STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and- **CASE NO. C-6259**

VILLAGE OF LAWRENCE,

Employer,

-and-

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 882,

Intervenor.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their

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

Included: All full-time nonsupervisory employees of the Village.

Excluded: Supervisory, part-time, and seasonal personnel.

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: October 6, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DANA CASTINE, ELISABETH TIGER, and ANDREW CAMERON,

Petitioner,

-and-

CASE NO. C-6225

FLORIDA UNION FREE SCHOOL DISTRICT,

Employer,

-and-

FLORIDA UNION FREE SCHOOL DISTRICT ADMINSTRATORS ASSOCIATION,

Intervenor.

DANA CASTINE, for Petitioners

SHAW, PERELSON, MAY & LAMBERT LLP (DAVID S. SHAW, ESQ. of counsel), for Employer

STARVAGGI LAW OFFICES, PC (MICHAEL A. STARVAGGI, ESQ., of Counsel), for Intervenor

BOARD DECISION AND ORDER

On November 4, 2013, Dana Castine, Elisabeth Tiger, and Andrew Cameron (petitioners) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition for decertification of the Florida Union Free School District Administrators Association (intervenor), the current negotiating representative

for employees in the following negotiating unit:

Included: Elementary Principal, Middle/High School Principal, Assistant Principal, Director of Instruction, and Director of Technology Integration.

Excluded: All other employees.

Upon consent of the parties, an election was held on August 8, 2014. The results of the election show that a majority of eligible employees in the unit who cast valid ballots no longer desire to be represented for purposes of collective negotiations by the intervenor.

THEREFORE, IT IS ORDERED that the intervenor is decertified as the negotiating agent for the unit.

DATED: October 6, 2014,
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Charging Party,

CASE NOS. U-28689,U-29055 & U-30369

- and -

COUNTY OF CLINTON & SHERIFF OF CLINTON COUNTY,

Respondent.

STEVEN A. CRAIN, GENERAL COUNSEL, for Charging Party

STAFFORD, PILLER, MURNANE, PLIMPTON, KELLEHER & TROMBLEY, PLLC (JACQUELINE M. KELLEHER of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO (CSEA) to a decision of an Administrative Law Judge (ALJ) in three consolidated improper practice proceedings.[1] The ALJ dismissed CSEA's allegations that the County of Clinton (County) and the Sheriff of Clinton County (Sheriff) (collectively, Joint Employer) violated §§ 209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by disciplining Lieutenant Terry Guynup, CSEA's local unit president serving Clinton County Correction officers, in retaliation for protected union activity. The ALJ also dismissed that portion of the

---

[1] 46 PERB ¶ 4650 (2013). The three improper practice petitions assert claims arising from (1) the initial institution of disciplinary proceedings; (2) the initial termination of Guynup based on those charges; and (3) the adherence to the penalty of termination after remand for reconsideration by the Appellate Division, Third Department.

charge alleging that the Joint Employer failed to negotiate in good faith in violation of § 209-a.1 (d) of the Act by cancelling a negotiation session scheduled to be held on September 12, 2008—the day before that session was scheduled to take place.

After a hearing, the ALJ held that the disciplinary proceedings against Guynup had been initiated because of his alleged threats against Sheriff David Favro and Guynup's threats of violence after being served with a Family Court Order of Protection which required him to relinquish his personal firearms to the State Police. The ALJ likewise found that the decision by County Administrator Michael Zurlo to reject the lower penalty recommended by the Hearing Officer and to impose the penalty of termination was motivated by Guynup's misconduct. Therefore, the ALJ dismissed the alleged violations of § 209-a.1(a) and (c) of the Act. Finally, the ALJ found that the totality of the Joint Employer's conduct did not establish a refusal to bargain in good faith, and he therefore dismissed the alleged violation of § 209-a.1(d) of the Act.

EXCEPTIONS

In its exceptions, CSEA contends that the ALJ erred in crediting Zurlo's testimony on several issues. First, CSEA contends that Zurlo's testimony that he did not speak to the County legislators about the matter, other than to inform them in executive session that he had been assigned to make a determination, and did not feel under pressure to terminate Guynup, was not worthy of credit. CSEA contends that contrary testimony from a County legislator that Zurlo informed the legislators that he had been deputized to "terminate" Guynup was more credible.

Second, CSEA asserts that Zurlo's testimony that his decision to terminate Guynup was in part based on liability concerns was incredible, as no evidence

supported these findings. Zurlo's professed rationale that the termination was warranted because Guynup's continued employment would permanently impair the functioning of the Sheriff's Department is, in CSEA's view, likewise unsupported by any evidence.

Third, CSEA argues that the ALJ erred in finding that Zurlo's inaccurate testimony on the liability issue was not false, but rather the result of his not reviewing all the facts before him thoroughly.

Finally, CSEA claims that the ALJ erred in crediting Zurlo's testimony that this decision was based on the facts in front of him, and not on the unit president's protected activity. This testimony is undermined, CSEA asserts, by a series of factors, including Zurlo's rejection of the Hearing Officer's lesser penalty, the Appellate Division's dismissal of the most serious charge as time-barred, the mitigating evidence, the errors adverted to in the other exceptions, statements of legislators demonstrating anti-union animus, and the fact that "the order of protection on which the termination was partially based was issued *ex parte*, on the word of a scorned unfaithful wife."[2]

The Joint Employer asserts that the three of the exceptions fail to comply with § 213.2 (b) of our Rules of Procedure (Rules), and that, in any event, the ALJ's credibility findings were supported by the voluminous record.

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

---

[2] Exceptions ¶ 4.

FACTS

Although the exceptions, and thus the issues before us, are limited to Zurlo's two decisions to terminate Guynup,[3] evaluation of CSEA's claims of discrimination requires understanding of the context in which that decision was made and then reaffirmed on remand. As the ALJ found, and as no party has denied, CSEA and the Joint Employer were engaged in acrimonious negotiations for a successor contract, in which Guynup played a leading role, and which involved public protests and controversy.

The negotiations began in December 2007, impasse was declared by CSEA in February 2008, and mediation and fact-finding continued into September 2008. Zurlo acknowledged that negotiations were "acrimonious," and that he had told a local newspaper that the County legislators were "shocked and dismayed" that CSEA had declared impasse as early as February 2008."[4] Other instances of displeasure with the negotiations and CSEA's tactics were in evidence. On June 11, 2008, CSEA held a

---

[3] CSEA did not include within its exceptions any contention with respect to the ALJ's dismissal of its claim that the Joint Employer had violated § 209-a.1(d) of the Act by refusing to negotiate in good faith with the Union. CSEA also did not include within its exceptions any contention that the ALJ erred in finding the Sheriff's testimony as to his motivation in instituting disciplinary action to be credible. Nor did CSEA include any claim that, other than the evidentiary rulings excepted to, the ALJ erred in determining the legal standard to be applied, or in applying that standard to the facts as he found them to be. As CSEA did not specifically urge any exception to these portions of the ALJ's decision, these claims have been waived, and are not before the Board. Rules, § 213.2(b)(4);*City of Schenectady*, 46 PERB ¶ 3025, at 3056, n. 8 (2013), *confirmed sub nom. Matter of City of Schenectady v New York State Pub Empl Relations Bd*, Index No. 4090/2011 (Sup Ct Albany Co July 9, 2014); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confirmed sub nom. Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009).

[4] Transcript, at p. 224-225, 227.Gallagher testified to the same effect. Transcript, at p. 323.

rally, attended by approximately 200 people, at which it deployed a giant inflatable rat, and led chants of "Hey ho, Favro has got to go."[5] On the same date, several labor representatives addressed the County legislature. As Zurlo testified, the chamber was filled to capacity. According to Zurlo, the legislators were "dissatisfied with the rally," and "would have appreciated a different tone."[6]

On August 6, 2008, a productive bargaining session was held between Sheriff Favro and CSEA, in which Guynup participated. Chairman of the Legislature James Langley was quoted in a February 12, 2009 newspaper article as saying that "Now that the agreement is in place, I am breaking ranks with my fellow legislators, and I am making my own comments," and that "the [CSEA] leadership has acted so inappropriately they deserve a little of their own medicine."[7]

Prior to his termination, Guynup was assigned to the County jail, where, as one of three lieutenants, he served as a shift supervisor responsible for overseeing the safety and security of the facility, assigning duties to staff, and, as firearms control inspector, ensuring that all facility firearms were accounted for.

On September 11, 2008, Sheriff Favro received a telephone call from Lieutenant Donald Calkins of the Office of Court Administration, at the behest of a Family Court judge in Clinton County, informing Favro that the testimony in support of an application for an the Order of Protection had "indicated that there was a point in time where Terry

---

[5] Joint Exhibit 1, at p. 304.

[6] Transcript, at p. 222.

[7] Charging Party Exhibit 11.

Guynup had attempted to retrieve or retrieved a weapon and was going to shoot the Sheriff."[8] Favro described himself as "kind of beside myself" and "taken aback" by the conversation, and asked the undersheriff to convene a meeting to arrange to obtain the Order of Protection and to serve it on Guynup.[9] Favro also determined to place Guynup on administrative leave, both because of the threat to himself and because the provision in the Order of Protection barring Guynup from carrying a firearm would limit his ability to carry out his duties, although Guynup did not routinely handle firearms.

When the Order of Protection was ready, Major Roger Craig of the Sheriff's office went to the courthouse and picked it up, and he, along with Guynup's direct supervisor, Major Michael Smith, arranged to serve it on Guynup when his shift ended that day. The Order of Protection included a requirement that Guynup "surrender any and all handguns, pistols, revolvers, rifles, shotguns, and other firearms owned or possessed . . . . no later than 9/11/08 at 5:00 p.m. at New York State Police."[10] Favro testified that the Major Craig retrieved the Order of Protection in order to preserve Guynup's privacy and to ensure he received it in time to comply with the Order of Protection's firearms surrender provision.[11]

At 2:00 p.m., Guynup's shift ended, and Major Smith brought him to Major Craig's office. Guynup asked what was going on, and Craig replied that he had an

---

[8] Transcript, at p. 363. No specification of the date of the alleged threat was provided to Favro in the telephone call. Joint Exhibit 1, at pp. 154-155, 200-201 (Calkins).

[9] *Id.*

[10] Joint Exhibit 1, at p. 423.

[11] Transcript at p. 362.

Order of Protection to serve on Guynup. Guynup "jumped up quite agitated and said is this from my f-----g wife?"[12] Craig began to read the Order of Protection to Gynup, who again became agitated, making comments such as "I can't believe my f-----g wife can go to a judge, tell him anything she wants and then I end up served this f-----g piece of paper."[13] Craig asked Guynup to calm down, and continued to read the Order of Protection to him. After Craig read the provision regarding firearms, Guynup "became very agitated and volatile"; Smith, agreeing, testified that he said "No f-----g way are you taking my guns. I will go home right now, load those f-----s up and I'll be waiting."[14] He then said, "Who am I supposed to give them to, you guys?"[15] Craig informed Guynup that he had to surrender them to the State Police by 5:00 that day. At this point, Smith advised Guynup to calm down and speak with his counsel. Guynup then said "Give me my f-----g paper," and left, placing a call on his cell phone as he departed. Craig and Smith reported the matter to the State Police and to the Sheriff.

On September 12, 2008, Guynup was placed on administrative leave. On October 14, 2008, Guynup was served with disciplinary charges pursuant to Civil Service Law (CSL) § 75, alleging misconduct, incompetence and insubordination in

---

[12] Joint Exhibit 1, at p. 70 (Craig), 89 (Smith).

[13] *Id.*

[14] Joint Exhibit 1, at p. 72 (Craig), 89-90 (Smith). Guynup denied this remark, but did not deny the rest of the conversation as testified to by Craig and Smith, and had previously testified that "To tell you the truth, I don't really know what was said in there." Joint Exhibit 1, at p. 320.

[15] Joint Exhibit 1, at p. 72 (Craig).

violation of Department rules and regulations.[16] The first charge, alleging misconduct, incompetence, and insubordination, was based on Guynup's response to the service of the Order of Protection. The second charge, also alleging misconduct, incompetence, and insubordination, was based on Guynup's alleged threat to shoot Favro, alleged to have taken place on an unspecified night in 2006. The third charge, incompetence, asserted that the bar on Guynup's possession or use of guns prevented him from performing his job duties. Finally, the fourth charge accused Guynup of misconduct and incompetence for having made comments derogatory of the Sheriff's administration and operation of the Department in June 2008.

A disciplinary hearing was scheduled, and was adjourned twice, due to Guynup's requiring surgery and complications resulting from the surgery. A grievance was filed over Guynup's use of leave time during the suspension period, which was resolved in Guynup's favor.

After the hearing, the Hearing Officer issued a report and recommendations dated February 10, 2009. The Hearing Officer sustained the first and third charges and dismissed the remaining two charges. With respect to the first charge, the Hearing Officer found that Guynup's conduct "caused unnecessary alarm" to Craig and Smith, and raised concerns about Guynup's compliance with the Order of Protection.[17] Additionally, the Hearing Office found that Guynup's "statements and non-verbal conduct implied that Craig and Smith were possessed of insufficient stature and

---

[16] Joint Exhibit 1, at pp.18-21.

[17] Joint Exhibit 1, at p. 25.

authority to take his guns upon serving the Order even though they were his superior officers."[18] The Hearing Officer noted that Guynup directed his "venom" at his superior officers, and that his language "exhibited a disregard, if not contempt, for superior authority."[19]

The Hearing Officer found that the second charge was time barred, as it alleged conduct that took place more than 18 months prior to the commencement of the disciplinary proceedings, and the evidence did not establish that the conduct fell into the exception to the limitations period to conduct that "would, if proved in a court of competent jurisdiction, constitute a crime."[20] Moreover, although the Hearing Officer, noted that "the volatile nature of [Guynup's] reaction to superior officers on September 11, 2008 lends some credibility" to her testimony, he nonetheless declined to credit Michelle Guynup's account of events.[21] The Hearing Officer discredited Mrs. Guynup's account based on her "lack of immediate self-protective action" and the testimony of a neighbor that Guynup did not go to the neighbor's house to borrow a weapon after Mrs. Guynup wrested the gun away from her husband, which she had claimed to have heard him threaten to do.[22]

---

[18] Joint Exhibit 1, at p. 26.

[19] *Id.*

[20] Joint Exhibit 1, at p. 27 (quoting Civil Service Law § 75(4)); *id.* at 28-30.

[21] Joint Exhibit 1, at pp. 28-29.

[22] *Id.* Charge 4 was dismissed because no evidence was offered in support of it.

The Hearing Officer found that the claim of stress resulting from Guynup's marital and financial situation "provides little basis for mitigation," and found that, while his "unblemished record of service is commendable," "his rank is at once an aggravating and mitigating factor," in view of his managerial and representational functions.[23] The Hearing Officer rejected the claim that the charges were brought in retaliation for union activities. He found that given "the conduct described, especially in charge 2[,] and despite its dismissal, it would have been surprising if no charges had been brought."[24]

As a penalty, the Hearing Officer recommended that Guynup be required to participate in an employee assistance program and be suspended without pay for 30 days, or, if he could not be so required, an additional 30 day suspension be added to the penalty.

Favro recused himself from reviewing the Hearing Officer's report and recommendations, and designated Zurlo to do so. Zurlo testified that the Sheriff and undersheriff delivered a copy of the entire record from the disciplinary hearing and said to him, "Here's the record, whatever decision you come up with, we will live with."[25] Zurlo testified that no one talked to him about reaching a desired outcome.[26] He specifically testified that no member of the county legislature instructed him on what to do with respect to his review of the record. Gallagher testified that Zurlo had reported to

---

[23] Joint Exhibit 1, at p. 35.

[24] Joint Exhibit 1, at p. 13.

[25] Transcript, at p. 215.

[26] Transcript, at pp. 216-217.

the legislature that he had been "[d]eputized to terminate Mr. Guynup," which he later stated was not a direct quotation but his understanding of what was said.[27]

Zurlo, who had recently applied to be reappointed to his position, testified that at no time did he believe that his reappointment depended on the decision he made regarding Guynup's disciplinary matter. Asked whether the fact that Guynup was the union president had factored into his decision, Zurlo replied, "Not at all. I can say irrespective of Mr. Guynup's title with the union, that fact pattern with any name on it would have resulted in the same decision."[28]

On March 6, 2009, Zurlo issued his findings. He agreed with the findings on charges 1 and 3. However, he rejected the Hearing Officer's conclusion on charge 2 that Guynup was not guilty of making threats directed at the Sheriff, and also deemed the charge to be timely. Zurlo also disagreed with the Hearing Officer's conclusion as to the penalty to be imposed, and ruled that Guynup should be terminated.

In December 2008, the Order was modified to allow Guynup to use firearms in his official capacity, and the Order of protection itself expired on March 11, 2009.

Guynup challenged Zurlo's determination in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules (CPLR). The Appellate Division, Third Department, found that substantial evidence existed to support Zurlo's determination as to Guynup's guilt of charges 1 and 3, but that charge 2 was time-barred, as insufficient evidence

---

[27] Transcript, at pp. 321, 339.

[28] Transcript, at p. 216.

existed to prove a crime had taken place.[29] The matter was remanded to Zurlo for a new determination on the appropriate penalty.

On remand, Zurlo again imposed the penalty of termination. Zurlo testified that after receiving the decision from the Appellate Division he conferred with the County Attorney, and then reviewed the record "absent anything having to do with Charge 2."[30] On July 6, 2010, he issued his determination in a letter to Guynup, in which he stated, "It is clear to me that your egregious and threatening comments to your commanding officers, as well as your demonstrated incompetence based on your inability to carry firearms, creates a pervasive liability to the County."[31] He concluded, once again, that termination was the proper penalty.[32] Zurlo explained that he felt the County faced potential liability over Zurlo's inability to carry a firearm under the Order of Protection, even though the Order of Protection had expired.[33] Zurlo also testified to his opinion that the Sheriff's department would have been "permanently impaired" if Guynup had remained, on the basis that Guynup's behavior toward his supervisors would create a hostile work environment.[34] According to Zurlo, Guynup's position as a union officer

---

[29] *Guynup v County of Clinton*, 74 AD3d 1552 (3d Dept 2010).

[30] Transcript at p. 442.

[31] Joint Exhibit 3.

[32] *Id.*

[33] Transcript at pp. 462-463.

[34] Transcript at p. 464.

had "zero bearing" on his decision.[35] Zurlo reaffirmed that, limited to the charges sustained and remanded by the Appellate Division, the facts before him would have resulted in the same decision as to any employee, regardless of any union position.[36]

Guynup again challenged his termination in a second Article 78 proceeding. The Appellate Division, Third Department affirmed the termination based on charge 1, finding that the penalty was not "so disproportionate as to be shocking to one's sense of fairness."[37] In so holding, the Appellate Division explained that Guynup:

> stands convicted of threatening law enforcement personnel who were attempting to execute a court order requiring that he surrender his firearms. Such conduct, especially when committed by an individual who occupies a senior position in law enforcement, is clearly at odds with the strict discipline necessary to effectively operate a Sheriff's Department where he is employed and supports the decision imposing termination as his penalty.[38]

CSEA adduced evidence that obscene language was tolerated by Sheriff Favro, and Favro himself testified that another officer who used the word f—k to a superior officer who was reprimanding him received only a counseling memorandum and a three day suspension.[39] Pombrio admitted having said to Favro in a conversation seeking to settle the disciplinary charges against Guynup that "Terry said that Sheriffs Trombley and Lawless would never have put up with this much s—t from him," and further

---

[35] Transcript at p. 444.

[36] *Id.*

[37] *Guynup v County of Clinton*, 90 AD3d 1390, 1391 (3d Dept 2011).

[38] *Id.* at 1392 (citations and quotation and editing marks omitted) (quoting *Longton v Village of Corinth*, 57 AD3d 1273, 1275–1276 (3d Dept 2008), *lv denied* 13 NY3d 709 (2009).

[39] Transcript at pp. 404-407.

testified that those sheriffs "ran a very tight ship and that they expected a certain amount of decorum in the facility."[40]

DISCUSSION

When an improper practice charge alleges unlawfully motivated 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 evidence: a) that the affected individual engaged in protected activity 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.[41]

Here, the evidence clearly establishes that negotiations were contentious, although progress had been made as of August 2008. Zurlo was concededly aware of Guynup's role in the negotiations and in the protected activity surrounding them. However, the ALJ found that the credible evidence before him established that Favro's decision to bring charges, and Zurlo's decision to terminate Guynup both originally and on remand, were not motivated by Guynup's protected conduct.[42] Only the latter decisions, those by Zurlo, are excepted to before us.

Credibility determinations by an ALJ are generally entitled to "great weight unless there is objective evidence in the record compelling a conclusion that the credibility

---

[40] Transcript at p. 141.

[41] *UFT, Local 2, AFT-CIO (Jenkins)*, 41 PERB ¶ 3007(2008), *confirmed sub nom. Jenkins v New York State Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct New York County 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021 (2013).

[42] 46 PERB ¶4560, at 4685-4686.

finding is manifestly incorrect."[43] This is especially true where, as here, the credibility determination rests in part on the witness's "demeanor."[44] Against the weight afforded a fact-trier's credibility findings, no objective evidence demonstrating that the ALJ's credibility determinations with respect to Zurlo are manifestly incorrect has been adduced, and we therefore decline to reverse them.

CSEA nonetheless claims that the grounds advanced to support Zurlo's determinations were pretextual in nature. In evaluating whether the employer's stated business reasons for an action are pretextual, we have looked to factors such as the timing of the action,[45] whether it is consistent with the employer's customary practices,[46] and whether any direct evidence demonstrates that the stated reasons for acting are false.[47] In the instant case, no such factors support a finding of pretext.

Timing in this matter does not support a finding of pretext, as progress had been made on the negotiations prior to the charges being brought, and the agreement was reached prior to Zurlo's first decision. The isolated statements attributed to individual

---

[43] *Manhasset Union Free Sch. Dist.*, 41 PERB ¶ 3005, at 3019 (2008); *County of Tioga*, 44 PERB ¶ 3016, at 3062 (2011); *Mount Morris Cent. Sch Dist.*, 41 PERB ¶ 3020 (2008); *see also*, *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977).

[44] 46 PERB ¶ 4560, at p. 4686; *see County of Ulster*, 39 PERB ¶ 3013, at 3045-3046 (citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, at p. 7009 (1st Dept 1974)).

[45] *See Town of Newark Valley*, 16 PERB ¶3102, *affg* 16 PERB ¶4621 (1983), *confirmed sub nom. Town of Newark Valley v Union of the Town of Newark Valley Highway Department Employees*, 17 PERB ¶7005 (1984).

[46] *City of Salamanca*, *supra*.

[47] *Id.; see also Town of Newark Valley*, *supra*.

legislators indicating general anger at or frustration with CSEA's handling of negotiations do not negate Zurlo's credible testimony that such feelings did not weigh in his own decision-making process, especially in the absence of any reason to believe that Zurlo discussed the merits of the matter with the legislators in question.

CSEA faults Zurlo for disagreeing with the Hearing Officer as to the timeliness of Charge 2, and in finding Michelle Guynup's testimony to be credible. In both instances, disagreement with the Hearing Officer is assumed to be of its own weight evidence of bias. No basis for this conclusion is presented. Indeed, the Hearing Officer himself acknowledged that Guynup's "volatility" toward Craig and Smith tended to corroborate Mrs. Guynup's testimony. In view of this finding, Zurlo's disagreement with the Hearing Officer's finding on this point is not so illogical or inexplicable as to, absent more, raise any suspicion of pretext.

CSEA's argument that Zurlo did not address the various mitigating factors it raises in its exceptions does not constitute "objective evidence" that the ALJ erred in finding Zurlo's testimony credible. The Hearing Officer's Report and Recommendations itself rejected each of those grounds as mitigating Guynup's offense, except for his previously unblemished service history and promotions, as to which the Hearing Officer noted that Guynup's rank was itself an aggravating factor as well as a mitigating factor.

That obscene language toward superior officers by other employees was tolerated, or punished only lightly when such language was directed at superior officers, does not provide any support for the claim that Zurlo's decisions were pretextual. Zurlo's adoption of the Hearing Officer's finding that Guynup's behavior was threatening toward his superior officers and the State police, as well as displaying "disregard if not

contempt for superior authority" was supported by substantial evidence, as the Appellate Division found. CSEA's equation of this behavior to routine use of obscene language or even disrespect to a superior officer is unconvincing, and does not tend to establish pretext.

Nor does Zurlo's testimony regarding his concerns over liability issues stemming from the Order of Protection even after it expired support a different conclusion. As the ALJ found, Zurlo's credible testimony that he based his testimony on the record and on the facts provided in the record, is not invalidated because he misapprehended or misremembered a portion of the record that he reviewed.

On the record before us, we find that the ALJ's factual determination that the Joint Employer was not motivated by anti-union animus was neither unsupported by the record nor manifestly incorrect. Accordingly, we affirm the ALJ's decision to dismiss the charge alleging that the Joint Employer violated § 209-a.1(a) and (c) of the Act.

IT IS, THEREFORE, ORDERED that the improper practice charges are dismissed.

DATED: October 6, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SUFFOLK COUNTY CORRECTION OFFICERS ASSOCIATION,

CASE NO. U-27738

Charging Party,

-and-

COUNTY OF SUFFOLK and SUFFOLK COUNTY SHERIFF,

Respondent.

In the Matter of

SUFFOLK COUNTY DEPUTY SHERIFFS POLICE BENEVOLENT ASSOCIATION,

Charging Party,

CASE NO. U-27757

- and -

COUNTY OF SUFFOLK and SUFFOLK COUNTY SHERIFF,

Respondent.

MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (STEVEN E. STAR, of counsel), for SUFFOLK COUNTY CORRECTION OFFICERS ASSOCIATION

GREENBERG BURICHELLI GREENBERG P.C. (SETH H. GREENBERG & GENEVIEVE E. PEEPLES of counsel), for SUFFOLK COUNTY DEPUTY SHERIFFS POLICE BENEVOLENT ASSOCIATION

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

BOARD DECISION AND ORDER

These consolidated cases come to us on exceptions filed by the Suffolk County

Correction Officers Association (COA) and the Suffolk County Deputy Sheriffs Police Benevolent Association (PBA) to a decision of an Administrative Law Judge (ALJ).[1] The ALJ dismissed the charges on the respective grounds that the record evidence established that the employees represented by the COA did not perform the at-issue work, and that, under the circumstances presented, the civilianization of the work did not violate the Act, as the only loss to the employees and the PBA was the loss of the work. The ALJ also found that the PBA's claim that the County of Suffolk and the Sheriff of Suffolk County (Joint Employer) improperly refused to bargain over the impact of its decision to transfer the work was improperly before her, as she had already dismissed that claim, and the Board affirmed that dismissal.

EXCEPTIONS

The PBA excepts to the ALJ's decision on the grounds that she erroneously found that the assignment of work from the deputy sheriffs to security guards constituted a change to the level of services and/or qualifications, requiring the ALJ to balance the respective interests of the parties, and that, in such a balancing, the employer's interest must be found to outweigh those of the unit employees and employee organization.

The COA excepts to the ALJ's decision on the same grounds as the PBA, but also contends that the Joint Employer failed to plead the issue of civilianization or change in the level of services, and that the ALJ should have addressed and rejected the Joint Employer's defenses of waiver and duty satisfaction.

---

[1] 46 PERB ¶ 4531 (2013). The ALJ's decision followed our remand to the ALJ, reversing the ALJ's earlier decision as to the definition of the work claimed to have been improperly transferred outside of the units, but affirmed her dismissal of the safety impact claims. 44 PERB ¶ 3038 (2011), *reversing and remanding* 43 PERB ¶ 4538 (2010).

The Joint Employer responds to the exceptions by denying that the COA has standing to appeal, on the ground that the at-issue work was performed solely by the employees represented by the PBA. The Joint Employer points out that on remand, when presented with the opportunity to add additional evidence, the Joint Employer fully briefed the issue of civilianization. The Joint Employer finally argues that the ALJ's decision is correct, and supported by the facts in the record and the law.

FACTS

The relevant facts are stated in our prior decision in this matter, and in the ALJ's decisions, and are repeated here only as necessary to address the exceptions before us.

The Riverhead Correctional Facility, a maximum security prison, is managed by the Sheriff's Office. Inmates are housed in a main building situated on a lot that includes a prison yard, a tower, two parking lots and grounds. This property is enclosed by a fence (perimeter fence).

Within the perimeter fence, an inner fence separates and isolates the correctional building, prison yard and tower from the rest of the grounds. The area within the inner fence is known as the "secured area." Entry to the facility is through a gate in the perimeter fence, guarded by a security booth. The two parking lots and the other grounds between the security booth and the inner fence are known as the "unsecured area."

The security booth is staffed by a deputy sheriff who checks the identity of those entering the facility and directs visitors to appropriate areas. The deputy sheriffs stationed at the security booth are also responsible for maintaining security in the area around the perimeter fence and in the unsecured area. Deputy sheriffs, levels I through

IV, are represented by the PBA.[2]

Correction officers work primarily within the secured area and are responsible for maintaining security within that area and for the care and custody of the inmates housed within the correctional building. Correction officers and deputy sheriffs share responsibility for security of the area along the inner fence. The only duty performed by correction officers outside the secured area is supervision of inmates they escort to the unsecured area to perform maintenance and grounds work. The inmates pick up garbage and perform landscaping and similar work in the unsecured area. If a disturbance occurs in the unsecured area unrelated to the prisoners they are supervising, correction officers are required to remain with their prisoners and may not respond to the disturbance. Correction officers, as well as correction corporals, correction sergeants, correction lieutenants and correction captains (collectively, correction officers) working in the correctional facility are represented by the COA.

Both correction officers and deputy sheriffs are peace officers. Candidates for the positions of deputy sheriff or correction officer must pass written competitive examinations and qualifying medical, psychological and physical fitness evaluations. Correction officers must, after appointment, obtain a peace officer training certificate and demonstrate good knowledge of the policies, rules and regulations of the Joint Employer with respect to correctional facilities. Deputy sheriffs must successfully complete a police officer training course and are expected to possess knowledge of criminal, civil, and vehicle and traffic laws and court procedures.

In May 2007, a trailer was placed in the employee parking lot located between the perimeter and inner fences for use by the Suffolk County Department of Social Services (DSS), operating it as an overnight shelter for homeless registered sex

[2] The PBA also represents unit employees in the title of investigator.

offenders. Shelter residents were not in the custody of the Sheriff and they were required to arrive at and depart from the facility in DSS authorized taxis.[3] Pursuant to the Sheriff's direction, shelter residents were not permitted to walk around the facility's grounds for any reason; and if they left without DSS approval were subject to arrest. Deputy sheriffs stationed at the security booth were required to verify the identity of the taxicab drivers and of the passengers against a list provided by DSS. At times, the deputy sheriff assigned to the security booth would be required to respond to disturbances among the shelter residents.

DSS assigned two or three security guards to the trailer to supervise the homeless and provide security within the trailer.[4] The security guards were responsible for opening the trailer in the evenings and locking it in the mornings, and for enforcing, inside the trailer, DSS rules, such as the prohibitions against bringing food, drink or tobacco into the trailer. Security guards are required to maintain a current New York State security guard license, which is obtained by completing an eight-hour training course.[5] No deputy sheriff has been fired or transferred because of the use of security guards in the trailer.

DISCUSSION

We have long held that:

> [T]wo essential questions [] must be determined when deciding whether the transfer of unit work violates §209-a.1(d) of the Act: a) was the work at-issue exclusively performed by unit employees for a

[3] In its memorandum of law in opposition to the exceptions on remand, the County represents that the trailer has been removed from the facility. *Id.* at 1, n. 1. This representation does not affect our jurisdiction or our decision.

[4] The number of security guards the DSS assigns to the trailer varies based upon the number of homeless who use the shelter during any given evening.

[5] Transcript, at p. 244.

> sufficient period of time to have become binding; and b) was the work assigned to non-unit personnel substantially similar to that exclusive unit work. If both these questions are answered in the affirmative, we will find a violation of §209-a.1(d) of the Act unless there is a significant change in job qualifications. When there is a significant change in job qualifications, however, we must balance the respective interests of the public employer and the unit employees to determine whether §209-a.1(d) of the Act has been violated.[6]

In our prior decision in this matter, we determined that the work in issue is "the security, monitoring and maintenance of order for the area between the perimeter and inner fences, which includes the two parking lots."[7] In its exceptions, the COA acknowledges that "the Board and the ALJ determined that the Deputy Sheriffs are exclusively responsible for the general security of the unsecured area."[8] On this record, the ALJ correctly found that the employees represented by the COA did not engage in the at-issue work, let alone establish exclusivity, and we therefore deny its exceptions and affirm the ALJ's dismissal of the charge in case No. 27738.[9]

As to Case No. 27757, we affirm the ALJ's finding that the deputy sheriffs have established exclusivity over the at issue work under the past practice analysis set forth in *Mahasset Union Free School District.*[10] In particular, we find that correction officers' supervision of inmates while they are performing maintenance and grounds work in the unsecured area is sufficiently distinct from the work performed by deputy sheriffs that it

---

[6] *Town of Riverhead*, 42 PERB ¶3032, at 3119 (2009), *citing Niagara Frontier Transp Auth*, 18 PERB ¶3083 (1985).

[7] 44 PERB ¶ 3038, at 3123.

[8] COA exceptions at ¶ 2.

[9] *See, e.g., County of Seneca*, 47 PERB ¶ 3005 (2014).

[10] 41 PERB 3005, at 3025-3026 (2008), *affd as modified as to remedy,* 61 AD23d 1231, 42 PERB ¶ 7004 (3d Dept 2009) (history on remand omitted).

does not breach exclusivity. We find a discernible boundary `concerning the at-issue work is demonstrated by the record evidence relied upon by the ALJ, finding especially salient the fact that correction officers supervising such inmates are prohibited from responding to disturbances that do not involve those inmates. [11]

We find that the ALJ properly addressed the Joint Employer's claim that the civilianization of the at-issue work constitutes a de facto change in job qualifications requiring application of the balancing of the parties' respective interests. [12] We likewise affirm the ALJ's balancing of the interests of the parties. As we have previously found, where, as here, the consequences have been limited to the mere loss of work to the unit, "a transfer of unit work, even if motivated solely by economic considerations, does not constitute a violation of the employer's duty to bargain".[13]

IT IS, THEREFORE, ORDERED that the improper practice charges are dismissed.

DATED: October 6, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

[11] *Id.*; *see also Town of Stony Point*, 45 PERB 3045, at 3115.

[12] *Fairview Fire District*, 29 PERB ¶ 3042 (1996); *Town of Stony Point*, 45 PERB ¶ 3045, at 3115.

[13] *Fairview Fire District*, 29 PERB ¶ 3042, at 3099-3100 ;*Town of Stony Point*, 45 PERB ¶ 3045 at 3115; *Town of Riverhead*, 42 PERB ¶ 3033, at 3119-3120 (2009) (citing *City of Newburgh*, 31 PERB ¶ 3017 (1998) (subsequent history omitted)).

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

DOUGLAS P. BIENKO,

Charging Party, **CASE NO. U-32953**

- and –

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO,

Respondent.

DOUGLAS P. BIENKO, *pro se*

STEVEN A. CRAIN AND DAREN J. RYLEWICZ, GENERAL COUNSEL (LESLIE C. PERRIN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Douglas P. Bienko to a decision of an Administrative Law Judge (ALJ).[1] The ALJ dismissed Bienko's improper practice charge in which he alleged that the Civil Service Employees Association, Inc., Local 1000, AFSME, AFL-CIO (CSEA) violated § 209-a.2(c) of the Public Employees' Fair Employment Act (Act) by entering into a settlement agreement with the County of Erie in violation of its duty of fair representation to him. Bienko contended that the agreement treated him disparately, as the only captain in the unit, by potentially requiring him to work forced overtime. The ALJ dismissed these allegations on the ground that CSEA entered into the settlement agreement with the understanding that the County would be

---

[1] 47 PERB ¶ 4525 (2014).

hiring an additional captain and sergeant, and that no evidence supported the contention that CSEA acted in an arbitrary, discriminatory, or bad faith manner.

EXCEPTIONS

Bienko excepts to the ALJ's rejection of his claim that the settlement agreement affected him disparately because lieutenants could also be subjected to forced overtime to replace absent tour supervisors. Bienko contends that the lieutenants were already subject to forced overtime requirements, but that captains, of whom he is the only one, have not. Likewise, Bienko claims that the ALJ's reliance on CSEA's "anecdotal, unsworn 'testimony'" that the County would hire additional staff was error, in that the statement had no evidentiary value. In its response, CSEA points out that, in a letter dated November 13, 2013, the ALJ set out the facts as alleged in the pleadings and as clarified at the conference, held on November 8, 2013. The ALJ's letter directed the parties to respond correcting the facts or adding any additional facts "no later than December 13, 2013." As Bienko neither responded to this letter nor submitted a brief when given the opportunity to do so, his exceptions to the facts as stated are not preserved. Moreover, the ALJ's factual findings are supported by the record.

FACTS

The facts are set forth in the ALJ's November 13, 2013 letter, to which neither party responded with corrections or objections, despite having an opportunity to do so.

The New York State Commission of Corrections (COC) published a staffing report notifying the County that corrections sergeants could no longer serve as watch commanders; that only an officer in the rank of lieutenant or above could serve as a watch commander. As a result of the County's implementation of the COC's staffing

requirements, a lieutenant who wanted a day off could only get that day if he or she arranged for another lieutenant to work to cover the shift.

CSEA filed an improper practice charge (Case No. U-32367), complaining that the County's staffing change violated the Act. On April 19, 2013, in settlement of that charge, CSEA and the County entered into a stipulation of settlement providing that:

1. Single day requests by lieutenants for any accrued leave time or vacation days will be granted so long as staffing requirements are met.

2. If a lieutenant requests a single day use of accrued leave or vacation leave that would cause the facility to fall below staffing requirements, the request could be approved only if the lieutenant had prearranged for coverage with another lieutenant.

3. Personal leave requests will be honored, except if such request places the employer in violation of the Commission on Corrections staffing level requirements. The parties also agree that another lieutenant must be available to work by being mandated, swap or overtime.

4. Unless and until a replacement is secured, the request will not be approved.

5. Captains will be considered tour supervisors.

6. Lieutenants and higher stationed at the Correctional Facility are eligible to volunteer or may be forced to cover sick leave openings for tour supervisor.

7. By settlement, neither party admits to any wrongdoing. IP U-32367 will be withdrawn with prejudice.[2]

CSEA entered into the settlement above based upon the County's representation that another captain and another sergeant would be hired. Such hiring had not taken place as of the November 8, 2013 conference.

---

[2] Charging Party Exhibit A.

Bienko alleged that he is the only one negatively impacted by paragraph six of the settlement agreement as he is the only captain. Bienko claimed that CSEA's bad faith in reaching the settlement agreement with the County is evidenced by the fact that he was, and remains, the only captain who may be forced to work overtime to replace an absent tour supervisor. As the date of the conference before the ALJ, Bienko had not been required to work overtime for a sick tour supervisor.

DISCUSSION

Section 213.2 of our Rules of Procedure (Rules) "limits our review of the ALJ's determination to the record before him or her."[3] As a result, Bienko's exceptions challenging the facts as set out in the ALJ's post-conference letter, to which he did not submit proposed corrections or otherwise object, as required to if such facts were not agreed by him to be accurate, are not properly before us.[4]

Even were we to consider Bienko's belated factual contentions, however, we would not find that they established that CSEA breached its duty of fair representation. To establish a breach of the duty of fair representation under the Act, a charging party "has the burden of proof to demonstrate that an employee organization's conduct or actions are arbitrary, discriminatory or founded in bad faith."[5] A "mere assertion that the negotiated terms of an agreement are not advantageous to the bargaining unit membership is insufficient to state a claim of a breach of the duty of fair

---

[3] *CSEA (Paganini)*, 36 PERB ¶ 3006, at 3019 (2003), citing *Margolin v. Newman*, 130 AD2d 312, 20 PERB ¶ 7018 (3d Dept 1987), *affd other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988); *see also Town of Blooming Grove*, 47 PERB ¶ 3010 (2014).

[4] *Id.*; *see also Rochester Teachers Assn (Hirsch)*, 46 PERB ¶ 3035, at 3078 (2013).

[5] *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, at 3119 (2008).

representation."[6] Indeed, absent proof of improper motivation by an employee organization, the "fact that the terms of a negotiated agreement are more favorable to some bargaining unit members is insufficient to establish a breach of the duty of fair representation."[7]

The parties do not dispute that the COC forbade the continued use of sergeants as watch commanders, and that CSEA's filing of an improper practice charge led to a negotiated resolution that allowed CSEA's members to alleviate the impact of that altered staffing requirement upon the bargaining unit as a whole. As the Court of Appeals explained in *Civil Service Bar Association, Local 237, IBT v City of New York*, "[w]here the union undertakes a good-faith balancing of the divergent interests of its membership and chooses to forego benefits which may be gained for one class of employees in exchange for benefits to other employees, such accommodation does not, of necessity, violate the union's duty of fair representation."[8] Bienko has not adduced any grounds upon which we could conclude that CSEA acted with any kind of improper motivation. That Bienko is the only captain potentially affected by the settlement agreement is merely a function of the fact that he is the only captain the County employs. This does not, of its own weight, establish intentional disparate treatment. Accordingly, we cannot on the record before us conclude that CSEA breached its duty of fair representation.

---

[6] *Id.*

[7] *Id.*

[8] 64 NY2d 188, 197, 18 PERB ¶ 7502, at 7512 (1984); *see also County of Tompkins*, 44 PERB ¶ 3024 (2011) citing *Calkins v Assn of New York State Troopers, Inc.*, 21 Misc3d 1119(A), 2007 NY Slip Op 52569(U) (Supreme Court Ontario County 2007), *affd*, 55 AD3d 1328, 41 PERB ¶7517 (4th Dept 2008), *lv denied*, 11 NY3d 714 (2009).

Based upon the foregoing, we deny Bienko's charge and affirm the decision of the ALJ.

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

DATED: October 6, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CANANDAIGUA FIREFIGHTERS ASSOCIATION, LOCAL 2098, IAFF,

Charging Party,

CASE NO. U-29660

- and -

CITY OF CANANDAIGUA,

Respondent.

CHAMBERLAIN D'AMANDA (MATTHEW J. FUSCO of counsel), for Charging Party

BOND, SCHOENECK & KING, PLLC (TERRY O'NEIL and HOWARD M. WEXLER of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Canandaigua (City) to a decision of an Administrative Law Judge (ALJ) on an improper practice charge, as amended, filed by the Canandaigua Firefighters Association, Local 2098, IAFF (Association).[1] The amended charge alleges that the City violated §209-a.1(d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred outside the bargaining unit certain firefighter duties exclusively performed by Association unit members in the Canandaigua Fire Department (Department) and when it eliminated the position of captain and

---

[1] 43 PERB ¶ 4585 (2010).

reassigned its duties to other unit members.[2] The City filed an answer denying that it violated the Act and asserting various affirmative defenses.

The ALJ determined, as relevant here, that the City violated §209-a.1(d) of the Act when it unilaterally transferred the performance of certain unit duties to non-unit volunteer firefighters and the duties of the stipended position of fire inspector to a non-unit code enforcement officer, and when it unilaterally contracted with the Cheshire Volunteer Fire Company to perform firefighting for the Town of Canandaigua in part of the area covered by a City contract with the Town to provide firefighting services. She rejected the City's claim that the management rights clause in the parties' collective bargaining agreement, at Article 2, defeated any claimed right by the Association to negotiate the transfer of unit work. The ALJ also dismissed the allegations that the City improperly reduced the categories of advanced life support emergency medical services calls (ALS-EMS) to which the unit firefighters automatically responded, assigned a non-unit volunteer firefighter to respond to ALS-EMS calls, eliminated the unit position of captain, and assigned its duties elsewhere in the bargaining unit.

The parties' collective bargaining agreement was in effect from January 1, 2009 to December 31, 2010. The instant charge, filed on December 4, 2009, concerns events between November 5, 2009 and July 1, 2010, when the agreement was in effect. Following exceptions filed by the City to the ALJ's

[2] An allegation regarding the testing of fire hydrants, dismissed at an earlier stage of this proceeding, has not been pursued by the Association here.

decision, we deferred the allegations of the charge, as relevant here, to the parties' contractual arbitration procedure.[3]

On April 15, 2013, the arbitrator selected by the parties issued his decision. Thereafter, the Association moved to reopen the appeal before us on the basis that the City had raised timeliness as a defense before the arbitrator. We granted the motion[4] and now consider the merits.

Our initial inquiry is whether we have jurisdiction over the Association's claims.[5] In determining our jurisdiction, we examine the scope and effect of the arbitrator's ruling. The arbitrator found that the City's assignment of volunteer firefighters to drive and operate City fire apparatus, as well as giving them responsibility for "the normal and reasonable fire station cleanliness inside and out and...normal maintenance of the fire stations, equipment and apparatus" violated Articles 12(1) and 16(1), respectively, of the collective bargaining agreement.[6]

The arbitrator noted that the City had promulgated separate rules and regulations for unit firefighters and for volunteer firefighters, that those applicable to unit firefighters included responsibility for the at-issue duties while those

---

[3] 44 PERB ¶ 3047 (2011).

[4] 47 PERB ¶ 3002 (2014).

[5] *See, e.g., County of Erie*, 26 PERB ¶ 3054 (1993), *affd, CSEA, Inc., Local 1000 v New York State Pub Empl Rel Bd*, 213 AD2d 897, 28 PERB ¶ 7004 (1995); *Gloversville-Johnstown Joint Sewer Board*, 27 PERB ¶ 3051 (1994).

[6] Association's Exhibit C (Arbitrator's Decision), at p.21, quoting Article 16 of the collective bargaining agreement. The parties' collective bargaining agreement is Joint Exhibit 1 in the record before us.

applicable to volunteers did not refer to them. The arbitrator further found that unit firefighters' exclusive performance of said duties predated both sets of rules and regulations, and that the City's unilateral assignment at issue here marked the first such assignment of the duties to volunteer firefighters. The arbitrator determined that Article 12 protected unit firefighters' exclusivity over the duties absent the City's revisions of the rules and regulations in the manner prescribed:

> All rules and regulations of the Fire Department not covered by this Agreement shall be covered in general and special orders and by the published Fire Department Rules and Regulations book.
>
> The Association shall be consulted for suggestions in the event of any revisions of the rules and regulations.... [7]

The language of Article 16 on which the arbitrator relied states:

> on-duty Firefighters shall be responsible for the normal and reasonable fire station cleanliness inside and out...and the normal maintenance of the fire stations, equipment and apparatus shall be included in the duties of the on-duty Firefighters.[8]

He found that unit firefighters exclusively performed these duties and the fact that unit and volunteer firefighters together "clean the equipment and return it to the storage compartments following an incident response"[9] did not destroy that exclusivity.

We adopt these findings. Nothing in the record contradicts these findings; neither are they repugnant to the Act, nor were they reached in a manner tainted

---

[7] Arbitrator's Decision at p.17

[8] Arbitrator's Decision at p. 21.

[9] *Id.*

by serious procedural irregularity, and the issues were fully litigated.[10] As the parties' collective bargaining agreement was in effect at the time of these changes, we lack jurisdiction over them.[11] That portion of the charge is therefore dismissed.[12]

The arbitrator also found that the performance of fire inspections and the provision of firefighting services to the Town of Canandaigua were not covered by the parties' collective bargaining agreement.[13] Again, we adopt these findings. They are not contradicted by the record; nor are they repugnant to the Act, nor was any serious procedural irregularity or lack of a full litigation of the issue claimed, let alone established.[14] As the parties' collective bargaining agreement in effect at the time did not encompass these claims, we have

---

[10] *See, e.g. State of New York (Dept of Mental Hygiene)*, 11 PERB ¶ 3084 (1978) (citing *New York City Transit Auth (Bordansky)*, 4 PERB ¶ 3031 (1971)); *see also Matter of Chenango Forks Cent. Sch. Dist. v NYS Pub Empl Rel Bd*, 21 NY3d 255, 46 PERB ¶ 7008 (2012).

[11] *See St Lawrence County*, 10 PERB ¶ 3058 (1977); *NYS Office of Court Administration*, 32 PERB ¶ 3073 (1999); *Regional Transportation Authority*, 28 PERB ¶ 3007 (1995). In determining our jurisdiction, the findings of the arbitrator are given "substantial weight." *Herkimer County BOCES*, 20 PERB ¶ 3050, at 3109 (1987); *see also County of Erie*, *supra* n. 5.

[12] Accordingly, we do not address the ALJ's analysis regarding these duties or the merits of the Association's claims and the City's defenses.

[13] The arbitrator noted that the Association "no longer claims" (Arbitrator's Decision at p. 21) that the collective bargaining agreement was violated in regard to the provision of firefighting services to the Town and argued before him that "such a claim usually is for PERB to decide" (*Id.* at p.22). The arbitrator went on to make findings on the issue because, he explained, the parties had presented it to him for decision.

[14] *Supra* note 10.

jurisdiction over the allegations that this work was improperly transferred unilaterally outside the bargaining unit.

The ALJ found that the duties had been exclusively performed by bargaining unit members and that their reassignment outside the bargaining unit therefore violated §209-a.1 (d) of the Act. No basis in the record or law has been established to warrant our overturning these determinations.

Regarding the assignment of fire inspection duties to the newly-created part-time code enforcement officer position, the record evidences that the City, when it created the part-time code enforcement officer position, assigned it the same duties performed by the City's two full-time code enforcement officers and added the duties of the former fire inspector position, which duties had not previously been performed by City code enforcement officers. The record further reveals that the training as to the fire inspector duties is the same for the newly-created part-time code enforcement officer as it was for the previous fire inspectors. Under these circumstances, the nature of the duties has not changed. The transferred duties are clearly "substantially similar"[15] to those performed by the fire inspector.

The transfer of these duties from uniformed personnel to a civilian position constitutes a "significant" change in the qualifications for the job, requiring a balancing of the parties' interests.[16] Upon review, we find that the ALJ properly

---

[15] *Niagara Frontier Transp Auth,* 18 PERB ¶ 3083, at 3182 (1985).

[16] *Id. See also County of Suffolk*, 12 PERB ¶ 3123 (1979); *City of Albany*, 13 PERB ¶ 3011 (1980); *City of New Rochelle*, 13 PERB ¶ 3045 (1980); *Town of Stony Point*, 45 PERB ¶ 3046, at 3115 (2012).

struck that balance. The sole interest asserted by the City is essentially economic. The City, in creating a position to relieve a code enforcement backlog, added the fire inspection duties to it, in consequence of its reduction in the firefighter work force. We have only found that "a transfer of unit work, even if motivated solely by economic considerations, does not constitute a violation of the employers duty to bargain" where the consequence has been limited to the mere loss of work to the unit.[17] Here, however, concrete harm to the members of the unit has been established; unit employees have lost the stipend for performing the work. Accordingly, the ALJ correctly found that the balance tips in favor of the employees' interest.

The ALJ's dismissals regarding the captain's position and the ALS-EMS calls are also supported by the record and the law. As to the captain, abolition of positions is a nonmandatory subject of bargaining[18] and, as the duties of that position were not transferred outside the bargaining unit, the claimed breach of the unit's exclusivity has not been established.[19] By contrast, the record establishes that the ALS-EMS calls have historically been performed by the non-

---

[17] *Fairview Fire District*, 29 PERB ¶ 3042, at 3099-3100 (1996); *Town of Stony Point*, 45 PERB ¶ 3046 at 3115; *Town of Riverhead*, 42 PERB ¶ 3033, at 3119-3120 (2009) (citing *City of Newburgh*, 31 PERB ¶ 3017 (1998) (subsequent history omitted).

[18] *See, e.g., Burnt Hills-Ballston Lake Cent Sch Dist*, 25 PERB ¶ 3066 (1992).

[19] *Id.*

unit Canandaigua Ambulance Service as well as unit employees.[20] Accordingly, the work is not exclusive to the bargaining unit.[21]

The City's transfer to the Cheshire Volunteer Fire Company of firefighting duties covered by the City's contract with the Town of Canandaigua violated the Act. There is no dispute that firefighting pursuant to the contract between the City and the Town was, until the City entered into the subcontract, unit work.[22] The City contends that the work was not exclusive, based upon the Town's having also contracted with volunteer fire companies to provide similar services in other sections of the Town, and due to the practice of mutual aid.

---

[20] The record also refers to the Canandaigua Emergency Squad (Transcript, p.105). Whether the reference is to the same company or another company does not affect the analysis and outcome above.

[21] Specifically regarding the elimination of the unit's automatic response to some ALS-EMS calls, the ALJ's determinations that such concerns the deployment of personnel and is nonmandatory are also correct. *See, e.g., State of New York (Div of State Police),* 46 PERB ¶ 3003 (2013), and the cases cited therein at note 2.

We note, however, that the charge makes no mention of this action. A broad interpretation of its claim that the exclusive work of unit firefighters has been unilaterally removed from the unit may encompass a transfer of this work, but not a claim that a reduction in the categories assigned for unit response independently violates the Act.

[22] We decline to, as the City requests us to, revisit and revive the argument "that the Board's analysis focus on the core components of the at-issue work and then determine whether the proposed discernible boundary is reasonably related to those intrinsic duties." *Manhasset Union Free Sch. Dist.* 41 PERB ¶ 3005, at 3025-3026 (2008), *affd as modified as to remedy,* 61 AD23d 1231, 42 PERB ¶ 7004 (3d Dept 2009) (history on remand omitted). We adhere to our reasoning in *Manhasset* and its progeny for the reasons stated in that decision. However, to the extent that the City's argument based on core components is raised in the context of the transfer of all firefighting duties within the Town to volunteers, the argument is not germane.

The fact that the Town also contracted with volunteer companies to provide firefighting services for it, in addition to those contacted with the City, does not defeat exclusivity. The City, and not the Town, is the employer, and the record is clear that the City's contractual obligation to provide firefighting services was performed by unit members until the time the City entered into the subcontract with the Cheshire Volunteer Fire Company.[23] As our application of past practice analysis in transfer of unit work cases is rooted in "the dynamics of the bilateral employer-employee organization relationship and the policies underlying the Act" related thereto, the performance of similar work by non-unit personnel on behalf of a different employer, the Town, does not breach exclusivity over the unit work performed for the City.[24]

The practice of mutual aid—a "request for fire or other emergency services from other emergency service providers"[25]—which the City's Fire Department has utilized as needed, does not, as argued by the City, breach exclusivity. We have previously held that "the invocation of mutual aid among firefighting companies of neighboring communities does not constitute

---

[23] Joint Exhibit 7; Transcript, at pp. 147-150; 170-171, 177-179.

[24] *Manhasset Union Free Sch. Dist.*, 41 PERB ¶ 3005, at 3024; *see, e.g., Buffalo Urban Renewal Agency*, 18 PERB ¶ 4533 (1993); *County of Chemung*, 47 PERB ¶ 4539 (2014).

[25] *City of Glens Falls*, 30 PERB ¶ 3047, at 3109 (1997) (mutual aid as a nonmandatory subject of bargaining); *see also City of Newburgh,* 16 PERB ¶ 3030, at 3046-3047 (1983) (same).

subcontracting."[26] Our finding to that effect was predicated on the supplemental nature of such mutual aid in an emergency situation, where resources are stretched thin, or "the fire companies of neighboring communities have special equipment or specifically trained personnel" necessary for the emergency at hand.[27] The record in this case establishes that the invocation of mutual aid by the City was consistent with that understanding,[28] and we therefore find that the conditions on its use are thus circumscribed and distinguishable from the routine firefighting duties of the unit.

The City's claim that it has eliminated its service to that portion of the Town is belied by the testimony of its own witness. James, the City's manager, testified that the purpose of the transfer was "to cover *on behalf of the City* so that we could fulfill our contract with the Town".[29] The City continues to provide the service, utilizing the Cheshire Volunteer Fire Company to do so. Under these

---

[26] *City of Saratoga Springs*, 16 PERB ¶ 3058, at 3093 (1983), citing *City of Newburgh*, 16 PERB ¶ 3030, at 3047 (1983).

[27] *City of Newburgh*, 16 PERB ¶ 3030, at 3047.

[28] *See, e.g.,* Transcript, at pp. 104-106. The issuance of a memorandum requiring the invocation of mutual aid from the VA Fire Department in any case of a structural fire does not warrant a different result, as it requires that the VA Fire Department be requested to come "to the scene for City addresses," but only to "Standby in their quarters for Town addresses." Charging Party Exhibit 4. As to the performance of firefighting work in the Town at issue, the memorandum does not alter the nature of mutual aid.

[29] Transcript, at p.147 (emphasis added).

circumstances, elimination of service has not been established.[30] Any argument that reliance on the Cheshire Volunteer Company represents a significant change in the level of service is not supported by any record evidence.

Finally, the City's reliance on the parties' contractual management rights clause is misplaced, for the reasons set forth in the ALJ's decision.[31]

Based on the above, we reverse the ALJ's determination that the City violated §209-a.1(d) of the Act by unilaterally transferring the duties of operating City Fire Department vehicles, performing routine maintenance of the fire stations and grounds, and testing and cleaning of fire apparatus and equipment in the fire houses. Those allegations of the charge are hereby dismissed for lack of jurisdiction.

The ALJ's dismissal of the allegations regarding the abolition of the captain's position, the reassignment of the duties of that position within the unit, reduced firefighter response to ALS-EMS calls and the assignment of a volunteer firefighter to respond to ALS-EMS calls are affirmed.

The ALJ's determinations that the City's unilateral transfer of fire inspection duties from unit members to civilian code enforcement officers violated §209-a.1(d) of the Act as did its unilateral transfer to the Cheshire Volunteer Fire

---

[30] *See, e.g., County of Chautauqua*, 21 PERB ¶ 3005, at 3124(1988); *County of Montgomery*, 19 PERB ¶ 4600 (1986); *Buffalo Urban Renewal Agency*, 18 PERB ¶ 4533 (1985).

[31] The issue regarding Article 2 presented by the parties to the arbitrator was solely as to the transfer of firefighting services in the Town of Canandaigua. The arbitrator found that Article 2 did not "expressly provide that the City has the right to subcontract" that work (p.22).

Company of performance of a portion of the firefighting services it provided to the Town of Canandaigua are affirmed.

THEREFORE, IT IS HEREBY ORDERED that the City:

1. Cease and desist from unilaterally transferring the exclusive bargaining unit work of fire inspection and of firefighting services in the Town of Canandaigua outside the unit;

2. Forthwith restore such work to the bargaining unit represented by the Association;

3. Forthwith reinstate unit employees to their former positions;

4. Make unit employees whole for any and all wages and benefits lost as a result of the unilateral transfer of said work, with interest at the maximum legal rate, until such time as the City offers to reinstate those unit members who performed said work to their former positions, including those whose employment with the City was terminated as a result of the loss of said work; and

5. Sign and post the attached notice in all physical and electronic locations normally used to communicate with unit employees.

DATED: October 6, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, 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 City of Canandaigua in the unit represented by the Canandaigua Firefighters Association, Local 2098, IAFF, that the City:

1. Will not unilaterally transfer the exclusive bargaining unit work of fire inspection and of firefighting services in the Town of Canandaigua outside the unit;

2. Will forthwith restore such work to the bargaining unit represented by the Association;

3. Will forthwith reinstate unit employees to their former positions;

4. Will make unit employees whole for any and all wages and benefits lost as a result of the unilateral transfer of said work, with interest at the maximum legal rate, until such time as the City offers to reinstate those unit members who performed said work to their former positions, including those whose employment with the City was terminated as a result of the loss of said work.

Dated . . . . . **By** . . . . . .
on behalf of the City of Canandaigua

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

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

Petitioner,

- and - **CASE NO. C-6253**

HYDE LEADERSHIP CHARTER SCHOOL - BROOKLYN,

Employer.

In the Matter of

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

Charging Party,

- and - **CASE NO. U-33454**

HYDE LEADERSHIP CHARTER SCHOOL - BROOKLYN,

Respondent.

RICHARD E. CASAGRANDE, GENERAL COUNSEL, (MICHAEL J. DEL PIANO, of counsel) and STROOK & STROOK & LAVAN, LLP (ALAN M. KLINGER, ESQ., of counsel), for Petitioner and Charging Party

JACKSON LEWIS, PC (THOMAS V. WALSH, ESQ., of counsel), for Employer and Respondent

BOARD DECISION AND ORDER

On July 24, 2014, the United Federation of Teachers, Local 2, AFL-CIO (UFT) filed a motion, pursuant to § 212.4 (h) of our Rules of Procedure (Rules) for leave to file consolidated exceptions to the Board challenging two pre-hearing rulings of

Administrative Law Judges (ALJs), both dated June 6, 2014. One of the rulings conditionally dismissed the above-captioned representation proceeding, the other conditionally dismissed the above-captioned improper practice charge. For the reasons stated below, we grant the motion, deny the exceptions, and affirm the decisions of the ALJs.

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.

As we have consistently held, we 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 the majority of requests for

---

[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).

permission to file exceptions.[2]

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, especially in cases involving representation petitions, 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 obviate the need for further processing of the petition.[4]

This representation proceeding and the related improper practice proceeding present extraordinary circumstances warranting a grant of leave to file exceptions pursuant to §212.4(h) of the Rules. Here, the UFT is, effectively, requesting this Board to issue a decision on jurisdiction that would purport to overturn a decision made by a Regional Director of the National Labor Relations Board (NLRB), while that decision is under review by the full NLRB. Because the federalism concerns raised by the motion could create procedural uncertainty, we grant the motion, and accept the filing of the exceptions. However, because we are constrained, at least at the present time, by governing case law that deprives us of jurisdiction to hear the matter, we affirm the ALJs, and conditionally dismiss the petitions.

In *Brooklyn Excelsior Charter School*, we had before us the questions whether

---

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

[3] *Supra,* note 1.

[4] 40 PERB at ¶ 3019.

the Public Employees' Fair Employment (Act) "was applicable to certain charter schools created and managed pursuant to the New York State Charter Schools Act of 1998, and whether we are preempted by the National Labor Relations Act from hearing and determining questions of representation involving such charter schools."[5] We found that, under the Charter Schools Act, "the Legislature intended PERB to have jurisdiction over all New York charter schools," and that the charter schools were "political subdivisions pursuant to § 2.2 of the NLRA, and, therefore, we are not preempted from determining the questions of representation presented."[6] However, we also acknowledged "that the NLRB and the federal courts have ultimate authority over issues of preemption."[7] The Appellate Division, Fourth Department reserved decision, rather than review our finding on the merits, based on that last point:

> Inasmuch as the two collective bargaining matters arguably fall within the scope of the National Labor Relations Act (NLRA) the National Labor Relations Board (NLRB) has primary jurisdiction to determine in the first instance whether its jurisdiction preempts PERB's jurisdiction. Under the circumstances of this case, and in the interest of judicial economy, we hold the case pending a determination of the NLRB whether the NLRA applies to the collective bargaining matters herein at issue and thus preempts PERB's jurisdiction.[8]

---

[5] 44 PERB ¶ 3001, at 3003 (2011) (footnotes and citations omitted) (citing Educ. Law § 2850, *et seq.* and 29 USC § 151, *et seq.*) (subsequent history omitted).

[6] 44 PERB ¶ 3001, at 3016, 3019.

[7] *Id.* at 3019.

[8] *Buffalo United Charter School v NYS Pub Empl Relations Bd*, 107 AD3d 1437, 1437-1438, 46 PERB ¶ 7009 (4th Dept 2013), *lv denied*, 22 NY3d 1082, 47 PERB ¶ 7001 (2014) (internal quotation marks and citations omitted).

The instant representation case was filed on April 14, 2014, the very day on which Hyde Leadership Charter School-Brooklyn (Hyde) filed a representation petition under the NLRA in which the "school contends that it is an employer subject to the jurisdiction of the" NLRB.[9] Moreover, on May 28, 2014, a regional director of the NLRB found that Hyde was "not exempt as a 'political subdivision' within the meaning of" the NLRA, and that "the NLRB has jurisdiction over the Employer in this case."[10] In so ruling, the Regional Director opined that "[t]he Board would find it 'not controlling' at best and 'immaterial' at worst, that the New York legislature intended charter schools to be public schools in many respects, including specifically being subject to the state's Public Employees' Fair Employment Act."[11] On August 6, 2014, the NLRB granted review of the Regional Director's decision.

As we noted in *Brooklyn Excelsior Charter School*, and consistent with the Appellate Division's finding in *Buffalo United Charter School*, the "NLRB and the federal courts have ultimate authority over issues of preemption." As the NLRB is in the process of exercising its primary jurisdiction to determine the question of preemption with respect to the very employer at issue here, we find that the ALJs did not err in conditionally dismissing the instant petition subject to the outcome of such

---

[9] *Hyde Leadership Charter School-Brooklyn*, 47 PERB ¶ 8001, at 8001 (2014).

[10] *Id.* at 8010.

[11] *Id.* at 8009 (quoting *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (2012); *The Pennsylvania Cyber Charter School* (Case 06-RC-120811, 2014 WL 1390806 (April 9, 2014)(unpublished opinion denying review).

determination.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, conditionally dismissed, with leave to re-open the case upon further administrative or judicial decisions resolving the issue of our jurisdiction over the employer, Hyde Leadership Charter School.

DATED: October 6, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

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

Petitioner,

- and -

CASE NO. C-6256

NEW VISIONS CHARTER HIGH SCHOOL FOR THE HUMANITIES,

Employer.

RICHARD E. CASAGRANDE, ESQ. (MICHAEL J. DELPIANO, of counsel) and STROOK & STROOK & LAVAN, LLP (ALAN M. KLINGER, of counsel) for Petitioner

PROSKAUER ROSE, LLP (DANIEL ALTCHEK, of counsel), for Employer

BOARD DECISION AND ORDER

On July 1, 2014, the United Federation of Teachers, Local 2, AFL-CIO (UFT) filed a motion pursuant to §§ 213.2 (b) and 212.4 (h) of our 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 6, 2014, conditionally dismissing the above-captioned certification proceeding. For the reasons stated below, we grant the motion, deny the exceptions, and affirm the decision of the ALJ.

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.

As we have consistently held, we 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]

By 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 petitions, under the extraordinary circumstances standard, when:

---

[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.

> 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 obviate the need for further processing of the petition.[4]

We conclude that the UFT has established extraordinary circumstances warranting the grant of leave to file exceptions pursuant to §212.4(h) of the Rules. The issue here clearly is of important statewide policy and has already proven to have implications for the processing of future representation petitions; the pendency of a number of essentially identical cases involving the same issues at multiple charter schools emphasizes the need for procedural certainty. In the absence of clear guidance from this Board, future representation petitions will be filed, and conditionally dismissed, leading to a multiplicity of interlocutory appeals based upon the same arguments advanced here. Accordingly, we grant the motion, and accept the filing of the exceptions. However, because we are constrained, at least at the present time, by governing case law that deprives us of jurisdiction to hear the matter, we affirm the ALJ, and conditionally dismiss the petition.

In *Brooklyn Excelsior Charter School*, we had before us the questions whether the Public Employees' Fair Employment (Act) "was applicable to certain charter schools created and managed pursuant to the New York State Charter Schools Act of 1998, and whether we are preempted by the National Labor Relations Act from hearing and

---

[4] *State of New York*, 40 PERB at ¶ 3007, at 3019.

determining questions of representation involving such charter schools."[5] We found that, under the Charter Schools Act, "the Legislature intended PERB to have jurisdiction over all New York charter schools," and that the charter schools were "political subdivisions pursuant to § 2.2 of the NLRA, and, therefore, we are not preempted from determining the questions of representation presented."[6] However, we also acknowledged "that the NLRB [National Labor Relations Board] and the federal courts have ultimate authority over issues of preemption."[7] The Appellate Division, Fourth Department reserved decision, rather than review our finding on the merits, based on that last point:

> Inasmuch as the two collective bargaining matters "arguably" fall within the scope of the National Labor Relations Act (NLRA) (, the National Labor Relations Board (NLRB) has primary jurisdiction "to determine in the first instance" whether its jurisdiction preempts PERB's jurisdiction. Under the circumstances of this case, and in the interest of judicial economy, we hold the case pending a determination of the NLRB whether the NLRA applies to the collective bargaining matters herein at issue and thus preempts PERB's jurisdiction.[8]

On May 28, 2014, a regional director of the NLRB found that a charter school created pursuant to the Charter Schools Act was "not exempt as a 'political subdivision'

---

[5] 44 PERB ¶3001, at 3003 (2011) (footnotes and citations omitted) (citing Educ. Law § 2850, *et seq.* and 29 USC § 151, *et seq.*) (subsequent history omitted).

[6] 44 PERB ¶ 3001, at 3016, 3019.

[7] *Id.* at 3019.

[8] *Buffalo United Charter School v NYS Pub Empl Relations Bd*, 107 AD3d 1437, 1437-1438, 46 PERB ¶ 7009 (4th Dept 2013), *lv denied*, 22 NY3d 1082, 47 PERB ¶ 7001 (2014) (citations omitted).

within the meaning of" the NLRA, and that "the NLRB has jurisdiction over the Employer in this case."[9] In so ruling, the Regional Director opined that "[t]he Board would find it 'not controlling' at best and 'immaterial' at worst, that the New York legislature intended charter schools to be public schools in many respects, including specifically being subject to the state's Public Employees' Fair Employment Act."[10] On August 6, 2014, the NLRB granted review of the Regional Director's decision.

The UFT argues that decisions of a Regional Director are not afforded precedential weight by the NLRB. Moreover, the UFT contends that the Regional Director's decision is further drawn into question by its reliance on *Chicago Mathematics & Science Academy Charter School*, a decision of the NLRB issued when, as the Regional Director noted, "the Board . . . included recess appointments whose status is being litigated in *Noel Canning v NLRB.*"[11] Those recess appointments were subsequently determined to have been unconstitutional.[12] Therefore, the UFT reasons, the decision of the NLRB Regional Director in *Hyde Leadership Charter School* does not preempt our assertion of jurisdiction over the instant matter.

However, as we noted in *Brooklyn Excelsior Charter School*, and consistent with

---

[9] *Hyde Leadership Charter School-Brooklyn*, 47 PERB ¶ 8001, at 8010 (2014).

[10] *Id.* at 8009 (quoting *Chicago Mathematics & Science Academy Charter School, Inc.*, 359 NLRB No. 41 (2012); *The Pennsylvania Cyber Charter School* (Case 06-RC-120811, 2014 WL 1390806 (April 9, 2014)(unpublished opinion denying review).

[11] *Id.* at 8012, n. 10 (citation omitted).

[12] *NLRB v Noel Canning*, 573 US ___, 134 S. Ct. 2550, 47 PERB ¶ __ (2014)

the Appellate Division's finding in *Buffalo United Charter School*, the "NLRB and the federal courts have ultimate authority over issues of preemption." As the NLRB is in the process of exercising its primary jurisdiction to determine the question of preemption, we find that the ALJ did not err in conditionally dismissing the instant petition subject to the outcome of such determination.

IT IS, THEREFORE, ORDERED that the charge must be, and hereby is, conditionally dismissed, with leave to re-open the case upon further administrative or judicial decisions resolving the issue of our jurisdiction over the employer, New Visions Charter High School for the Humanities.

DATED: October 6, 2014
Albany, New York

Jerome Lefkowitz, Chairperson

Sheila S. Cole, Member