

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DR. SIMPSON GRAY,

Charging Party,

CASE NO. U-28282

- and -

UNITED FEDERATION OF TEACHERS,

Respondent,

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

Employer.

DR. SIMPSON GRAY, *pro se*

**ROBERT E. WATERS, ESQ. (SETH J. BLAU of counsel), for Respondent
Board of Education of the City School District of the City of New York**

**JAMES R. SANDNER, GENERAL COUNSEL (WENDY M. STAR of counsel),
for Respondent United Federation of Teachers**

BOARD DECISION AND ORDER

On July 28, 2008, Dr. Simpson Gray (Gray) filed a motion, pursuant to §212.4(h) of the Rules of Procedure (Rules) for leave to file exceptions to the Board challenging a pre-hearing ruling of an Administrative Law Judge (ALJ), dated June 24, 2008, refusing to process a second amendment to Gray's improper practice charge alleging that the United Federation of Teachers (UFT) violated §209-a.2(c) of the Act.

FACTS

On or about April 11, 2008, Gray filed an improper practice charge alleging that UFT violated §209-a.2(c) on the grounds that only two of his fifteen grievances, filed since 2006, have been heard and that decisions have not been issued with respect to those two grievances. Consistent with §209-a.3 of the Act, the Board of Education of the City School District of the City of New York (District) is a statutory party to the improper practice charge.

On April 15, 2008, the Director of Public Employment Practices and Representation (Director) sent Gray a letter stating that his charge would not be processed due to deficiencies outlined in an attached notice. The Director's notice stated:

You need to clearly and concisely identify the acts of the union that you allege constitute the violation, with facts sufficient to arguably establish each act as arbitrary, discriminatory or in bad faith. You need to include names, dates times, places and other facts.

In response to the deficiency notice, Gray filed, on or about April 24, 2008, an amended pleading with the Director entitled "Amended Verified Complaint." Consistent with the Director's deficiency notice, Gray's amended pleading set forth specific allegations of actions and inactions by the UFT that Gray asserts violate §209-a.2(c) of the Act. Additionally, the amended pleading added the District and a UFT representative as named respondents and alleged that the District violated §§202 and 209-a.1(a)(c) and (d) of the Act by refusing to meet with him with respect to his 20 grievances and for violating the terms of the District-UFT collectively negotiated agreement (agreement).

On May 5, 2008, the Director issued a notice scheduling a conference on June 5, 2008 before an ALJ. In his May 5, 2008 notice, the Director informed Gray that although his allegations against UFT were being processed, the allegations against the District in his amended pleading would not be processed "because no charge was filed against it and the facts pled are insufficient to base a violation of the Act against the employer."

Both UFT and the District filed answers to Gray's amended charge.

Without seeking leave from the Director or the assigned ALJ, on or about May 25, 2008, Gray filed a second amended pleading, entitled "Second Amended Verified Complaint and Charge", containing seven numbered "counts" and 50 numbered paragraphs of allegations against UFT and the District along with 24 pages of exhibits. In Count 6, Gray alleges that Article 22B1(b) of the District-UFT agreement violates the Act because it grants UFT the sole discretion to process a grievance beyond Step 1. Both UFT and the District opposed the processing of Gray's second amendment.

Following a June 17, 2008 conference with the parties, the ALJ issued a ruling, in letter form, dated June 24, 2008, concluding that Gray's second amended pleading was deficient and, therefore, it would not be processed. In her ruling, the ALJ confirmed that at the conference Gray acknowledged that the allegations in Counts 1, 2 and 3 were a mere repetition of the allegations contained in his first amended pleading.

In addition, the ALJ ruled that:

1. Count 1's allegations against the District had already been determined to be deficient by the Director in his May 5, 2008 notice;
2. The allegations in Count 2 and 3 are substantially the same as the allegations contained in the first amended pleading;

3. Counts 4, 5 and 6 allege facts that do not constitute an improper practice under the Act and are untimely pursuant to §204.1(a)(1) of the Rules;
4. Count 7 is deficient because an individual lacks standing to allege a violation of §209-a.1(d) and because the allegations had already been determined to be deficient by the Director in his May 5, 2008 notice.

MOTION FOR LEAVE TO FILE EXCEPTIONS

In his motion for leave to file exceptions, Gray contends that extraordinary circumstances exist warranting the Board to grant his motion. We disagree.

The purported extraordinary circumstances cited by Gray in support of his motion include: a) the alleged repudiation of the agreement by UFT and the District by failing to process his numerous grievances; b) UFT's failure to enforce a stipulation of settlement; c) the ALJ's ruling is contrary to the Act because, according to Gray, the failure to perform the terms of an agreement constitutes a violation of the Act; d) the second amended pleading cured the deficiencies found by the Director with respect to the first amended pleading; e) the ALJ misconstrued the allegations in the second amended pleading; and f) the allegations in the second amended pleading are timely and state facts constituting an improper practice under the Act.

Both UFT and the District oppose Gray's motion for leave to file exceptions.

DISCUSSION

Section 212.4(h) of the Rules states, in relevant part, that:

"All motions and rulings made at the hearing shall be part of the record of the proceeding, and unless expressly authorized by the board, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision."

Under well-established precedent, the Board will not grant leave to file exceptions to non-final rulings and decisions unless the moving party demonstrates extraordinary circumstances.¹ The reasoning underlying the extraordinary circumstances standard is the recognition that it is far more efficient for the Board and the parties to await a final disposition of the merits of a charge before examining interim determinations. The improvident grant of leave results in unnecessary delays in the final resolution of the factual and legal issues raised by an improper practice charge or representation petition. As a result, the Board has consistently rejected most requests for permission to file exceptions, especially motions seeking review of interim rulings in improper practice cases.² In contrast, as we stated in *State of New York (Division of Parole)*,³ the Board has been more willing to grant leave to file interlocutory exceptions in cases involving representation cases, under the extraordinary circumstances standard, when:

the issue raised in the motion for leave has important statewide policy or legal implications for the processing of future representation petitions, may help insure procedural certainty in such processing or where our decision may

¹ *Mt Morris Cent Sch Dist*, 26 PERB ¶3085 (1993); *Greenburgh No 11 Union Free Sch Dist*, 28 PERB ¶3034 (1995); *Town of Shawangunk*, 29 PERB ¶3050 (1996); *New York State Housing Finance Agency*, 30 PERB ¶3022 (1997); *Council 82, AFSCME*, 32 PERB ¶3040 (1999); *Watertown City Sch Dist*, 32 PERB ¶3022 (1999); *UFT (Grassel)*, 32 PERB ¶3071 (1999); *City of Newburgh*, 33 PERB ¶3031 (2000); *State of New York (Division of Parole)*, 40 PERB ¶3007 (2007).

² *Town of Shawangunk*, *supra*, note 1.

³ *Supra*, note 1.

obviate the need for further processing of the petition.⁴

In the present case, Gray seeks leave to file exceptions to challenge the ALJ's refusal to permit him to file a second amended pleading with respect to his improper practice charge. As we recently reiterated in *City of Elmira*,⁵ an ALJ, in general, is granted considerable discretion with respect to the processing of an improper practice charge.

Pursuant to §204.1(d) of the Rules, the Director or an ALJ is granted the discretion to determine whether a party may amend a pleading. Section 204.1(d) of the Rules states:

The director or administrative law judge designated by the director may permit a charging party to amend the charge before, during or after the conclusion of the hearing upon such terms as may be deemed just and consistent with due process.

Consistent with §204.1(d) of the Rules, we conclude that extraordinary circumstances do not exist in the present case to grant Gray leave to file exceptions because he has not demonstrated that the ALJ's interim ruling has resulted or will necessarily result in a denial of due process or undue prejudice. Gray's motion is primarily a repetition of his various pleadings combined with an exposition with respect to his disagreement with the ALJ's legal conclusions. Such factual and legal issues are best determined on exceptions from the final disposition of the charge.

Based upon the foregoing, we deny Gray's motion for leave to file exceptions

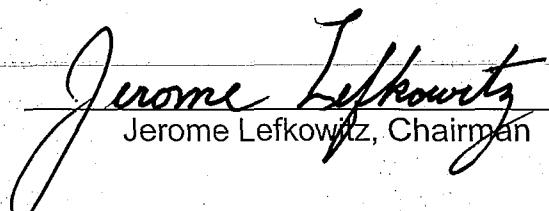
⁴ 40 PERB at 3019.

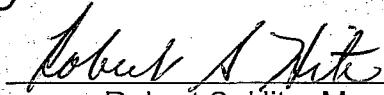
⁵ 41 PERB ¶3018 (2008).

and remand the case to the ALJ for further processing consistent with this decision.

SO ORDERED

DATED: September 24, 2008
Albany, New York





Jerome Lefkowitz, Chairman
Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Charging Party,

-and-

CASE NO. U-26761

COUNTY OF COLUMBIA,

Respondent.

LAW OFFICES OF RICHARD M. GREENSPAN, P.C. (THOMAS RUBERSTONE, JR. of counsel), for Charging Party

ROEMER WALLENS & MINEAUX LLP (WILLIAM M. WALLENS, of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by the County of Columbia (County) to a decision by an Administrative Law Judge (ALJ) on a charge filed by United Public Service Employees Union (UPSEU) finding that the County violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally created a new 4:00 am-12:30 pm shift for cleaning County buildings and unilaterally assigned a member of the UPSEU bargaining unit to work that shift.¹ In reaching her decision, the ALJ dismissed the County's duty satisfaction and waiver defenses pled in its answer.

¹ 41 PERB ¶4533 (2008).

EXCEPTIONS

In its exceptions, the County contends that the ALJ erred in her interpretation of the parties' collectively negotiated agreement, in dismissing the County's duty satisfaction and waiver defense, and in finding that the County violated §209-a.1(d) of the Act when it established the 4:00 am-12:30 pm shift and assigned a UPSEU bargaining-unit member to that shift. In addition, the County challenges the ALJ's proposed remedial order. UPSEU supports the ALJ's decision and remedial order.

FACTS

In lieu of a hearing, the parties submitted to the ALJ a stipulation of facts along with eight exhibits, including the parties' 2004-2007 collectively negotiated agreement (agreement). UPSEU is the certified employee organization representing various County employees, including building maintenance workers in the Department of Public Works Facilities Division.

Article II, entitled "Compensation", includes negotiated provisions with respect to premium pay and overtime pay. Article II, §§5(a), 5(c)(2) and 5(c)(4) refers to bargaining unit members working in shifts:

a. **Shift Differential**

All employees at the Pine Haven Home and the Night watch person in the Department of Public Works working in shifts other than the day shift shall receive shift differential of \$.75 per hour. Effective January 1, 2005, the shift differential shall increase to \$1.00 per hour.

c. **Overtime Pay**

(2) Employees' regular daily shift schedules will not be changed for the express purpose of avoiding overtime payments.

(4) Employees who are scheduled to work overtime on a regular scheduled shift such as scheduled night hours and

evening hours in the DMV shall be entitled to receive overtime at time and one-half the hourly rate of pay for hours in excess of eight (8) hours in one shift.

With respect to the distribution of overtime, Article II, §5(d)(4)(e) makes reference to a normal work day:

- (e) During hours outside the normal work day (4:00 p.m. to 7:30 a.m.) and weekends and holidays, employees will be called in-for duty in accordance with paragraph 4(b) and, other employees of the Highway Department may be activated depending upon the need of the Department at the time of the snow and ice incident.

Article III of the agreement, entitled "Work Day, Workweek" states:

a. **Normal Work Day – Work Week**

The normal work week for all employees of the County of Columbia shall not in any event be in excess of forty (40) hours, consisting of five (5) consecutive days not in excess of eight (8) hours per day. Employees shall have two consecutive twenty-four hour days, a total of forty-eight consecutive hours off each week. Except in the event of emergencies and field employees, employees shall finish their work day at the place it began. This provision shall not affect employees at Pine Haven House.

Employees who normally work a 35 hour week and who are required to work in excess of 35 hours shall receive their regular hourly rate of pay up to 40 hours per week. Time worked in excess of forty hours shall be at the rate of time and one half the regular hourly rate.

The County agrees that the current scheduling practice on Thursdays only in the Department of Motor Vehicles will continue for the duration of this Agreement. Thursday evening hours at the Department of Motor Vehicles and Mental Health shall be suspended when Friday is celebrated as a holiday. However, the County reserves the right, to reduce or eliminate the scheduling practice in the Department of Motor Vehicles on Thursdays. Nothing herein shall be construed to reduce or comprise the County's right as an employer.

b. **Paving Crew**

Designated employees in the Highway Department will work on a voluntary basis for ten hour days per week at straight time wages in the summertime on the paving crew.

c. **Pine Haven**

The County agrees to guarantee every other weekend off for Pine Haven Home employees.

d. **Change in Schedule**

The County may establish new or alter existing work days or work weeks, upon fourteen (14) calendar days notice, except in an emergency, to the Union and affected employees. This shall not be a waiver of any Taylor Law right of the Union to demand impact negotiations.

Article XVII, entitled "County's Right As An Employer", states, in part:

The County retains all of its rights as Employer, including, but not limited to, the right to assign work as required, including that which requires overtime, the right to supervise as required and the right to discipline where necessary, subject to the provision of this provision of this Agreement, the Civil Service law of the State of New York, and any other Federal, State of [sic] Local Laws.

On January 30, 2006, the County met with UPSEU and various UPSEU bargaining unit members to discuss the County's intention to change the shift for employees assigned to clean County buildings. Among those present at the meeting were building maintenance workers Frank Wright (Wright) and Ronald Seymour (Seymour). Both Wright and Seymour are assigned to the County's public safety building and, at the time, worked 7:30 am to 4:00 pm.

During the meeting, the County announced its unilateral decision to change the cleaning assignments in the public safety building to 4:00 am to 12:30 pm. However, the County indicated that it did not need both Wright and Seymour to work the new shift and requested they submit their respective preferences with respect to the new shift. In

addition, they were informed that if they both wanted to work the new shift, the County would consider an alternating work schedule. Both Wright and Seymour were also given letters, dated January 30, 2006, from the County informing them that, pursuant to Article III(d) of the agreement, their work schedule would be 4:00 am to 12:30 pm, commencing on March 1, 2006. After Wright and Seymour did not respond with their preferences, the County informed Wright that, effective February 27, 2006, his new shift would be 4:00 am to 12:30 pm and Seymour was notified that his shift would remain unchanged.

On or about February 28, 2006, the County changed the work hours of Wright, laborer Louise Sacco and cleaners Terry Guntert, Barton Hover and William Hughes to 4:00 am to 12:30 pm. On March 21, 2006 and April 17, 2006, UPSEU sent letters to the County questioning the procedures it utilized in making the changes to the shift assignment. In response, the County offered to meet to discuss UPSEU's concerns.

DISCUSSION

In its exceptions, the County asserts that the ALJ erred in her interpretation of the plain language of the parties' agreement, resulting in the erroneous rejection of the County's duty satisfaction and waiver defenses. We disagree.

In *New York City Transit Authority*,² the Board recently reaffirmed the principle that when parties have bargained a specific subject to completion and have entered into an agreement with respect to that subject, an employer has satisfied its duty to negotiate and does not act unilaterally, in violation of the Act, when it takes an action

² 41 PERB ¶3014 (2008); see also, *City of Albany*, 41 PERB ¶3019 (2008).

that is permitted under the specifically negotiated term of the agreement.³ However, the burden rests with the respondent to both plead and prove a duty satisfaction defense through negotiated terms that are reasonably clear on the specific subject at issue.⁴

In order to prevail on a waiver defense, a respondent must plead and prove that an agreement contains a provision that constitutes a "clear, unmistakable and unambiguous" waiver of the charging party's right to negotiate a mandatory subject under the Act.⁵

In determining whether an agreement contains a provision that satisfies a respondent's duty to negotiate or a waiver of a charging party's right to negotiate a mandatory subject, the Board will apply standard principles of contract interpretation.⁶ When applying such principles, our aim is to discern the parties' intent by giving a practical interpretation to the language utilized. When the contract language is clear and unambiguous, evidence outside the four corners of the agreement will not be

³ See also, *County of Nassau*, 31 PERB ¶3064 (1998); *County of Nassau* 31 PERB ¶3074 (1998); *State of New York (Workers' Compensation Board)*, 32 NYPERB ¶3076 (1999).

⁴ NYCTA, 20 PERB ¶3037 (1987), *confd*, 147 AD2d 574, 22 PERB ¶7001 (2d Dept 1989); *Town of Shawangunk*, 32 PERB ¶3042 (1999); *County of Sullivan and Sullivan County Sheriff*, 41 PERB ¶3006 (2008); *City of Oswego*, 41 PERB ¶3011 (2008).

⁵ *CSEA v Newman*, 88 AD2d 685, 15 PERB ¶7011 (3d Dept 1982), *app dismissed*, 57 NY2d 775, 15 PERB ¶7020 (1982) *affd*, 61 NY2d 1001, 17 PERB ¶7007 (1984) (subsequent history omitted). See also, *County of Saratoga and Saratoga County Sheriff*, 37 PERB ¶3024 (2004) *rev*, *County of Saratoga v New York State Pub Empl Rel Bd*, 21 AD3d 1160, 38 PERB ¶7013 (3d Dept 2005); *City of Yonkers*, 40 PERB ¶3001 (2007); *MABSTOA*, 40 PERB ¶3023 (2007); *State of New York-Unified Court System*, 41 PERB ¶3009 (2008).

⁶ NYCTA, *supra* note 2; *County of Livingston*, 30 PERB ¶3046 (1997). See also, *Bornstein, Gosline, Greenbaum, Labor and Employment Arbitration*, 2d ed., Ch. 9 (2008).

considered. However, where the language is susceptible to more than one reasonable interpretation, extrinsic evidence, such as negotiation history and/or a past practice, is admissible to clarify the ambiguity and thereby effectuate the intent of the parties. For example, in *New York City Transit Authority*,⁷ we sustained a duty satisfaction defense based on parol evidence in the record despite the fact that the relevant contract provision was susceptible to more than one reasonable interpretation.

In the present case, the County argues that the clear and unambiguous language contained in Articles III and XVII demonstrates that, contrary to the ALJ's conclusion, the parties reached an agreement with respect to the establishment and modification of employee shifts along with the procedures for assigning bargaining unit employees to such shifts. The County relies upon dictionary definitions of certain contractual terms to support its contention that the phrase "work day," as used in Article III(a) and (d), is synonymous with an eight hour shift and that Article III(d) expressly authorizes the County to both establish and alter such shifts. In addition, the County argues that it has the right to determine when an eight hour shift begins and ends because it is granted "the right to assign work as required" under Article XVII.

While the use of dictionary definitions can constitute a proper means for interpreting the terms of an agreement aimed at discerning the parties' intent, we find the use of that interpretive tool to be unhelpful in the present case. Based upon the specific, but varying, terms and phrases utilized by the parties in various sections of the agreement, we conclude that the agreement is not reasonably clear on the subject matter at issue.

⁷ *Supra*, note 2.

Article II, §§5(a), 5(c)(2) and 5(c)(4) of the agreement utilize relevant phrases such as "shifts other than the day shift," "regular daily shift schedules" and "regularly scheduled shift," but the agreement is silent with respect to the definition of those phrases including identifying the specific hours, if any, for each referenced shift.

The ambiguity with respect to what constitutes a shift under the agreement is compounded by the parties' use of the phrase "normal work day" in Article II, §5(d)(4)(e) rather than continuing to make reference to a shift. Although Article II, §5(d)(4)(e) does not affirmatively define the phrase "normal work day," a definition can be inferred from the description of the period 4:00 pm to 7:30 am as being "hours outside the normal work day." The hours defined as being "outside the normal work day" in Article II suggests that the remaining eight and one-half hours of a day, 7:30 am to 4:00 pm, constitutes a "normal work day" for bargaining unit members. However, even if we conclude that the hours of a "normal work day" are implicitly defined in Article II, it remains unclear whether those same hours are intended to be applicable for a "day shift," "daily shift" or the other shifts referred to in Article II.

We next turn to Article III, where Article II's implicit definition of the hours of a "normal work day" may have relevance. The subheading for Article III(a) is "Normal Work Day – Work Week." Despite the subheading, the text of Article III(a) and (d) refers only to a "work day," without the modifying term "normal", rendering it uncertain whether a "work day" is intended to be synonymous with a "normal work day" or a shift, or is intended to have a different meaning such as the days of the week when an employee will perform assigned duties. There is an internal inconsistency between Article II, §5(d)(4)(e), which implicitly defines a "normal work day" as an eight and one-half hour

day, while Article III(a) defines a "work day" as not in excess of eight hours. Moreover, the reference to undefined "Thursday evening hours," in Article III(a), for the Departments of Motor Vehicles and Mental Health, exacerbates the difficulties in rendering a reasonable interpretation of the agreement.

Based on the inconsistent, if not contradictory, terminology in Articles II and III of the agreement, we are unable to conclude that the agreement is reasonably clear that the parties reached an agreement with respect to the establishment and modification of employee daily work hours and the procedures for assigning bargaining unit employees to those hours.

Alternatively, even if we found the agreement to be reasonably clear, we would conclude, based on the inconsistencies in the terminology, that the agreement is susceptible to more than one reasonable interpretation. For example, Article III(d) can be reasonably interpreted to afford the County the prerogative of changing the number of hours in a work day, which is not the same as changing the time of shifts within the work day. Therefore, in order to sustain the County's duty satisfaction defense, the record would have to include sufficient extrinsic evidence to support the County's contractually based defense. However, the stipulated record does not include any parol evidence to aid in construing the agreement.

In addition, we reject the County's waiver argument, premised on Articles III(d) and XVII. Article III(d) of the agreement grants the County the power to alter "existing work days" as long as it provides the requisite 14 day notice to UPSEU and affected employees. The text of Article III(d) does not explicitly grant the County the authority to alter shifts or even the hours of a normal work day. At best, it permits the County to

determine which days of the week, and the number of hours, bargaining unit members are to perform their job duties.

Similarly, the authority of the County to assign work, under Article XVII, permits the County to determine the particular duties to be performed by bargaining unit employees. The ability to assign work cannot be reasonably construed as constituting authority to modify the hours worked. We conclude that the agreement does not contain a clear, unmistakable and unambiguous waiver by UPSEU of the right to negotiate over the establishment and modification of shifts and the procedures for assigning bargaining unit employees to those shifts.

Therefore, we deny the County's challenge to the ALJ's interpretation of the agreement to the extent that she concluded that the terms of the agreement are insufficient to support the County's duty satisfaction and waiver defenses.

We also deny the County's exception challenging the ALJ's conclusion that the County violated §209-a.1(d) of the Act when it unilaterally created the new shift and assigned Wright to work the shift. It is well-settled that shifts, tours of duties and work schedules, in general, constitute mandatory subjects of bargaining under the Act as long as they do not interfere with an employer's prerogative with respect to staffing.⁸

Finally, we examine the County's exception challenging the ALJ's remedial order that the County rescind the new 4:00 am to 12:30 pm shift for cleaning County buildings, rescind its order that Wright work that shift and make UPSEU represented employees, if any, whole for any wages and benefits lost, with interest at the maximum legal rate, as a result of the County's improper practice. Contrary to the County's

⁸ *City of New York*, 40 PERB ¶3017 (2007).

argument, in remedying an improper practice, under §205.5(d) of the Act, the Board is not limited or constrained by a remedy proposed by a charging party. In addition, we are not persuaded by the County's argument that the remedial order constitutes an enforcement of the parties' agreement.

Based on the foregoing, we find that the County violated §209- a.1(d) of the Act when it unilaterally created the 4:00 am to 12:30 pm shift for cleaning County buildings and unilaterally assigned a member of the UPSEU bargaining unit to work that shift.

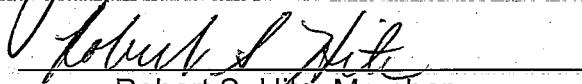
IT IS, THEREFORE, ORDERED that the County shall:

1. Rescind its directive establishing the 4:00 am to 12:30 pm shift and its order that Frank Wright work that shift;
2. Make UPSEU represented employees whole for wages and benefits lost, if any, by virtue of the County's unilateral actions, plus interest at the maximum legal rate and;
3. Sign and post the attached notice at all locations customarily used to post notices to unit employees.

DATED: September 24, 2008
Albany, New York



Jerome Lefkowitz, Chairman



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 Columbia in the unit represented by the United Public Service Employees Union that the County will:

1. Rescind its directive establishing the 4:00 am to 12:30 pm shift and its order that Frank Wright work that shift and;
2. Make UPSEU represented employees whole for wages and benefits lost, if any, by virtue of the County's unilateral actions, plus interest at the maximum legal rate.

Dated By
(Representative) (Title)

.....
County of Columbia

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

VICTOR MALTSEV,

Charging Party,

CASE NO. U-27372

- and -

DISTRICT COUNCIL 37, AFSCME, AFL-CIO,

Respondent,

- and -

NEW YORK CITY TRANSIT AUTHORITY,

Employer.

VICTOR MALTSEV, pro se

**EDDIE M. DEMMINGS, GENERAL COUNSEL (ROBIN ROACH, of counsel),
for Respondent**

**MARTIN B. SCHNABEL, GENERAL COUNSEL (MICHELE L. SHERIDAN, of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions by Victor Maltsev (Maltsev) to a decision of an Administrative Law Judge dismissing an improper practice charge filed by Maltsev, on February 8, 2007, alleging that District Council 37, AFSCME, AFL-CIO (DC 37) violated §209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it refused to process a grievance to arbitration and based on its alleged failure to respond

Case No. 3-27872
to his inquiries with respect to the grievance.¹

DC 37 filed an answer that denied it violated the Act and affirmatively alleged that Maltsev had retired from employment with the New York City Transit Authority (NYCTA) almost two years before filing the charge and that the charge was untimely. NYCTA, as a statutory party pursuant to §209-a.3 of the Act, filed an answer that also raised timeliness as an affirmative defense.

Following a hearing on December 11, 2007, the ALJ issued a decision dismissing the charge concluding that Maltsev, as a retiree, is not a public employee under PERB's Rules of Procedure (Rules), §204.1(a)(1) and therefore lacks standing to file the charge. In the alternative, the ALJ concluded that Maltsev's allegations are untimely under §204.1(a)(1) of the Rules and that they lack substantive merit.

EXCEPTIONS

In his exceptions, Maltsev contends that the ALJ made both errors of law and fact in dismissing the charge. Specifically, he asserts that the ALJ erred, as a matter of law, in concluding that he lacks standing to pursue the charge. In addition, he contends that the ALJ misconstrued the evidence in the record when she concluded that the charge lacks merit and is untimely. DC 37 and NYCTA support the ALJ's decision.

Based upon our review of the record, consideration of the parties' arguments and application of relevant precedent, we grant Maltsev's exceptions, in part, but affirm the ALJ's dismissal of the charge.

¹ 41 PERB ¶4542 (2008).

FACTS

Prior to March 1, 2005, Maltsev was employed by NYCTA. In a letter, dated January 27, 2005, he requested DC 37, Local 375, Chapter 2 Grievance Chair George Dames (Dames) to initiate a grievance on his behalf challenging NYCTA's failure to comply with the timeframes, set forth in NYCTA's employee suggestion policy and procedure, for responding to employee suggestions and appeals. This non-contractual policy and procedure permits employees to propose suggestions to NYCTA aimed at improving its operations. An employee wishing to submit a suggestion is required to agree to a number of explicit conditions including:

I agree that any decision by NYC Transit concerning this suggestion, including but not limited to whether I am eligible to participate in the Employee Suggestion Program, whether or not to use the suggestion, and whether or not I receive an award for the suggestion, is final and binding. I agree that my submission of the suggestion to NYC Transit will not give rise to any claim of any nature whatsoever against NYC Transit on the part of myself, my heirs or my assigns.

Under the policy and procedure, if an employee's suggestion is adopted by NYCTA, an employee may be entitled to a monetary award if the adopted suggestion leads to, *inter alia*, budgetary savings, increased revenue, improved safety and/or improved NYCTA services. If an employee suggestion is rejected, an employee may file a written appeal requesting a reevaluation. If dissatisfied with the outcome of the reevaluation, the employee may appeal to a NYCTA committee which determines the appeal in a final and binding decision.

On February 25, 2005, DC 37 filed a Step 1 grievance on behalf of Maltsev.² A few days later, Maltsev retired from NYCTA employment. Thereafter, DC 37 processed the grievance consistent with the procedures of the parties' collectively negotiated agreement. On May 2, 2006, Dames requested that the DC 37 Legal Department process the grievance to arbitration. Following a review of the grievance, the DC 37 Legal Department, on May 8, 2006, issued a memorandum stating that it had determined that the grievance lacked merit and therefore should not be processed to arbitration.

It is undisputed that Maltsev received a copy of the DC 37 Legal Department memorandum in May 2006. Thereafter, no one from DC 37 advised him that his grievance would be proceeding to arbitration. Between June 2006 and September 2006, Maltsev made attempts at contacting various DC 37 representatives with respect to its refusal to pursue the grievance at arbitration. These efforts included July 2006 letters to DC 37 Local 375 President Claude Fort (Fort) and Dames, numerous telephone calls, as well as unscheduled visits to DC 37 headquarters to discuss the grievance with DC 37 representatives. According to Maltsev, DC 37 representatives refused to respond to him about the grievance.

The record reveals that on August 21, 2006, Maltsev had a brief conversation

² Although the employee suggestion policy and procedure is not incorporated into the parties' collectively negotiated agreement, the agreement permits the filing of grievances for violations, misinterpretation or misapplication of "any written working conditions, rule or resolution of the Authority governing or affecting its employees...." Union Ex. 1, Art. VI(A).

with DC 37 Assistant Director Maynard Anderson (Anderson) at DC 37 headquarters.³

During the conversation, Maltsev complained about Fort's failure to respond to Maltsev's numerous inquiries about the grievance, and Anderson agreed to investigate the status of the grievance. Maltsev testified that he sent a letter to Anderson, dated September 6, 2006, requesting the results of Anderson's investigation. During his testimony, however, Anderson stated that he did not receive Maltsev's letter.

In August, September and October 2006, Maltsev also communicated by letter and email with DC 37's Ethical Practices Officer J. Bruce Maffeo (Maffeo) on the issue of Fort's alleged failure to respond to Maltsev's inquiries about the grievance. On October 17, 2006, Maffeo sent a letter to Maltsev summarizing their communications to date including Maffeo's September 7, 2006 email suggesting that Maltsev proceed with his complaint alleging that Fort failed to respond to his inquiries about the grievance.

On January 25, 2007, following his inquiry into the status of Maltsev's grievance, Anderson sent a letter to Maltsev stating:

I am attaching hereto a copy of a memorandum from our DC 37 Legal Department to Local 375 Chapter 2, Transit Authority grievance representative George Dames, dated May 8th 2006 informing him that based on a careful review of your file, they have determined that the grievance filed on your behalf is not meritorious and therefore should not proceed to arbitration.⁴

³ Maltsev testified that the discussion took place on August 21, 2006 which is confirmed by his September 6, 2006 letter to Anderson. In contrast, Anderson was unable to recall, during his testimony, the date of their conversation.

⁴ In his exceptions, Maltsev includes a chronology of purported events between October 16, 2006 and the filing of his charge. However, the evidence in the record is inconsistent with the chronology.

DISCUSSION

In his exceptions, Maltsev challenges the ALJ's conclusion that he lacks standing to pursue the charge, pursuant to §209-a.2(c) of the Act, because he is no longer a public employee.

1. Standing

Pursuant to §209-a.2(c), it is an improper practice for an employee organization "to breach its duty of fair representation to public employees under this article." The term "public employee" is defined in §201.7(a) of the Act as "any person holding a position by appointment or employment in the services of a public employer...." In *Greece Central School District, et al*,⁵ the Board dismissed a duty of fair representation charge alleging that an employee organization had failed to respond to a request by retirees to file a grievance seeking a leave credit benefit, under a collectively negotiated agreement, on the ground that the charging parties were not public employees, pursuant to 209-a.2(c) of the Act, because they had voluntarily and permanently severed their employment relationship. Subsequently, in *Westchester County Correction Officers' Benevolent Association (Bartolini)*,⁶ the Board emphasized that:

When an employee's employment relationship is severed, the union's representation duties to that former employee end, except in circumstances in which the severance from employment is being contested or there is some other basis upon which to conclude that there is a continuing nexus to employment notwithstanding the individual's relinquishment

⁵ 28 PERB ¶3048 (1995), *confd sub nom.*, 29 PERB ¶7003 (Albany County 1996). See also, *County of Dutchess and Dutchess County Deputy Sheriffs' PBA*, 31 PERB ¶3068 (1998).

⁶ 30 PERB ¶3075 (1997).

or loss of employment.⁷

The Appellate Division, Third Department in *Baker v. Board of Education, Hoosick Falls Central School District*,⁸ applying our standards for standing under §201-a.2(c) of the Act, held that retirees stated a cause of action for a breach of the duty of fair representation against an employee organization for allegedly excluding them from retroactive salary increases for a period when they were still employed. In reinstating the complaint, the Third Department stated:

In our view, there is a continuing nexus between a retiree's former employment and negotiations over terms and conditions that will be retroactively applied to those periods of active employment. We conclude, therefore, that the Association had a continuing duty to represent plaintiffs in negotiations for the new retroactive CBA.⁹

In the present case, Maltsev retired from employment with NYCTA a few days following the filing of the grievance by DC 37 challenging NYCTA's delays in responding to his suggestions and appeals. It is undisputed that Maltsev voluntarily ended his employment with NYCTA and the subject matter of the grievance does not relate in any manner to the circumstances under which he severed his employment relationship. However, we conclude that there is a nexus between Maltsev's grievance and his period of active employment with NYCTA. It was during his employment that Maltsev submitted his numerous suggestions and appeals which, arguably, may have entitled him ultimately to compensation in the form of a monetary award under NYCTA's

⁷ 30 PERB at 3184.

⁸ 3 AD3d 678, 37 PERB ¶7502 (3d Dept 2004).

⁹ 3 AD 3d at 681.

employee suggestion policy. Although the grievance does not seek negotiated compensation or benefits for the period during which he was employed, the Board has previously recognized that an employee organization's duty of fair representation can extend to non-contractual issues that are job related and which directly affect an employee's compensation and other terms and conditions of employment.¹⁰

Therefore, we reverse the ALJ's conclusion that Maltsev lacked standing to pursue his charge.

We next turn to the exceptions challenging the ALJ's alternative bases for dismissing the charge: lack of merit and untimeliness.

2. DC 37's Decision to Not Proceed to Arbitration

It is well-settled that an employee organization is entitled to a wide range of reasonable discretion in the processing of grievances under the Act.¹¹ In the present case, DC 37 processed the grievance through the three step grievance procedure but decided against filing a demand for arbitration. This decision was made based on an evaluation by DC 37's Legal Department and it is well within broad range of discretion granted to an employee organization under the Act. Furthermore, a review of the explicit terms of the employee suggestion policy establishes that Maltsev's suggestions and appeals do not give rise to a claim for a monetary award against NYCTA. NYCTA retains final and binding authority under the policy to determine whether to use a suggestion or whether to issue a monetary award for an adopted suggestion.

¹⁰ *UFT (Barnett)*, 14 PERB ¶3017 (1981).

¹¹ *Rochester Teachers Assoc (Danna)*, 41 PERB ¶3003 (2008); *PEF (Frisch)*, 29 PERB ¶3019 (1996); *District Council 37, AFSCME (González)*, 28 PERB ¶3062 (1995).

In the alternative, we affirm the ALJ's dismissal of Maltsev's charge challenging DC 37's decision, as untimely pursuant to §204.1(a)(1) of the Rules, because the charge was filed over four months after Maltsev received the DC 37 Legal Department memorandum indicating that the grievance would not be processed to arbitration.¹² His subsequent unsuccessful effort to communicate with DC 37 representatives about the grievance does not toll the four month period to file a charge under the Rules.¹³

Therefore, we affirm the ALJ's dismissal of Maltsev's charge claiming DC 37 violated its duty of fair representation by refusing to process the grievance to arbitration.

Finally, we consider Maltsev's exceptions challenging the ALJ's dismissal of his allegations that DC 37 failed to respond to his inquiries about the grievance.

3. DC 37's Alleged Failure to Respond to Inquiries

As the Board stated in *United Federation of Teachers (Grassel)*:¹⁴

A request for information or appeal of an employee organization's decision, if not merely redundant and/or onerous, is deserving of a response, and the absence of one at least establishes a charge to the extent of requiring the presentation by the employee organization of an explanation for its failure to respond.¹⁵

An employee organization is obligated, under the Act, to respond to a request for information within a reasonable period of time under the facts and circumstances of

¹² NYCTA (Sayad), 28 PERB ¶3070 (1995); Buffalo Teachers' Fed (Boyar), 29 PERB ¶3006 (1996).

¹³ New York State Thruway Auth, 40 PERB ¶3014 (2007); City of Elmira, 41 PERB ¶3018 (2008).

¹⁴ 23 PERB ¶3042 (1990).

¹⁵ 23 PERB at 3084.

each particular case.¹⁶

Like all other improper practice charges, however, a charge alleging that an employee organization has refused or failed to respond to a reasonable request must be filed within four months from when the charging party knew or should have known of the alleged violation of the Act.¹⁷

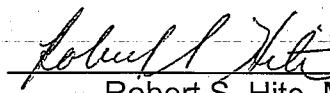
In the present case, we affirm the ALJ's dismissal of Maltsev's allegations with respect to DC 37's alleged failure to respond to his inquiries as untimely pursuant to §204.1(a)(1) of the Rules. On September 7, 2006, Maffeo advised Maltsev that he should proceed with his complaint about DC 37's alleged failure to respond to his inquiries. We conclude that upon receipt of this advice from Maffeo on September 7, 2006, Maltsev knew or should have known that DC 37 may have violated the Act by failing to respond to his inquiries. Therefore, we conclude that the charge, filed following receipt of Anderson's January 25, 2007 letter, is untimely.

WE, THEREFORE, ORDER that the improper practice charge must be, and hereby is, dismissed in its entirety.

DATED: September 24, 2008
Albany, New York



Jerome Lefkowitz, Chairman



Robert S. Hite, Member

¹⁶ *Nassau Educ Chapter CSEA, Inc. (Marinoff)*, 11 PERB ¶3010 (1978); *UFT (Freedman)*, 33 PERB ¶3062 (2000); *PEF (St. George)*, 18 PERB ¶3005 (1985).

¹⁷ *Buffalo Teachers' Fed (Boyar)*, *supra*, note 12.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

**TRIBOROUGH BRIDGE AND TUNNEL
AUTHORITY SUPERIOR OFFICERS
BENEVOLENT ASSOCIATION and BRIDGE
AND TUNNEL OFFICER'S BENEVOLENT
ASSOCIATION,**

Charging Parties,

**CASE NOS.
U-28072 & U-28267**

- and -

**TRIBOROUGH BRIDGE AND TUNNEL
AUTHORITY,**

Respondent.

**DAVIS & HERSH, LLP (CHRISTOPHER S. ROTHEMICH of counsel) for
Charging Party Triborough Bridge and Tunnel Authority Superior Officers
Benevolent Association**

**STUART SALLES, ESQ., for Charging Party Bridge and Tunnel Officer's
Benevolent Association**

JULIA R. CHRIST, ESQ., for Respondent

BOARD DECISION AND ORDER

On September 22, 2008, the Triborough Bridge and Tunnel Authority Superior Officers Benevolent Association (SOBA) and the Bridge and Tunnel Officer's Benevolent Association (BTOBA) filed a joint motion, pursuant to §212.4(h) of the Rules of Procedure (Rules), for leave to file exceptions challenging pre-hearing rulings of an Administrative Law Judge (ALJ) denying their respective requests for issuance of

subpoenas *duces tecum* and denying a request by BTOBA to adjourn the hearing scheduled to commence on September 25, 2008. The Triborough Bridge and Tunnel Authority (TBTA) opposes the motion.

FACTS

On or about January 2, 2008, SOBA filed an improper practice charge alleging that TBTA violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) by posting a job vacancy notice for a civilian Security Operations Center Operator position in TBTA's Internal Security Department. The gravamen of SOBA's charge is that the duties set forth in the job description for the Security Operations Center Operator position constitute exclusive SOBA bargaining unit work.

On or about January 4, 2008, BTOBA filed a similar improper practice charge alleging that TBTA violated §§209-a.1(a) and (d) of the Act on the grounds that the job description for the Security Operations Center Operator position includes duties exclusively performed by BTOBA's bargaining unit.

TBTA filed answers to both improper practice charges denying that it violated the Act and alleging, *inter alia*, that the charges are untimely.

On July 7, 2008, the parties were sent a notice consolidating the cases for a hearing on September 25, 2008 before an ALJ. On August 25, 2008, BTOBA filed a request to the ALJ, pursuant to §211.3 of the Rules, for issuance of an agency subpoena *duces tecum* to be served on TBTA requiring the production of seven categories of documents. The affidavit in support of BTOBA's proposed subpoena

states that:

- (2) The documents requested pursuant to the Subpoena is needed to be able to establish that the work to be performed by people to be employed as security operations center operator in the Internal Security Department is the same that have been performed by the members of the charging party.
- (4) All of the documents requested are relevant to the issue as contained in the charge.

On September 9, 2008, the ALJ issued a ruling denying BTOBA's request for the issuance of an agency subpoena, concluding that the request did not comply with the Rules because the affidavit in support of the request did not set forth facts establishing the relevancy of the materials sought to be produced.

On September 15, 2008, SOBA filed its own request to the ALJ, pursuant to §211.3 of the Rules, for issuance of an agency subpoena *duces tecum* to be served on TBTA seeking substantially similar documents to those sought in BTOBA's proposed subpoena. The affidavit in support of SOBA's proposed subpoena states that:

- 2. The documents requested are needed because the Charging party [sic] needs to establish: a) the work was exclusively performed by SOBA members; and b) that the positions that were posted to non-bargaining unit members contain job tasks and duties (work) that are "substantially similar" to work currently being done by SOBA members.
- 3. The requested documents are relevant to this issue.

The ALJ denied SOBA's request in a ruling, dated September 16, 2008. In her ruling, the ALJ found that SOBA had failed to demonstrate good cause for its submission of an untimely request for a subpoena. In addition, the ALJ concluded that

SOBA failed to set forth sufficient facts to establish the relevancy of the documents sought and that the requested subpoena was overbroad.

One day following the ALJ's denial of SOBA's request, BTOBA renewed its request for issuance of an agency subpoena through the filing of a supplemental affidavit with the ALJ along with a cover letter suggesting that the hearing may need to be adjourned. Although BTOBA's supplemental affidavit substantially modified its original request, the ALJ denied BTOBA's renewed request as well as its request for an adjournment.

MOTION FOR LEAVE TO FILE EXCEPTIONS

In support of their joint motion for leave to file exceptions, SOBA and BTOBA contend that extraordinary circumstances exist warranting the Board to grant their joint motion. The purported extraordinary circumstances cited by SOBA and BTOBA in support of their motion are: a) TBTA is unilaterally transferring work duties to non-bargaining unit civilian employees; b) the ALJ denied requests by SOBA and BTOBA for issuance of agency subpoenas *duces tecum*; c) SOBA and BTOBA need the subpoenaed documents to establish the extreme safety sensitive nature of the duties being reassigned to non-bargaining unit employees; d) the ALJ denied BTOBA's request for an adjournment; e) the ALJ's denial of the requests for subpoenas and the denial of the request for an adjournment will result in prejudice to SOBA and BTOBA.

TBTA opposes the joint motion for leave to file exceptions.

DISCUSSION

Section 212.4(h) of the Rules states, in relevant part, that:

All motions and rulings made at the hearing shall be part of the record of the proceeding, and unless expressly authorized by the board, shall not be appealed directly to the board, but shall be considered by the board whenever the case is submitted to it for decision.

It is well settled that the Board will not grant leave to file exceptions to non-final rulings and decisions unless the moving party demonstrates extraordinary circumstances.¹ In *State of New York (Unified Court System)*² the Board refused to grant leave to file exceptions to an ALJ's denial of a request for the issuance of a subpoena when the moving party failed to demonstrate extraordinary circumstances, such as severe prejudice, resulting from the denial.

The rationale for the extraordinary circumstances standard is the Board's recognition that it is far more efficient to await a final disposition of the merits of a charge before examining an ALJ's interim determinations. In addition, the granting of interlocutory relief results in unnecessary delays in the final resolution of the factual and legal issues raised by an improper practice charge. Therefore, the Board has consistently rejected most requests for permission to file exceptions, especially motions seeking review of interim rulings in improper practice cases.

In the present cases, SOBA and BTOBA seek leave to file exceptions

¹ *Mt Morris Cent Sch Dist*, 26 PERB ¶3085 (1993); *Greenburgh No 11 Union Free Sch Dist*, 28 PERB ¶3034 (1995); *Town of Shawangunk*, 29 PERB ¶3050 (1996); *New York State Housing Finance Agency*, 30 PERB ¶3022 (1997); *Council 82, AFSCME*, 32 PERB ¶3040 (1999); *Watertown City Sch Dist*, 32 PERB ¶3022 (1999); *UFT (Grassel)*, 32 PERB ¶3071 (1999); *City of Newburgh*, 33 PERB ¶3031 (2000); *State of New York (Division of Parole)*, 40 PERB ¶3007 (2007).

² 36 PERB ¶3031 (2003).

challenging the ALJ's denial of their respective requests for issuance of agency subpoenas. In support of their motion for leave, SOBA and BTOBA have failed to demonstrate extraordinary circumstances, such as severe prejudice, warranting the grant of interlocutory review of the denial of their requests for subpoenas.

Pursuant to §211.1 of the Rules, an ALJ has the discretion to grant or deny a request for the issuance of an agency subpoena.³ In the present cases, the ALJ denied the requests for the issuance of agency subpoenas based, in part, on the failure of SOBA and BTOBA to submit affidavits containing facts sufficient to establish the relevancy of the materials sought to be produced consistent with §211.3(c)(2) of the Rules. We conclude that the ALJ's denials of the requests for subpoenas do not constitute extraordinary circumstances, at this juncture in the present cases, for the granting of interlocutory review.

Similarly, we deny SOBA and BTOBA's request that the Board grant interlocutory review of the ALJ's denial of BTOBA's request for an adjournment. Section 212.4(b) of the Rules states:

The hearing will not be adjourned unless good and sufficient grounds are established by the requesting party, who shall file with the administrative law judge an original and three copies of the application, on notice to all other parties, setting forth the factual circumstances of the application and the previously ascertained position of the other parties to the application. The failure of a party to appear at the hearing may, in the discretion of the administrative law judge, constitute ground for dismissal of the absent party's pleading.

³ *Nanuet Union Free Sch Dist*, 17 PERB ¶3005 (1984); *Oswego City Sch Dist*, 25 PERB ¶3052 (1992).

In its September 17, 2008 letter to the ALJ, BTOBA stated that if TBTA were unable to supply the subpoenaed documents in advance of the hearing an adjournment may be necessary. In light of the ALJ's denial of BTOBA's request for a subpoena, the sole rationale given for the requested adjournment has become moot. In their joint motion for interlocutory review, SOBA and BTOBA fail to establish that they have been or would be prejudiced by the ALJ's denial of the requested adjournment and consequently have failed to demonstrate extraordinary circumstances.

Based upon the foregoing, we deny SOBA and BTOBA's joint motion for leave to file exceptions and remand the cases to the ALJ for further processing consistent with this decision.

SO ORDERED.

DATED: September 24, 2008
Albany, New York

Jerome Lefkowitz, Chairman

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

RONALD GRASSEL,

Charging Party,

- and -

CASE NO. U-27502

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

Respondent.

RONALD GRASSEL, *pro se*

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS (RUSSELL J.
PLATZEK, of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to the Board on exceptions filed by Ronald Grassel (Grassel) to a decision by an Administrative Law Judge (ALJ) dismissing an improper practice charge, alleging that the Board of Education of the City School District of the City of New York (District) violated §209-a.1(a) of the Public Employees' Fair Employment Act (Act), on the grounds that Grassel had failed to satisfy his burden of proof demonstrating that the District violated the Act.

The improper practice charge, as amended, alleges that the District violated §209-a.1(a) of the Act when it failed to reinstate Grassel following the District's March 1,

2007 withdrawal of pending Educ Law §3020-a disciplinary charges.¹

Over a month following the close of the record, Grassel made a motion to amend the charge to include allegations that the District had issued new disciplinary charges against him and to reopen the record for the purpose of admitting additional evidence into the record. The ALJ denied the motion.

EXCEPTIONS

In his exceptions, Grassel contends that the ALJ erred in dismissing the charge contending that the District's delay in reinstating him was in retaliation for a grievance he filed on or about June 13, 1997. In addition, Grassel asserts that the ALJ erred in denying his motion to amend the charge and to reopen the record. Finally, Grassel excepts to the ALJ accepting the District's post-hearing brief although it was filed two days following the due date for such briefs.

The District supports the ALJ's decision and asserts that Grassel's exceptions are procedurally defective pursuant to §213.2 of the Rules.

Based upon our review of the record and consideration of the parties' arguments, we reject the District's procedural objections to the exceptions, deny Grassel's exceptions and affirm the ALJ's dismissal of the charge.

¹ In his original charge, Grassel also alleged violations of §§209-a.2(a) and (c) of the Act by the United Federation of Teachers (UFT). The Director of Public Employment Practices and Representation (Director) found the allegations against UFT to be deficient and they were, therefore, not processed pursuant to §204.2 of the Rules of Procedure (Rules).

FACTS

The relevant facts are set forth in the ALJ's decision.² The facts are repeated here only as necessary to address the exceptions.

In 1997, Grassel worked at the Harry Van Arsdale, Jr. High School. In response to the distribution of a weekly calendar, Grassel sent the assistant principal a memorandum, dated January 17, 1997, complaining that employee organization pamphlets had been removed from a classroom bulletin board. Following a June 1997 incident between Grassel and the high school principal, the principal requested the local superintendent to have Grassel examined to determine whether he is medically fit to perform his job duties. In letters, dated November 7, 1997, December 23, 1997, July 3, 1998, July 24, 1998 and June 29, 2006, the District directed Grassel to report to the District's Medical Bureau for a medical examination pursuant to Educ Law §2568.

As a result of his repeated failure to appear or contact the Medical Bureau, the District informed Grassel, by letter dated February 4, 1998, that he was being removed from the payroll. Grassel's legal challenge to this action by the District was unsuccessful. In affirming the grant of summary judgment against Grassel, the Appellate Division, Second Department stated:

The sole reason that he was precluded from teaching was his own failure to comply with the Board's reasonable directives. Under such circumstances, the Board should not

² 41 PERB ¶4541 (2008). We have also considered the factual conclusions reached by the Appellate Division, Second Department, in *Grassel v Bd of Educ of the City of New York*, 301 AD2d 498 (2d Dept 2003), when it affirmed summary judgment against Grassel, as well as, the factual conclusions contained in an arbitration opinion and award, dated April 4, 2005, finding Grassel guilty of certain Educ Law §3020-a disciplinary charges and the decision by Kings County Supreme Court Justice Lewis Bart Stone, dated March 15, 2006, which vacated a proviso from the remedy issued by the arbitration panel. Joint Exhibits 1 and 2.

be compelled to pay the plaintiff.³

In the late 1990s, the District issued multiple disciplinary charges against Grassel, pursuant to Educ Law §3020-a, seeking his termination. The charges set forth 20 specifications alleging that he was unfit to teach, he was insubordinate to his supervisors and he lacked concern for the students. Following a multi-day hearing, an arbitration panel issued an opinion and award, dated April 4, 2005, finding Grassel guilty of certain allegations and imposing the following remedy:

As a remedy for the Specifications that the Department proved the Respondent is guilty, the period of time that the Respondent has been suspended without pay shall be deemed to be a disciplinary suspension in full satisfaction of such action by the Respondent. The Department shall reinstate the Respondent forthwith subject to the Respondent's satisfactory resolution of any currently pending medical examination issue.⁴

Thereafter, Grassel commenced a special proceeding seeking an order vacating the arbitration opinion and award. On March 16, 2006, Justice Lewis Bart Stone issued a decision and order vacating the remedial portion of the arbitration award to the extent that it conditioned Grassel's reinstatement on the "satisfactory resolution of any current pending medical examination issue."

Subsequently, the District issued new Educ Law §3020-a disciplinary charges and specifications against Grassel premised on a continuing failure to submit to a medical examination. On March 1, 2007, before disciplinary hearing officer Joshua Javits, the District and UFT counsel, representing Grassel, entered into a stipulation on the record. Pursuant to the stipulation, the District agreed to withdraw the pending Educ

³ *Grassel v Bd of Educ of the City of New York*, 301 AD2d at 499.

⁴ Joint Exhibit 1, p. 105.

Law §3020-a disciplinary charges "with prejudice." During a colloquy between counsel, with respect to the terms of the withdrawal, it was agreed that if the District decided to proceed with additional disciplinary charges against Grassel, those charges would not be premised upon the 1997 and 1998 directives for him to be medically examined or anything determined in the April 4, 2005 arbitration award.⁵ In addition, the District's counsel made clear that although the disciplinary charges were being withdrawn, he did not have the authority to reinstate Grassel and that any decision with respect to reinstatement would be made by other District representatives.⁶

Following Grassel's receipt of the hearing transcript on March 7, 2007, he spoke with Superintendent Graham (Graham) on March 14, 2007. During that conversation, Graham stated that he was unfamiliar with the March 1, 2007 transcript and unaware of what happened at the hearing.

Later, in March 2007, Grassel met with the District's Deputy Director for Human Resources Bernard Palmer (Palmer) about his reinstatement. At the meeting, Grassel presented Palmer with a copy of the transcript. Prior to reading the transcript, Palmer did not have any information as to what took place at the disciplinary hearing. During their meeting, Palmer explained that he needed to consult with both the District's counsel and Graham. Palmer explained, during his testimony, that consultation with the District's counsel was particularly necessary due to his lack of familiarity with the import of a stipulation contained in the transcript. Following Palmer's consultation with counsel, he sent a letter to Grassel informing Grassel that he is being reassigned to the Harry Van Arsdale High School, effective June 25, 2007, and that he should report to

⁵ Joint Exhibit 7, pp. 3-4.

⁶ Joint Exhibit 7, p. 5.

the high school's principal on that date.

DISCUSSION

At the outset, we examine the District's procedural arguments challenging Grassel's exceptions. Contrary to the District's claim, we find Grassel's exceptions to be in substantial compliance with §213.2 of the Rules. The exceptions do contain certain citations to the record which are sufficient to meet the requirements of §213.2 of the Rules.

In addition, we conclude that Grassel's exceptions are timely. Based upon a review of our records, we find that Grassel received a copy of the ALJ's decision only after it was remailed to him and his exceptions were filed with the Board within 15 working days following the remailing.

We next turn to Grassel's exceptions challenging the ALJ's denial of his motion to amend the charge and reopen the record, along with his exception challenging the ALJ's acceptance of the District's post-hearing brief.

Pursuant to §204.1(d) of the Rules, an ALJ is granted considerable discretion to grant or deny a request to amend an improper practice charge before, during or after the conclusion of a hearing so long as the decision is consistent with the principles of due process.⁷ Similarly, whether or not to grant a request to reopen a record is subject to the ALJ's discretion.⁸ Finally, §212.5 of the Rules grants an ALJ the discretion to determine when post-hearing briefs are due and whether or not to permit reply or

⁷ *Village of Johnson City*, 12 PERB ¶3020 (1979); *UFT (Ayazi)*, 32 PERB ¶3069 (1999).

⁸ *County of Nassau*, 18 PERB ¶3076 (1985); *County of Nassau*, 35 PERB ¶3045 (2002), confirmed *sub nom.*, *CSEA v New York State Pub Empl Rel Bd*, 2 AD3d 1197, 36 PERB ¶7019 (2003).

supplemental briefs.

In the present case, we conclude that the ALJ did not abuse her discretion in denying Grassel's motion to amend the charge to allege a new set of facts based upon the new disciplinary charges issued against Grassel and to reopen the record for the introduction of additional evidence. As the ALJ correctly concluded, permitting an amendment and a reopening of the record in the present case would result in an unnecessary delay in the final resolution of the charge. Moreover, Grassel could have filed a new improper proper practice charge if he believed that the District violated the Act by issuing new disciplinary charges.

Similarly, we conclude that the ALJ did not abuse her discretion in accepting the District's tardily filed post-hearing brief. An ALJ has the discretion, under §212.5 of the Rules, to determine the due date for post-hearing briefs. There is nothing in the record to establish or even suggest that the ALJ abused her discretion. Grassel had not been prejudiced by the two-day delay and the ALJ had granted him an opportunity to file a reply brief.

Finally, we examine Grassel's exceptions challenging the ALJ's determination that Grassel failed to satisfy his burden of proof by presenting evidence establishing that the District violated §209-a.1(a) of the Act.

As we recently reiterated in *United Federation of Teachers (Jenkins)*,⁹ a charging party in an improper practice charge, alleging unlawfully motivated interference in violation of §209-a.1(a) of the Act, has the burden of proof to demonstrate by a preponderance of evidence that: a) the charging party engaged in protected activity

⁹ 41 PERB ¶3007 (2008).

under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected activity.¹⁰ An employer's unlawful motivation can be proven through direct or circumstantial evidence.

If an inference of unlawful motivation is established through circumstantial evidence, the burden of persuasion shifts to the respondent to rebut the inference by presenting evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason.¹¹ If the respondent establishes a legitimate non-discriminatory reason, then the burden of persuasion shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual.¹² However, the burden of proof rests, at all times, "with the charging party to establish the requisite causation under the Act by a preponderance of evidence."¹³

In the present case, Grassel asserts that the District violated §209-a.1(a) of the Act by delaying his reinstatement from March 1, 2007, when the District stipulated to the withdrawal of the pending disciplinary charges "with prejudice," to June 25, 2007, when he was assigned to the Harry Van Arsdale, Jr. High School in retaliation for protected activity ten years earlier.

The record demonstrates that Grassel presents sufficient evidence to establish the first two elements of a *prima facie* case of unlawful interference in violation of §209-a.1(a)

¹⁰ *City of Salamanca*, 18 PERB ¶3012 (1985); *Town of Independence*, 23 PERB ¶3020 (1990); *County of Orleans*, 25 PERB ¶3010 (1992); *Stockbridge Valley Cent Sch Dist*, 26 PERB ¶3007 (2000); *County of Wyoming*, 34 PERB ¶3042 (2001).

¹¹ *State of New York (SUNY at Buffalo)*, 33 PERB ¶3020 (2000).

¹² *Supra*, notes 10, 11 and 12.

¹³ *UFT (Jenkins)*, 41 PERB at 3044.

of the Act: he engaged in protected activity when he sent his January 17, 1997 memorandum to the high school assistant principal complaining about anti-union animus in a classroom and when he was represented by UFT at the March 1, 2007 hearing with respect to the disciplinary charges; and the District was aware of this protected activity.

However, Grassel does not present sufficient evidence to meet the third element of his *prima facie* case establishing an inference of improper District motivation. The ten years between his 1997 memorandum to the assistant principal and the District's alleged adverse action is too long a period of time, under the facts and circumstances of the present case, to create an inference of improper motivation. The 1997 grievance, referenced by Grassel in his exceptions, is not in the record. Therefore, we are unable to conclude what probative value, if any, the 1997 grievance has in establishing an inference of improper motivation.

In addition, we conclude that the delay between the March 1, 2007 stipulation and Grassel's June 25, 2007 assignment is insufficient to establish an inference of unlawful motivation.¹⁴ The March 1, 2007 transcript reveals that the District's counsel expressly stated that Grassel would not be reinstated that day because the attorney did not have the authority to reinstate and that the decision to reinstate would be made by other District representatives. There is no evidence in the record establishing that either Palmer or Graham was present at the disciplinary hearing; nor is there evidence establishing when the District first informed each of them about the terms and meaning

¹⁴ In his exceptions, Grassel did not argue that UFT representation during the disciplinary hearing constituted protected activity under the Act. Therefore, the issue is waived. Rules, §213.2(b)(4); *Town of Orangetown*, 40 PERB ¶3008 (2007). However, even if we considered UFT representation of Grassel as constituting protected activity the evidence in the record remains insufficient to establish unlawful District motivation.

of the stipulation. In fact, during his testimony, Grassel admitted that he did not learn of the stipulation until after he received the transcript in the mail on March 7, 2007, and when he discussed the transcript with Graham on March 14, 2007, Graham told him that he was unfamiliar with it. Therefore, under the facts and circumstances presented in the present case, we conclude that the delay in reinstating Grassel is insufficient to establish an inference of unlawful motivation.

We also reject Grassel's related contention that the March 1, 2007 stipulation, which contains a "with prejudice" withdrawal of the pending discrimination charges, constitutes evidence that the District violated §209-a.1(a) of the Act. The transcript reveals that although the District stipulated that it was withdrawing the pending disciplinary charges "with prejudice," the colloquy between counsel makes clear that the stipulation was limited to the District agreeing not to bring future disciplinary charges based on the directives given to Grassel in 1997 and 1998 and the disciplinary issues resolved by the arbitration panel. The stipulation did not bar the District from filing future disciplinary charges premised on other alleged conduct by Grassel or from following its administrative practices with respect to reinstatements.

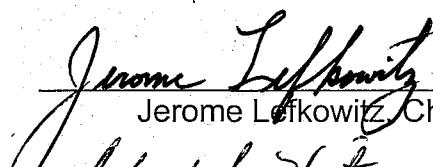
In the alternative, even if we were to conclude that the delay in Grassel's reinstatement, following the March 1, 2007 stipulation, constituted circumstantial evidence sufficient to shift the burden of persuasion, we conclude that Palmer's testimony about his initial unawareness of the stipulation, combined with his need to consult with District counsel, constituted sufficient evidence of a non-discriminatory reason for the delay, a reason that Grassel failed to rebut.

Finally, we deny Grassel's exception premised on his contention that the District

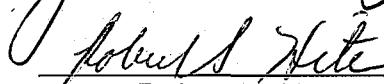
allegedly reinstated him without pay. The ALJ concluded that the issue of Grassel's pay status following his reinstatement is not a part of his improper practice charge. In fact, Grassel raised his pay status for the first time during his cross-examination of Palmer, and, during his rebuttal testimony failed to present credible evidence contradicting Palmer's testimony that Grassel's reinstatement on June 25, 2007 was with pay.

WE, THEREFORE, ORDER that the improper practice charge must be, and hereby is, denied in its entirety.

DATED: September 24, 2008
Albany, New York



Jerome Lefkowitz, Chairman



Robert S. Hite, Member