OF YONKERS,

Respondent.

In the Matter of

YONKERS UNIFORMED FIRE OFFICERS ASSOCIATION,

Charging Party,

CASE NO. U-34970

-and-

CITY OF YONKERS,

Respondent.

ARCHER, BYINGTON, GLENNON & LEVINE, LLP (PAUL K. BROWN of counsel), for Charging Party Yonkers Firefighters, Local 628, IAFF, AFL-CIO

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for Charging Party Yonkers Uniformed Fire Officers Association

COUGHLIN & GERHART, LLP (PAUL J. SWEENEY of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the City of Yonkers (City) to a decision of an Administrative Law Judge (ALJ) finding that the City violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) as to employees represented by the Yonkers Firefighters, Local 628, IAFF, AFL-CIO (Local 628) and the Yonkers

Uniformed Fire Officers Association (UFOA).[1] The ALJ found that the City violated the Act by ending the practice of "paying current employees certain supplemental salary payments under New York State General Municipal Law (GML) § 207-a (2), should they in the future retire with a line of duty disability," in particular, the night differential, check-in pay, and holiday pay."[2]

EXCEPTIONS

The City excepts to the ALJ's decision on five grounds. First, the City contends that the ALJ disregarded controlling precedent from the Court of Appeals and PERB holding that a claim to a monetary benefit as a part of a GML § 207-a disability benefit is unenforceable as a matter of law unless the applicable collective bargaining agreement explicitly includes the monetary benefit within the GML § 207-a benefit.

Second, the City asserts that the ALJ erred in failing to distinguish the non-statutory and non-discretionary benefits at issue in *Chenango Forks Central School District*,[3] to find the statutory and discretionary GML § 207-a (2) benefit paid to retired firefighters who suffer on-duty injuries after an application process were mandatorily negotiable.

The City's third exception claims that the ALJ ignored the central holding of *Chenango Forks Central School District* that the past practice was established by the fact that all the at-issue employees had a reasonable expectation of receiving the benefits at issue. By contrast, the City avers that current active firefighters have no

[1] 52 PERB ¶ 4551 (2019).
[2] 52 PERB ¶ 4551, at 4740, 4746.
[3] 40 PERB ¶ 3012, 3048 (2007), *on remand* 42 PERB ¶ 4527 (2009), *affd*, 43 PERB ¶ 3017 (2010), *confirmed sub nom, Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 92 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013).

reasonable expectation that they would receive the GML § 207-a (2) benefit as only 10% of the membership of both charging party unions ever receive the benefit.

In its fourth exception, the City argues that GML § 207-a (2) benefits are excluded from "terms and conditions of employment" covered by the Act, as the benefits can only be paid to retired firefighters following their retirement and "therefore constitute a classic 'payment to retirees or their beneficiaries'" and are a prohibited subject under Civil Service Law (CSL) § 201 (4).[4]

Finally, the City excepts to the ALJ's finding that the City violated its duty to negotiate in good faith under § 209-a.1 (d) of the Act without any showing by either of the charging parties that it had demanded to negotiate over the subject of the reduction of the GML § 207-a payments to the retired firefighters.

Local 628 and UFOA support the ALJ's decision. Neither union cross-excepted to the ALJ's dismissal of the charges to the extent that they claimed a violation of § 209-a.1 (a) of the Act.

For the reasons given below, we reverse the ALJ's decision and dismiss the charges.

FACTS

The facts are fully stated in the ALJ's decision and are only set out here to the extent necessary for deciding the issues presented. Local 628 represents all regular, full-time firefighters working for the City, while the UFOA represents all City fire officers holding the ranks of fire lieutenant, fire captain and assistant fire chief.

GML § 207-a provides for the payment of benefits to firefighters (defined broadly enough to include fire officers) who are injured in the performance of their duties or who

[4] Exception No 4.

are "taken sick as a result of the performance of [their] duties."[5] Pursuant to GML § 207-a (1), firefighters and fire officers who are expected to return to full duty receive "the full amount of [their] regular salary or wages until [their] disability arising therefrom has ceased."[6] Pursuant to GML § 207-a (2), firefighters and fire officers who are permanently disabled and who receive a disability retirement pension receive, until they reach the mandatory retirement age, the difference between their disability retirement allowance or pension and their "regular salary or wages."[7] The payment made pursuant to GML § 207-a (2) is referred to as the "supplemental" payment.

On December 9, 2015, the City issued a letter to approximately 43 retired firefighters and fire officers (Retirees) who were receiving the salary supplement pursuant to GML § 207-a (2). The letter stated that the City had overpaid the Retirees' GML § 207-a (2) benefits, and that their supplemental wage benefit should have been calculated based solely on their "regular wages or salary" and should not have included "special pays" and other payments afforded to active firefighters.[8] The letter further set forth a specific dollar amount reflecting the biweekly overpayment made to each Retiree and advised that, going forward, the Retirees' GML § 207-a (2) supplement would be reduced by that amount.[9] The overpayment amount identified by the City reflects

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[5] GML § 207-a (1), (2).
[6] *Id*.
[7] *Id*. More precisely, the firefighters and fire officers receive benefits pursuant to GML § 207-a (2) "until such time as he or she shall have attained the mandatory service retirement age applicable to him or her or shall have attained the age or performed the period of service specified by applicable law for the termination of his or her service." *Id*.
[8] Joint Ex 5; ALJ Ex 12, at ¶ 16. The City previously sent the Retirees a letter dated October 5, 2015 regarding the overpayment, but issued a subsequent letter advising that the October 5, 2015 letter had been issued in error. Joint Exs 3, 4; ALJ Ex 12, at ¶¶ 14-15.
[9] Joint Ex 5.

payments it made to the Retirees for the night differential, check-in pay, and holiday pay.[10] Prior to sending this letter, the City engaged in correspondence with counsel for both Local 628 and the UFOA in which the City informed counsel of its intention to cease including the "overpayments" to Retirees receiving supplements pursuant to GML § 207-a (2), and counsel's objections thereto.[11]

The collective bargaining agreements (CBA) between the City and the UFOA and the City and Local 628 provide for three types of payment, referred to by the parties as the night differential, check-in pay, and holiday pay.[12] Those payments are set forth in Article 4 of both of the CBAs between the parties.[13] The parties agree that the provisions in the UFOA and Local 628 CBAs with respect to the night differential, check-in pay, and holiday pay are substantially and materially the same as related to the matters at issue here.[14]

The parties stipulated as follows regarding the history of payment of the night differential, check-in pay, and holiday pay:

> Since at least 1995 to the present, the City has paid Night Differential, Check-in Pay and Holiday Pay to all active bargaining unit members of the UFOA and Local 628 employed by the City as part of their regular salary or wages regardless of their work status or their work schedule.[15]
>
> Since at least 1995 to the present, the City has paid Night Differential, Check-in Pay and Holiday Pay to all UFOA and Local 628 bargaining unit members on sick leave, including extended sick

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[10] *Id*.
[11] Joint Exs 7-19.
[12] *See* Joint Exs 1, 2. The parties agree that the language relevant to these proceedings is included in the "comprehensive agreements" (Local 628's 2002-2005 CBA, and UFOA's 1991-1992 CBA), and has not been modified by any subsequent agreement.
[13] Joint Ex 1, at 14; Joint Ex 2, at 103.
[14] *See* ALJ Ex 13 (ALJ letter dated December 12, 2016).
[15] ALJ Ex 12, at ¶ 7.

leave.[16]

Since at least 1995 to the present, the City has paid Night Differential to all UFOA and Local 628 bargaining unit members as part of their regular salary or wages whether or not the individual actually worked a night tour.[17]

Since at least 1995 to the present, the City has paid Check-In Pay to all active bargaining unit members of the UFOA and Local 628 employed by the City as part of their regular salary or wages whether or not the individual was present for duty or was actively working.[18]

Since at least 1995 to the present, the City has paid Night Differential, Check-In Pay, and Holiday Pay to all UFOA and Local 628 bargaining unit members injured in the line of duty who have been approved for benefits under General Municipal Law § 207-a(1) ("GML 207-a(1)").[19]

Since at least 1995 to the present, the City has paid Night Differential, Check-In Pay, and Holiday Pay to UFOA and Local 628 bargaining unit members who have been approved for benefits under GML 207-a(1) and who were assigned to work in limited or light duty positions during the day.[20]

Since at least 1995 until the instant dispute arose, GML § 207-a(2) supplemental benefits paid by the City to UFOA and Local 628 bargaining unit members who received either Accidental or Performance of Duty ("POD") disability retirement from the New York State Police and Fire Retirement System have included Night Differential, Check-In Pay, and Holiday Pay.[21]

. . .

Since at least 1995 until the instant dispute arose, the salary reported by the City to the New York State Retirement System for the purpose of calculating an individual's Accidental or Performance of Duty disability retirement benefits has included Night Differential, Check-in Pay, and Holiday Pay.[22]

Since at least 1995 until the instant dispute arose, the City has

[16] *Id*, at ¶ 8.
[17] *Id*, at ¶ 9.
[18] *Id,* at ¶ 10.
[19] ALJ Ex 12, at ¶ 11.
[20] *Id,* at ¶ 12.
[21] *Id*, at ¶ 13.
[22] ALJ Ex 12, at ¶ 21.

> provided tax letters to Retirees, which state that the earnings reported on their City W-2 statements represent payments made in accordance with the requirements of GML 207-a.[23]
>
> Since at least 1995 until the instant dispute arose, the amounts listed in the payroll and other salary statements provided to Retirees has included Night Differential, Check-in Pay, and Holiday Pay.[24]

Both the UFOA and Local 628 negotiated with the City a GML § 207-a policy. These policies do not state whether the night differential, check-in pay, or holiday pay are included in the payment made to qualifying Retirees under GML § 207-a (2).[25]

Barry McGoey, President of Local 628, testified that, as president, he has explained to firefighters that if they file for a disability retirement due to an injury or illness incurred in the line of duty, they will receive their annual salary, which consists of their base pay, longevity, night differential, check-in pay, and holiday pay. He testified that the term commonly used in the fire house is that the firefighters "will be kept whole."[26]

Ted Von Hoene, a Labor Relations Assistant who has worked for the City in its Human Resources Department for more than 15 years, testified on its behalf that night differential, check-in pay, and holiday pay are different types of payments than regular salary. Van Hoene further testified that the CBA between the City and the UFOA and Local 628 each define base wage separately from night differential, check-in pay, and holiday pay, and that the latter payments are paid on a different schedule and are not included when calculating overtime payments to the unit employees.[27] Von Hoene also

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[23] *Id*, at ¶ 22.
[24] *Id*, at ¶ 23.
[25] 52 PERB ¶ 4551, at 4742; *see* Joint Ex 1 (Local 628); Joint Ex 2 (UFOA).
[26] Tr, at 107.
[27] Tr, at 128-130.

testified that, during the years 2010 to 2016, only 10 percent of the firefighters and fire officers who retired from the City received the supplemental salary benefit pursuant to GML § 207-a (2).[28]

DISCUSSION

As a preliminary matter, we reject the City's argument that "there can be no refusal to negotiate when Local 628 and UFOA have failed to present any demand for negotiations."[29] As we recently reaffirmed in *Cayuga Community College*, we have long held that "[w]hile a demand is a necessary precondition to an obligation under the Act to negotiate the impact of an employer's decision, the duty to negotiate a change to a mandatory subject of negotiations does not require a demand as a precondition to the filing of a charge."[30] Indeed, we expressly stated in *Cayuga Community College* that "a charge premised on a refusal to negotiate on demand is distinct from a charge 'premised on a unilateral change in terms and conditions of employment,' and '[t]herefore, a demand to negotiate is not a condition precedent to the violation found' in the latter case."[31] Accordingly, this exception is meritless, and it is denied.

We need not treat with all the remaining exceptions, as we find one dispositive of the matter before us. An employer is obligated to negotiate on demand proposals on mandatory subjects, including post-retirement monetary benefits, put forth by the bargaining agent on behalf of current employees who may retire during the life of the

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[28] Tr, at 156; Respondent's Ex 4.
[29] Brief in Support of Exceptions, at 26.
[30] 50 PERB ¶ 3003, 3011-3012 (2017), quoting *City of Niagara Falls*, 44 PERB ¶ 3015, 3055 (2011) (footnotes omitted), *confd*, *City of Niagara Falls v NYS Pub Empl Relations Bd*, 45 PERB ¶ 7004 (Sup Ct Albany Co 2012) (Ceresia, J.); *see Bd of Educ, City Sch Dist City of New York*, 40 PERB ¶ 3002 (2007); *City of Niagara Falls*, 31 PERB ¶ 3085, 3190-3191 (1998); *Great Neck Water Pollution Control Dist*, 28 PERB ¶ 3030 (1995).
[31] *Id*, quoting *City of Niagara Falls*, 31 PERB ¶ 3085, at 3190, citing *Roma v Ruffo*, 92 NY2d 489, 495 (1998).

CBA.[32] However, as we held in *Chenango Forks Central School District*, among other cases, this continuing obligation to negotiate does not prohibit the employer from acting unilaterally as to individual retired employees because they are no longer employees and thus no longer in the bargaining unit.[33]

Here, the ALJ's conclusion that "both the UFOA and Local 628 seek to enforce the practice only to the extent that it affects current employees; that is, individuals who were active City employees, and not retired, as of the date that the charge[s] [were] filed and who, in the future, qualify for the at-issue benefit"[34] is contradicted by the undisputed facts of the case. Though the charges assert a claim on behalf of current employees, there is no allegation or evidence of communication of any such action or intent toward current employees who might elect to retire during the life of the agreement. In the absence of such evidence, the mailing of the December 9, 2015 letters solely to 43 retired former bargaining unit members and former employees substantiates that no action was taken towards current employees.

Indeed, the correspondence between the City's counsel and the counsel to Local 628, in which the City puts both Local 628 and the UFOA on notice as to its intentions, is couched solely in terms of discontinuing (and possibly seeking recoupment of what

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[32] *Inc Vill of Lynbrook*, 10 PERB ¶ 3065, at 3115-3116; *Myers v City of Schenectady*, 244 AD2d 845, 846-847 (3d Dept 1997), *lv denied,* 91 NY2d 812 (1998).

[33] 40 PERB ¶ 3012 (2007) ("[t]here is no duty under the Act to bargain for those who are not in the bargaining unit, including retirees"), *remanded* 42 PERB ¶ 4527 (2009), *affd,* 43 PERB ¶ 3017 (2010), *confirmed sub nom, Chenango Forks Cent Sch Dist v NYS Pub Emp Relations Bd*, 92 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd,* 21 NY3d 255, 46 PERB ¶ 7008 (2013). *See also Troy Uniformed Firefighters Assn, Local 2304, IAFF,* 10 PERB ¶ 3015, at 3034; *Inc Village of Lynbrook*, 10 PERB ¶ 3067, 3121 (1977), *revd in part sub nom, Inc Village of Lynbrook v NYS Pub Emp Relations Bd*, 64 AD2d 902, 11 PERB ¶ 7012 (2d Dept 1978), *reinstated*, 48 NY2d 398, 12 PERB ¶ 7021 (1979).

[34] 52 PERB ¶ 4551, at 4743.

the City considered to be overpayment from) the 43 "retirees."[35] Current employees received no similar notice regarding what to expect in the future. In response to an email request to provide the names of the affected Retirees to Local 628 and the UFOA, the City replied "[s]ince your respective contracts state that you represent active members only, we would request that you FOIL a list of the retirees affected."[36]

Since the City took no action against current employees, the instant case essentially mirrors the facts in *Aeneas McDonald Police Benevolent Assn v City of Geneva.*[37] Where, as here, retirees base a claim to post-retirement benefits on a past practice, absent an explicit contractual right to receive such a benefit,[38] the Court of Appeals in *Aeneas McDonald PBA* has squarely ruled in terms that are dispositive:

> At issue is whether retired municipal employees, who are no longer members of any collective bargaining unit, may enforce a past practice in civil litigation with their former municipal employer. Where, as here, the past practice concededly is unrelated to any entitlement expressly conferred upon the retirees in a collective bargaining agreement, we hold that there is no legal impediment to the municipality's unilateral alteration of the past practice.[39]

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[35] Joint Exs 7-19.
[36] Joint Ex 12.
[37] 92 NY2d 326, 330-331 (1998).
[38] Where collective bargaining agreements expressly provide for post-retirement benefits for current employees, evidence of past practice is properly used to address ambiguities in the collective bargaining agreements, including as to subjects such as duration of the benefit. *Myers v City of Schenectady*, 244 AD2d 845, at 847-848.
[39] 92 NY2d 326, at 330-331; *Kolbe v Tibbetts*, 22 NY3d 344, n 1 (2013); *see also Rocco v City of Schenectady*, 252 AD2d 82, 84 (3d Dept 1998) ("[O]nce employees retire, they are no longer represented by the union and would not possess collective bargaining rights on their own."). Where a collective bargaining agreement provides an explicit right to receive a post-retirement benefit, the enforcement of that contractual right is outside the scope of our jurisdiction as limited by § 205.5 (d) of the Act. *Myers v City of Schenectady*, 244 AD2d 845, 847 (3d Dept 1997) ("[A]t the expiration of [the collective bargaining agreements under which the retirees obtained the disputed health benefits, the union] no longer represents the retirees, has no bargaining rights or obligations on their behalf and, indeed, may not even have the right to bargain voluntarily on their behalf").

We are bound by this holding.

Moreover, it is undisputed that no express definition of the parties' understanding of what constitutes "regular salary and wages" is provided in the collective bargaining agreements. Instead, both Local 628 and the UFOA acknowledge that they seek enforcement of a "past practice . . . to include the Night Differential, Call-in Pay, and Holiday Pay as components of 'regular salary and wages' for the purpose of calculating GML § 207-a (2) benefits."[40]

Here, as was the case in *Aeneas McDonald PBA*, the position of Local 628 and the UFOA that "a past practice concerning retirement [] benefits that was in place when an individual retired, in and of itself, prevents the City from unilaterally reducing those benefits for such person after cessation of public service" cannot be upheld.[41] "Such a conclusion misconstrues and unjustifiably extends the role of past practice in the field of public employment relations."[42]

Accordingly, and for the reasons stated herein, the ALJ's decision is reversed, and the charges must be and hereby are dismissed.

Dated: November 6, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[40] Local 628 Memorandum in Response to Exceptions, at 10; UFOA Brief in Response to Exceptions, at 14.
[41] 92 NY2d at 332.
[42] *Id*.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

BRIAN BURKE,

Charging Party,

CASE NO. U-35278

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Respondent.

BRIAN BURKE, *pro se*

JAMES B. HENLY, GENERAL COUNSEL (DANIEL CHIU of counsel), for Respondent

BOARD DECISION AND ORDER

This case come to us on exceptions filed by Brian Burke to a decision of an Administrative Law Judge (ALJ) dismissing Burke's amended improper practice charge.[1] In his amended charge, Burke alleged that the New York City Transit Authority (NYCTA) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) when it terminated him from his employment as a station agent in retaliation for filing and prosecuting a prior improper practice charge. The ALJ found that Burke had failed to establish a *prima facie* case of retaliatory motive because he failed to present evidence sufficient to give rise to an inference that improper motivation was the "but for" factor in NYCTA's decision to terminate him. The ALJ also denied Burke's request that she reconsider her earlier denial of his request for subpoenas seeking the production of documents.

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[1] 52 PERB ¶ 4549 (2019).

EXCEPTIONS

Burke filed eight exceptions to the ALJ's decision. Burke excepts to the ALJ's failure to grant his subpoena requests[2] and to the length of time it took for the ALJ to issue her decision.[3] He also excepts to the ALJ's failure to find that he established the required nexus between his engaging in protected activity and his termination.[4]

NYCTA did not file any response to Burke's exceptions.

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

FACTS

The facts herein are taken from Burke's improper practice charge, offer of proof, papers filed in opposition to the motion to dismiss, exhibits annexed to the foregoing documents, and the facts set forth in the decisions issued in Case No. U-34459.[5]

Burke was employed by NYCTA for more than 14 years, working most of that time as a train operator, but also as a station agent. He was also a Transport Workers Union, Local 100 (TWU) shop steward. Burke alleges that NYCTA terminated his employment because he filed and prosecuted PERB Case No. U-34459, which he filed on July 24, 2015.[6] Specifically, Burke alleges that Kristen Nolan, an attorney assigned to represent NYCTA in Case No. U-34459, is the individual responsible for his termination.[7]

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[2] Exception No 1 and 5.
[3] Exception No 3.
[4] Exception No 2, 4, 6, 7, 8.
[5] *NYCTA (Burke)*, 48 PERB ¶ 4604 (2015), *affd*, 49 PERB ¶ 3021 (2016), *confd sub nom*, *Burke v NYCTA*, 51 PERB ¶ 7009 (Sup Ct NY County 2018).
[6] *NYCTA (Burke)*, 48 PERB ¶ 4604, at 4878.
[7] Amended charge; offer of proof, at 4.

On July 24, 2015, Burke filed the improper practice charge in Case No. U-34459, alleging that NYCTA violated §§ 209-a.1 (a) and (c) of the Act by making derogatory comments about him in a March 29, 2015 newspaper article and by withholding sick leave, pay, vacation time, and overtime.[8] Burke also alleged in that charge that the newspaper article prompted him to have a panic attack, and constituted retaliation against him for his filing of prior PERB cases.[9] Burke further alleged in Case No. U-34459 that Nolan was responsible for publishing the article. The ALJ in that matter noted that the newspaper article did not attribute any of its information to NYCTA and appeared to rely on information taken from Burke's federal lawsuit papers. The ALJ dismissed the charge, finding that Burke's allegations were based solely on speculation and devoid of facts upon which a *prima facie* case could be based.[10]

Burke filed exceptions to the ALJ's decision, and the Board affirmed the ALJ's decision.[11] Burke brought an Article 78 proceeding challenging the Board's decision. The Supreme Court of the State of New York, New York County, granted PERB's motion to dismiss the Article 78 proceeding, thus confirming the Board's order.[12] Burke did not appeal Supreme Court's decision.

By letter dated May 5, 2016, NYCTA notified Burke that it terminated his employment as a station agent, effective May 5, 2016, "due to an unsatisfactory

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[8] *NYCTA (Burke)*, 48 PERB ¶ 4604, at 4878. Since approximately 2007, Burke has filed several improper practice charges against NYCTA, including charges filed in 2007 and February 2014.
[9] *Id.*
[10] *Id.*
[11] 49 PERB ¶ 3021 (2016).
[12] *Burke v NYCTA*, 51 PERB ¶ 7009 (Sup Ct NY County 2018).

probationary period."[13] The letter includes the apparent signature of Monica F. DaCosta, Chief Officer for Operations Training. Burke alleges in the instant charge that:

> [On] Information and Belief, Affiant is informed and believes that the individual who actually 'Terminated' Charging Party is in fact Kristen Nolan, [E]sq., who does know [Burke] for the sole reason of unlawful Retaliation for filing and prosecuting PERB case # U-34459. Ms. Nolan was counsel for NYCTA on that case and has again Retaliated against Charging Party for Protected PERB activity.[14]

In his offer of proof, Burke states that NYCTA's Department of Law began to engage in "criminal retaliation" against him due to his filing PERB charges that were heard in 2014 and earlier, that a conference or hearing was held on April 11, 2014, in another PERB case, and that:

> [t]he next working day Ms. Nolan ordered the terroristic attacks on Charging Party, until injury resulted. This was verified, under oath, by Labor Relations Director Leonard Akselrod at a Workers Comp Hearing.[15]

Burke requests, in his offer of proof, that NYCTA provide him with a copy of the Workers' Compensation hearing transcript from the hearing that took place on September 28, 2016.[16] Burke further alleges that NYCTA "has criminally withheld all wages, over 40K [sic], and Workers Comp payments and Differential/medical payments since 2014."[17]

In his offer of proof, Burke refers to the March 29, 2015 newspaper article, and

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[13] *See* May 5, 2016 letter, annexed to the amended charge.
[14] *See* amended charge.
[15] Offer of proof, at 2.
[16] *See* Burke's affidavit in support of his request for subpoenas.
[17] Offer of proof, at 3.

again alleges that Nolan was "the sole source of the injurious defamation."[18] Burke alleges that, but for Nolan's ongoing retaliation, he would not have been terminated.[19] Burke admits in his offer of proof that the termination letter does not say that he was terminated for reasons of unlawful retaliation for filing PERB cases. Nonetheless, he states that NYCTA's explanation for his termination was pretextual because he should not have been required to pass a probationary period in the station agent title.[20] Burke refers to letters, affidavits, and motions he filed with the New York City Civil Service Commission (Commission), wherein he sought to challenge the fact that he had been subjected to a probationary period and was terminated.[21] He also states that he received a decision from the Commission that was not in his favor, and he speculates that Nolan improperly submitted a proposed decision that the Commission improperly issued as its own.[22]

DISCUSSION

Initially, Burke excepted to the length of time it took the ALJ to issue her decision (approximately two years and four months from the time the last briefs were filed). We do not condone or excuse this substantial delay. However, in the absence of any specified harm or prejudice purportedly resulting from the delay, we do not believe that the lapse of time in issuing the decision provides a basis for overturning the decision. The length of processing time here is not sufficient, as a matter of law, to require setting

[18] *Id*.
[19] Offer of proof, at 4.
[20] *Id.*
[21] *Id*.
[22] *Id.*

aside the decision.[23]

When an improper practice charge alleges retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) that such activity was known to the person or persons taking the employment action; and c) that the employment action would not have been taken "but for" the protected activity.[24] These elements establish a *prima facie* case and give rise to an inference of improper motivation.[25] The initial burden of proof to establish a *prima facie* case is relatively low.[26] The ALJ is required to accept the charging party's evidence as true and give it the benefit of every inference that can reasonably be drawn from that evidence. Only "if the charging party can establish such an inference, does the burden of production shift to the respondent to present

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[23] *See Louis Harris & Assocs, Inc v deLeon*, 84 NY2d 698, 703–04 (1994) (Court of Appeals held that a more than seven-year delay in issuing a final order by the New York City Commission on Human Rights was not so unreasonable as to establish prejudice as a matter of law to party); *Corning Glass Works v Ovsanik*, 84 NY2d 619 (1994) (eight 1/2-year delay by the State Division of Human Rights in processing a complaint of discrimination based on disability against party was not substantially prejudicial as a matter of law).

[24] *Mt Pleasant Cottage Union Free Sch Dist*, 50 PERB ¶ 3002, 3008 (2017); *Bellmore-Merrick High Cent Sch Dist*, 48 PERB ¶ 3022, 3976 (2015), citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); *see generally 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); *State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021 (2013); *see also City of Salamanca*, 18 PERB ¶ 3012 (1985).

[25] *See Town of Tuscarora*, 48 PERB ¶ 3011, 3037 (2015).

[26] *Board of Educ, City Sch Dist City of New York (Elgalad)* 52 PERB ¶ 3001, 3005 (2019); *Board of Educ, City Sch Dist City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3140 (2018); *State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3021 (2017), citing *State of New York (SUNY)*, 38 PERB ¶ 3019 (2005), *confd sub nom CSEA v NYS Pub Empl Relations Bd*, 35 AD3d 1005, 39 PERB ¶ 7012 (3d Dept 2006).

evidence demonstrating that its conduct was not improperly motivated."[27]

The ALJ found that the first two elements were established here, and there are no exceptions to those findings. She found, however, that Burke failed to meet the third element—showing that he would not have been terminated "but for" his protected activity of filing a prior PERB improper practice charge. The ALJ found that Burke put forth only vague, conclusory, and speculative statements supporting his claims that Nolan terminated him, that NYCTA's Department of Law engaged in "criminal retaliation" against him due to his filing PERB charges heard in 2014 and earlier, and that Nolan ordered "terroristic attacks" on him "until injury resulted." Burke alleges that Nolan represented NYCTA in a prior improper practice charge. The ALJ found that this single fact, however, was insufficient to support Burke's remaining speculative claims that Nolan was responsible for terminating him because he had filed and pursued a prior improper practice charge.[28]

After reviewing the record, we affirm the ALJ's findings. While circumstantial evidence can be sufficient to establish a *prima facie* case under the Act, pure

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[27] *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037; *see generally Littlejohn v City of New York*, 795 F3d 297, 307-308 (2d Cir 2015).

[28] In his exceptions, Burke states that this charge, PERB Case No. U-34459, is "under appeal to the First Judicial Department." This is not accurate. As set forth in the facts, Case No. U-34459 was appealed to New York County Supreme Court and decided in PERB's favor on October 10, 2018. See *Burke v NYCTA and NYS Pub Empl Relations Bd*, 51 PERB ¶ 7009 (Sup Ct NY Co 2018). Burke did not appeal Supreme Court's decision. The case that is pending in front of the First Department relates to a different improper practice charge filed by Burke, Case No. U-35767. In that case, the Board affirmed the decision of the Director of Public Employment Practices and Representation dismissing a distinct improper practice charge filed by Burke and another charging party. See 51 PERB ¶ 3001 (2018). Supreme Court granted the Board's motion to dismiss. See 51 PERB ¶ 7004 (Sup Ct NY Co 2018).

speculation is not.[29] As the ALJ here carefully detailed, Burke failed to marshal facts in support of his claims and his vague, conclusory allegations that Nolan is responsible for his termination are not sufficient to give rise to an inference of improper motivation.

We note that Burke attached material to his exceptions that was not introduced into the record before the ALJ, and he referred to this material in his exceptions. Because our review is limited to the record before the ALJ, we do not address issues that are impermissibly raised for the first time on exceptions.[30] As a result, we have not reviewed this material or Burke's arguments related to it.

With respect to Burke's subpoena requests, an ALJ has the discretion to grant or deny a request for the issuance of an agency subpoena pursuant to § 211.2 of our Rules of Procedure. We will not disturb a decision denying an application for a subpoena unless, upon our review of the entire record, we conclude that the ALJ abused his or her discretion resulting in prejudice to the requesting party's ability to present relevant and necessary evidence in support of a claim or defense.[31]

Here, the ALJ found that Burke failed to allege sufficient facts to demonstrate that a copy of the transcript of a Workers' Compensation hearing would be relevant, simply stating in a conclusory fashion that the testimony demonstrated terroristic activity by

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[29] *State of New York (New York State Police) (Oliver)*, 51 PERB ¶ 3037, 3168 (2018); *PEF (Graf)*, 22 PERB ¶ 3049, 3114 (1989).
[30] *Board of Educ, City Sch Dist of the City of New York (Bagarozzi)*, 51 PERB ¶3032, 3139 (2018); *CUNY (Javed)*, 50 PERB ¶ 3028, 3106 (2017); *NYS Thruway Assn*, 47 PERB ¶ 3032, 3100, n 25 (2014).
[31] *State of New York (Office of Temporary and Disability Assistance)*, 51 PERB ¶ 3023, 3098 (2018); *NYCTA (Burke)*, 50 PERB ¶ 3015 (2017); *Board of Educ, City Sch Dist City of New York*, *(Ruiz)*, 43 PERB ¶ 3022 (2010); *Oswego City Sch Dist (Carp)*, 25 PERB ¶ 3052 (1992).

Nolan. The ALJ also denied Burke's request for any emails to or from Nolan that reference him, on the ground that Burke did not allege that he had any reason, other than pure speculation, to believe that any emails exist that would support the charge's allegations. The ALJ also denied Burke's request for the emails of other (unnamed) employees at NYCTA because Burke gave no information as to the basis for the subpoena request, failing to identify the individuals in his subpoena request and the substance of the sought-after emails. The ALJ found that subpoena request to be overbroad and vague. Having reviewed the record, we find that the ALJ did not abuse her discretion in denying Burke's subpoena requests, and we affirm her rulings for the reasons she gave.

IT IS, THEREFORE, ORDERED that the ALJ's decision is affirmed, and the charge must be, and hereby is, dismissed.

DATED: November 6, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

AFSCME COUNCIL 66, LOCAL 1635-F,

Charging Party,

CASE NO. U-35349

-and-

ROCHESTER HOUSING AUTHORITY,

Respondent.

JEFFREY N. MIS, ESQ., for Charging Party

HARRIS BEACH PLLC (EDWARD A. TREVVETT of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Rochester Housing Authority (RHA) to a decision by an Administrative Law Judge (ALJ) finding that RHA violated §§ 209-a.1 (a) and (d) of the Public Employees' Fair Employment Act (Act).[1] The ALJ found that RHA's failure to provide the negotiated health insurance plan to employees in the bargaining unit represented by AFSCME Council 66, Local 1635-F (Local 1635-F) constituted repudiation by RHA of the parties' negotiated agreement covering health insurance benefits.

EXCEPTIONS

RHA filed 10 exceptions to the ALJ's decision, arguing that the ALJ erred in finding that it repudiated its agreement with Local 1635-F. In essence, RHA argues that the ALJ erred in finding that there was a meeting of the minds between the parties

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[1] 52 PERB ¶ 4546 (2019).

regarding the inclusion of nonrepresented RHA employees into the "group" of employees subject to the new healthcare plan, a necessary prerequisite to the healthcare provider's willingness to provide the negotiated level of benefits for the represented employees.[2] RHA argues that it was unaware of this requirement and never agreed with Local 1635-F to include nonrepresented employees in the covered group.[3] RHA argues that it stands "ready, willing, and able" to enroll Local 1635-F-represented employees in the bargained-for plan and has not repudiated the agreement to do so.[4] It contends that the healthcare provider—not RHA—declined to provide the benefits because the nonrepresented employees are not included in the group.

RHA also argues that the ALJ mistakenly drew a negative inference against RHA and erred in applying the "unilateral mistake" doctrine.[5] Further, because RHA argues that there is no contract repudiation here, RHA argues that the ALJ should not have also found a violation of § 209-a.1 (a) of the Act.[6]

Finally, RHA argues that no monetary relief can be granted, assuming that the Board finds a violation, because Local 1635-F failed to adduce any concrete proof of damages.[7]

Local 1635-F supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

For the reasons stated below, we affirm the ALJ's decision and remedial order.

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[2] Exception No 1.
[3] Exceptions Nos 3, 4, 6.
[4] Exceptions Nos 2, 5.
[5] Exceptions Nos 7, 8.
[6] Exception No 9.
[7] Exception No 10.

FACTS

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

Pursuant to the parties' collective bargaining agreement (CBA) covering the term of July 1, 2010 through June 30, 2014, unit employees were covered under a health care plan provided by Finger Lakes Municipal Health Insurance Trust (FLMHIT).[8] During negotiations for the parties' next CBA covering the term of July 1, 2015 through June 30, 2018,[9] the parties discussed the possibility of changing to an alternative health care plan as a cost savings measure.

On October 9, 2014, Local 1635-F submitted a contract proposal to RHA that, among other things, suggested moving to an alternative health insurance plan known as the Labor-Management Healthcare Fund (LMHF).[10] In its proposal, Local 1635-F specifically stated: "attached to this Contract Proposal we present a commitment from Labor-Management Healthcare Fund to provide a plan of benefits and rates . . . for January 1, 2015 *but it must include both labor and management of the RHA*."[11] The attachment repeated this language, again noting that the LMHF plan "must include both labor and management of the RHA."[12]

RHA rejected Local 1635-F's health care proposal but, ultimately, the parties agreed to create a joint committee, referred to as the Health Care Committee (HCC), that was tasked with finding information on alternative health care providers. At the

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[8] Joint Ex 1, Article Nineteen, at 23.
[9] Joint Ex 3.
[10] Respondent's Ex 2.
[11] *Id*, at 4 **(**emphasis added).
[12] *Id*.

recommendation of the HCC, RHA released a Request for Proposal (RFP) seeking a health insurance broker that would assist in that process. Effective September 1, 2015, Lawley Services, Inc. (Lawley) was selected to act in that capacity.[13]

On or about November 16, 2015, Jacquelyn J. Milne, then RHA's Director of Human Resources, advised Lawley representative John Berger that "the HCC has determined that we will move forward with joining LMHF in July [2016]."[14] At that time, Milne was both a member of the HCC and RHA's chief spokesperson on its negotiating committee.[15] Thereafter, the LMHF plan became the focus of discussions during the parties' ongoing negotiations.

Pursuant to LMHF's underwriting requirements, both represented and nonrepresented RHA employees must be included in the LMHF plan.[16] Berger testified that LMHF was a "jointly managed trust" and that "it requires both labor and management employees."[17] He explained that "[y]ou can't just have labor on there, you have to have both."[18] Berger testified that, even if requested, the plan would not have allowed only unit employees to participate.[19]

The parties agreed to switch from the FLMHIT plan to the LMHF plan. At that time, RHA intended to place both represented and nonrepresented RHA employees in

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[13] Tr, at 39, 187.
[14] ALJ Ex 1, Exhibit G. *See also* Tr, at 389.
[15] Tr, at 99. Milne left the employ of RHA effective February 1, 2016 (Tr, at 98, 397). Upon her departure, Sandra Whitney replaced Milne as RHA's chief negotiator (Tr, at 100, 150, 361, 455, 564). Prior to that time, Whitney had been both a member of RHA's negotiating committee and the HCC (ALJ Ex 1, Exhibit C; Tr, at 115, 138-139).
[16] Tr, at 48-49, 76.
[17] Tr, at 49.
[18] Tr, at 54.
[19] Tr, at 253-254.

the LMHF plan.[20]

The parties' agreement to switch to the LMHF plan was memorialized in a Tentative Agreement (Agreement) dated May 9, 2016.[21] In relevant part, the Agreement states: "Health Insurance to be changed from FLMHIT to LMHF as soon as notice can be given to FLMHIT that will not result in financial penalty to RHA."[22] The Agreement was subsequently ratified by both parties.[23]

Consistent with the Agreement, RHA notified FLMHIT, via an email sent by its attorney Edward A. Trevvett, dated July 22, 2016, that it would not be renewing its contract with FLMHIT and that it would exit the FLMHIT plan as of December 31, 2016.[24] In that communication, Trevvett stated that "[a]though there was some consideration of keeping the non-Union employees and retirees in FLMHIT, RHA is going to be enrolling everyone in the new plan [LMHF] that has been negotiated with the Union."[25]

Milne testified that she had served as RHA's Director of Human Resources from September 2013 to February 1, 2016. During that period of time, she also served as RHA's chief negotiator and was a member of the HCC. Milne testified that Berger appeared before the HCC and at joint sessions of the parties' negotiating committees, and explained to those present that LHMF "was a union-management plan and that

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[20] Tr, at 652 (Maslowski), 719, 741 (Trevvett). At that time, the existing FLMHIT plan covered both represented and nonrepresented RHA employees. Tr, at 385.
[21] ALJ Ex 1, Exhibit C.
[22] *Id*.
[23] Charging Party's Exs 2, 7, at 52 and ¶ 2, respectively. *See also* Tr, at 657, 689. It is not disputed that the Agreement was ratified by both sides.
[24] Respondent's Ex 20, at 2.
[25] *Id*.

everyone had to be part of that plan."[26] When specifically asked: "So is it fair to say that both the health care committee [HCC] and the negotiating committee were aware of the requirements of LHMF?", Milne responded: "To my knowledge, yes."[27]

Later in her direct testimony, Milne reiterated that when she was with RHA "everyone" on RHA's negotiating committee "knew that [LMHF] was labor/management, that everyone had to go."[28] She further elaborated, "[w]e talked about it in negotiations. They knew that everyone had to go, that everyone had to be part of [the plan]. It was all or nothing because it was labor/management combined at the time that I was there."[29] When asked if, given her understanding of LMHF's underwriting parameters, LMHF would have accepted "only" represented RHA employees into "that plan?", Milne stated: "No. I knew, the health care committee knew, and the people on the negotiating team knew at that point, when I was there, it was all or none. It had to be labor/management. It could not be one or the other."[30]

Trevvett testified that he has represented RHA in labor matters for approximately 15 years.[31] During the negotiations that resulted in the parties' Agreement, Trevvett testified that he was a member of RHA's negotiating committee and a signatory to that Agreement. Contrary to the testimony of Milne, Trevvett testified that he "was at every negotiating meeting, including the ones where Mr. Berger presented [and Berger] never said that everyone had to be included."[32] According to Trevvett, when the Agreement

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[26] Tr, at 389-390.
[27] Tr, at 390-391.
[28] Tr, at 416.
[29] *Id*.
[30] Tr, at 419.
[31] Trevvett's direct examination was conducted by Joshua Steele, Esq., from the firm of Harris Beach PLLC.
[32] Tr, at 734-735.

was executed on May 9, 2016, he was "unaware of [LMHF's] underwriting guidelines,"[33] and did not learn of their existence until sometime in October 2016.[34]

Becky Maslowski testified that she was a member of RHA's negotiating committee and a signatory to the Agreement. According to her testimony, after Jackie Milne left RHA's employ on February 1, 2016, Maslowski "filled the role"[35] of Human Resource Director from time to time and Sandy Whitney took over as RHA's "chief negotiator."[36] Whitney was not called to testify by either party. Whitney, Maslowski, and Trevvett were all members of the negotiating committee prior to Milne's departure.

Maslowski testified that when the parties executed the Agreement, it was her "belief" and RHA's "intent" that all RHA employees, both represented and nonrepresented, would be placed into the LMHF plan.[37] However, she denied knowledge of LMHF's applicable labor/management underwriting requirements at that time and stated that she did not learn of those requirements until September of 2016. She acknowledged that she attended meetings as a member of RHA's negotiating committee where Lawley representatives presented information regarding the LMHF plan, but stated, "I do not recall anything where the non-bargaining [unit employees] had to be in the plan."[38]

On or about October 13, 2016, contrary to its original intent, RHA decided to exclude its nonrepresented employees from the LMHF plan; instead keeping them in

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[33] Tr, at 751.
[34] Tr, at 750-751. *See also* Respondent's Ex 18.
[35] Tr, at 97.
[36] Tr, at 99-100.
[37] Tr, at 102-104, 652, 661.
[38] Tr, at 662.

the FLMHIT plan.[39] Upon RHA's communication of that decision to LMHF, the LMHF plan, which was agreed upon in the Agreement, no longer was available to unit employees due to the applicable underwriting requirement that both represented and nonrepresented RHA employees be included in the plan.

As a consequence, both represented and nonrepresented RHA employees remained in the FLMHIT plan, rather than moving to the agreed upon LMHF plan, and the projected cost savings associated with changing plans were never realized.

On November 30, 2018, during the pendency of the hearing in this matter, the parties executed a new CBA covering the term of July 1, 2018 through June 30, 2022. Pursuant to Article Nineteen, Hospitalization and Medical Benefits of that Agreement, the parties agreed that, effective January 1, 2019, all unit employees would be covered under the FLMHIT plan.[40]

DISCUSSION

First, we affirm the ALJ's finding that RHA was aware of LMHF's requirement that both represented and nonrepresented employees be placed in the LMHF plan as a necessary prerequisite to obtain the negotiated benefits. This finding was based in part on Local 1635-F's October 9, 2014 contract proposal,[41] which explicitly stated that the LMHF plan "must include both labor and management of the RHA." Although RHA did not accept this proposal, we agree with the ALJ that this proposal served as notice to RHA negotiators, including Trevvett, Maslowski, and Whitney (RHA's chief negotiator at the time the Agreement was signed) that the nature of the LMHF plan

[39] Tr, at 60. *See also* ALJ Ex 1, Exhibit E.
[40] Joint Ex 4, at 23.
[41] Respondent Ex 2.

required both represented and nonrepresented employees to be included.

In addition to Local 1635-F's contract proposal, the ALJ relied on the testimony of numerous witnesses, most importantly Milne, RHA's chief negotiator prior to her departure on February 1, 2016, three months before the Agreement to join LMHF was reached. As the ALJ found, Milne "unequivocally" testified that

> Berger appeared before the HCC and at joint sessions of the parties' negotiating committees, and explained to those present that LMHF "was a union management plan and that *everyone* had to be part of that plan." Milne credibly stated that "*everyone*" on RHA's negotiating committee "knew that LMHF was labor/management and that *everyone* had to go (emphasis added)." She elaborated further and stated that the LMHF underwriting requirements were "talked about in negotiations" and that "they all knew that *everyone* had to go, that *everyone* had to be part of the plan – it was all or nothing.[42]

These negotiation sessions included both Trevvett, Maslowski, and Whitney. Although Trevvett and Maslowski testified that Berger did not explain that nonrepresented employees had to be a part of the LMHF plan, the ALJ did not credit their contrary testimony.

As we have often stated, "[c]redibility 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."[43] RHA argues that the ALJ's credibility resolution is incorrect, but it simply asserts that its witnesses, Trevvett and Maslowski, were more credible than Local 1635-F's, and has not presented any objective evidence that the ALJ has erred in crediting Milne's testimony. We find no

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[42] 52 PERB ¶ 4546, at 4717-4718 (emphasis in original) (editing marks and internal citations omitted).

[43] *Pine Valley Cent Sch Dist*, 51 PERB ¶ 3036, 3160 (2018), quoting *Village of Scarsdale*, 50 PERB ¶ 3007, n 51 (2017). *See also Pleasantville Union Free Sch Dist*, 51 PERB ¶ 3024, 3100 (2018); *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014).

basis upon which to overturn the ALJ's credibility finding.

Because we find that RHA knew that the LMHF plan required that both represented and nonrepresented employees be included in the plan, we affirm the ALJ's finding that when RHA agreed to provide the LMHF plan to unit employees as set forth in the Agreement, it also agreed to place nonrepresented RHA employees into the same plan as a condition precedent to meeting its contractual obligation of providing LMHF plan benefits to unit employees.[44] We further affirm the ALJ's finding that RHA repudiated the parties' Agreement by failing to place its nonrepresented employees into the LMHF plan. Put simply, RHA intentionally destroyed the condition precedent for the plan.

We have held that a meritorious contract repudiation claim arises only in "extraordinary circumstances" in which a party to a contract "denies the existence of an agreement or acts in total disregard of the contract's terms without any colorable claim of right."[45] We find the instant situation to present just such extraordinary circumstances, and that RHA has acted in total disregard of the Agreement's terms without any colorable claim of right.

We have found that repudiation of an agreement could be established by a showing that one party "has acted to deprive the [other] from receiving the fruits of its

[44] We do not rely on the negative inference drawn by the ALJ against RHA for RHA's failure to call Whitney to testify. At the time of the hearing, Whitney no longer was employed by RHA and thus was not under RHA's control. Moreover, RHA presented the testimony of Trevvett and Maslowski, both of whom testified as to what occurred at the negotiations sessions. Thus, from RHA's perspective, the testimony of Whitney would be cumulative. Even without the negative inference, we find the ALJ's finding of a violation here to be well supported.

[45] *Incorporated Vill of Hempstead*, 42 PERB ¶ 3024, 3094 (2009); *see also Village of Monroe*, 40 PERB ¶ 3013, 3051 (2007); *Buffalo Teachers Federation*, 25 PERB ¶ 3064, 3135 (1992).

bargain while retaining the benefit of the" agreement,[46] which establishes the extraordinary circumstances needed to establish repudiation.[47] The duty of good faith and fair dealing includes a pledge that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."[48]

The implied covenant of good faith and fair dealing here included an obligation on RHA's part to place its nonrepresented employees into the LMHF plan in order to provide its benefits to Local 1635-F's unit employees. Without doing so, the contract was not capable of being performed, and Local 1635-F was fully justified in believing that RHA was promising to include its nonrepresented employees in the LMHF plan. By disregarding this obligation, RHA prevented Local 1635-F from receiving the fruits of the contract and, under our law, repudiated the contract.

We find that RHA's remaining defenses lack merit. RHA argues that after it decided not to put nonrepresented employees in the LMHF plan, the LMHF plan could still have been available to bargaining unit employees if LMHF was willing to modify its underwriting guidelines. There is no evidence supporting the claim that LMHF would be willing to modify its underwriting guidelines to take represented employees only. In

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[46] *Board of Educ, City Sch Dist City of New York*, 49 PERB ¶ 3012, 3053 (2016).
[47] *See, eg*, *Related Companies, LP v Tesla Wall Systems, LLC*, 159 AD3d 588, 590-591 (1st Dept 2018) (Trial required on cognizable claim that defendant wrongfully "repudiated the contract" where issue of fact existed as to whether defendant "frustrated or prevented the occurrence of the condition precedent", citing *ADC Orange, Inc v Coyote Acres, Inc*, 7 NY3d 484, 490 (2006). *See also Van Valkenburgh, Nooger & Neville v Hayden Publ Co,* 30 NY2d 34, 45, *cert denied* 409 US 875 (1972).
[48] *Dalton v Educational Testing Service*, 87 NY2d 384, 389 (1995) (internal citations omitted).

fact, Berger expressly testified that such an option was not available.[49]

We do not rely on the ALJ's alternative findings under the "unilateral mistake" doctrine or his findings of what RHA should have known through the exercise of due diligence, and it is therefore unnecessary for us to address RHA's exceptions regarding these points.

We also affirm the ALJ's finding that RHA's conduct satisfies the standard for establishing a *per se* violation of § 209-a.1 (a) of the Act.[50] We agree with the ALJ that the honoring of agreements between employee organizations and employers is fundamental to the purposes of the Act. As a matter of public policy, the Act requires public employers "to negotiate with, and enter into written agreements" with certified or recognized employee organizations.[51] RHA here has flouted these basic principles by repudiating its contract with Local 1635-F. As discussed above, we find that RHA has not shown a legitimate justification for its actions, and its conduct therefore satisfies the standard for establishing a *per se* violation of § 209-a.1 (a) of the Act.

The ALJ ordered a make-whole remedy consisting of wages or benefits lost, if any, as a result of RHA's repudiation, with interest at the maximum legal rate. RHA argues that no monetary relief should be granted because Local 1635-F failed to adduce any concrete proof of damages. We find that the ALJ's remedy was an appropriate one. It is a well-established Board practice to address factual issues with respect to the proper application of a remedial order during a compliance

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[49] Tr, at 253-254.
[50] *UFT (Jenkins)*, 41 PERB ¶ 3007, 3043 (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); *Greenburgh Union Free Sch Dist,* 33 PERB ¶ 3018, 3049 (2000).
[51] Act, § 200 (b).

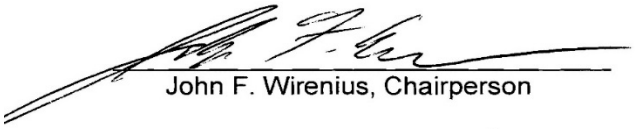
proceeding.[52] The time period to be covered by the remedy is January 1, 2017, when the Agreement was to become effective, until December 31, 2018, when the parties agreed that unit employees would stay in the LMFIT plan.

Accordingly, we deny RHA's exceptions and affirm the ALJ's findings that RHA violated §§ 209-a.1 (a) and (d) of the Act when it repudiated the parties' negotiated agreement covering health insurance benefits.

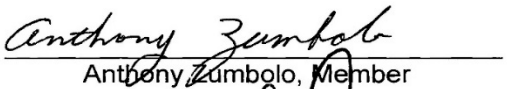
IT IS, THEREFORE, ORDERED that RHA will forthwith:

1. Not repudiate the May 9, 2016 Agreement;
2. Make all affected unit employees whole for wages and benefits lost, if any, as a result of RHA's repudiation, with interest at the maximum legal rate for the time period January 1, 2017 to December 31, 2018;
3. Not interfere with, restrain, or coerce Local 1635-F unit employees in the exercise of their rights guaranteed in Section 202 of the Act; and
4. Sign and post the attached notice at all physical and electronic locations customarily used by it to post notices to unit employees.

DATED: November 6, 2019
Albany, New York



John F. Wirenius, Chairperson



Anthony Zumbolo, Member

Monte A. Klein, Member

[52] *City of New Rochelle*, 44 PERB ¶ 3002, 3028 (2011); *Manhasset Union Free Sch Dist*, 42 PERB ¶ 3016, 3048 (2009) *on remittitur from Appellate Division 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009)*.

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 Rochester Housing Authority (RHA) in the unit represented by AFSCME Council 66, Local 1635-F that the RHA will:

1. Not repudiate the May 9, 2016 Agreement;

2. Make all affected unit employees whole for wages and benefits lost, if any, as a result of RHA's repudiation, with interest at the maximum legal rate for the time period January 1, 2017 to December 31, 2018; and

3. Not interfere with, restrain, or coerce Local 1635-F unit employees in the exercise of their rights guaranteed in Section 202 of the Act.

Dated . . . . . By . . . . . .
on behalf of the ROCHESTER HOUSING AUTHORITY

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.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MIGUEL CALLIRGOS,

Charging Party, **CASE NO. U-36904**

- and -

FASHION INSTITUTE OF TECHNOLOGY and UNITED COLLEGE EMPLOYEES FASHION INSTITUTE OF TECHNOLOGY/SUNY,

Respondents.

NOAH A. KINIGSTEIN, ESQ., for Charging Party

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Miguel Callirgos to a decision of the Director of Public Employment Practices and Representation (Director) dismissing his amended improper practice charge.[1] Callirgos's initial charge was filed on April 22, 2019 and alleged a violation of § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) by an unnamed employee organization. An attachment to the charge alleged that Callirgos, Adjunct Lecturer at the Fashion Institute of Technology (FIT), was terminated on May 15, 2018. Callirgos asserted that FIT "violated many rules of the contract" during the process of evaluating his tenure or CCE (Certificate of Continuing Employment), and terminated him "because [he] complained to the union about their violations." Callirgos acknowledged PERB's four-month filing period, but stated that he

[1] 52 PERB ¶ 4542 (2019).

"discovered for the first time that the real reason [he] was fired was due to [his] activities with the union," after he "spoke to a lawyer from PERB" on March 25, 2019.

Pursuant to the Director's preliminary review of the charge under § 204.2 of PERB's Rules of Procedure (Rules), on April 30, 2019, the Director advised Callirgos that his charge was deficient because, among other reasons, it was untimely filed pursuant to § 204.1 (a) (1) of the Rules.

On or around May 14, 2019, Callirgos filed an amended charge alleging that FIT violated §§ 209-a.1 (a) and (c) of the Act and that United College Employees Fashion Institute of Technology/SUNY (UCE FIT) violated § 209-a.2 (c) of the Act. The attachment to the amended charge stated, in relevant part, that:

> After FIT fired me on May 15, 2018 I went to the union and I spoke to Ms. Hellen Lynch executive vice president and I told her I just was fired and she stated that she knew about it but there is nothing else she can do. I told her to see if in the union book there was anything we can do and she said, there is nothing the union can do after the college has given [its] final decision. And I went to see her several times and also I called her several times but her answer was that there was nothing else to do. On March 25, 2019 I spoke to a PERB lawyer and . . . in addition, after carefully reading the contract book I found out that all the reasons the college gave for my termination were not valid because all the reasons they stated were in violation [of] the contract.

The Director found that Callirgos's amended charge failed to correct the timeliness deficiency of the original charge, and she dismissed the charge.

EXCEPTIONS

Callirgos filed four exceptions to the Director's decision, in which he argues that he filed his improper practice charge as soon as he was reasonably aware of the improper practice and that he was misled by UCE FIT into believing that the union contract did not cover his termination. Callirgos argues that UCE FIT was being

deceitful and that Callirgos did not discover this until March 2019 and argues that this "fraudulent concealment and/or equitable estoppel" extends PERB's four-month period of limitations.[2]

For the reasons that follow, we affirm the Director's decision.

DISCUSSION

Section 204.1 (a) of our Rules requires that an improper practice charge be filed within four months of when the charging party "first knew, or reasonably should have known" of the conduct that forms the basis for the alleged improper practice.[3] Here, the conduct that forms the basis for the alleged improper practice is Callirgos's termination by FIT and UCE FIT's refusal to grieve that termination. The termination occurred on May 15, 2018, and Callirgos does not dispute that he filed his charge more than four months after both his termination and UCE FIT's refusal to grieve his termination. However, he argues that UCE FIT purposely misled him into believing that his termination did not violate the contract and that he did not learn "he had been deceived" until he carefully read the contract in March 2019 and spoke with a PERB attorney.[4]

We affirm the Director's finding that Callirgos's charge is untimely. Whatever Callirgos's disagreement with UCE FIT regarding the contractual merits of his claim, Callirgos should have reasonably discovered this disagreement (by examining the

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[2] Brief in Support of Exceptions, at 5.
[3] *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶ 3002, 3008 (2019); *UFT (Martinez)*, 51 PERB ¶ 3021, 3088 (2018); *District Council 37 (Bacchus)*, 50 PERB ¶ 3013, 3057-3058 (2017); *UFT (Davis)*, 50 PERB ¶ 3014, 3059 (2017); *NYS Thruway Auth*, 40 PERB ¶ 4533, 4595 (2007); *State of New York (Office of Children and Family Services (Leone))*, 50 PERB ¶ 3039, 3163 (2017); *CSEA, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n 4 (1995).
[4] Exceptions, at 4.

contract, as he eventually did) through the exercise of due diligence within the four-month period of limitations provided by our Rules.[5] We also agree with the Director that the fact that Callirgos may have recently spoken to an attorney, who allegedly indicated to him that he may have a cause of action, does not revive his claim or otherwise extend the four-month period of limitations.[6]

Accordingly, the exceptions are denied, the Director's decision is affirmed, and the charge must be, and hereby is, dismissed.

DATED: November 6, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[5] See, eg, *District Council 37 (Javed)*, 50 PERB ¶ 3028 (2017) ("It is clear that [charging party] disagreed with [the union]'s position, but if he wished to challenge [the union]'s position as a violation of its duty of fair representation under the Act, he had a four-month time period in which to do so").

[6] *State of New York (Office of Alcoholism and Substance Abuse Services)*, 32 PERB ¶ 3036, 3083 (1999) ("Unless an act is performed in secret, the time to challenge that act as improper runs from the date the act is done, not from the date the charging party first discovers evidence of improper motive"), citing *State of New York (GOER)*, 22 PERB ¶ 3009 (1989); *Board of Educ of the City Sch Dist of the City of New York (Chamberlain)*, 15 PERB ¶ 3050 (1982). *See also State of New York (Office of Children and Family Services (Leone))*, 50 PERB ¶ 3039, 3163 (2017).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUFFOLK COUNTY DEPUTY SHERIFFS POLICE BENEVOLENT ASSOCIATION,

Charging Party,

CASE NO. U-37059

- and -

COUNTY OF SUFFOLK and SUFFOLK COUNTY SHERIFF,

Respondent,

- and -

SUFFOLK COUNTY CORRECTION OFFICERS ASSOCIATION,

Intervenor.

GREENBERG, BURZICHELLI, GREENBERG, PC (SETH H. GREENBERG of counsel), for Charging Party

LAMB & BARNOSKY, LLP (RICHARD K. ZUCKERMAN of counsel), for Respondent

ARCHER, BYINGTON, GLENNON & LEVINE, LLP (RICHARD S. CORENTHAL of counsel), for Intervenor

INTERIM BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Suffolk County Correction Officers Association (SCCOA) to a ruling of an Administrative Law Judge (ALJ) denying SCCOA's motion to intervene in an improper practice charge filed by the Suffolk County Deputy Sheriffs Police Benevolent Association (DSPBA) against the County of Suffolk and the Suffolk County Sheriff (together, the County). Because SCCOA's exceptions are to an interim ruling of the ALJ, we treat them as a motion seeking leave to file

interlocutory exceptions pursuant to § 213.4 of our Rules of Procedure (Rules). The improper practice charge in this case alleges that the County unilaterally transferred unit work exclusively performed by employees represented by DSPBA to employees represented by SCCOA.

Motion for Leave to File Interlocutory Exceptions

We will not grant leave to file interlocutory exceptions to non-final rulings and decisions unless the moving party demonstrates extraordinary circumstances.[1] In improper practice cases, we have held that a showing of extraordinary circumstances requires either a showing of "severe prejudice" or that "failure to consider the appeal would result in harm to a party which cannot be remedied by our review of the ALJ's final decision and order."[2]

Here, we find that extraordinary circumstances warranting our entertaining an interlocutory appeal exist, and that the interlocutory appeal should be considered on its merits. Were we to find that the motion to intervene was improperly denied, SCCOA's absence from the hearing and other proceedings to represent its interests could not be cured by our review of an ALJ's final decision and order rendered without SCCOA's

[1] *NYCTA*, 51 PERB ¶ 3031, 3133 (2018); *State of New York (UCS)*, 50 PERB ¶ 3042, 3169-3170 (2017).

[2] *State of New York (UCS)*, 50 PERB ¶ 3042, at 3170, citing *UFT (Fearon)*, 37 PERB ¶ 3007 (2004); *State of New York (UCS)*, 36 PERB ¶ 3031 (2003); *see also State of New York (Division of Parole)*, 25 PERB ¶ 3007, 3019-3020 (1992), citing *United Univ Professions*, 19 PERB ¶ 3009 (1986). *See also Jasper-Troupsburg Cent Sch Dist*, 27 PERB ¶ 3005, 3011 (1994); *Mt Morris Cent Sch Dist*, 26 PERB ¶ 3085, 3165 (1993) (finding that interlocutory appeal from rulings by an ALJ is properly entertained only if our failure to consider the appeal would result in harm to a party which cannot be remedied by our review of the ALJ's final decision and order).

participation. Accordingly, we grant SCCOA's motion to file interlocutory exceptions and proceed to the merits of the exceptions.

Exceptions

SCCOA filed three exceptions to the ALJ's denial of its motion to intervene. SCCOA argues that the ALJ's denial of its motion to intervene was factually and legally incorrect and that it should be allowed to intervene because DSPBA's requested relief directly implicates the terms and conditions of employment of the SCCOA bargaining unit as well as SCCOA members' fundamental rights guaranteed under the Public Employees' Fair Employment Act (Act).

DSPBA filed a response in which it opposed SCCOA's exceptions and argued that the ALJ properly denied the motion to intervene.

The County filed a response in which it argued that SCCOA's exceptions should be granted.

SCCOA also filed a reply to DSPBA's and the County's briefs. Section 213.4 of our Rules does not allow for the filing of reply briefs unless requested by the Board or filed with the Board's authorization. As the Board neither requested nor authorized SCCOA's additional filing here, we have not considered it.

Discussion

The ALJ denied SCCOA's motion for intervention on the basis that SCCOA was not at risk of having been found to have violated the Act and because SCCOA's position appeared to be aligned with the County's legal position. We disagree with the ALJ's reasoning and find that the ALJ should have granted SCCOA's motion to intervene under the facts and circumstances of this case. DSPBA claims that SCCOA has

engaged in work which DSPBA argues properly belongs to it. Thus, any remedy that restores the at-issue work to DSPBA is likely to take work away from employees represented by SCCOA, giving SCCOA an interest in the proceeding and a legitimate basis for intervention.[3]

Accordingly, we grant SCCOA's exceptions and remand the matter for further proceedings consistent with this decision.

DATED: November 6, 2019
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[3] *See State of New York (UCS)*, 35 PERB ¶ 3032, 3088 (2002).