

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

In the Matter of

JOSEFINA CRUZ,

Charging Party,

-and-

CASE NO. U-32233

UNITED FEDERATION OF TEACHERS, LOCAL 2,

Respondent,

-and-

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

Employer.

JOSEFINA CRUZ, *pro se*

LICHTEN & BRIGHT, P.C. (DANIEL R. BRIGHT of counsel), for Respondent

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS (JOHN WALLIN of
counsel), for Employer**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Josefina Cruz to a decision of an Administrative Law Judge (ALJ).¹ The ALJ dismissed Cruz's amended improper practice charge in which she alleged that the United Federation of Teachers, Local 2 (UFT) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) when it failed to respond to a letter from Cruz dated June 4, 2012 seeking a re-hearing of a salary grievance and the provision of requested documents related to that grievance. After a hearing, the ALJ adhered to her pre-hearing ruling that claims filed more than

¹ 47 PERB ¶ 4552 (2014).

four months prior to the filing of the charge were untimely, and found, as to the timely portion of the charge, that the evidence did not establish that the UFT had acted in an arbitrary, discriminatory, or bad faith manner in its representation of Cruz.

EXCEPTIONS

Cruz excepts to the ALJ's ruling on four grounds. First, she asserts that the ALJ erred in finding various claims set forth in the charge to be untimely, arguing that "[d]espite a significant reversal of existing *Long Beach II* precedent, the [ALJ's] decision applied *Long Beach II* and ignores the new PERB Precedent (*Brown*)."² Second, Cruz contends that the ALJ's decision is "prejudicial" on the basis of alleged factual errors and for using demeanor "as a confusing criteria to adjudicate credibility."³ Cruz's third exception is predicated on "contradictions and inconsistencies with prior rulings" by the ALJ in the case.⁴ Finally, Cruz argues in her fourth exception that the ALJ's decision "misapprehended and misconstrues important facts," providing several alleged instances, including that "the statute of limitations for filing a PERB improper practice charge is tolled until the grievance machinery is exhausted," but the [ALJ's] decision makes no reference to this policy."⁵

FACTS

Cruz was employed by the Board of Education of the City School District of the

² Exceptions, ¶ 1.

³ Exceptions, ¶ 2.

⁴ Exceptions, ¶ 3.

⁵ Exceptions, ¶ 4.

City of New York (District) as a teacher for fourteen years. In February 2010, about fourteen months after the District terminated her employment, Cruz received an invoice from the District stating that it had overpaid her more than three thousand dollars and was seeking to recoup that money from her.

At Cruz's request, the UFT filed a salary grievance on her behalf disputing the accuracy of the District's calculations and the amount she allegedly owed. On May 31, 2012, a step 2 hearing was held in that grievance, at which UFT borough representative Pedro Serrano, whose duties include the representation of members in salary recoupment grievances, appeared on Cruz's behalf. Cruz testified that, when the hearing ended that day, she believed that the hearing had been adjourned and had not been concluded.

Subsequently, Cruz wrote a letter dated June 4, 2012, addressed to Lawrence Becker, the District's acting Chief Executive Officer of the Division of Human Resources.⁶ Underneath Becker's name and address, Cruz wrote the word "via" on a separate line, followed by "Ellen Gallin-Procida, Director, UFT Grievance Department."⁷ The letter opens "Dear Mr. Becker," and makes no further mention of Gallin-Procida.⁸

The June 4 letter contains Cruz's account of the step 2 hearing, and Cruz's objections to the conduct of the hearing, including a claim that the step 2 hearing officer was biased against her. In the letter, Cruz requested the District to schedule a new step

⁶ Charging Party's Exhibit 1.

⁷ *Id.*

⁸ *Id.*

2 hearing before a different hearing officer and that it provide her with specific documents.

Cruz testified that she mailed copies of her June 4, 2012 letter to both Becker and Gallin-Procida and that she also hand delivered a copy to the UFT office. Cruz further testified that she sent the letter to Gallin-Procida so that the UFT would take action with respect to that letter. When asked during cross-examination what she meant by the word “via” in the letter, Cruz initially testified that she sent the letter to the UFT so that they would know about the issues she addressed in that letter. She then testified that it was her way of asking the UFT to assist her, that the word means “through” and that she was indicating that Gallin-Procida was the person through whom she would seek action. She also testified that she thought that the UFT should know what to do with respect to her grievance.

On June 13, 2012, Cruz sent an e-mail to Gallin-Procida and attached a copy of her June 4, 2012 letter. In that e-mail, Cruz states that she has attached her June 4, 2012 letter for her “information and action.”⁹

The ALJ found that Cruz sent a copy of her June 4, 2012 letter to Gallin-Procida and that Gallin-Procida received it, but that the letter did not clearly request that Gallin-Procida, or the UFT, respond or take action on Cruz’s behalf. In particular, the ALJ credited Gallin-Procida’s testimony that she read Cruz’s June 4, 2012 as a request to the District to take action, and not a request directed at the UFT. The ALJ specifically cited Gallin-Procida’s demeanor and the language of the letter as grounds for finding

⁹ See ALJ Exhibit 9, Exhibit J.

her testimony credible. In particular, the ALJ found that:

the language of Cruz' June 4, 2012 letter is unclear with respect to whether she is asking the UFT to respond or take action. The letter's vagueness is demonstrated by the fact that the greeting is directed only towards Becker and that, in the body of the letter, Cruz does not specifically state that she is asking the UFT to represent her or take any action. Instead, the letter's contents are directed towards the District and discuss Cruz' request that the District schedule her grievance for another step 2 hearing before a different hearing officer and other related relief.¹⁰

The ALJ also cited the lack of any evidence of personal animosity between Gallin-Procida and Cruz, noting that Gallin-Procida "went out of her way to assist Cruz by having Cruz's case taken out of order and an investigation and review completed faster than it otherwise would have."¹¹

The ALJ noted that the Grievance Department is not involved in scheduling, or representing grievants in, step 2 hearings. Additionally, Gallin-Procida understood that, if Cruz had a question with respect to the step 2 hearing she could ask Serrano, who represented her at that step, or another UFT borough representative.

The step 2 hearing officer issued her decision on June 6, 2012, in which she denied the grievance.¹² The UFT received a copy of that decision on or about June 28, 2012. Cruz testified that she never received a copy of the step 2 decision from the District and that she first received a copy of it on or about October 24, 2012, when she went to the UFT office. Cruz further testified that she went to the UFT office that day to

¹⁰ 47 PERB ¶ 4552, at 4704-4705.

¹¹ Id. at 4705.

¹² Charging Party Exhibit 5.

drop off a letter dated October 24, 2012 addressed to Gallin-Procida, that she spoke with Serrano and gave him a copy of her October 24, 2012 letter and that Serrano stamped that letter in for her and gave her a copy of the step 2 decision. She testified that she did not know that the grievance had been denied until Serrano gave her a copy of the step 2 decision. According to Cruz, in her October 24, 2012 letter she inquired regarding her June 4, 2012 letter.

Cruz testified that she heard nothing from the UFT until November 10, 2012, when she received a letter from Gallin-Procida dated October 25, 2012. That letter states that the UFT Grievance Department had concluded its review and investigation of Cruz's salary grievance and that it had concluded that her grievance could not be successfully pursued to arbitration.¹³

The amended charge does not address the claim that the UFT failed to respond to Cruz's October 24, 2012 letter. The ALJ therefore found that the matter was not properly before her.¹⁴ In any event, she credited Gallin-Procida's testimony that she had not received that letter, and Serrano's testimony that Cruz had described the copy she gave him as a "carbon copy" and he thus assumed no action was expected of him.

DISCUSSION

Cruz's reliance on decisions of the California Public Employment Relations Board respecting timeliness and tolling of the statute of limitations is unpersuasive, as those decisions are decided under another state's statutory provisions and rules, which are

¹³ Charging Party's Exhibit 4.

¹⁴ 47 PERB ¶ 4552, at 4705 (citing *County of Rockland and Rockland County Sheriff*, 31 PERB ¶ 3062 (1998)).

separate and distinct from those applicable to this proceeding.¹⁵ While we might consider out-of-state authority to be persuasive authority in the absence of any applicable statutory provisions, rules, or decisions from this Board or the courts of New York State, no such gap exists here.

Under § 204.1(a)(1) of our Rules of Procedure (Rules), “the four-month time period for filing a charge commences when a charging party had actual or constructive knowledge of the act or acts that form the basis for the charge or the date that such conduct could have reasonably been discovered.”¹⁶ We “strictly apply the timeliness requirement, and it is not tolled by the pendency of a grievance or other related matters.”¹⁷ The ALJ correctly found that the UFT and the City School District of the City of New York raised the issue of timeliness in their answers, and therefore no waiver

¹⁵ Cruz cites *Los Angeles Unified Sch Dist (Brown)*, PERB Dec. No. 2359 (Calif. PERB 2014) as overruling *Long Beach Cmty College Dist*, PERB Dec. No. 2002 (Calif. PERB 2009), as well as *Sacramento City Unified School Dist*, PERB Decision No. 1461 (Calif. PERB 2001).

¹⁶ *Local 456, IBT (Rojas)*, 45 PERB ¶ 3031, at 3072 (2012) (citing *Solvay Union Free Sch Dist*, 45 PERB ¶ 3023 (2012); *Nanuet Union Free Sch Dist*, 45 PERB ¶ 3007 (2012); *New York State Thruway Auth*, 40 PERB ¶ 3014 (2007); *City of Binghamton*, 31 PERB ¶ 3088 (1998); *City of Oswego*, 23 PERB ¶ 3007 (1990); *State of New York (GOER)*, 22 PERB ¶ 3009 (1989); *Bd of Edu of the City Sch Dist of the City of New York (Chamberlin)*, 15 PERB ¶ 3050 (1982)).

¹⁷ *Local 456, IBT (Rojas)*, *supra* note 16, at 3072, citing *State of New York (Insurance Department Liquidation Bureau) (Smulyan)*, 45 PERB 3008 (2012); *TWU (Edwards)*, 45 PERB ¶ 3014 (2012); *see also State of New York (SUNY Stony Brook)*, 44 PERB ¶ 3021, at 3074 (2011), *confd sub nom. Cooper v State of New York State University of NY at Stony Brook*, 45 PERB ¶ 7002 (Sup Ct Albany Co 2011).

could be found.¹⁸

Similarly, we find no merit in Cruz's exceptions on the ground that certain of the ALJ's findings in her post-hearing decision vary from her recitation of the facts underlying the charge in her letter decision of August 16, 2013.¹⁹ These exceptions do not take into account the differing standards applicable to a pre-hearing motion to dismiss and to a determination after a hearing. We have long held that:

A "pre-hearing motion to dismiss for failure to set forth a *prima facie* case is properly granted only if the facts alleged cannot, as a matter of law, constitute a violation of the Act under any recognized or acceptable legal theory. In deciding such a motion, the charging party is entitled to all reasonable inferences and a presumption of the truth regarding the matters asserted."²⁰

That presumption of truth does not apply at a hearing, at which, "[t]o 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.'"²¹ As a result of the different procedural context, the factual recitations of the allegations of the charge in a decision on a motion to dismiss have no bearing on the factual findings made by an ALJ based

¹⁸ Cruz's conclusory claims of collusion and fraudulent concealment, not supported by any allegation of fact, do not raise any basis upon which a claim of equitable tolling could be predicated. See *PEF(Goonewardena)*, 27 PERB ¶ 3006, at 3012-3013 (1994).

¹⁹ ALJ Exhibit 12.

²⁰ *Buffalo City Sch Dist*, 24 PERB ¶ 3033, at 3064 (1991) (citing Rules § 204.2; *State of New York (Office of Mental Health)*, 24 PERB ¶ 3004 (1991)).

²¹ *Munroe (UFT)*, 47 PERB ¶ 3031, slip op, at 5 (2014) (quoting *Bienko (CSEA)*, 47 PERB ¶ 3027, 3082-3083 (2014); see *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, at 3119 (2008)).

upon the evidence presented, and in determining the credibility of testimonial evidence.

With respect to the one timely allegation in the charge, the allegation that the UFT violated the duty of fair representation by failing to respond to the June 4, 2012 letter, Cruz has failed to provide a basis for reversal.

Cruz's exceptions to the ALJ's credibility determinations, including her claim that the ALJ's reliance on demeanor in judging credibility constituted error, are unpersuasive. As we recently explained in *County of Clinton*,

Credibility determinations by an ALJ are generally entitled to "great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect." This is especially true where, as here, the credibility determination rests in part on the witness's "demeanor."²²

Here, no objective evidence undermines the ALJ's credibility determinations. Indeed, as the ALJ properly noted, the text of the June 4, 2012 letter does not, on its face, ask the UFT to do anything, the Grievance Department was not normally involved in step 2 hearings, and no evidence of ill-will or bad faith has been adduced. In these circumstances, the evidence supports at most a good faith error or negligence, which is

²² 47 PERB ¶ 3026, at 3079 (2014) (quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019 (2008)); citing *County of Tioga*, 44 PERB ¶ 3016, at 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977); see also *County of Ulster*, 39 PERB ¶ 3013, at 3045-3046 (citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, at 7009 (1st Dept 1974)) (deference due credibility determinations based on observation of witness's demeanor).

insufficient to breach the duty of fair representation.²³

Finally, we affirm the ALJ's conclusion that the alleged failure to respond to Cruz's October 24, 2012 letter was not properly before her. We have long held "that we will not find a violation of the Act upon an allegation which has not been pleaded, even if that allegation has been litigated."²⁴ Moreover, even were the claim properly raised, no objective evidence has been adduced compelling a conclusion that the ALJ's credibility findings with respect to the October 24, 2012 letter were manifestly incorrect.

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

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

DATED: January 15, 2015
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

²³ *Cairo-Durham Teachers Assn*, 47 PERB ¶¶ 3008, 3026 (2014); see also *Civ Serv Empl Assn, Local 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD2d 430, 432, 20 PERB ¶¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶¶ 7017 (1988)).

²⁴ *County of Rockland*, 31 PERB 3062, at 3136 (1998); see also *County of Nassau*, 29 PERB ¶¶ 3016 (1996); *Arlington Cent Sch Dist*, 25 PERB ¶¶ 3001 (1992); *City of Buffalo*, 15 PERB ¶¶ 3027 (1982); *City of Mt. Vernon*, 14 PERB ¶¶ 3037 (1981). Indeed, even when a motion is made to conform the pleadings to the proof, the motion "is essentially a request to amend the charge. Leave to amend is not available if the effect is to add a new substantive claim otherwise barred by PERB's four-month statute of limitations." *County of Monroe*, 36 PERB ¶¶ 3002, at 3005 (2003) (citing Rules § 204.1(a)(1)); *Town of Brookhaven*, 26 PERB ¶¶ 3066 (1993).

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

In the Matter of

**BUFFALO COUNCIL OF SUPERVISORS AND
ADMINISTRATORS, AFSA, LOCAL 10,**

Charging Party,

CASE NO. U-33047

- and -

CITY SCHOOL DISTRICT OF THE CITY OF BUFFALO,

Respondent.

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

HODGSON RUSS, LLP (KARL W. KRISTOFF of counsel), for Respondent

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Buffalo Council of Supervisors and Administrators, AFSA, Local 10 (BCSA) and cross exceptions filed by the City School District of the City of Buffalo (District) to a decision of an Administrative Law Judge (ALJ) in an improper practice proceeding.¹ The ALJ dismissed BCSA's improper practice charge, which alleged that the District violated §§ 209-a.1 (a) and (b) of the Public Employees' Fair Employment Act (Act) when a member of the District's Board of Education, Carl Paladino, sent an e-mail to BCSA unit members that, according to BCSA, interfered with the employees' protected rights under § 202 of the Act and dominated or interfered with BCSA's administration.

As limited by the ALJ, the record consists of the improper practice charge and

¹ 47 PERB ¶4526.

attachments, the District's answer, a letter from the ALJ to the parties dated October 31, 2013, BCSA's offer of proof dated November 22, 2013, and attachments, the District's response dated January 3, 2014, and attachments, and another letter from the ALJ to the parties dated January 7, 2014. The record for our review also includes BCSA's exceptions and brief in support of its exceptions and the District's response and cross-exceptions.

The ALJ held that the at-issue email, while attributable to the District, "contains neither a threat of reprisal nor a promise of benefits." According to the ALJ, the email was "simply a recitation of Paladino's opinion of the [District's] superintendent and others in the administration of the District," and that it was "merely critical of the administration of the District and of BCSA and [Buffalo Teachers Federation] leadership." She concluded that "[t]he expression of opinion alone, in the absence of either a threat or a promise is not unlawful."

EXCEPTIONS

BCSA alleges that the ALJ erred in concluding that Paladino's email did not constitute a violation of §§ 209-a.1 (a) and (b) of the Act. It further alleges that the ALJ erred by relying only on the parties' papers. It argues that the ALJ should have conducted an evidentiary hearing.

The District, while supporting the ALJ's conclusion that the email did not violate the Act, cross-exceptions to the ALJ's determination that Paladino's email is attributable to the District for purposes of assessing the alleged violations. BCSA filed no response to the District's cross-exceptions.

For the reasons that follow, we affirm the ALJ's conclusion that the charge must

be dismissed, but on different grounds. On the undisputed facts of this case, we agree with the District that Paladino's email cannot be attributed to the District for purposes of assessing the alleged violations of §§ 209-a.1 (a) and (b) of the Act.

FACTS

The ALJ based her decision primarily on BCSA's offer of proof and attachments. The District did not deny that the relevant email and other attachments to BCSA's offer of proof were sent and received.

On September 17, 2013, Board member Carl P. Paladino sent an e-mail to members of BCSA and the Buffalo Teachers Federation (BTF) regarding a rally scheduled to show support for Superintendent Pamela Brown.² As conceded by BCSA, the rally did not concern terms and conditions of employment. The e-mail, which excluded BCSA's leadership from its list of recipients, stated:

On September 16, 2013, Crystal Barton, President of Buffalo Council of Supervisors and Administrators (BCSA), sent a memo to the members of BCSA, without their or their officers' consent or knowledge, requesting that you attend a rally in support of Superintendent Pamela Brown on Thursday, September 18, 2013 on the steps of City Hall at 5:30 PM.

Apparently Phil Rumore [president of the Buffalo Teachers Federation] has asked the same of the teachers.

The issue is simply whether or not it is in the best interests of the 32,000 Buffalo Public School (BPS) children to keep the present Superintendent and her misfit group of phony, incompetent and inexperienced "turn around experts," all from someplace else on the planet, looking for a paycheck.

In a school district where the morale of all constituencies is at rock bottom and positions are filled, not by merit, but by who you know or by consultant and "shadow"

² BCSA's offer of proof, Exhibit A.

Superintendent Mary Guinn, who the Superintendent and sisterhood say is only a “reorganization/leadership consultant,” when in fact she runs the executive cabinet with no apparent actual authority. Where did they get the right to deny a present employee of the district, who has worked his or her way up in the system by merit, in favor of a carpetbagger with no apparent “special qualities” and a trumped up resume with self-awarded titles who knows nothing about us or our problems?

Attached is my BPS, Board of Education (BOE) Agenda dated August 16, 2013 and supplements dated August 20, 2013 and September 9, 2013 which explain the importance of ridding the BPS of this growing infection immediately.

Your union leaders have decided for you that you should protest the effort by some members of the Board of Education to remove the Superintendent from her office.

That arrogance and interference in the selection of the person who will act as their adversary on behalf of the community in dealing with the unions is not only illegal but also evidence of past practice that has resulted in a school as dysfunctional as the BPS. Your leaders, as they always have, assume that they know best what is good for all the constituencies of the BPS. Their motives dramatically conflict with what is good for the children of the community. Advancing weak and inexperienced incompetents, who they can manipulate and control, have [sic] resulted in the chaos and inequities presently suffered by our teachers and administrators.

I ask that you not attend the rally, but instead do the right thing, stand tall, don't be intimidated and E-mail me a reply which will be a vote to dismiss the Superintendent and her cronies and change the status quo, top down. Your name will be kept in confidence. Feel free to forward this memo to your fellow teachers and administrators.

The email contained a multi-page attachment consisting of various motions that Paladino had made to the Board of Education over the previous several months and his

reasons for making them.³ Among the passages contained in the attachment were bitter criticisms of the Board of Education and the Superintendent of Schools, which he characterized as a “[c]abal.” Indeed, Paladino opined:

The BOE [Board of Education] has been controlled for over a generation by a self-righteous majority faction of self-absorbed, irresponsible members with a “our way or the highway,” mentality. They are challenged people with no sense of their ongoing failures, no guilt for destroying the lives of children and the family fabric of their community. They have no sense of urgency. They are clearly “underwater” and clueless. They do not command any respect from any BPS constituency including employees, parents or the citizens of the City. They lead from behind by intimidation and recrimination. They hold public office only because of an apathetic and complacent public and “political osmosis,” (the art of political parasites filling any vacuum when the opportunity presents itself.) They hold positions that require a sense of good judgment which far exceeds their level of competency. From a distance they look innocent and well-intended. Up close they play the race card, lie, make up their own reality, connive and scheme in defense of their capabilities. Despite a new awareness and engagement manifested in a clear mandate from the electorate in this past election, they continue to fight the inevitable need for major and dynamic change.⁴

Virtually all of Paladino’s motions contained in the attachment to the September 17 email sought to undo recent actions of the Board of Education. Among the motions was one calling for the dismissal of the Superintendent, whom he blamed, along with the “Education [c]abal,” for what he considered to be the District’s status as a “dysfunctional train wreck.”⁵ He threatened that if another of his motions was not carried, he would “commence a taxpayer’s action seeking an order that the [State

³ BCSA’s offer of proof, Exhibit B.

⁴ *Id.*

⁵ *Id.*

Education Department] discharge the [Board of Education] and the Superintendent in favor of the appointment by SED of a Special Master with the expertise to lift the District out of its malaise.”⁶

One of Paladino’s criticisms contained in the attachment was about what he considered to be the quelling of dissent, including the following request to the Superintendent: “Will you issue a directive to all employees of the [D]istrict that there will be no intimidation or recrimination for any person in the [D]istrict speaking out and speaking their mind on any issue?”⁷

In addition to the afore-described attachment to Paladino’s September 17 email to BCSA unit members, BCSA’s offer of proof contains two memoranda that Paladino sent to Board of Education President Barbara Nevergold.⁸ In one, which BCSA alleges was dated August 20, 2013, Paladino opined that the

cozy symbiosis of local and State Democratic politicians . . . , the inner city Grassroots organization and the [District’s] teacher and administrator unions is also a breach of the public trust. The Education [c]ouncil supported and financed their ill feelings toward me and their affection for certain BOE members in the recent election. This is a root cause of the [District’s] dysfunction.⁹

Later in the same memo, Paladino declared: “The search criteria for the present Superintendent was limited by reactionary and racist BOE members who demanded a weak, minority, female candidate from someplace else who could then be controlled by

⁶ *Id.*

⁷ *Id.*

⁸ BCSA’s offer of proof, Exhibits C and D.

⁹ BCSA’s offer of proof, Exhibit C.

complicit BOE members.”¹⁰ According to Paladino, “no other qualified minority wanted the job of turning around a chaotic and dysfunctional school system wrought with incompetence, corruption and a collectively incapable BOE.”¹¹ Noting that the Superintendent has a PhD. from Harvard, Paladino concluded that her status as Superintendent “doesn’t say much for her.”¹² Indeed, criticizing the BOE’s recent hirings, Paladino stated: “Reactionary racism cannot deal with serious reform of the iconic education systems of the 20th century.”¹³

In response to Paladino’s September 17 email to BCSA members, Nevergold sent an e-mail to Crystal Barton, BCSA’s president, and Paladino, with copies to all board members and secretaries, the attorney for BCSA, the cabinet and the superintendent.¹⁴ The subject was “Memo from Carl Paladino to Members of Local 10 BCSA and Buffalo Teachers Federation (Not sent to your president, but nothing’s confidential).”¹⁵ Nevergold’s e-mail provided as follows:

Mr. Paladino, I believe that a value we all share as Americans is that each of us has the right to freely express our opinion. But I also agree with Patrick Moynihan who said “*Everyone is entitled to his own opinion, but not his own facts.*” I am concerned, as an educator, parent, grandparent and member of the Board, who knows that young people are watching and reading comments from Board members, that

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ BCSA’s offer of proof, Exhibit E.

¹⁵ *Id.*

you are sending a message that invective, name-calling, distorted facts and general disrespect are acceptable in debates where two parties don't agree. If you care about the children in this District, I ask that you observe some civility in the messages you are sending out. We know your position.¹⁶

Paladino responded to Nevergold's memo by memo dated September 19, attached to BCSA's offer of proof.¹⁷ In it, Paladino harshly criticized Nevergold for the manner in which she conducts Board of Education meetings, particularly the way she treats Paladino. Also, the memo, again, criticizes the Superintendent's hiring practices, stating: "You have allowed the Superintendent to hire many outsiders, exacerbating the morale problem. These appointees have not risen by merit through the system and know nothing about the District except who their godmothers are."¹⁸ He accused Nevergold of sanctioning the Superintendent's "repeated lies" regarding student attendance records. He criticized Nevergold for her role in hiring the District's General Counsel, whom he described as having "highly questionable competence," and he threatened that if Nevergold did not resign as president of the Board of Education he would "ask the Commissioner of Education to dismiss [her]."¹⁹ And, he renewed his request that the Board of Education dismiss the Superintendent. Finally, the memo contains a harsh criticism of Governor Andrew Cuomo's educational policies.

As with the September 17, 2013 email that Paladino sent to BCSA members, the attachment and the two memoranda of August 20 and September 19 contain a

¹⁶ *Id.*

¹⁷ BCSA'S offer of proof, Exhibit D.

¹⁸ *Id.*

¹⁹ *Id.*

smattering of criticisms of BCSA and its leadership. Those criticisms are primarily directed to what Paladino considered to be the union's influence over decisions made by the Board of Education, allegedly obtained through electoral support and intimidation. While harsh, those criticisms pale in comparison to Paladino's tirade against the District's Board and Superintendent.

DISCUSSION

As a threshold matter, we find no fault with the ALJ's decision not to conduct an evidentiary hearing. Section 205.5 (i) of the Act states that PERB is authorized "[t]o hold such hearings and make such inquiries *as it deems necessary* for it properly to carry out its functions and powers" (emphasis added). Section 212.4 (a) of PERB's Rules of Procedure similarly states: "A formal hearing for the purpose of taking evidence relevant to the proceeding before the agency shall be conducted *as necessary* by the administrative law judge designated by the director" (emphasis added). Thus, although "[i]t shall be the duty of the [ALJ] to inquire fully into all matters at issue and to obtain a full and complete record" (Rules, § 212.4), a hearing is not required absent disputed relevant facts.²⁰ Here, the only issue raised by BCSA was the content of Paladino's email and attachments and their effect on BCSA's and the employees' protected rights. To the extent that content required any clarification, BCSA filed with its offer of proof additional memoranda from Paladino to Nevergold. Again, it was the content of those documents that BCSA relied on. Because the District did not deny that those documents were sent and received, there are no relevant disputed facts that would require an evidentiary hearing.

²⁰ See, e.g., *Village of Spring Valley Policemen's Benevolent Association*, 14 PERB ¶ 3010 (1981).

Relying on the same documents relied on by BCSA, the District argues that there is no basis to attribute Paladino's remarks to the District or the Board of Education. Applying an agency analysis, the District argues, in effect, that no statements made by Paladino as a member of the Board of Education can violate the Act unless they are authorized by the Board of Education.²¹ The ALJ rejected that argument, stating: "Paladino was, however, acting as a member of the board, and as such his remarks in his e-mail of September 17, 2013, can be attributed to the District."

We disagree with the ALJ's conclusion that it was enough that Paladino was acting as a member of the Board of Education to attribute the alleged violations of the Act to the District. However, we are also not persuaded by the District's unduly narrow application of agency principals to disclaim responsibility for the statements. While we find that there must be some agency relationship between an individual board member and a board of education to impute the member's statement to the Board, the authorization need not be explicit, as the District seems to argue. For example, a board member may act with apparent or implied authority without express authorization of the full board of education. Thus, a board of education may violate the Act when a single member, although not expressly authorized by the board, credibly threatens to do everything in her power to terminate employees who exercise protected rights under the Act, if the board fails to issue a prompt, equally credible, repudiation of such threats. However, we need not address that issue here. The ALJ correctly observed: "Clearly, Paladino was not acting on behalf of the board, as his position regarding the

²¹ See, e.g., *Appeal of Balen* 40 Ed Dept Rep 479, Dec No 14,532 (January 20, 2001); *Appeal of Silano* 33 Ed Dept Rep 20, Dec No 12,961 (July 22, 1993).

superintendent is well publicized and not the majority view.” On the facts of this case, however, we find that Paladino’s remarks cannot be attributed to the District or the Board of Education.

Given the language and tone of Paladino’s invectives, we conclude that no reasonable person could interpret them to represent the views of the District or its Board of Education, much less that they were apparently or implicitly made on their behalf. In that regard, we note that while Nevergold’s email does not expressly reject Paladino’s sentiments toward BCSA, it is a civil rejection of the positions that he expressed generally. And we find that it is a sufficient denunciation of Paladino’s positions to defeat any remnant claim that Paladino was acting on behalf of the District or the Board of Education.

Finding that Paladino’s tirade cannot be attributed to the District for purposes of the alleged violations, we do not need to address the ALJ’s conclusion that Paladino’s September 17, 2013 email did not interfere with protected rights.

Accordingly, the decision of the ALJ is affirmed, BCSA’s exceptions are denied and the District’s cross-exception is granted for the reasons stated herein.

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

DATED: January 15, 2015
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

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

In the Matter of

SHELDON LAMAR HUNT,

Charging Party,

CASE NO. U-33563

- and -

UNITED FEDERATION OF TEACHERS,

Respondent.

SHELDON LAMAR HUNT, *pro se*

CHARLES D. MAURER, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Sheldon Lamar Hunt to a decision of the Director of Public Employment Practices and Representation (Director).¹ The Director dismissed Hunt's improper practice charge in which he alleged that the United Federation of Teachers (UFT) violated § 209-a.2(c) of the Public Employees' Fair Employment Act (Act) when it "conspired with [his] former employer to terminate his employment under false pretense."² The Director held that Hunt's charge was untimely under § 204.1 of PERB's Rules of Procedure (Rules) because it was filed more than four months after Hunt knew or reasonably should have known of the conduct alleged to have violated the Act.

EXCEPTIONS

Hunt contends that the proceedings pursuant to Education Law § 3020-a

¹ 47 PERB ¶ 4577 (2014).

² *Id.* at 4784 (editing marks in original).

usurped the jurisdiction of the criminal courts, and that only after the adjudication of the claims against him under criminal law can the disciplinary arbitration under § 3020-a take place. Hunt further asserts that the UFT “has continuously engaged in an improper practice by not moving this instant case into the New York State” criminal courts, and that therefore the statute of limitations should be tolled.³

DISCUSSION

Hunt’s exceptions to the Director’s August 5, 2014 decision were dated August 19, 2014, and were filed timely on August 20, 2014. However, these August exceptions lacked proof of service. When this deficiency was called to Hunt’s attention, he did not provide proof of service of the August exceptions, but instead filed new exceptions, dated October 6, 2014, with proof of service bearing that date.

Section 213.2 (a) of our Rules of Procedure (Rules) provides that exceptions must be filed “within 15 working days after receipt of a decision, report, order, ruling, or other appealable findings[,] or conclusions.” Likewise, pursuant to § 213.2 (a) of the Rules, “[t]imely service of exceptions upon all other parties is a necessary component for the filing of exceptions under the Rules, and this timeliness requirement is strictly applied.”⁴ Fifteen working days after August 5, (adding five calendar days for service of the Director’s decision by mail) elapsed on September 2, 2014. Thus, Hunt’s August exceptions were not, on the record before us, served, and are therefore a nullity, while

³ Exceptions, at 3.

⁴ *State of New York (Commission of Correction)*, 47 PERB ¶ 3019, at 3058 (2014) (citing *UFT (Pinkard)*, 44 PERB ¶ 3011, at 3042 (2011); *UFT, Local 2, AFT, AFL-CIO (Elgalad)*, 43 PERB ¶ 3028 (2010); see generally *Honeoye Falls-Lima Cent. Sch Dist (Malcolm)*, 41 PERB ¶ 3015 (2008); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶ 3037 (2002); *Yonkers Fedn of Teachers (Jackson)*, 36 PERB ¶ 3050 (2003)).

his October exceptions are untimely, and both must be denied.

Even if the exceptions had been timely served and filed, however, we would affirm the Director's decision. Under §204.1(a)(1) of the Rules, "the four-month time period for filing a charge commences when a charging party had actual or constructive knowledge of the act or acts that form the basis for the charge or the date that such conduct could have reasonably been discovered."⁵ We "strictly apply the timeliness requirement, and it is not tolled by the pendency of a grievance or other related matters."⁶

According to the amended improper practice charge, Hunt was terminated by the Board of Education of the City School District of the City of New York (DOE) on August 19, 2010, having been found guilty of charges of misconduct filed under § 3020-a of the Education Law. Hunt admits that the charges against him were brought on October 15, 2008, and that his employment was terminated on August 19, 2010. Moreover, the UFT ceased providing representation for Hunt in May 2010. The UFT's representation of Hunt, up to and including the withdrawal of the UFT's provided counsel on May 5, 2010, was the subject of a prior improper practice proceeding, in which we found no breach of the duty of fair representation on the part of the UFT.⁷

⁵ *Local 456, IBT (Rojas)*, 45 PERB ¶ 3031, at 3072 (2012) (citing *Solvay Union Free Sch Dist*, 45 PERB ¶ 3023 (2012); *Nanuet Union Free Sch Dist*, 45 PERB ¶ 3007 (2012); *New York State Thruway Auth*, 40 PERB ¶ 3014 (2007); *City of Binghamton*, 31 PERB ¶ 3088 (1998); *City of Oswego*, 23 PERB ¶ 3007 (1990); *State of New York (GOER)*, 22 PERB ¶ 3009 (1989); *Bd of Educ of the City Sch Dist of the City of New York (Chamberlin)*, 15 PERB ¶ 3050 (1982)).

⁶ *Id.*

⁷ *UFT (Hunt)*, 45 PERB ¶ 3039 (2012) (*affg*, 45 PERB ¶ 4502 (2012)). The facts regarding the UFT's representation of Hunt and its termination, are found in our prior opinion and that of the Administrative Law Judge which we affirmed.

The original charge in this matter was filed on May 27, 2014, almost four years after the UFT withdrew from representing Hunt, and almost four years after the last alleged act, his termination. No act or omission within four months of the filing of the charge has been alleged, nor any lack of knowledge of the acts outside of the limitations period. Therefore, Hunt's claims are untimely.

Moreover, even if both the exceptions and the underlying charge were not independently time-barred, the Director properly found that the conclusory allegation of collusion without any factual predicate did not suffice to state a claim.⁸

Based upon the foregoing, we deny Hunt's charge and affirm the decision of the Director.

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

DATED: January 15, 2015
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member

⁸ See, e.g., *PEF (Goonewardena)*, 27 PERB ¶ 3006 (1994). We note that, in addition, the *res judicata* effect of our prior decision concerning the UFT's representation of Hunt provides yet another basis for dismissal of this charge. See, e.g., *UFT (Grassel)*, 43 PERB ¶ 3033, at 3127, n. 6 (2010).

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

In the Matter of

**ROOSEVELT CHILDREN'S ACADEMY WORKERS'
ASSOCIATION, NYSUT, AFT, NEA, AFL-CIO,**
Charging Party,

- and -

CASE NO. U-33754

**DR. RONALD BOYKINS, as Superintendent of the
ROOSEVELT CHILDREN'S ACADEMY & the
ROOSEVELT CHILDREN'S ACADEMY,**
Respondent.

JASON LASKY, for Charging Party

**BEE READY FISHBEIN HATTER & DONOVAN, LLP (PETER M. FISHBEIN,
ESQ., and ANDREA ANDRADE, ESQ., of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on 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 the Director of Public Employment Practices and Representation (Director), conditionally dismissing the above-captioned proceeding. For the reasons given in our recent decision in *New Visions Charter High School for the Humanities*,¹ we grant the motions, deny the exceptions, and affirm the conditional dismissal of this matter, with leave to re-open the case upon further administrative or judicial decisions resolving the issue of our jurisdiction over the employer at issue.

As we explained in *New Visions*:

On May 28, 2014, a regional director of the NLRB found that a charter school created pursuant to the Charter Schools Act was “not

¹ 47 PERB ¶ 3023 (2014).

exempt as a 'political subdivision' within the meaning of" the NLRA, and that "the NLRB has jurisdiction over the Employer in this case."² 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."³ On August 6, 2014, the NLRB granted review of the Regional Director's decision.

....

However, 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."⁴

As of the present writing, the NLRB has not yet decided the issue in *Hyde Leadership Charter School-Brooklyn*. Accordingly, "[a]s the NLRB is in the process of exercising its primary jurisdiction to determine the question of preemption, we find that the [Director and ALJs] did not err in conditionally dismissing the instant petition subject to the outcome of such determination."⁵

IT IS, THEREFORE, ORDERED that the above-captioned proceeding 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

² *Hyde Leadership Charter School-Brooklyn*, 47 PERB ¶ 8001, at 8010 (2014).

³ *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)).

⁴ *New Visions*, *supra* note 1, at 3067 (citing *Brooklyn Excelsior Charter School*, 44 PERB ¶ 3001, at 3019 (2011) (subsequent history omitted), and *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)).

⁵ *Id.*

employer at issue.

DATED: January 15, 2015
Albany, New York


Jerome Lefkowitz, Chairperson


Sheila S. Cole, Member