

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

In the Matter of

**TRANSPORT WORKERS UNION, LOCAL 106
(TRANSIT SUPERVISORS ORGANIZATION),**

Petitioner,

-and-

CASE NO. C-6327

NEW YORK CITY TRANSIT AUTHORITY,

Employer,

-and-

SUBWAY SURFACE SUPERVISORS ASSOCIATION,

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 Transport Workers Union, Local 106 (Transit Supervisors Organization) 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.

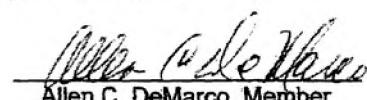
Included: All Full-time Maintenance Supervisors, Level II working in Maintenance of Way Division for the New York City Transit Authority.

Excluded: Based upon their confidential duties, the following Maintenance Supervisors, Level II, who work in the following Maintenance of Way units/positions and their successors: Paul K. Demarest, New Technology, Division of Signals; Russell C. Hope, Enterprise Asset Management, Division of Signals; Jean R. Jerome, Signal Operations, Division of Signals; Regy John, Signal Asset Management, Division of Signals; Joseph W. Kral, Signal Operations, Division of Signals; Kevin W. Lee, Signal Shop Material, Division of Signals; Anthony P. Maglione, Signal Operations, Division of Signals; Jose L. Aneiros, Maintenance Planner, Enterprise Asset Management and Maintenance Planning; Troy J. Rowe, Maintenance Planner, Enterprise Asset Management and Maintenance Planning; the successor to Mohamed Moustafa, Maintenance Planner, Enterprise Asset Management and Maintenance Planning; the successor to Regy John who previously held the position in Quality Assurance, Enterprise Asset Management and Maintenance Planning; and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Transport Workers Union, Local 106 (Transit Supervisors Organization). The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 10, 2015
Albany, New York


Seth H. Agata, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

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

In the Matter of

UNITED PUBLIC SERVICE EMPLOYEES UNION,

Petitioner,

-and-

CASE NO. C-6334

COUNTY OF LEWIS & SHERIFF,

Employer,

-and-

**CIVIL SERVICE EMPLOYEES ASSOCIATION, INC.,
LOCAL 1000, AFSCME, AFL-CIO, UNIT 725003,
OF LOCAL 10825,**

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: Deputy Sheriff, Deputy Sheriff/Correction, Special Patrol Officer, Deputy Sheriff Sergeant, Deputy Sheriff/Sergeant/Juvenile Officer, Deputy Sheriff/Correction Officer/Sergeant, Deputy Sheriff Tech Sergeant, Deputy Sheriff/Correction Officer/Lieutenant, and Deputy Sheriff/Criminal Investigator.

Excluded: Sheriff, Undersheriff, Jail Physician, Chief Deputy, and other Sheriff's Department Employees.

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

DATED: November 10, 2015
Albany, New York


Seth H. Agata, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

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

In the Matter of

**LOCAL 687, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS,**

Petitioner,

-and-

CASE NO. C-6349

**FRANKLIN COUNTY AND FRANKLIN COUNTY
SHERIFF'S DEPARTMENT,**

Employer,

-and-

UNITED PUBLIC SERVICE EMPLOYEES UNION,

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;¹

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

¹ This unit has been represented by the United Public Service Employees Union, which notified PERB, by letter dated October 27, 2015, that it supports the petition and disclaims any interest in further representing the unit.

IT IS HEREBY CERTIFIED that Local 687, International Brotherhood of Teamsters 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.

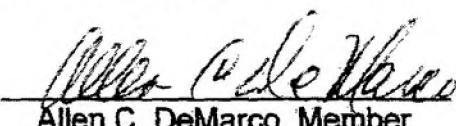
Included: All full and part-time Sheriff Department employees.

Excluded: Sheriff, Undersheriff, Warden, Principal Account Clerk/Typist, and Correctional Facility Nurse.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with Local 687, International Brotherhood of Teamsters. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: November 10, 2015
Albany, New York


Seth H. Agata, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

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

In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES
UNION,**

Petitioner,

CASE NO. CP-1397

- and -

**COUNTY OF FRANKLIN and FRANKLIN
COUNTY SHERIFF,**

Employer.

**LAW OFFICES OF RICHARD M. GREENSPAN, P.C. (ERIC J. LARUFFA of
counsel), for Petitioner**

**NORTH COUNTRY LABOR RELATIONS ASSOCIATES, INC. (DANIEL C.
MCKILLIP of counsel), for Employer**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the employer, the County of Franklin and the Franklin County Sheriff (together, County), to a decision of an Administrative Law Judge (ALJ) granting an amended petition placing the title of correction officer lieutenant (lieutenant) into an existing bargaining unit of employees represented by the United Public Service Employees Union (UPSEU).¹

EXCEPTIONS

The County filed exceptions to the decision based on the ALJ's alleged failure to:

(1) "base her decision upon the record"; (2) draw proper conclusions regarding the community of interest; (3) "adequately address respondent's [sic] argument regarding the burden of proof"; and (4) permit the County to "[identify] duties of the lieutenant that

¹ 47 PERB ¶ 4009 (2014).

conflict with a community of interest of bargaining unit members.”² For the reasons set forth herein, we find each of these exceptions meritless.

FACTS

On January 27, 2014, UPSEU filed a petition, as amended, seeking the placement of the newly-created position of lieutenant into an existing bargaining unit of County employees represented by UPSEU. The County responded, objecting to the placement on the ground that the lieutenant performed high-level supervisory duties that would make placing the lieutenant in the same unit as those he or she supervised inappropriate. A hearing was held on August 19, 2014, at which both parties were represented by counsel. Both parties filed post-hearing briefs. The facts are fully set forth in the ALJ’s decision and in the record before her, and are repeated here only as necessary to address the County’s exceptions.

The Franklin County Sheriff, Kevin Mulverhill, was the only witness to testify at the hearing. According to Mulverhill, the bargaining unit at issue includes, among other employees, correction officers and sergeants, while managerial titles not in the unit are sheriff, undersheriff, warden and lieutenant.³ The lieutenant, sergeant and correction officer positions are all in the civil service competitive jurisdictional class.⁴

The lieutenant position was created in March 2013, in response to an analysis conducted by the New York State Commission of Correction (SCOC), which recommended the creation of an “assistant chief administrative officer” position to assist

² Brief in Exception of the ALJ’s Decision, at p. 2.

³ Also included are the titles of Cook, Cook/Manager, Account Clerk, LPN, Account Clerk/Civil Deputy, Senior Account Clerk/Correction Officer and Senior Account Clerk/Civil Deputy. Neither party addressed these titles during the hearing. ALJ Ex 1.

⁴ Tr. at pp. 45-46.

the chief administrative officer, the warden, and to pick up duties that had been performed by the undersheriff.⁵ Specifically, the lieutenant took over from the undersheriff the duty to update the policy and procedure manual to ensure compliance with the rules, regulations and minimum requirements set by the Commission of Correction.⁶ Currently, there is only one employee in the title.⁷

As Mulverhill explained:

When I first came into office, the policy and procedure [sic] hadn't been updated since probably 2000, so it was well over ten years. And the commission strongly urged us to update our policies. And with the current administrative staff, it was near impossible, along with the day-to-day operations and just the curve balls that get thrown at you on a daily basis, it was almost impossible to get to the updating of the policy. So during their staffing analysis, it became clear to the Commission of Corrections the position was needed that could be specific to updating the policy and procedure.⁸

Mulverhill testified that in addition to updating procedures, the day-to-day duties of the lieutenant would include directly supervising the sergeants and ensuring compliance with the rules and regulations of the sheriff and the minimum standards set by SCOC.⁹ The lieutenant could not and does not conduct formal evaluations of those he supervises because there is no formal evaluation process.¹⁰ The lieutenant has no role in hiring other than making recommendations to the sheriff based on his review of employment applications.¹¹ The sheriff does hiring and firing (although as of the hearing, no individual had been terminated) and determines whether a probationary

⁵ Employer Ex 1; Tr, at p. 26.

⁶ Tr, at p. 29.

⁷ Tr, at p. 18.

⁸ Tr, at p. 44.

⁹ Tr, at pp. 31-32.

¹⁰ Tr, at p. 41.

¹¹ Joint Ex 1.

employee becomes a permanent employee.¹² The lieutenant may be assigned to help investigate potential disciplinary charges against other employees but has no other role in the disciplinary process.¹³ Moreover the sheriff may call upon the lieutenant to help in an internal investigation and obtain documents as he would a sergeant.¹⁴ The lieutenant would oversee the sergeants (and could direct them to gather evidence in a disciplinary matter)¹⁵ and has more overall responsibility for the operation of the jail than a sergeant.¹⁶ The lieutenant works the 7:30 a.m. to 3:30 p.m. shift, which is one of the three shifts worked by correction officers.¹⁷ It is the warden who approves time off.¹⁸

Thus, the Sheriff sets overall policy which includes all relevant rules and regulations and makes employment-related decisions.¹⁹

DISCUSSION

Under §§ 201.2 (b) and 201.5 of our Rules of Procedure (Rules), the filing of a unit placement petition commences a representation proceeding limited to determining whether an at-issue position should be accreted to a pre-existing unit. In determining a unit placement petition, we conduct a nonadversarial investigation and apply the statutory criteria set forth in § 207.1 of the Act.²⁰ It is, "in substance and effect, a mini representation proceeding calling only for [such] a nonadversarial investigation and the application of the statutory uniting criteria in § 207.1 of the Public Employees' Fair

¹² Tr, at pp. 47-48.

¹³ Tr, at pp. 35, 45.

¹⁴ Tr, at pp. 45, 51-52, 54.

¹⁵ Tr, at p. 50.

¹⁶ Tr, at p. 49.

¹⁷ Tr, at p. 46.

¹⁸ Tr, at p. 52.

¹⁹ Tr, at p. 43.

²⁰ AFSCME, Local 264 (City of Buffalo), 46 PERB ¶ 3023 (2013); General Brown Cent Sch Dist, 28 PERB ¶ 3065 (1995).

Employment Act (Act).²¹

Thus, we will first address the County's exception that the ALJ, by asking the County to present its evidence first at the hearing, placed an undue burden of proof upon the County. This claim is manifestly without any merit. Logic dictates that one party must proceed first during a hearing and that another party must, therefore, go second; proceeding first does not place any burden of proof on a party. The County was aware that the hearing would be conducted in such a manner before walking into the hearing.²² An ALJ has considerable discretion with respect to conducting hearing under § 212.4 of the Rules, including discretion to control the order of proof to promote an orderly and expeditious hearing and she did not abuse that discretion by requiring one particular party to go first.²³

Moreover, as explained to the County during the hearing, the petition was one for unit "placement" the ALJ correctly described as investigatory rather than adversarial in nature.²⁴ We have held:

A unit clarification petition seeks only a factual determination as to whether a job title is actually encompassed within the scope of the petitioner's unit. We have held a unit clarification petitioner to a burden of proof on its petition because that particular type of petition necessarily seeks only a determination of fact. A unit clarification petition differs from a unit placement petition. Although both are directed to newly created or substantially altered titles, only

²¹ *General Brown Cent Sch Dist*, 28 PERB ¶ 3065, (1995).

²² Tr, at p. 10.

²³ *County of Orleans*, 25 PERB ¶ 3010, n. 2 at 3029 (1992). See also *City of Elmira (PBA)*, 41 PERB ¶ 3018, 3084 (2008), citing *Nanuet Union Free Sch Dist*, 17 PERB ¶ 3005 (1984); *Bd of Ed of the City Sch Dist of the City of Buffalo and Buffalo Teachers Fed*, 26 PERB ¶ 3019 (1993); *New York State Security and Law Enforcement Employees, Council 82, AFSCME (Fronczak)*, 29 PERB ¶ 3015 (1996); *Amalgamated Transit Union, Division 580, AFL-CIO (Farella)*, 32 PERB ¶ 3053 (1999).

²⁴ *Id.*

the unit placement petition puts the appropriateness of the unit under § 207 of the Act in issue. Moreover, the unit placement petition proceeds from the finding or admission that the position in issue is not in the petitioner's unit, but should be most appropriately placed there.²⁵

The County also takes exception to the ALJ's evidentiary rulings at various times limiting the testimony of the only witness, the sheriff.²⁶ We have examined the rulings to which the County takes exception and each denies the sheriff the opportunity to offer his legal conclusion and speculate rather testify as to a fact. Rather than set forth the text of each of the questions the ALJ ruled was improper, we will cite the following two as representative:

County: Now, in terms of the overall management and, in particular, the responsibilities of the lieutenant, do you see any potential conflicts if the lieutenant is placed in the unit with the bargaining unit employees?²⁷

* * *

County: In terms of the knowledge that the sheriff would have, such as if he [lieutenant] became a union shop steward or the chief negotiator for the union of the president of the union, would that pose a problem for him carrying out his responsibilities?

ALJ: I'm going to stop you. That ultimately is my decision to make. What you need to tell me is what this lieutenant does. . . What's relevant is what the individual does.

County: Right. Oh, okay. I see the distinction, not what could happen.²⁸

It is incumbent upon the ALJ to draw and, as in this case, ultimately the Board to reach the legal conclusions called for by the Amended Petition, not a witness. The ALJ

²⁵ CSEA, Local 1000, AFSCME, 24 PERB ¶ 3019, 3038 (1991) citing CSEA, Local 1000, AFSCME, 21 PERB ¶ 3030, affg 21 PERB ¶ 4012 (1988).

²⁶ In particular, the County cites to Tr, at pp. 32 (lines 20-24); 33 (lines 1-11); 37 (lines 16-24); 38 (lines 17-24); 39 (lines 1-2).

²⁷ Tr, at p. 32 (lines 20-24).

²⁸ Tr, at pp. 37 (lines 16-24), 39 (lines 3-4).

did not improperly exercise her discretion by barring such speculative testimony.

The substance of the County's exceptions is that the ALJ failed to base her decision on the record and erroneously found a community of interest. The record and her determination belie those exceptions. As a first point, the County alleges that titles other than that of lieutenant, sergeant and officers were ignored. Those titles are indeed, a part of the record, and indeed, were included in the Amended Petition.²⁹

Every member of a unit need not perform identical tasks. However, the County raises in its exceptions for the first time this issue. At the hearing, it only raised concerns regarding the new title's prospective relationship with respect to correction officers and sergeants. The County made it clear that it would "argue that it's inappropriate to be in the unit with people that he's [lieutenant is] supervising and responsible for evaluating. We acknowledge that were there a supervisory unit, we would not be here today in this proceeding and we would not object to a lieutenant being placed in such a unit. . ."³⁰ But using the County's argument, cooks should not be in the same unit as correction officers and accountants – which they are. The sanctity of the UPSEU unit, as a whole, was never challenged or put into question below.³¹

Indeed, the mission of the sheriff is, in his words, "that of administering the

²⁹ ALJ Ex 1.

³⁰ Tr, at p. 12.

³¹ It should be noted that the Board has held that a unit of uniformed and non-uniformed personal is not *per se* inappropriate. See *County of Schenectady and Sheriff of Schenectady County*, 14 PERB ¶ 3013 (1981) (where we included within a sheriff's office, the titles of correction officer and correction lieutenant along with physician's assistant, cook and senior typist).

county jail and whatever other duties the voters see fit. . ."³² The Sheriff's office has no general law enforcement component. Thus, while the direct care of inmates may not be every member of the bargaining unit's day-to-day focus, they all work together to fulfill one governmental mission. The ALJ, when comparing the lieutenant to sergeants and correction officers, correctly noted their mission.

Getting to the nub of the County's case and exceptions, there is no formal evaluation system in place, and the lieutenant does not supervise and administer employee performance and evaluation interviews and reports.³³ The tasks that might involve implementing such a system were established at the hearing as being strictly theoretical and purely speculative. The lieutenants, like other officers, are members of the competitive civil service class. While it is not clear from the record whether lieutenants and the remaining members of the unit are all paid on the same basis (per annum or hourly), the answer to that question is not dispositive in this matter given the other facts that were adduced.³⁴

The Board's decision in *St. Paul Boulevard Professional Firefighters Assn*, is particularly instructive where it upheld an ALJ's placement of newly created fire lieutenant position in a pre-existing bargaining unit containing other paid firefighters:

In sharp contrast to the provisions of the National Labor Relations Act (NLRA), [citation omitted] the Act does not exclude supervisors from the statutory rights to organization and representation, nor does the Act define what constitutes

³² Tr, at p. 16.

³³ Tr, at p. 40.

³⁴ *St. Paul Boulevard Professional Firefighters Assn*, 42 PERB ¶ 3009, at 3028 (2009) ("The existence of disparities in benefits is not a sufficient basis for the exclusion of an unrepresented employee when other facts, such as shared duties and responsibilities, establish a community of interest.") (citing *Unatego Cent Sch Dist*, 15 PERB ¶ 3097 (1982) and *County of Genesee*, 29 PERB ¶ 3068 (1996)).

a supervisor. [citation omitted]. Under the Act, in determining whether an unrepresented supervisor should be placed in a bargaining unit of rank-and-file employees, the Board will apply the community of interest and administrative convenience standards set forth in § 207.1 of the Act, with the community of interest given predominant consideration.³⁵

The most important criterion under § 207.1 of the Act for determining a unit placement petition is, indeed, the community of interest standard.³⁶ Under this standard, the Board has consistently held that, “[a]mong the factors to be considered in determining whether a community of interest exists are similarities in terms and conditions of employment, shared duties and responsibilities, qualifications, common work location, common supervision, and an actual or potential conflict of interest between the members of the proposed unit.”³⁷

When examining the issue of placing an unrepresented supervisor into a pre-existing unit, we also examine:

Whether the extent and nature of the assigned supervisory functions create a conflict of interests, thereby outweighing other facts that may support inclusion. [citation omitted] Among the significant supervisory duties that may indicate such a conflict of interests is the authority to impose discipline, initiate disciplinary procedures, conduct formal evaluations, render first step decisions on contract grievances and provide supervision over day-to-day operations.³⁸

³⁵ 42 PERB ¶ 3009, 3027 (2009). That case is particularly instructive where in the Board upheld an ALJ’s placement of newly created fire lieutenant position in a pre-existing bargaining unit containing other paid firefighters.

³⁶ AFSCME, Local 264 (*City of Buffalo*), 46 PERB ¶ 3023 (2013); Niagara Frontier Transportation Auth, 45 PERB ¶ 3020 (2012).

³⁷ Niagara Frontier Transportation Auth, 45 PERB ¶ 3020, at 3050 (2012); citing Sachem Cent Sch Dist, 42 PERB ¶ 3030 (2009); St. Paul Boulevard Professional Firefighters Assn, 42 PERB ¶ 3009 (2009); Monroe #1 BOCES, 39 PERB ¶ 3024 (2006); Somers Cent Sch Dist, 12 PERB ¶ 3068 (1979); East Ramapo Cent Sch Dist, 11 PERB ¶ 3075 (1978); Somers Cent Sch Dist, 12 PERB ¶ 3068 (1979).

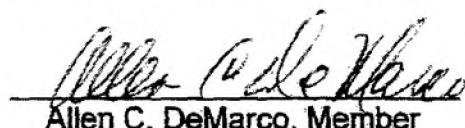
³⁸ St. Paul Boulevard Professional Firefighters Assn, 42 PERB ¶ 3009, at 3028.

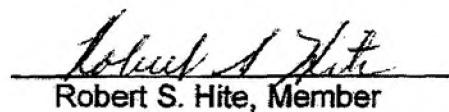
In this matter, the lieutenant shares the same work location as other members of the unit, has terms and conditions of employment set by the County, may participate in the investigation of disciplinary matters but has no authority to impose discipline, or to hire or fire fellow unit members or even conduct evaluations of those members and is answerable in many matters to the sheriff, without having independent authority.³⁹ Thus, based upon their common conditions of employment, supervision and work responsibilities, we affirm the ALJ's conclusion that there is a community of interest between the title of lieutenant and the other titles in the current bargaining unit.

IT IS, THEREFORE, ORDERED that the ALJ's findings granting the petition of the UPSEU are affirmed.

DATED: November 10, 2015
Albany, New York


Seth H. Agata, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

³⁹ *Id.*

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

In the Matter of

**ALBANY POLICE OFFICERS UNION, LOCAL
2841, LAW ENFORCEMENT OFFICERS UNION,
DISTRICT COUNCIL 82, AFSCME, AFL-CIO,**

Charging Party,

CASE NO. U-29881

- and -

CITY OF ALBANY,

Respondent.

**SCHEUERMANN & SCHEUERMANN, LLP (ARTHUR SCHEUERMAN Special
Counsel), and KEVIN S. CASEY, LLP (KEVIN S. CASEY Special Counsel) for
the Albany Policy Officers Union, Local 2841, Law Enforcement Officers
Union, District Council 82, AFSCME, AFL-CIO.**

**ROEMER WALLENS GOLD & MINEAUX, LLP (MARY M. ROACH of counsel),
for the City of Albany.**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the Albany Police Officers Union, Local 2841, Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (APOU) to a decision of an Administrative Law Judge (ALJ) finding that the City of Albany (City) did not violate § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the health insurance coverage and Medicare Part B reimbursement for members of the patrol, communications and civilian units when such members retire.¹

¹ 47 PERB ¶ 4593 (2014).

EXCEPTIONS

APOU filed four exceptions to the ALJ's decision. First, it takes exception to the ALJ's finding that mandatory benefits for current employees, even if paid in retirement, are negotiable, correctly finding "that the elements of an enforceable past practice are satisfied," but then allowing a unilateral cessation of those benefits to current employees, thus reducing their compensation package without negotiations, on the ground that "the City never directly notified current employees of its intention to reduce the value of their compensation package."² Second, APOU takes exception to the ALJ's ruling that a party alleging an unlawful unilateral change of a mandatorily bargainable issue must first demand to negotiate over that change; it did not make such a formal demand in this matter. Third, it avers that allowing a "silent unilateral modification of compensation package of current employees" to nonetheless impose a requirement of a formal demand for bargaining be made violates the Act's public policy. Finally, APOU takes exception to the conclusion reached by the ALJ that the City did not violate the Act.

The City filed papers supporting the ALJ's decision. Upon review of the papers filed herein and the proceedings below, we affirm the ALJ's decision, albeit for different reasons than those stated in her opinion.

FACTS

A hearing was held on November 15, 2011 and February 8, 2012, at which both

² Exceptions, at ¶ 1.

parties were represented by counsel.³

APOU represents three separate bargaining units (patrol, communications and civilians) in the City's police department, each with its own collectively negotiated agreement. The agreements' durations are January 1, 2002 through December 31, 2005 and all were extended by MOAs through 2009. Each agreement covers health insurance for current employees but is silent on the issue of health insurance benefits for retirees and silent on reimbursement of Medicare Part B costs incurred by employees and retirees.⁴ The core of APOU's charge is that the City discontinued a past practice of providing a future benefit to current employees upon their retirement of reimbursing such individuals for the cost of Medicare Part B payments and continuing coverage upon retirement by the City's primary insurance plans received while employed (formerly, Blue Cross/Blue Shield Indemnity Extended Benefits or Wraparound plans).⁵

Charles Barthe, a member of the communications unit's negotiating committee

³ Following an initial pre-hearing conference, the matter was conditionally dismissed in light of the parties' contractual grievance procedure (raised an affirmative defense by the City) and deferred to arbitration. Thereafter, the charge was reopened by the Director of Public Employment Practices and Representation, in a decision dated March 1, 2011, because the arbitrator found that he lacked jurisdiction and, therefore, did not reach the merits of the dispute.

⁴ Joint Ex 8 (article 19.1 for patrol unit), 9 and 10 (article 19 communications unit which specifically provides in relevant part that "[i]f the EMPLOYER wishes to change the existing health insurance plan the EMPLOYER shall present proposals to the UNION for discussion and possible agreement on the proposal . . . [and if] no proposal is agreed upon, then an expedited arbitration will commence . . ."), and 11 and 12 (article 24 for civilians unit).

⁵ APOU's Improper Practice Charge and post-hearing "Memorandum of Law", at p. 1.

for the last two agreements that expired in 2009 and 2005, testified that there were no contract proposals regarding either Medicare Part B reimbursement or the continuation of the extended healthcare benefits into retirement when those agreements were implemented.⁶ In addition, James Teller, a patrol unit member who served as a union officer during his employment, including president, testified that APOU unsuccessfully attempted to add language codifying the members' retirement healthcare benefits into the contract during negotiations.⁷ Christian Mesley, APOU's president until March, 2011 (and a member of the patrol unit), testified that the City had never negotiated with APOU concerning either the change to Medicare reimbursement or the health insurance plans.⁸

Before the events at issue here, the City had unilaterally implemented changes in health benefits provided to retirees. On or about October 31, 2008, the City sent a document titled "IMPORTANT NOTICE" (2008 Notice) addressed to "Retirees and Participants Who Have City of Albany Health Insurance," which stated that "as of January 1, 2009, the City is no longer offering the following health plans: GHI, Inc. [and] MVP Health Plan," and required enrollees in those plans to select from the City's other options.⁹ As summarized by City Personnel Director Elizabeth Lyons, the 2008 Notice further implemented changes to prescription drug co-payments, and added "step

⁶ Tr, at p. 36.

⁷ Tr, at pp. 50-51.

⁸ Tr, at p. 69.

⁹ Joint Ex 3.

therapy, prior authorization, quantity limits, contingent therapy" to the "prescription portion" of the retiree benefits.¹⁰ The 2008 Notice further provided that: "Under the City's current policy, the City will reimburse you the Medicare Part B premium on a monthly basis."¹¹ Lyons also testified to other changes involving prescription and office copays to available plans and "other minor changes to the plans over these years [2000 to 2010] as well."¹²

Lyons explained that the City sent three separate letters to all retirees regarding changes to their health insurance coverage in 2008. The first letter, dated September 30, 2008, stated the following, in relevant part:

To All Retirees:

This letter is to notify you that beginning January 1, 2009, there will be changes to your current health insurance coverage and/or prescription coverage with the City of Albany. The City has been working closely with our health insurance and prescription providers to re-structure current plans to offer you similar coverage.

For those of you that are not Medicare Part B eligible, the proposed changes will affect only the prescription portion of your policy. The prescription co-pay will be changed from a fixed \$2.00 co-pay to \$2.00 for Generic and \$7.00 for Brand name.

For retirees that are Medicare eligible, the City will be offering two new Medicare Advantage plans that are similar to your current type of coverage. If you are currently covered by CDPHP, and are Medicare eligible, the new CDPHP

¹⁰ Tr, at p. 191; Joint Ex 3 at 1-2. Respondent's Ex 2 contains 3 notices dated September 30, October 22 and October 29 addressed to retirees.

¹¹ Joint Ex 3, at 2. Testimony was also taken with respect other notices sent during the "open enrollment" period in 2008 to employees (Joint Ex 4) which have no bearing on this decision.

¹² Tr, at p. 184.

PPO Medicare Advantage Plan will be available to you.

For retirees currently enrolled in the Empire BlueCross Extended Benefits, Empire BlueCross Wrap-Around Plan, Empire BlueCross HMO, or BlueShield HMO/POS, the City will be offering a BlueShield of Northeastern New York PPO Medicare Advantage Plan. The plan is very similar to BlueCross in so far as there are no co-pays, no coinsurances and no deductibles. The prescription co-pay will be increased from a fixed \$2.00 to \$2.00 for Generic and \$7.00 for Brand name. The primary difference in the policy is that a doctor must accept Medicare in order for the doctor to be covered. The BlueShield of Northeastern New York PPO MAP policy will provide benefits for vision, dental and hearing, which are currently not covered under the Empire BlueCross Plans.¹³

The second letter to retirees, dated October 22, 2008, stated in pertinent part:

Dear City of Albany Retiree:

Attached is information regarding the new Medicare Advantage Plans that will be replacing your current health insurance effective January 1, 2009. It is mandatory that as a Medicare eligible retiree you choose one of the two plans:

BlueShield Medicare PPO: The plan design is similar to Empire BlueCross extended plan, as it has a \$0 co-pay for participating providers, no deductibles and no coinsurance. The prescription coverage will be \$2/\$7 (\$2 for Generic, \$7 for Brand). Please review the enclosed plan summary for specific services. This plan also affords benefits for vision, dental and hearing aids.

CDPHP Medicare Choices: This plan design offers a \$5 co-payment for Primary Care Physician visits and a \$10 co-payment for specialty visits. Preventive services have a \$0 co-payment. Please review the plan summary for specific services and the applicable co-pays, as well as the prescription co-payments. This plan also affords benefits for vision, dental and hearing aids.

You will be receiving another letter shortly listing dates and times of informational meetings in November. These meetings are designed to help our

¹³ Respondent's Ex 2.

Medicare-eligible retirees, employees, and dependents learn about the change in the health insurance plans.¹⁴

The third letter to retirees, dated October 29, 2008, in relevant part:

Dear Medicare Eligible Retiree:

Enclosed are applications for BlueShield Medicare PPO and CDPHP Medicare Choices. Please choose one and fill out the appropriate application....

If you currently have a family plan with a spouse or eligible dependents (who are not Medicare eligible), they will remain on their current insurance.

If you wish to gather additional information before selecting an insurance plan, we have scheduled informational seminars regarding the Medicare Advantage plans being offered. Below are dates and locations of these meetings.¹⁵

Lyons explained that the Medicare Advantage Plan took away benefits such as pediatric care and pediatric vitamins, and anything that would be relevant to a family as it grows and matures, and “added things that would be more advantageous for someone who may be 65 or older,” such as hearing, vision and dental.¹⁶ According to Lyons, hearing, vision and dental benefits were not provided to active employees under the City’s Wrap-Around or Extended Benefits plans.

Mesley acknowledged that, pursuant to the 2008 Notice and associated documents, retirees were “switched into a PPO,” but testified that APOU did not file any charge or grievance because “because there was no diminishment other than the two to

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Tr, at pp. 197-198.

seven dollar co-pay.”¹⁷

Lyons testified that the notice regarding Medicare Part B sent in 2008 was not sent to active employees because “[t]here’s a different notice that goes to active employees,” and that the term “participants” referred to in the notice are only “those individuals that are COBRA and surviving spouses” not existing employees.

The genesis of the matter before us is a notice the City sent on or around October 30, 2009, to all “Retirees and Participants Who Have City of Albany Health Insurance (non-active employees),” regarding the “Open Enrollment Period for Health Insurance.” The notice stated the following, in relevant part:

Open Enrollment is the entire month of November. During this time, you may choose to change your current health insurance coverage to one of the other plans offered by the City. If you decide to change to a different plan, the new coverage will become effective January 1, 2010.

Please be aware of the following changes:

As of January 1, 2010, the City is no longer offering the following health insurance plans:

- BlueShield Community Blue HMO
- Empire Blue HMO
- Empire BlueCross Extended Benefits
- Empire BlueCross Wrap-Around

If you are enrolled in any of these plans, you must either select the Capital District Physicians’ Health Plan or Empire BlueCross PPO.

New Benefits:

Effective January 1, 2010, the City will be offering a new Empire BlueCross plan. Empire BlueCross PPO has a \$10 co-pay for office visits and \$2/\$7/\$20 co-pay for prescription coverage (\$2 generic, \$7 brand, \$20 formulary drugs.)

¹⁷ Tr, at p. 76.

Changes for existing plans:

Capital District Physicians' Health Plan's co-pay will increase from \$10 to \$15 in January 2010. (This is for the commercial plan, not the Medicare Advantage Plan.)

BlueShield PPO Medicare Advantage Plan's prescription co-pay for a 90-day supply at a retail pharmacy will increase from 2 co-pays to 3 co-pays. (The mail order will still remain at 2 co-pays for a 90-day supply.)

Medicare Eligibility

Medicare Advantage Plans were implemented as of January 1, 2009. Any retiree who is Medicare eligible (Parts A & B) must switch to a Medicare Advantage Plan. There are two options available: BlueShield PPO Medicare Advantage Plan and CDPHP Medicare Advantage Plan. It is mandatory that you elect Medicare Part B coverage when you become Medicare eligible. (You will receive Part A automatically when eligible.) Failure to enroll in Medicare Part B will result in the cancellation of your insurance through the City. Please note, if you do not enroll in Medicare Part B once you are eligible, you will also be penalized by Medicare and pay a higher monthly premium. Please remember to contact Medicare or the Social Security Administration 3 months prior to you and/or your spouse becoming Medicare eligible (age 65 or disabled). Once you receive your Medicare card, a copy must be sent to this office and you must then enroll in a Medicare Advantage Plan, as stated above. An important reminder: DO NOT enroll in Medicare Part D. Your prescription coverage will remain with the health insurance that you choose (BlueShield or CDPHP).

Medicare Eligibility on or after February 1, 2010

Retirees who receive Medicare Part B eligibility as of February 1, 2010 or later and elect the BlueShield PPO Medicare Advantage Plan, please note, your prescription coverage will be \$2/\$7/\$20.

Medicare Refund for Part B Coverage

As of December 31, 2009, the City will no longer reimburse individuals for the Medicare Part B premium whose effective date for Part B is January 1, 2010 and later. Individuals currently receiving a Medicare refund will continue to do so. Please note, regardless of your eligibility for Part B premium refund, it is mandatory that you elect Medicare Part B coverage when you become Medicare eligible.¹⁸

¹⁸ Joint Ex 1 [emphasis added].

On or around October 30, 2009, the City also sent a notice to "All Eligible Active Employees Covered by City Insurance," regarding the "Open Enrollment Period (November) for All Benefits." The notice stated the following, in relevant part:

Open enrollment is the month of November. During this time, you may choose to change your current health insurance coverage to one of the other plans offered by the City. If you decide to change to a different plan, the new coverage will become effective January 1, 2010. Eligible employees are also allowed to review and enroll in Dental and Vision coverage during open enrollment. We are currently working with our insurance carriers to finalize 2010 benefits and rates. More information will be available during open enrollment.

Please be aware of the following changes:

As of January 1, 2010, the City is no longer offering the following health insurance plans:

BlueShield Community Blue HMO
Empire Blue HMO

If you are enrolled in any of these plans, you must review other health insurance options and opt into one of the other health insurances that the City offers.

The following plan(s) will only be offered to Unionized Employees:

Empire BlueCross (Extended and Wrap)

Non-union employees will have the option to participate with either the Capital District Physicians' Health Plan or Empire BlueCross PPO.

New Benefits:

Starting January 1, 2010, the City will be offering a new Empire BlueCross plan. Empire BlueCross PPO has a \$10 co-pay for office visits and \$2/\$7/\$20 co-pay for prescription coverage (\$2 generic, \$7 brand, \$20 formulary drugs)

Changes for existing plan:

Capital District Physician's Health Plan's office co-pay will increase from \$10 to \$15 in January 2010. (This is for the commercial plan, not the Medicare Advantage Plan.)

For non-union employees, police civilian union employees, Teamsters and

Operating Engineers who have Informed Rx (formerly NMHCRx) for prescription coverage, please note we are changing to a new prescription vendor. Effective January 1, 2010, our new prescription carrier will be EnvisionRxOptions and their mail order company, Orchard.

Hospitalization buyout incentive (eligible employees):

The buyout incentive for employees is \$1,500 for individual coverage and \$3,000 for family coverage. Union employees should refer to their union contract for their buyout incentive. Please contact the Office of Personnel for additional information.

Flexible Benefits Plan:

Enrollment forms for 2010 are available through your payroll personnel, from this office or at the open enrollment locations.

NYS Deferred Compensation:

All employees have the opportunity to add to their future pension and Social Security benefits by electing to participate in the New York State Deferred Compensation Plan.

Other Benefits:

Open enrollment is the time to review any of the optional benefits or services offered by the City....¹⁹

APOU proffered a number of witnesses who testified, without contradiction, that over time, the City had made representations that healthcare coverage received by an employee while employed would continue through retirement.²⁰ Even Personnel Director Lyons confirmed that when she was first hired by the City, the City informed her

¹⁹ Joint Ex 2.

²⁰ See testimony of: Charles Barthe who testified that he first learned of this in 1996 when hired (Tr, at p. 27); James Teller who began working for the City 1975 and retired in 2007 (Tr, at p. 42); Christian Mesley, a former president of APOU (Tr, at p.64); Thomas McGraw whom the City hired in 1990 and was on disability retirement at the time of the hearing but was still considered employed (Tr, at p.85) ; Richard Nowosielski who came on the police force in 1973 (Tr, at pp. 98, 104); Donna Whalen who at the time had been working for the City for 23 years (Tr, at pp. 113, 114, 119); and Rosalind Weatherholtz who had been employed by the city since 1986 (Tr, at pp. 136-138).

that when she retired, she "would have health insurance free of charge for the rest of [her] life."²¹ The City argued below to the ALJ that if there was a past practice, it would have been the provision of health coverage, in general, and not any specific coverage to retirees. Through a number of witnesses, it was also presented that this included reimbursement for Medicare Part B coverage and coverage in the Blue Cross/Blue Shield Extended Benefits Plan.²² Significantly, with minor variations in testimony, they confirmed that, while not mentioned when hired, they all had learned during their employ (during the late 1980's and early 1990's) that the City would reimburse them for Medicare Part B payments in retirement. It was also not disputed that the City's withdrawal of this benefit was not negotiated with APOU.²³

Thomas McGraw, an employee of the City's Police Department who held the rank of detective at the time of the hearing, testified that as of May 2011, the City had "submitted" his name under the federal Social Security Law for disability retirement benefits pursuant to which he would be covered by Medicare Part B. He learned, contrary to his understanding of benefits available from the City theretofore, that he would be paying the cost of the Medicare Part B premiums rather than the City.²⁴

Lyons explained that the Medicare Advantage Plan which the City was now offering in lieu of other plans, did not provide certain benefits previously available, such

²¹ Tr, at p. 179.

²² See note 13, *supra*.

²³ Tr, at pp. 236-237.

²⁴ Tr, at pp. 91-94, 242-243.

as pediatric care and pediatric vitamins “added things that would be more advantageous for someone who may be 65 or older,” such as hearing, vision and dental. According to Lyons, hearing, vision and dental benefits were not provided to active employees under the City’s Wrap-Around or Extended Benefits plans.²⁵

Lyons testified that the City did not advise its active employees of the changes to Blue Shield Medicare PPO or CDPHP Medicare choices that would be implemented for retirees because it considered retiree health insurance to be “completely separate from the active employee health insurance.”²⁶ She further explained:

So active employees receive one memo with all of the changes that would affect their health insurance or their options, and then we do a separate mail-out to the retirees, and those individuals, this says retirees and participants. It could be COBRA individuals or people that are out of work paying contributor. They’re on a different policy than these individuals.²⁷

Lyons testified that, as of the second day of hearings, there were approximately 400 active employees who were members of APOU. When asked, during cross-examination, if “...according to the change in the practice now they will not receive the reimbursement for Medicare Part B,” Lyons replied, “[t]hat is correct.” Lyons agreed that this change was not negotiated with APOU, testifying, “But it changed prior retiree policy. We had a change to the retiree, the Medicare, the way we were handling it.”²⁸

²⁵ Tr, at pp. 197-198.

²⁶ Tr, at pp. 193-194.

²⁷ Tr, at p. 236.

²⁸ Tr, at p. 237.

Lyons also testified, during cross-examination, that the City continues to offer both the extended benefits and wrap-around health insurance plans for active, unionized employees, and that retirees had the same options until the January 1, 2010 change. Finally, Lyons agreed that the plans offered to retirees after January 1, 2010 contained different benefits with increased costs.²⁹

DISCUSSION

We do not reach the issues upon which the ALJ grounded her decision because we find that, contrary to APOU's contention in its exceptions, the evidence did not suffice to establish an enforceable past practice. In *Chenango Forks Central School District*, the Board reaffirmed what it termed:

our most authoritative statement regarding the applicable test for the establishment of a binding past practice: the practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue.³⁰

As the Court of Appeals has glossed this Board's decisions, in affirming its analysis, "the expectation of the continuation of the practice is something that may be presumed from its duration with consideration of the specific circumstances under which

²⁹ Tr, at pp. 80, 237.

³⁰ *Chenango Forks Cent Sch Dist*, 40 PERB ¶ 3012 (2007), remanded, 42 PERB ¶ 4527 (2009), affd, 43 PERB ¶ 3017 (2010), *confd sub nom Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 95 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), affd, 21 NY3d 255, 46 PERB ¶ 7008 (2013) (discussing and quoting *County of Nassau*, 24 PERB ¶ 3029, 3058 (1991) (quotation and editing marks omitted)).

the practice has existed.”³¹ Moreover, as the Board has noted, “in *Chenango Forks* we emphasized that the facts and circumstances of each case must be examined to determine whether an enforceable past practice has been established.”³² An examination of the facts and circumstances at issue here, however, compel the conclusion that the ill-defined nature of the alleged past practice and the changes in circumstances over the years preclude a finding of an enforceable past practice.

The documentary evidence clearly establishes that the City changed the benefits available to retirees and members upon retirement in 2008, in terms of the available range of plans, and thus associated benefits available, as well as altering prescription drug coverage and associated costs to enrollees in the form of copayments for both office visits and prescriptions. Moreover, the City explicitly stated that “[u]nder the City’s *current* policy, the City will reimburse you the Medicare Part B premium on a monthly basis.”³³ These changes, communicated in 2008, and implemented in 2009 without any objection from the APOU, are inconsistent with any prior reasonable expectation that may or may not have existed that benefits to retirees, whether conceived of as such or as future benefits to current employees, would remain unchanged. Far from evincing an unequivocal intention to continue uninterrupted continuation of the past coverage, the City’s 2008 changes interrupted any such alleged practice, as it eliminated or altered

³¹ *Town of Islip v NYS Pub Empl Relation Bd*, 23 NY3d 482, 492, 47 PERB ¶ 7002 (2014) (citing and quoting *Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 21 NY3d at 263 (quoting *County of Nassau*, 24 PERB ¶ 3029, at 3058)).

³² *North Colonie Cent Sch Dist*, 41 PERB ¶ 3028, 3123 (2008).

³³ Joint Ex 3, at 2 (emphasis added).

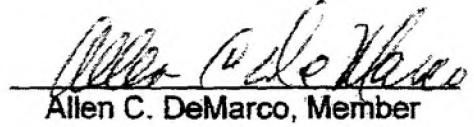
various plans and benefits, and the City's qualification of its reimbursement of Medicare Part B premium expenses as paid "under the City's current policy" served to provide notice that such policy could not be relied upon to continue indefinitely. Under these circumstances, we find that the APOU did not carry its burden and failed to prove the existence of an enforceable past practice. In fact, it appears that the City was allowed to modify and adjust the provisions of the health plan options multiple times, including reimbursement for Medicare Part B premiums, without objection or challenge by the APOU, thereby, one could argue, setting policy as to how health insurance modifications would be made. Accordingly, the charge was properly dismissed.

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

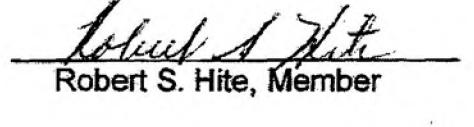
DATED: November 10, 2015
Albany, New York



Seth H. Agata, Chairperson



Allen C. DeMarco, Member



Robert S. Hite, Member

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

In the Matter of

**HUDSON VALLEY COMMUNITY COLLEGE
NON-INSTRUCTIONAL EMPLOYEES UNION,**

Charging Party, **CASE NO. U-30395**
- and -

**HUDSON VALLEY COMMUNITY COLLEGE and
COUNTY OF RENSSELAER,**

Respondent.

**HINMAN STRAUB P.C. (JOHN R. SACCOCIO, of counsel), for
Charging Party**

**MARTIN, SHUDT, WALLACE, DiLORENZO & JOHNSON (CARLO C. DE
OLIVEIRA and DAVID T. GARVEY of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on remittitur from the Appellate Division, Third Department.¹ Although that Court confirmed our finding that Hudson Valley Community College had violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) the Court modified as to the remedy, stating:

There is, however, some record evidence supporting petitioner's claim that determinations regarding reinstatement and back pay are impracticable as to certain second jobs that were infrequent and voluntary. Although some of the second jobs that petitioner stopped offering to NIEU members were formerly held by specific, identifiable individuals who worked regularly scheduled hours, others—such as assisting at student orientation events—were not regularly scheduled or assigned to particular individuals, but

¹ *Hudson Valley Community Coll v NYS Pub Empl Relations Bd*, ___ AD3d ___, 2015 NY Slip Op 07731 (3d Dept Oct 22, 2015).

instead were available on a sporadic basis to those who chose to sign up for them. PERB's remedial order cannot be reasonably applied to these positions, as it cannot be determined who would have claimed the positions, how many hours they would have worked, and how much back pay is owed. We thus remit the matter to PERB for a determination as to which NIEU members can be reinstated to second jobs that they previously held or should receive back pay.²

Pursuant to the mandate of the Appellate Division, Third Department, we remand the matter to the Administrative Law Judge for further proceedings, consistent with the Court's opinion, to compile an appropriate record and to fashion an appropriate remedy for the violation.

IT IS, THEREFORE, ORDERED that the matter is hereby remanded for further proceedings to compile an appropriate record and to fashion an appropriate remedy for the violation found by the Board and confirmed by the Court.

DATED: November 10, 2015
Albany, New York



Seth H. Agata, Chairperson



Allen C. DeMarco, Member



Robert S. Hite, Member

² *Id.*, at *2.

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

In the Matter of

NEAL MADNICK,

CASE NO. U-30752

Charging Party,

- and -

**BELLMORE-MERRICK CENTRAL HIGH SCHOOL
DISTRICT,**

Respondent.

**LEWIS, CLIFTON & NIKOLAIDIS, P.C. (LOUIE NIKOLAIDIS of counsel), for
Charging Party**

**INGERMAN SMITH, L.L.P. (CHRISTOPHER M. POWERS of counsel), for
Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Bellmore-Merrick Central High School District (District) to a decision by an Administrative Law Judge (ALJ).¹ After a hearing, the ALJ found that the District had violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) by not selecting Neal Madnick for the position of boys' varsity assistant coach in retaliation for protected activity in his capacity as a representative of the Bellmore-Merrick United Secondary Teachers (BMUST). The ALJ ordered that the District not consider Madnick's activity as a BMUST representative in considering him for a coaching position, and ordered make whole relief and a posting.

EXCEPTIONS

The District excepts to the ALJ's order on several grounds. First, the District asserts that the ALJ erred in finding that Madnick had established a *prima facie* case

¹ 47 PERB ¶ 4554 (2014).

that the District's decision not to appoint him to the coaching position was in retaliation for his protected activity. Second, the District contends that the record does not support the ALJ's determination that Saul Lerner, the District's director of athletics, physical education, health, and driver and adult education, decided to not hire Madnick. The District alleges as its third and fourth exceptions that the record likewise does not support the ALJ's findings that Lerner had knowledge of Madnick's protected activity, and that such activity was the "but for" cause of the decision not to hire Madnick.

The District's fifth and sixth exceptions maintain that the ALJ erred in finding that a series of uncommon and irregular steps were taken in determining to hire a coach other than Madnick, and in holding, based in part on that conclusion, that the District's proffered legitimate business reason was pretextual. Rather, the District asserts that the ALJ's finding of pretext disregarded the probative evidence, and warrants reversal.

FACTS

The facts are fully set forth in the ALJ's decision and are summarized here only as necessary to address the exceptions before us. Madnick joined the staff of Sanford H. Calhoun High School (Calhoun) as a social studies teacher in September 2000. He became a BMUST building representative in September 2002, and a grievance representative in 2006, and served in both capacities until the fall of 2010. BMUST generally initiates few grievances; in the four years that Madnick served as the grievance representative, it filed four grievances, all initiated by Madnick.

Fred Harrison, who served as head building representative in Calhoun from 1975 until his retirement in June 2010, led settlement efforts prior to the filing of a grievance; when a grievance became necessary Madnick formulated it and presented it to BMUST's board for approval. Madnick would not represent BMUST in the grievance

process, but continued to assist the grievant as necessary. Brian Moeller, a social studies teacher in Calhoun since 2004, described Madnick as the “go to” man when it came to grievances and union representation in the building. Three of the grievances Madnick was involved in were addressed in the charge and in the hearing.

The first grievance was filed on behalf of a Calhoun guidance counselor who was not re-hired for the 2008-2009 school year as girls’ junior varsity basketball coach at Mepham High School, with the position being filled by an out-of-District candidate. The grievance was settled on May 6, 2009, awarding the grievant \$2,000 for lost pay and revising the District’s guidelines for posting of coaching positions to provide that “an out-of-district candidate may be selected to fill a coaching vacancy instead of a Unit I member if the administration determines in its discretion that the out-of-district candidate is more qualified for the position.”²

The second grievance also arose in 2008, and alleged that teachers were no longer being given preference in the assignment of paid supervision of after-school athletic events, but that the assignments were being given to nonunit persons who were not otherwise employed by the District. Madnick and Harrison repeatedly raised the issue over nearly two years with Calhoun’s principal, David Seinfeld, and BMUST ultimately filed a grievance. Harrison testified that Madnick kept track of who was being hired to perform that work and that, each time he and Madnick discussed the matter with Seinfeld, Seinfeld brought their concerns to Lerner, which made Seinfeld uncomfortable. Harrison also testified that Madnick’s persistence led Seinfeld to

² Charging Party’s Ex 8. “Unit I” refers to BMUST’s negotiating unit.

describe him to Harrison as “a pain in the ass.”³ Madnick testified that his repeatedly raising the issue of supervisory assignments strained his relationship with Seinfeld.

Finally, Madnick initiated a grievance filed on Moeller’s behalf that went to arbitration. After the 2009-2010 school year, Moeller was not re-hired as the boys’ assistant varsity football coach and the boys’ assistant varsity basketball coach, under Jay Kreutzberger, who was also a BMUST representative at Calhoun.

According to the arbitrator’s award in the case, “the decision to withhold [Moeller’s] reappointment as assistant football coach was made because Seinfeld disagreed with the professional views expressed by Moeller” as part of “a contractual process established in order to promote teacher involvement in curriculum development.”⁴ The arbitrator ultimately found that “the District’s action withholding the 2010 assistant football coach assignment from Moeller violated his contractual right to support his proposal [for a new social studies course], which was pending before the Curriculum Committee.”⁵

The removal of Moeller from his coaching positions was controversial, as testified to both by Madnick and Mara Bollettieri, the assistant superintendent for personnel and administration. Madnick and Douglas Smested, who had replaced Harrison as the new head building representative in Calhoun, represented Moeller at the initial steps of the grievance, meeting with Seinfeld several times to advocate on Moeller’s behalf. On July 7, 2010, BMUST filed a grievance on Moeller’s behalf challenging the letter to his file and his removal from coaching.

³ Tr, at p. 204.

⁴ Charging Party’s Ex 25, at 34.

⁵ *Id.* The arbitrator found that insufficient evidence had been presented to establish that Moeller was denied reappointment to the basketball position because of activity presented by the agreement. *Id.*, at 35.

In September 2010, on the first day of school, BMUST held a faculty-only meeting at Calhoun. During that meeting, Madnick discussed Moeller's grievance and stated that BMUST was supporting Moeller, that Lerner was out to get Moeller, that "Saul tried to 'F' Mr. Moeller"⁶ and that, even though Lerner "was planning on screwing Mr. Moeller over,"⁷ BMUST was backing him and planning on taking his grievance to arbitration.

Madnick testified that, one or two days after the BMUST meeting, he learned that Learner had heard of and was displeased by Madnick's comments. Madnick testified that Smested relayed to him that Seinfeld had said that there was "consternation"⁸ in central administration regarding Madnick's comments about Lerner during the union meeting. Also, Madnick testified that BMUST president Michael Dolber had informed him that central building administrators had expressed to him that they were "very unhappy"⁹ about Madnick's comments. Madnick testified that Boelletierri also let him know that she was dissatisfied with the comments he made in the September 2010 meeting and that she was thereafter not as friendly towards him as she had previously been.

Madnick remained involved throughout the arbitration process, although other BMUST representatives were Moeller's primary representatives after the initial stage. On September 14, 2011, the arbitrator issued an on the record interim decision restoring Moeller to his football coaching position and awarding back pay. That decision was confirmed in a written award dated December 22, 2011, sustaining the grievance.

⁶ Tr, at p. 137.

⁷ *Id.*

⁸ Tr, at p. 340.

⁹ *Id.*

Madnick also advocated for teachers in matters that were resolved without the filing of a grievance. According to Harrison, the fact that issues were hotly contested in Calhoun, but not in other District schools, caused problems for Seinfeld. Harrison testified that both Seinfeld and the previous Calhoun principal told him that they were pressured by central administration to explain why so many issues arose in Calhoun in comparison to other schools and that central administration viewed the difference to be Madnick's advocacy. Harrison further testified that the administrative structure in the District is small and that a reference to "central administration" could only mean one of three or four people, including Lerner.¹⁰ Harrison further testified that the principal prior to Seinfeld showed him a letter from the prior superintendent asking him what he was going to do to bring "Calhoun under control."¹¹

In September 2010, the District posted as vacant Moeller's former position of boys' varsity assistant basketball coach and that of boys' junior varsity basketball coach. Applicants were required to submit their resumes and be interviewed. Moeller and Madnick similarly testified that the prior common practice had been to appoint coaches without an interview. Both Moeller and Madnick applied for the boys' varsity assistant basketball coach position.

The practice in the District has been to give preference to District teachers when hiring coaches and, among teachers within the District, to prefer teachers who work in the same school as the team to be coached.

Madnick testified in detail regarding his basketball coaching experience. He became involved in coaching basketball when he was 18 years old and continued

¹⁰ Tr, at pp. 211-212.

¹¹ Tr, at p. 209.

coaching at successively higher levels until September 2000, when he began working for the District. His last coaching position was that of head basketball coach for another public school district's high school during the 1997-1998 school year. Madnick never sought a coaching position in the District until September 2010, when he applied for the basketball coaching position that Moeller previously held.

Madnick testified that, although he had not actively coached since 2000, he has kept his basketball coaching skills up to date and has continued to hone his coaching skills by discussing the game with college and high school coaches, attending the practices of another coach at a private school, attending basketball games, reading sports and coaching literature and attending basketball games at Calhoun. Kreutzberger and Moeller often consulted with Madnick about basketball coaching techniques, as did parents who coached basketball outside the District.

The District received eight applications for the positions, including those of Moeller, Madnick and Thomas Rottkamp, who was hired for the junior varsity position. Only Moeller and Madnick were in-District applicants. Contrary to the District's established procedures, the out-of-District candidates were interviewed before the in-District candidates. After BMUST complained about this change from established practice, the District interviewed the in-District applicants and then re-interviewed the out-of-District candidates.

Generally, when interviews were conducted for coaching positions, they were conducted by the head coach and a building administrator. Lerner did not normally attend interviews. In the fall of 2010, Lerner attended the interviews conducted to fill the Calhoun basketball coaching positions. A script was used to interview the candidates, with all the candidates being asked the same questions. According to Lerner, Madnick

stated that he was only interested in the varsity position, and only if Moeller did not receive it. Kreutzberger testified that that Moeller and Madnick were his first and second choices to fill the boys' varsity assistant basketball coach position.

The day after his interview, Seinfeld called Madnick into his office and asked him why he had applied for the position. Madnick told Seinfeld that he applied because Kreutzberger had asked him to, that he knew and had a positive relationship with half of the students who were on the team and would, therefore, not have to earn the students' trust, and that he wanted to help Kreutzberger and Calhoun.

In mid-October 2010, Madnick asked to meet with Bollettieri to discuss the process being followed to fill the basketball coaching positions in Calhoun. According to Madnick, Bollettieri told him that Seinfeld had spoken highly of his work in the classroom and said to him, "Neal, you are so negative, if only we didn't have all this negativity. How can you expect Mr. Lerner to hire you when you said such negative things about him?"¹²

Madnick testified that on October 27, 2010, Seinfeld told him that he was not going to be appointed as the boys' varsity assistant basketball coach, although no other candidate had yet been hired. Seinfeld did not give him a reason for that decision.

On November 2, 2010, Kreutzberger learned that Ben Fisher, a teacher at Mephan High School and the boys' junior varsity coach at that school, had been offered the position of boys' assistant varsity basketball coach at Calhoun. Fisher sent Kreutzberger an e-mail in which he states that he was "recently hired"¹³ as his basketball assistant and that he wanted to talk to him about the circumstances

¹² Tr, at pp. 360-361.

¹³ Charging Party's Ex, at 34.

surrounding his hire. Kreutzberger testified that he was surprised by the contents of Fisher's e-mail, because he had not been consulted about hiring Fisher and had not heard that Fisher had applied for the position. Kreutzberger met with Fisher the same day in Calhoun. Madnick and Dolber were also present. During that meeting, Fisher stated that he had not sought the position and that Lerner had approached him and offered it to him. Kreutzberger told Fisher that Moeller had filed a grievance challenging his removal from the position. Madnick told him that he had also applied for the position and he showed Fisher his resume. After that meeting, Fisher called Lerner and declined the position. Seinfeld learned of the meeting, conducted an investigation and, on November 12, 2010, issued letters to Madnick and Kreutzberger that were copied to their personnel files regarding their conduct during their meeting with Fisher.

Ultimately, Jester Bates, an out-of-District candidate with little or no coaching experience, was hired to fill the boys' assistant varsity basketball coaching position.

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.¹⁴

Where "a charging party establishes a *prima facie* case of unlawful motivation

¹⁴ *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014), citing *UFT, Local 2, AFT-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS 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); see also *City of Salamanca*, 18 PERB ¶ 3012 (1985).

through circumstantial evidence, the burden of persuasion shifts to the respondent to rebut the inference by presenting evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason.”¹⁵ If the respondent establishes a legitimate non-discriminatory reason, then the burden shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual. At all times, however, “the burden of proof rests with the charging party to establish the requisite causation under the Act by a preponderance of evidence.”¹⁶

In arguing that the ALJ erred in finding a violation, the District asserts that “[c]ase law has held that the burden to show animus is quite high and will not be found by a mere nexus in time or prior disagreements between the parties that are vague or too remote in time.”¹⁷ While the latter part of the proposition is true, the former is not. As the standard we have long employed, articulated again here, makes clear, the charging party must prove its case by a preponderance of the evidence, and not by any higher standard. Moreover, as to the establishment of a *prima facie* case:

At minimum, the circumstantial evidence necessary to prove a *prima facie* case must be sufficient to give rise to an inference that unlawfully motivated interference or discrimination was a factor in the employer's conduct. This relatively low initial evidentiary threshold for establishing a *prima facie* case in circumstantial evidence cases is necessitated by the principles

¹⁵ *Dutchess Community College*, 47 PERB ¶ 3018, 3056 (2014), citing *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3018.

¹⁶ *Id.*, quoting *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3043.

¹⁷ District Memorandum of Law in Support of Exceptions at 11. *Board of Education of the City School District of the City of New York*, 35 PERB ¶ 3002, 3004 (2002), relied upon by the District, contains no such language as to the burden of proof, but merely holds that “timing alone is insufficient to establish the ‘but for’ element of a § 209-a.1(a) or (c) violation.” The other case cited by the District for this proposition, *State of New York (Department of Correctional Services)*, 32 PERB ¶ 4564 (1999), is likewise devoid of any such language, but did find “conclusory testimony regarding ‘arguments’” too vague to establish anti-union animus, and found other incidents too remote in time to give rise to a finding of animus.

underlying §§ 209-a.1(a) and (c) of the Act along with the lack of discovery and the pleading requirements under our Rules of Procedure (Rules). Although the timing and the context of events alone in a circumstantial evidence case may not be sufficient to meet a charging party's ultimate burden of proof, the timing and context of an employer's conduct may be sufficient to establish an inference of improper motivation, thereby shifting the burden of persuasion to the respondent to come forward with evidence demonstrating a non-discriminatory basis for the alleged conduct.¹⁸

Here, the ALJ found a *prima facie* case based upon circumstantial evidence. On the first prong of the showing, that Madnick participated in protected activity, there is no dispute. On the second prong, that the employer was aware of Madnick's protected activity, the District excepts to the ALJ's focus on Lerner's knowledge and to her refusing to credit Lerner's denial of knowledge of Madnick's protected activity.

As a threshold matter, the District's exception to the statement in the ALJ's decision that "the record is clear that it was Lerner who made the decision not to hire Madnick" is not persuasive, for several reasons.¹⁹ First, Lerner testified to precisely that effect.²⁰ Moreover, the ALJ immediately follows the statement excepted to by stating that the decision was "reached at a meeting with Lerner, Bollettieri, and Seinfeld," and that "it was Lerner who opposed selecting Madnick for the coaching job," with Seinfeld arguing in favor of Madnick, and Bollettieri mediating between them.²¹ This statement is consistent with Lerner's own testimony, and that of Bollettieri. The ALJ's summary of the facts is likewise consistent with Seinfeld's testimony that in reaching a final decision, he

¹⁸ *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3043.

¹⁹ Exceptions at ¶ 3, quoting 47 PERB ¶ 4554, at 4717.

²⁰ Tr, at pp. 611-612, 613-614; The ALJ's reliance on that testimony is not inappropriate, although Lerner also described the decision as being one made by himself and the principal with the approval of the Board and Bollettieri. Tr, at p. 578.

²¹ 47 PERB ¶ 4554, at 5717; see Tr, at pp. 860, 870.

deferred to Lerner's basketball expertise,²² and Bollettieri's testimony that Lerner and Seinfeld "have much more expertise, both of them, than I do, so I heard them both out," after which a decision was made.²³ The ALJ's conclusion that Lerner effectively wielded the casting vote is wholly consistent with Lerner's testimony, and that of Seinfeld and Bollettieri.

In finding Lerner's denial that he was aware of Madnick's protected activity not credible, the ALJ relied upon several factors. First, she found, Lerner's own testimony was inconsistent with his purported lack of knowledge:

[Lerner] testified that he had heard that Madnick had played a role in the Murray grievance, that Madnick's name came up "a lot" and that he knew Madnick to be an "activist." Lerner further stated that he knew that Madnick had criticized central administration and had referred to it as a den of vipers and to administrators as clowns and that Madnick had made many comments about the ability of the central office staff. Lerner testified that he would hear of Madnick's comments about the central office through different people, that the District "is a small community" and that things "filter back" to him. When asked if he had heard that Madnick was involved in the Moeller grievance, he stated that he knew of no direct role that Madnick played in that grievance, but that there was a lot of "noise" and that Madnick is not shy about expressing his opinion.²⁴

Second, the ALJ noted "that Madnick was involved in several grievances that affected Lerner's department and that the filing of formal grievances is unusual in the District."²⁵ Third, the ALJ found relevant "the fact that, as testified to by both Bollettieri and Lerner, the District is small and administrators hear of comments made by teachers in the schools," including comments made by Madnick about Lerner in the context of the

²² Tr, at pp. 774-775.

²³ Tr, at p. 871.

²⁴ 47 PERB ¶ 4554, at 4715 (footnotes omitted) (citing Tr, at pp. 658, 659, 660-661).

²⁵ *Id.*, at 4717.

Moeller grievance.²⁶

The ALJ's conclusion was further buttressed by Madnick's testimony, which she deemed credible, that BMUST's president had told him that the administration was "very unhappy" about Madnick's comments, and that the new building representative had likewise "told him that there was consternation in central administration regarding his comments about Lerner."²⁷ The ALJ also found credible Madnick's testimony that Bollettieri had expressly said to him, "How can you expect Mr. Lerner to hire you when you said such negative things about him?"²⁸

Finally, the ALJ also found credible, "based upon his demeanor," Harrison's testimony that he and Madnick raised an assignment grievance with Principal Seinfeld "repeatedly over two years and that, each time Madnick raised the issue, Seinfeld had to raise the issue with Lerner and that doing so made Seinfeld uncomfortable."²⁹

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' demeanor."³⁰ The District has pointed to no

²⁶ *Id.*, at 4717-4718. Bollettieri's testimony, in particular, linked Madnick's "tension with Mr. Lerner" and the fact that "[t]he relationship wasn't a positive one" to the Madnick's involvement in the Moeller grievance. Tr, at pp. 926-927.

²⁷ *Id.*, at 4718.

²⁸ 47 PERB ¶ 4554, at 4718.

²⁹ *Id.*

³⁰ *UFT (Cruz)*, 48 PERB ¶ 3004 (2015), quoting *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014) and *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, 7009 (1st Dept 1974)) (deference due credibility determinations based on observation of witness's demeanor).

such objective evidence tending to support Lerner's claim of ignorance of Madnick's protected activity. Accordingly, we decline to overturn the ALJ's credibility determination and her resultant factual finding that Lerner knew of Madnick's protected activity.

In support of the *prima facie* case, the ALJ did not rest solely on the basis of a temporal proximity between Madnick's protected activity and the decision to hire another applicant. Rather, she pointed to several factors, including that "Lerner viewed Madnick as a thorn in the administration's side," and his testimony that "he and most administrators did not think well of Madnick."³¹ In particular, she noted that, as the quality of Madnick's teaching was not disputed, Lerner's union advocacy seemed to be the cause. This finding is buttressed by the fact that Lerner did not testify to any other grounds for his disapproval of Madnick; indeed, he testified that "I have never spoken to Mr. Madnick except on rare occasions about basketball."³² The lack of any other articulated basis for the low opinion Lerner (and, by his account, other administrators) had of Madnick inferentially supports that it was in response to his protected activity.

Likewise, the ALJ relied upon the general tenor and overall context of labor relations in the District, including some of the facts relied upon to demonstrate knowledge of Madnick's protected activity, and an arbitration award finding that Moeller had been denied a coaching position in retaliation for his exercise of his contractual rights to participate in the curriculum process.³³

We do, however, find that the ALJ erred in relying on one factor in finding a *prima facie* case. The District reasonably points out that, in view of the fact it knew that

³¹ 47 PERB ¶ 4554, at 4718; see also Tr, at p. 663.

³² Tr, at p. 570.

³³ Charging Party's Ex, 25.

Madnick did not wish to be considered for the junior varsity coaching position, any “uncommon and irregular steps” by the District taken solely with respect to that position are not probative of discriminatory or retaliatory bias against Madnick, and therefore are not probative of his *prima facie* case. We agree. However, this does not invalidate the ALJ’s finding, not excepted to by the District, of similar “uncommon and irregular steps” taken as to Lerner’s making an unsolicited offer of the assistant varsity coach position to Fischer, despite the District’s practice of giving preference to teachers, such as Madnick, who work within the same school as the team they would be coaching.³⁴

The District’s assertion that those factors are not sufficient to make out a *prima facie* case is not persuasive. As we held in *Jenkins*, it is sufficient if the circumstantial evidence “under the totality of the circumstances,” suggests that the adverse employment action complained of “may have been unlawfully motivated in violation of the Act.”³⁵ The evidence here is ample to meet that burden, and the ALJ did not err in finding that Madnick established a *prima facie* case.

The District has put forward as legitimate business reasons for the hiring of Bates over Madnick that Lerner felt that the 12 year gap since Madnick had last coached rendered his skills outdated; that the basketball program at Calhoun was floundering under Kreutzberger’s leadership; that Bates “interviewed exceptionally well and came with incredible recommendations”; and that he had played varsity basketball with a coach whom Lerner considered to be one of the best in the region and in college, where

³⁴ 47 PERB ¶ 4554, at 4718. Other irregularities, such as the interviewing of out-of-District candidates first, and then re-interviewing them after the in-district candidate were interviewed, the lack of consultation with Kreutzberger in making an offer to Fischer, and in turning down Madnick, and the fact that the ALJ credited Madnick’s testimony that he was informed that he was out of consideration prior to the selection of a candidate, further support the ALJ’s finding.

³⁵ 41 PERB ¶ 3007, at 3045.

"he played for one of the most highly respected coaches in the country."³⁶ The District also complains that "the ALJ failed to take into consideration that, after Bates was hired, the team did significantly better."³⁷

To address the last point first, we do not see the relevance of Bates's performance subsequent to his hiring in establishing the District's motivation in hiring him in preference to Madnick. In a case predicated on retaliation or discrimination, it is hornbook law that the legality of the decision is to be judged on what the employer knew at the time it made the decision, not on how subsequent events play out, or even on subsequently acquired evidence that might have justified the decision had it been known at the time.³⁸ Events that happen after the decision are, therefore, simply not probative of the District's motivation at the time the decision was made.

We recognize that "the review of the articulated business reasons offered by an employer in support of a management decision does not include the substitution of an ALJ's judgment for the judgment of the employer."³⁹ Rather, a proffered legitimate business reason is properly regarded as pretextual if the credible evidence establishes that the decision was not so motivated, either directly or circumstantially,⁴⁰ or because

³⁶ Exceptions at ¶ 21.

³⁷ *Id.*, at ¶ 22.

³⁸ See, e.g., *Margerum v City of Buffalo*, 24 NY3d 721, 731 (2015), citing *United States v Brennan*, 650 F3d 65 (2d Cir 2011); see also *Corcoran v CHG-Meridian US Finance, Ltd.*, 2014 WL 1976671 (NDNY May15, 2014) ("after-acquired evidence of employee misconduct that was not the basis for the employer's decision to terminate the employee was not relevant for the purpose of determining whether the employer had violated the Age Discrimination in Employment Act ") (summarizing *McKennon v Nashville Banner Pub Co*, 513 US 352, 361 (1995)).

³⁹ *Town of North Hempstead*, 35 PERB ¶ 3027, 3075 (2002).

⁴⁰ *Dansville Support Staff Assn (Johnson)*, 45 PERB ¶ 3012, 3027-3028 (2012); *County of Saratoga*, 37 PERB ¶ 3024, 3069 (2004).

the articulated reasons are so lacking in merit as to be patently false.⁴¹ The ALJ rejected the District's legitimate business reasons on the former grounds, emphasizing behavior on the part of the District that was inconsistent with the rationales advanced, including that Kreutzberger received satisfactory evaluations as a coach, and that "no issues had previously been raised regarding his coaching," and the absence of any other record evidence of a perceived need to improve Calhoun's program.⁴² The ALJ further relied on her conclusion that Lerner's offering the position to Fisher, who had not applied for the position, and whose "team was also at the bottom of the conference" was inconsistent with the purported need to improve the program as the reason for not hiring Madnick. The ALJ pointed out "there is no record evidence that Fisher had success in the past or that Lerner had other reason to believe that Fisher would improve the Calhoun team."⁴³ In sum, the ALJ concluded that the District's behavior both before and during the hiring process for the boys' assistant varsity coach position was not consistent with the legitimate business reason articulated by the District, leading to the conclusion that the rationale was not credible, but rather a post-hoc rationalization of the decision.

The District faults the ALJ for not finding credible Lerner's testimony that the District's goal "was to infuse a 'floundering' program with 'new energy.'"⁴⁴ However, the District does not provide any objective evidence undermining the ALJ's credibility determination. Indeed, the District does not even address the reasons the ALJ gave for finding the proffered business reason to be pretextual, other than to reassert Lerner's

⁴¹ *Town of North Hempstead*, 35 PERB ¶ 3027, at 3075.

⁴² 47 PERB ¶ 4554, at 4719.

⁴³ *Id.*

⁴⁴ District's Memorandum of Law in Support of Exceptions, at 19.

testimony as credible.⁴⁵

Accordingly, we find that the ALJ did not err in declining to credit the proffered rationale. This finding is also consistent with her previous finding, supported by the evidence, that Lerner had not testified credibly with regard to his knowledge of Madnick's protected activity. Moreover, other factors in the record not expressly relied on by the ALJ also do not cohere with the District's proffered legitimate business reason. Lerner's admission that he did not ask Madnick any questions at his interview "about what he had done to keep up with basketball in the twelve years since he had last formally coached," is in tension with his testimony that Madnick's experience was outdated "was the principal reason he was not hired," and does not support the rationale offered by the District.⁴⁶ Nor does the fact that that Bates "had little or no coaching experience, although he had recently played college basketball and had worked as a graduate assistant in a college basketball program."⁴⁷ In sum, the record evidence, far from undermining the ALJ's credibility determination, is consistent with it.

Based upon the foregoing, we affirm the ALJ's finding that the District had violated §§ 209-a.1(a) and (c) of the Act when it did not select Madnick in the fall of 2010 for the position of boys' varsity assistant basketball coach in retaliation for his

⁴⁵ *Id.*, at 17-19. The District does address the ALJ's erroneous reliance on the "uncommon and irregular steps" in hiring Rottkamp. However, the ALJ does not rely on these steps in finding the District's rationale for hiring Bates pretextual, but rather in finding the existence of a *prima facie* case. 47 PERB ¶ 4554, at 4518, 4519. Thus, the ALJ's misreading of the facts on this point does not taint her finding of pretext.

⁴⁶ Tr, at pp. 686-687.

⁴⁷ 47 PERB ¶ 4554, at 4715.

activity as a BMUST representative.⁴⁸ However, under the highly atypical circumstances here, we believe the record should be further developed to determine what remedy is appropriate. We note that the existence of evidence of a merely conditional interest on Madnick's part in the job, along with the existence of a candidate whom some evidence suggests was preferable to Madnick and other issues which present material issues of fact that should be clarified prior to applying our well established preference for make whole relief, which we reaffirm herein.

Accordingly, we affirm the ALJ's finding of a violation, and remand for the clarification of the record to determine an appropriate remedy.

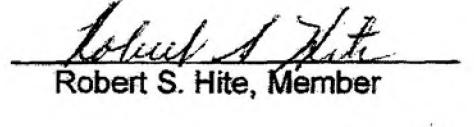
DATED: November 10, 2015
Albany, New York



Seth H. Agata, Chairperson



Allen C. DeMarco, Member



Robert S. Hite, Member

⁴⁸ We note that we do not exercise plenary review over ALJ decisions, but rather, that any objections not specifically raised to the ALJ's decision have been waived, and are not properly before us. § 213.2 (b)(4) PERB Rules of Procedure; *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014), citing *City of Schenectady*, 46 PERB ¶ 3025, at 3056, n. 8 (2013), *confd 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), *confd 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).

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

In the Matter of

**NASSAU COUNTY SHERIFF'S CORRECTION
OFFICER'S BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

CASE NO. U-32687

- and -

COUNTY OF NASSAU,

Respondent.

**KOEHLER & ISAACS, LLP (LIAM L. CASTRO of counsel), for Charging
Party**

**BEE READY FISHBEIN HATTER & DONOVAN, LLP (WILLIAM C. DE WITT of
counsel), for Respondent**

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by the County of Nassau (County) to a decision and order of an Administrative Law Judge (ALJ) in which the ALJ held that the County violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act).¹ The ALJ found that the County's Corrections Captain, Ronald Rogers, made certain remarks to rank and file corrections officers represented by the Nassau County Sheriff's Correction Officers Benevolent Association, Inc. (COBA) in retaliation for their efforts to obtain COBA's assistance regarding issues concerning Rogers's supervisory directives that affected their terms and conditions of employment.

¹ 47 PERB ¶ 4550 (2014).

EXCEPTIONS

The County filed 34 exceptions to the ALJ's decision and recommended order, challenging virtually all of her material findings of fact and each of her conclusions of law. They boil down to four arguments: 1) Rogers did not make the comments that the ALJ attributed to him; 2) Rogers's comments to rank and file officers cannot constitute an interference with their exercise of protected rights because he is a member of COBA's bargaining unit; 3) the County cannot be held liable for Rogers's comments because there is no evidence that it authorized or condoned them, and; 4) Rogers's comments cannot constitute retaliation or a threat of retaliation for the employees' exercise of protected rights because he has no authority to effect changes in their terms and conditions of employment. COBA filed a response supporting the ALJ's decision.

Having carefully reviewed the record as described below, and considered the County's exceptions and COBA's response, we affirm the decision of the ALJ in part and adopt her remedial order.

FACTS

COBA represents a collective negotiations unit of County employees under the general supervision of the Sheriff of Nassau County, Michael Spozotto.² The employees hold titles within the County's corrections department, including correction officers, corporals, lieutenants, and captains.³ The County's corrections department is divided into several units, including an Operations Unit. The Operations Unit consists of

² Because the Sheriff is an appointed position, the office of Sheriff is not a joint employer with the County. See *County of Nassau and Nassau County Sheriff*, 25 PERB ¶ 3036 (1992).

³ See *County of Nassau*, 32 PERB ¶ 8001 (1999).

approximately 40 officers deployed to security posts, admissions and discharge posts, identification and classification posts, and a court desk.⁴

At all relevant times, Captain Rogers commanded the Operations Unit.⁵ He was responsible for overseeing the Unit and increasing the efficiencies of daily operations.⁶ He held that role until shortly after COBA filed the instant improper practice charge, at which time he ceased to supervise the Operations Unit.⁷ Notwithstanding Rogers's supervisory responsibilities, as a captain, he is in COBA's bargaining unit.

During three separate conversations in the fall of 2012, Correction Officer William Sutch, who had been assigned to the Operations Unit for 16 years, reported to COBA's president, John Jaronczyk, its vice president, Frank Perez, and its second vice president, Corey Timo, that Rogers had issued certain verbal orders that changed written policies affecting the staffing of the Operations Unit.⁸ Sutch reported that the changes were causing safety and security issues due to a lack of post coverage, which affected the ability of officers to respond to emergencies.⁹

Sutch expressed his complaints to Timo just before Christmas 2012.¹⁰ Timo reported Sutch's concerns to Jaronczyk, who advised Timo that he had already spoken to the sheriff about them, but that he would do so again.¹¹ In Timo's presence,

⁴ Tr. at pp. 51, 95, 113-114.

⁵ Tr. at p. 45.

⁶ Tr. at pp. 113, 144.

⁷ Tr. at pp. 47, 143. There is no evidence that Rogers's departure from the Operations Unit is related to the instant improper practice charge.

⁸ Tr. at pp. 17-22, 31, 37-40, 54-58.

⁹ *Id.*

¹⁰ Tr. at pp. 18-20.

¹¹ Tr. at p. 22

Jaronczyk telephoned the sheriff and delivered the renewed complaint.¹² The Sheriff assured Jaronczyk that “he would take care of it.”¹³

On January 1, 2013, shortly after Jaronczyk’s Christmas complaint to the Sheriff and the Sheriff’s assurance that he would take care of it, Rogers made an unusual, out of uniform, unscheduled, off-duty holiday visit to the correctional facility.¹⁴ Sutch testified that at about 7:00 AM, Rogers entered the Admissions and Discharge office of the Operations Unit and ordered him to “get everybody in the office.”¹⁵ According to Sutch, the only on-duty correction officer who could not comply with Rogers’s order to assemble in the office was Daniel Hoffman, who was in the “bubble” – a locked room from which secured doors in the facility are opened and closed.¹⁶

Sutch testified that Rogers opened the meeting stating: “You nitwits again have started off with making complaints.”¹⁷ Taken aback, Sutch responded that he resented the name-calling, stating: “I’m a grown man; I [don’t] need to be talked [to] like that.”¹⁸ According to Sutch, Rogers continued, stating, “every time [you] contact the union it pisses the sheriff off and just draws more attention to our area, and that’s when things start to change.”¹⁹ To this, Sutch responded that it was he who contacted COBA and that “it was [his] right” to do so.²⁰ According to Sutch, Rogers responded: “You do have

¹² *Id.*

¹³ Tr, at p. 21.

¹⁴ Tr, at pp. 41, 53.

¹⁵ Tr, at p. 59; ALJ Ex 2, at ¶ 10.

¹⁶ Tr, at p. 60.

¹⁷ Tr. pp. 43, 65.

¹⁸ *Id.*

¹⁹ Tr, at pp. 43-44.

²⁰ *Id.*

that right to go, but when you do you drag the spotlight on your Unit.”²¹ Rogers also said: “I’m just letting you know that every time you go, the spotlight comes down on you guys. You’re going to wind up changing the policies maybe your fellow officers might not like.”²² Rogers also warned that the employees should “learn to pick their battles.”²³

Sutch further testified that Rogers stated that “since we kept stirring the pot that he would close our unit down on weekends,” to which another officer, Richard Friedel, observed that the Unit could not be closed on weekends because the inmates have a variety of needs that require staffing the Unit.²⁴ According to Sutch, Rogers responded: “The sheriff can do whatever he wants.”²⁵ At that point, another officer, Monroe, commented that he (Monroe) had been “here nineteen years and it’s a shame that I get stressed [sic] like a child.”²⁶ Rogers retorted that he had been there twenty-nine years and “I get treated like a child.”²⁷ Monroe quipped back: “How does it feel after twenty-nine years being a captain officer, taking orders from a chef?”²⁸ Finally, Sutch testified that others also commented on Rogers’s remarks, including Officer Scott Garranger.²⁹ According to Sutch, the meeting adjourned after about ten to fifteen minutes.³⁰

²¹ Tr, at p. 70.

²² Tr, at p. 45.

²³ Tr, at p. 170; ALJ Exhibit 2, ¶ 14.

²⁴ Tr, at p. 62.

²⁵ *Id.*

²⁶ Tr, at p. 62.

²⁷ Tr, at p. 63.

²⁸ Tr, at p. 63. Sutch explained that the sheriff had once been a cook for the corrections department. *Id.*

²⁹ *Id.*

³⁰ Tr, at p. 87.

Garranger, who could not recall exactly what Rogers said during his direct examination by COBA,³¹ testified on cross-examination by the County that when Rogers opened the meeting he asked "who was going to the Union with issues."³² According to Garranger, Rogers said that the sheriff was not happy that complaints were being reported to COBA.³³ Garranger testified that Rogers suggested that the Unit might be closed on weekends, to which another officer responded that the Unit required security staffing of "two or three guys" who might need to be called in from the identification unit where Garranger works.³⁴ Although Garranger attributed the response to Corporal Scott Hilbrandt,³⁵ at another stage in his testimony, he testified that Hilbrandt was not at the meeting.³⁶

Rogers denied that he ordered corrections officers to assemble for a meeting in the Admissions and Discharge office.³⁷ He testified that he occasionally visits the correctional facility when he is off duty "to check on different posts of the institution so that people don't get comfortable knowing there is no boss around."³⁸ He recalled that on January 1, 2013, he made such an off-duty visit to the correctional facility in order to "talk to the people . . . wish everybody a Happy New Year. . . , shake hands, see if I could see if there was anything going on with people on the post with people not on their posts . . . just routine supervisory issues."³⁹

³¹ Tr, at p. 97.

³² Tr, at p. 102.

³³ Tr, at p. 106.

³⁴ Tr, at p. 98.

³⁵ Tr, at p. 99.

³⁶ Tr, at p. 101.

³⁷ Tr, at pp. 152-154, 156.

³⁸ Tr, at p. 117.

³⁹ Tr, at pp. 119, 180.

According to Rogers, when he entered the Admissions and Discharge office, several employees, including Sutch, were complaining that they were not receiving as much pay as in the past due to a reduction in overtime.⁴⁰ Rogers testified that he and Sutch had a conversation “about the union” in the presence of other officers in the office.⁴¹ According to Rogers, he told Sutch that around Christmas Eve, Perez had complained to him about staffing cuts in the “satellite” post.⁴² Rogers testified that he told Sutch: “[Y]ou know, you guys got to stop complaining, whoever it is got to stop complaining that things aren’t correct. Frank [Perez] told me that somebody complained that the post was cut, totally cut.”⁴³ He testified that he told Sutch that the post had been merely reduced.⁴⁴ Rogers explained that staff had to be redeployed to transport inmates to court and there was a complaint that “there wasn’t a full complement of staff then.”⁴⁵

Rogers testified that, at some point during the meeting, an officer known to him only as “Vinny” chimed in stating: “I wish I knew who called the Union, I would like to straighten that person out.”⁴⁶ Rogers responded: “This isn’t about calling the union; it’s about good information and bad information.”⁴⁷ Rogers explained that he resents it when COBA reports employee complaints to the sheriff that are grounded on inaccurate information.⁴⁸ He testified that to respond to such complaints, he must engage in time

⁴⁰ Tr, at pp. 120-121.

⁴¹ Tr, at pp. 123, 179.

⁴² Tr, at p. 121.

⁴³ Tr, at p. 121.

⁴⁴ Tr, at p. 122.

⁴⁵ Tr, at p. 122.

⁴⁶ Tr, at p. 124.

⁴⁷ Tr, at p. 124.

⁴⁸ Tr, at p. 185.

consuming efforts to “correct bad information” and “dispelling rumors” where he could be “doing other things.”⁴⁹ He testified that he did not resent COBA reporting employees’ complaints to the Sheriff that are based on “good information.”⁵⁰

Rogers did not recall calling anyone a nitwit.⁵¹ He similarly did not believe he said, “every time you go to the union you [are] bringing attention to this Unit.”⁵² Rogers flatly denied stating that he resented being treated like a child or that anyone asked him how it felt to be taking orders from a chef during the January 1, 2013 meeting.⁵³ Likewise, he flatly denied suggesting that he would be closing the Operations Unit on weekends.⁵⁴ According to Rogers, the conversation with Sutch simply faded out in less than half an hour.⁵⁵

Later, in April 2013, COBA discussed Rogers’s orders with the sheriff again. This time, the discussion occurred during a labor-management meeting. Indeed, the April 22 agenda for the April 25 meeting expressly listed as its third item of “Old Business” for discussion: “Operations Unit - status of Capt Rogers’s verbal orders changing SOPs in Operations Unit.”⁵⁶ Timo explained that Jaronczyk’s December 2012 complaints to the sheriff about Rogers’s orders made its way into the agenda because they had not been resolved to COBA’s satisfaction.⁵⁷ According to Timo, during the labor-management meeting, the Sheriff said that he would stop the verbal orders that

⁴⁹ Tr, at p. 165.

⁵⁰ Tr, at pp. 162, 172-174.

⁵¹ Tr, at p. 130.

⁵² Tr, at pp. 130, 154, 159-160.

⁵³ Tr, at p. 129.

⁵⁴ Tr, at p. 136.

⁵⁵ Tr, at p. 128.

⁵⁶ Charging Party’s Ex 1.

⁵⁷ Tr, at pp. 21-22.

Rogers was issuing and end the new duties that operations officers had been assigned.⁵⁸

Shortly after the agenda of the labor-management meeting was distributed to Sheriff Spozotto and COBA's officials, Rogers had a conversation with Corporal Hilbrandt. Hilbrandt testified that on April 24, 2013, he was directed to meet with Rogers in the Transportation office.⁵⁹ Referring to the April 22 agenda for the April 25 labor-management meeting, Rogers told Hilbrandt that he had just been "reamed out by the sheriff" because of the complaints that had been lodged against him.⁶⁰ According to Hilbrandt, Rogers went on to say that "every time you guys go to the office they put a spotlight on themselves."⁶¹ Asked what he meant by "office," Hilbrandt corrected himself, observing that he meant to say "union;" i.e., Rogers told him that "every time you guys go to the union you put a spotlight on yourself."⁶² Hilbrandt testified that Rogers said that he was thinking about moving officers into security on weekends.⁶³

Rogers had no recollection of the conversation with Hilbrandt.⁶⁴ Specifically, he had no recollection of telling Hilbrandt that he had been "reamed out" by the sheriff due to his conduct at issue in the agenda for the labor-management meeting or telling Hilbrandt "once again you guys are back in the spotlight."⁶⁵ Indeed, he denied having spoken with the sheriff about the issues.⁶⁶ However, he remembered speaking to

⁵⁸ Tr, at pp. 26-29.

⁵⁹ Tr, at pp. 81-82.

⁶⁰ Tr, at p. 78.

⁶¹ *Id.*

⁶² Tr, at pp. 79, 84.

⁶³ Tr, at p. 84.

⁶⁴ Tr, at p. 135.

⁶⁵ Tr, at p. 135.

⁶⁶ Tr, at p. 132.

COBA about them, recalling that the conversations were about his redeployment of corrections officers out of the Operations Unit to the court “to do meal reliefs.”⁶⁷

DISCUSSION

When an improper practice charge alleges unlawfully motivated interference with or retaliation for the exercise of protected rights in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) 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.⁶⁸

Where “a charging party establishes a *prima facie* case of unlawful motivation through circumstantial evidence, the burden of persuasion shifts to the respondent to rebut the inference by presenting evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason.”⁶⁹ If the respondent establishes a legitimate non-discriminatory reason, then the burden shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual. At all times, however, the burden of proof rests with the charging party to prove the requisite causation by a preponderance of the evidence.⁷⁰

⁶⁷ Tr, at p. 134.

⁶⁸ *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014), citing *UFT, L 2, AFT-CIO (Jenkins)*, 41 PERB ¶ 3007(2008), *confd sub nom Jenkins v NYS 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); see also *City of Salamanca*, 18 PERB ¶ 3012 (1985).

⁶⁹ *Dutchess Community College*, 47 PERB ¶ 3018, 3056 (2014), citing *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3018.

⁷⁰ *Id.*, quoting *UFT (Jenkins)*, 41 PERB ¶ 3007, at 3043.

In the instant case, the County raises a barrage of objections to the ALJ's factual determinations based on her overall conclusion that Rogers's testimony was evasive and not credible where it conflicted with the testimony of COBA's witnesses. However, 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."⁷¹ The County has pointed to no such objective evidence showing that the ALJ's factual determinations were "manifestly incorrect." Indeed, as discussed below, we find that the ALJ's factual determinations are soundly supported by the record itself. Accordingly, we decline to overturn the ALJ's credibility determinations and her resultant factual findings.

Rogers's statements on January 1, 2013

Contrary to the County's arguments, we find that the record fully supports the ALJ's findings concerning the January 1, 2013 meeting. On that day, Rogers appeared at the Admissions and Discharge office of the Operations Unit in his capacity as commanding officer of the Unit. Upon his arrival, he ordered the on-duty officers to assemble. Once assembled, Rogers told the employees of his dissatisfaction with their complaints to COBA about his supervisory directives and COBA's successful pursuit of

⁷¹ *UFT (Cruz)*, 48 PERB ¶ 3004 (2015), *petition dismissed sub nom Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct New York Co 2015) (quoting *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014) and *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3019 (2008); citing *County of Tioga*, 44 PERB ¶ 3016, 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, 3045-3046 (2006), citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974) (deference due credibility determinations based on observation of witness's demeanor).

those complaints with the Sheriff. He told them that they should stop making their complaints and that if they persisted there would be consequences adverse to their employment interests, including the possibility that he would close the Operations Unit on weekends. Accordingly, we find that the record supports the ALJ's conclusion that the County violated §§ 209-a.1 (a) and (c) of the Act, unless there is merit to the County's defenses.

First, contrary to the County's argument, the record supports the ALJ's finding that Rogers appeared at the Admissions and Discharge office of the Operations Unit in his supervisory capacity. Rogers testified that he occasionally visits the facility during his off-duty hours to check on different posts of the institution so that the officers do not "get comfortable knowing there is no boss around." He testified that he made such a visit on January 1, 2013, to ensure that the posts were staffed – "just routine supervisory issues."⁷² Thus, Rogers's own testimony supports the conclusion that he appeared at the Operations Unit on January 1, 2013 in his supervisory capacity.

Second, contrary to the County's arguments, the record supports the ALJ's conclusion that once Rogers arrived at the Operations Unit, he ordered the on-duty officers to assemble in the Admissions and Discharge office. Despite Rogers's general denial and inability to recall the event, the record supports the ALJ's finding that Sutch's detailed recollection of the order should be credited. Sutch recalled that the only employee who could not comply with Rogers's order was locked in the bubble, supporting his recollection that the assembly was pursuant to a directive. Indeed, the

⁷² Tr, at p. 119.

County's answer admits that the employees assembled pursuant to Rogers's directive.⁷³

Third, contrary to the County's arguments, the record supports the ALJ's conclusion that Rogers told the assembled employees that he wanted them to stop making their complaints to COBA about his supervisory directives. Rogers himself testified that he made that statement to Sutch. Despite Rogers's general denials and inability to recall his remarks, the ALJ reasonably concluded that Sutch's recollection about what Rogers said to the assembled officers is more reliable than Rogers's. Indeed, we find it reasonable to believe that Sutch would remember being called a "nitwit" by his commanding officer, and why the characterization was ascribed to the group – that Rogers was angry about employees reporting their complaints regarding Rogers's supervisory directives to the Sheriff through COBA. While Garranger could not provide a verbatim recitation of Rogers's statements on COBA's direct examination, his testimony on the County's cross examination is sufficiently consistent with Sutch's testimony to corroborate his account of the events.

Rogers's own testimony supports a conclusion that he resented the complaints. Although he testified that he does not mind it when employees' complaints are based on accurate information, he testified that he resents complaints that are based on what he considers to be inaccurate information. In that regard, while Rogers denied having said to the assembled officers that they should "pick their battles" when complaining to

⁷³ ALJ Ex 2, at ¶ 10.

COBA about their terms and conditions of employment, the County's answer admitted that Rogers made that very statement.⁷⁴

Fourth, contrary to the County's arguments, we find no objective record evidence that compels our rejection of the ALJ's finding that Rogers threatened that if the employees continued to voice their complaints to COBA about his supervisory directives there would be consequences that their fellow employees might not like. The record supports the ALJ's determination that Rogers told the assembled group that if they continued to "stir the pot" he would close the Operations Unit on weekends. That the ALJ reasonably credited Sutch's recollection of the event is supported by Sutch's detailed account of the banter in response to Rogers's threat. While the employees questioned the propriety of such a move, Rogers responded that "the Sheriff can do whatever he wants." Similarly, Sutch's detailed recollection of the events supports our conclusion that Rogers told the assembled group that their complaints "piss the Sheriff off." Indeed, Rogers's testimony about "Vinny's" response to his statements supports the proposition that Rogers's announcement conveyed a threat of bad things to come if the complaints continued; to wit: "I wish I knew who called the Union, I would like to straighten that person out."⁷⁵ As with Sutch and Garranger, it reasonably appears that Vinny understood Rogers's remarks to convey a threat of actions adverse to the interests of unit employees if they continued to file complaints.

⁷⁴ ALJ Ex 2, at ¶ 14.

⁷⁵ Tr, at p. 124.

Rogers's statements to Hilbrandt on April 24, 2013

Again, no objective evidence has been adduced by the County invalidating the ALJ's decision to credit Hilbrandt's testimony as to his conversation with Rogers on April 24, 2013. Rogers directed Hilbrandt to meet with him in the Transportation office.⁷⁶ Then, referring to the April 22 agenda for the upcoming labor-management meeting, Rogers told Hilbrandt that he had just been "reamed out by the sheriff" because of the complaints that had been lodged against him.⁷⁷ Rogers went on to say that every time "you guys" go to the union you put a spotlight on yourselves and that he was thinking about moving officers into security on weekends.⁷⁸ Rogers's lack of recollection about the meeting does not refute Hilbrandt's testimony.

Conclusions

Initially, contrary to COBA's arguments, we find that Rogers's remarks to Hilbrandt do not rise to the level of a violation of the Act. Rogers's statement to a fellow supervisor, albeit of a lower rank, that he had been "reamed out" by the Sheriff because of the complaints by the rank and file officers appears to us to be the sort of conversation that any two supervisors might have regarding the consequences of their supervisory actions. Rogers's statement to Hilbrandt that he was thinking about moving people from the Operations Unit to security is also consistent with an exchange between supervisors about matters they are considering. Finally, Rogers's comment to Hilbrandt that the rank and file employees' complaints bring attention to the Operations

⁷⁶ Tr, at pp. 81-82.

⁷⁷ Tr, at p. 78.

⁷⁸ Tr, at p. 84.

Unit does not strike us as an admonition that Hilbrandt should refrain from making such complaints.

Accordingly, we reverse the ALJ's determination that Rogers's statements to Hilbrandt constitute a violation of §§ 209-a.1 (a) and (c) of the Act.

As for the events of January 1, 2013, the record establishes that shortly after Jaronczyk's Christmas report of Sutch's complaints to the sheriff about Rogers's directives and the sheriff's assurance to Jaronczyk that he would take care of them, Rogers made the remarks that formed the basis of COBA's improper practice charge.

Rogers's remarks were made to rank and file officers during a meeting that he called in his capacity as the commanding officer of the Operations Unit. His remarks were plainly intended to inhibit the employees from exercising their protected right to voice to their union their concerns about his supervisory actions – a violation of § 209-a.1 (a). Moreover, Rogers's remarks conveyed a threat of adverse employment consequences if the employees persisted in complaining about his directives, including the possibility that he would close the Operations Unit on weekends if they continued to “stir the pot” – a violation of § 209-a.1 (c).

Contrary to the County's argument, the fact that Rogers is in the same bargaining unit as the rank and file employees does not privilege his remarks that coerce, interfere with, or restrain the employees' protected rights where, as here, his remarks were made in his capacity as their commanding officer. In that capacity, Rogers is the person to whom rank and file employees look for guidance and direction regarding their employer's expectations as to their proper behavior. Rogers's statements can be reasonably, objectively understood to convey his supervisory antipathy toward their

protected rights and a desire to inhibit the employees' from voicing their complaints. Therefore, contrary to the County's arguments, Roger's inclusion in COBA's bargaining unit does not insulate the County from violations of the Act that Rogers commits in his capacity as the commanding officer of the Operations Unit, as, in that capacity, he is a representative of the County.

The County's reliance on *Sullivan County*⁷⁹ for a contrary result is without merit. That case has no precedential value. The conduct at-issue there—the alleged interference with and retaliation for the exercise of rights protected under § 202 of the Act – occurred before PERB had improper practice jurisdiction to prevent it,⁸⁰ as the Hearing Officer noted in the report to the Board.⁸¹

To the extent *Sullivan County* may have any persuasive value, the County's reliance on it here is unavailing. There, a supervisory officer in a bargaining unit of corrections officers that included supervisors and rank and file officers engaged in a dispute during a union meeting over what negotiations position the union should take regarding wages for the supervisory officers. The Board held that the supervisor's hostile remarks toward the rank and file officers for the union's negotiations position did not violate the Act because the supervisor was speaking in his capacity as unit member, not as a supervisor.

In the instant matter, Rogers was speaking in his capacity as a supervisor, not as a unit member. Indeed, the January 1, 2013 meeting was not a union meeting. It was convened pursuant to Rogers's order as commanding officer of the Operations Unit.

⁷⁹ 3 PERB ¶ 8006, *affd*, 3 PERB ¶ 3041 (1970).

⁸⁰ See *CSEA v Helsby*, 21 NY2d 541 (1968).

⁸¹ *Sullivan County*, 3 PERB ¶ 8006, at 8143.

Next, we reject the County's argument that it cannot be held liable for Rogers's statements that constitute the alleged violations of §§ 209-a.1 (a) and (c) because there is no evidence that it authorized or condoned them. Here again, the County's reliance on *Sullivan County* is unavailing. There, the Board addressed a second incident involving a supervisor where the supervisor's anger toward another unit member during a union meeting escalated to fisticuffs initiated by the supervisor. After the victim reported the matter to the sheriff and the local District Attorney, criminal charges were filed against the supervisor. Subsequently, the sheriff discharged the victim of the attack rather than the supervisor who initiated it. The Board rejected the argument that the sheriff retaliated against the victim's exercise of his protected right to freely participate in the union meeting, finding that the sheriff could not be held liable for the supervisor's assault where there was no evidence that the sheriff condoned or authorized it. The Board further rejected the notion that the sheriff's decision to fire the victim and not the assailant was improperly motivated, finding that the sheriff's decision was motivated by legitimate business reasons – greater personal loyalty to the supervisor than to the victim.

We agree that an employer cannot be held strictly liable for criminal acts of its employees where it did not authorize or condone the actions. However, where the conduct is solely a violation of the Act, we apply a more liberal construction of agency principals by which the conduct of supervisors may be attributed to an employer.⁸²

⁸² See *City of Schenectady*, 26 PERB ¶ 3038 (1993).

Contrary to the County's argument, the Board's decision in *City of Schenectady*⁸³ does not dictate the result the County seeks. There, a supervisor (a police captain) granted a benefit to a rank and file officer in the same unit that was in excess of the benefit to which the officer was entitled—a flexible work schedule other than the fixed schedule that had been posted for the position. Normally, the grant of a benefit in excess of that to which a represented employee is entitled violates § 209-a.1 (a) of the Act because it is inherently destructive of a union's representational rights and sends the message to employees that they can fare better without union representation.⁸⁴ In *Schenectady*, however, the Board found no violation. It reasoned that the work schedule had been secretly arranged between the supervisor and the rank and file officer and was contrary to express instructions given to the supervisor by the Police Commissioner that the posted shift could not be changed. Under those circumstances, the Board declined to attribute responsibility for the supervisor's clandestine prohibited conduct to the employer.⁸⁵

Likewise, in *City School District of the City of Buffalo*,⁸⁶ we found that the remarks of an elected school board member that were hostile toward the exercise of protected rights were not attributable to the district or the full board of education on agency principals. Not only were the remarks inconsistent with the district's current positions and interests, but they were immediately renounced by the president of the

⁸³*Id.*

⁸⁴ *Connetquot Cent Sch Dist*, 19 PERB ¶ 3045 (1986).

⁸⁵ Notably, the Board observed that there was no evidence that the City ratified or adopted the supervisor's grant of the more advantageous schedule. Indeed, the decision does not indicate what happened to the supervisor for his disobedience or whether the officer's schedule was adjusted to the posted schedule.

⁸⁶ 48 PERB ¶ 3001 (2015).

board of education in a communication to all who received the hostile message. There, however, we observed:

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 For example, a board member may act with apparent or implied authority without express authorization of the full board of education.⁸⁷

Here, in contrast to the circumstances in *Schenectady* and *Buffalo Board of Education*, Rogers's statements were not clandestine, expressly prohibited, or immediately renounced. Indeed, they were made to an assembly of rank and file employees in his capacity as the commanding officer of the Operations Unit. The statements were plainly intended to inhibit the employees from exercising their protected efforts to voice their complaints to COBA about his supervisory directives in violation of § 209-a.1 (a) of the Act. We find that, in context, Rogers, as commanding officer for the Operations Unit, was acting as an agent of the County cognizable under § 209-a.1 of the Act.

Indeed, the violation of § 209-a.1 (a) is established here, irrespective of whether higher level officials of the County expressly authorized or condoned the coercive statements. As the ALJ correctly observed, under the County's theory, supervisors could, with impunity, engage in campaigns designed to prevent employees from exercising their protected rights absent evidence that the "employer" (whoever that may be) authorized the unlawful behavior. The County's theory defies reason and the

⁸⁷ *Id.*, at 3005. There we offered a precautionary admonition: "[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."

policies underlying the Legislature's grant of protected rights to public employees.

Notably, an employer's authorization for supervisors to engage in activity that violates the Act would, itself, be unlawful.

We also reject the County's argument that Rogers's threats cannot violate § 209-a.1 (c) of the Act because he had no actual authority to implement employment related decisions. Indeed, the employees' protected complaints to COBA and COBA's pursuit of those complaints with the sheriff concerned Rogers's employment related directives. Although the County emphasizes that Rogers's supervisory authority does not extend to transfers of employees or shift assignments, he testified that he can make effective recommendations to the sheriff where such authority lies.⁸⁸ We find, therefore, that Rogers had apparent authority to actually influence, if not accomplish, his employment related retaliatory supervisory objectives.

Moreover, contrary to the County's arguments, we find that the employees had no reason to question the credibility of Rogers's threat that he would close the Operations Unit on weekends if they continued to "stir the pot." When challenging his threat, the employees questioned the wisdom of the closure, not Rogers's authority to implement it, supporting our view that the employees perceived no reason to doubt his authority. Moreover, in response to the employees' challenge, Rogers declared that the sheriff (who was also "pissed off" by the complaints) can do whatever he wants. When read in context, we find that the employees reasonably understood that Rogers's threat to close the Operations Unit on weekends if they continued to file complaints about his supervisory directives was a credible threat.

⁸⁸ Tr, at pp. 147-149.

Accordingly, we reject the County's argument that Rogers's threats cannot violate § 209-a.1 (c) of the Act because he had no actual authority to influence, much less implement, any employment related decisions. He had actual supervisory authority, and authority to make effective recommendations to the Sheriff to advance his objectives.⁸⁹ From the employees' perspective, he had, minimally, apparent authority to implement his threats.

By reason of the foregoing, we find that Rogers's remarks to rank and file employees in his capacity as their commanding officer were intended to coerce, restrain and interfere with the rank and file employees protected rights to voice their complaints to their union regarding Rogers's employment related supervisory actions and COBA's protected right to pursue those complaints with the Sheriff. Therefore, we find that the County violated § 209-a.1 (a) of the Act. We further find that Rogers's remarks conveyed a threat of retaliation for the employees' exercise of their protected rights and, therefore, that the County violated § 209-a.1 (c) of the Act. Accordingly, we affirm the ALJ's determination in those respects.

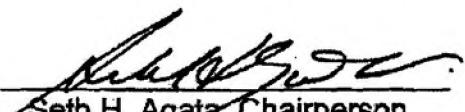
We find, however, that Rogers's remarks to Hilbrandt on April 24, 2013, do not rise to the level of a violation of the Act. We reverse the ALJ's decision in that regard.

THEREFORE, IT IS HEREBY ORDERED that the County of Nassau shall:

⁸⁹ The County's reliance on *County of Suffolk and Suffolk County Sheriff*, 25 PERB ¶ 4670 (1992) is misplaced. There, an ALJ held that there was no evidence that a supervisor's hostility toward the assignment of certain duties to unit corrections officers precipitated the transfer of the work to nonunit personnel where the supervisor was not responsible for the transfer. In any event, a decision of an ALJ is not binding on the Board and has no precedential value.

1. Cease and desist from retaliating against and interfering with unit members for their engagement in protected activity, to wit: making reports of workplace concerns to COBA and/or enlisting COBA's assistance and representation;
2. Cease and desist from threatening unit members for their engagement in protected activity, to wit: making reports of workplace concerns to COBA and/or enlisting COBA's assistance and representation;
3. Cease and desist from questioning unit members regarding their communications with COBA concerning representation relating to workplace concerns; and
4. Sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

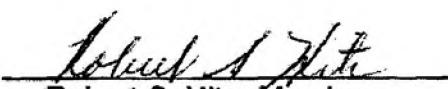
DATED: November 10, 2015
Albany, New York



Seth H. Agata, Chairperson



Allen C. DeMarco, Member



Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

**PURSUANT TO
THE DECISION AND ORDER OF THE**

**NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

and in order to effectuate the policies of the

**NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

we hereby notify the employees represented by the Nassau County Sheriff's Correction Officers Benevolent Association, Inc. that the County of Nassau will:

1. Not retaliate against unit members for their engagement in protected activity, to wit: making reports of workplace concerns to COBA and/or enlisting COBA's assistance and representation;
2. Not threaten unit members for their engagement in protected activity, to wit: making reports of workplace concerns to COBA and/or enlisting COBA's assistance and representation; and
3. Not question unit members regarding their communications with COBA concerning representation relating to workplace concerns.

Dated

By

(Representative)

(Title)

County of Nassau

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

RICHARD S. TROWBRIDGE,

Charging Party,

CASE NO. U-32822

- and -

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

Respondent,

- and -

VILLAGE OF GREENPORT,

Employer.

RICHARD S. TROWBRIDGE, *pro se*

STEVEN A. CRAIN, GENERAL COUNSEL, for Respondent

**LAMB AND BARNOSKY, LLP (ALYSON MATHEWS of counsel), for
Employer**

BOARD DECISION AND ORDER

This matter comes to the Board on exceptions to an Administrative Law Judge's (ALJ) decision¹ dismissing Richard S. Trowbridge's amended improper practice charge alleging a violation of § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) by the Civil Service Employees Association, Inc., Local 1000 (CSEA) when it failed to respond to his letters asking it to assist him in obtaining benefits from the Village of

¹ 47 PERB ¶ 4597 (2014).

Greenport (Village).²

Trowbridge had also alleged in his charge and amended charge that the Village violated §§ 209-a.1 (a) and (c) of the Act. The Director of Public Employment Practices and Representation (Director), by notice dated August 27, 2013, determined those charges were deficient for lack of standing, as untimely and that the activity alleged therein to have motivated retaliation against Trowbridge did not constitute protected activity.³ The ALJ also found that those same charges were deficient and the mere fact that the Village was included in the charge and amended charge as a necessary party pursuant to § 209-a.3 of the Act did not, in and of itself, raise any claims against it.

EXCEPTIONS

Trowbridge alleges in his exception that after his charge was assigned to an ALJ for a conference (which took place on October 30, 2013), "the issues that were addressed in my complaint were not clarified, limited or resolved at that conference, as is required by PERB's rules. No hearing date or ALJ was assigned to the matter and contrary to the written rules, [the ALJ] accepted a motion to dismiss the matter and has

² Trowbridge amended his original charge in response to a finding by the Director of Public Employment Practices and Representation dated June 21, 2013 that the charge was technically deficient with respect to claims against the Village. He attempted to address those claims in his amended charge.

³ Rules of Procedure of the New York State Public Employment Relations Board (Rules), § 204.2; Letter dated August 27, 2013 ("Notice of Conference"), Director to Trowbridge and counsel for CSEA and the Village. Trowbridge never filed exceptions to the Director's August 27, 2013 determination nor would exceptions now be timely; neither does he challenge the ALJ's findings on this issue. The outstanding charges before the Board are exceptions arising out of charges against CSEA.

ruled to dismiss the matter.”⁴

In particular, he relies upon the Board’s website (a portion of which is labeled “Frequently Asked Questions about Improper Practices”, commonly referred to as “FAQs”) which, at the time, stated:

Q: How is the case processed after the initial review by the Director?

A: The charge is assigned to an Administrative Law Judge (ALJ) to conduct a conference for the purpose of clarifying, limiting and resolving the issues. If the charge is not resolved at the conference, the matter is reassigned to a different ALJ for the issuance of the decision. That ALJ may either conduct a hearing or decide the matter on a stipulated record.⁵

Trowbridge alleges that the ALJ had no “jurisdiction” to decide the matter without holding an evidentiary hearing; indeed, the ultimate question, he argues, should have been decided by another ALJ. In addition, he alleges that “the timeliness of the charge has not been revealed and, since it has not been raised and revealed at a hearing, it cannot be considered by the ALJ and should be considered waived.”⁶

CSEA and the Village filed responses to the exceptions.

Upon review of the record and the papers filed herein, we affirm the ALJ’s decision.

FACTS

The ALJ found the following based upon the allegations in Trowbridge’s charge

⁴ Exceptions, contained in letter dated November 26, 2014.

⁵ *Id.*

⁶ *Id.*

and amended charge, and the facts set forth in Trowbridge's offer of proof. These facts, including the chronology of events, are uncontested by the parties.

CSEA represents a unit comprised of "all persons holding a position by appointment or employment in the Village . . . , except elected officials and supervisory personnel of the Village."⁷ The last collective bargaining agreement negotiated between the Village and CSEA had a term of June 1, 2006 to May 31, 2010 (Agreement).

Trowbridge worked for the Village from September 2008 to September 2011. His duties were to record and transcribe the meetings and/or hearings of the Village's Board of Trustees, Planning Board, Zoning Board of Appeals and Historic Preservation Commission and of other Village meetings as required.⁸

During this time, the Village alleges that it treated Trowbridge as an independent contractor; it did not withhold taxes from his pay or pay any taxes on his income and it reported his income to the taxing authorities as if he were an independent contractor. In addition, the Village did not pay Trowbridge according to the Agreement or otherwise accord him any benefits or rights contained therein.⁹

On or about September 16, 2011, after the Village terminated his services,¹⁰ Trowbridge filed for unemployment insurance benefits with the New York State

⁷ Charge, Ex 1.

⁸ Charge, Ex 10.

⁹ *Id.*

¹⁰ Charge, Ex 4 (in which the Village stated that it was "exploring various options for the recording and transcription of public meetings, to best serve the constituency") the receipt of which is acknowledged by Trowbridge. Indeed, Trowbridge had been advised as early as August 23, 2011 that the Village no longer needed his services (Charge, Ex 2). He had also received communications as late as September 21, 2011 (Charge, Ex 6) in which the Village asked him to return its recording equipment.

Department of Labor, Unemployment Insurance Division (UID). The Village opposed his application for unemployment benefits, arguing that he was an independent contractor and, therefore, not entitled to benefits. The UID issued an initial determination dated November 18, 2011, finding that Trowbridge was eligible to receive benefits.¹¹ The Village appealed that determination. After a hearing, the UID issued an award dated March 22, 2013, in which it rejected the Village's argument that Trowbridge was an independent contractor and found that he was an employee for purposes of the Unemployment Insurance Law and entitled to receive benefits thereunder.¹²

After he received the March 22, 2013 UID award, Trowbridge sent a letter dated May 3, 2013, to the Village's Mayor advising him that the UID had issued a decision determining that he had been a Village employee.¹³ He asked that the Village treat him as a Village employee entitled to the benefits of the Agreement. In particular, he asserted that he should have been paid at the contractual overtime rate for work he performed on Saturdays and for hours in excess of thirty-five hours a week, and he demanded that the Village compensate him for the three years he worked for it the difference between the salary he received and the overtime rate it should have paid him.

The Village Clerk responded to Trowbridge's letter with a letter dated May 30, 2013, denying his request and stating that, since he was not a member of the CSEA

¹¹ Charge, Ex 9.

¹² Charge, Ex 10.

¹³ Charge, Ex 11; Offer of Proof, at p. 5.

unit during his employment, the Agreement's overtime provisions did not apply to him.¹⁴

It was not until May 23, 2013, that Trowbridge wrote a letter to CSEA unit president Nick LaMorte forwarding a copy of his May 3, 2013 letter to the Mayor, asserting that the UID had issued a decision that found that during his employment, the Village had misclassified him as an independent contractor and seeking CSEA's assistance in obtaining benefits he believed he should have received under the Agreement.¹⁵ It is undisputed that before sending his May 23, 2013 letter, Trowbridge had not asked CSEA to represent him in any manner or sought its assistance. When CSEA did not respond to his May 23, 2013 letter, Trowbridge sent LaMorte a further letter dated June 10, 2013 that included a copy of his prior letter and asked LaMorte whether CSEA intended to assist him with his complaint with the Village.¹⁶

By letter dated September 12, 2013, CSEA's attorney responded to Trowbridge's May 23 and June 10, 2013 letters, in relevant part, as follows:

You were not considered an employee by the Village, CSEA, or yourself for that matter, during the time period you provided services to the Village as a contract stenographer. Neither did you tender or seek to tender dues to CSEA, nor did you sign a dues authorization card or seek membership in CSEA. Moreover, by the time your letters were received by Mr. LaMorte, any action by CSEA on your behalf, had you been a member, would have been untimely. In addition, the determination by the DOL that you are entitled to unemployment insurance benefits does not mean you are considered an employee for all purposes. That determination is limited in scope to your entitlement, if any, to

¹⁴ Charge, Ex 12; Offer of Proof, at p. 5.

¹⁵ Charge, Ex 13; Offer of Proof, at pp. 5-6.

¹⁶ Charge, Ex 14.

unemployment insurance benefits.¹⁷

On June 18, 2013, Trowbridge filed the instant improper practice charge against CSEA which responded by filing an answer denying the material allegations of the charge and raising the defenses of timeliness and that Trowbridge was never a unit employee or an employee of the Village.¹⁸ The Village, a statutory party pursuant to § 209-a.3 of the Act, filed an answer denying the charge's material allegations.

The ALJ held a conference on October 30, 2013, and by letter of the same date confirmed that the parties had agreed that certain facts were undisputed. Those facts were slightly modified June 25, 2014 based upon a letter the ALJ received from Trowbridge.¹⁹

In her letter, the ALJ stated that the only timely allegations raised in the charge against CSEA were that it failed to respond to Trowbridge's requests made in his May 23 and June 10, 2013 letters.²⁰ Trowbridge was given an opportunity to submit an offer of proof if he believed that the charge raised any other timely allegations under the Act. He filed such an offer sworn to November 19, 2013. CSEA and the Village filed responses.

By letter dated December 18, 2013, the ALJ confirmed her prior ruling regarding

¹⁷ Offer of Proof, Ex B.

¹⁸ CSEA's Verified Answer, "First Defense" (averred that the "improper practice charge must be dismissed as untimely and beyond the applicable statute of limitations"), and "Second Defense" through "Fifth Defense" (separately and collectively addressed issues of whether Trowbridge was an employee and member of the CSEA unit).

¹⁹ The ALJ noted that she mistakenly referred to a May 27, 2013 letter from Trowbridge to CSEA when in fact the correct date for such letter was May 23, 2013.

²⁰ Trowbridge's charge was filed June 18, 2013, within four months of both requests.

the limits of the charge and gave CSEA and the Village an opportunity to file motions to dismiss the charge (by January 30, 2014) and Trowbridge an opportunity to respond to any such motion (by March 3, 2014).

Trowbridge, in a letter dated February 10, 2014, alleged that the ALJ who conferred the matter could not also decide the ultimate question raised by the charges.²¹ The Director, by letter dated February 27, 2014, responded that “[t]he bifurcated procedure to which you refer in your letter was ended for those cases processed in the Brooklyn office [as this one was] as of late 2012. It has more presently ended as the cases processed out of our Albany and Buffalo offices as well.”²²

Subsequently, CSEA filed a motion to dismiss the charge, alleging among other things, that the charge was untimely and, in any event, Trowbridge lacked standing. By letter dated June 23, 2014, the ALJ advised Trowbridge that she had not received a response from him to CSEA's motion, extended his time to respond to that motion and stated that if he did not file a response by a date certain, she would rely upon the arguments he made in his offer of proof. Trowbridge never responded to CSEA's motion to dismiss.

DISCUSSION

The crux of the exceptions filed by Trowbridge challenge the propriety of a single ALJ both conferencing and making the ultimate decision on a matter rather than the

²¹ Letter of Trowbridge to Director, February 10, 2014.

²² Exceptions, Ex 2, Letter of Director to Trowbridge, February 27, 2014. The procedure referred to was never a part of the formal rules and operating procedures of the Board. It was a practice that was discontinued months prior to the processing of the instant charge.

substance of the ALJ's decision. We find that there has never been a statutory or regulatory mandate that the Board assign two administrative law judges to a single matter, or that the Board is precluded from assigning a single administrative judge to conference *and* ultimately preside over a charge before rendering a final determination.²³ Trowbridge recites no rule or law to the contrary because there is no such rule or law; he only recites the response to an online FAQ provided for informational purposes only. The Rules only require (now and as of the time Trowbridge filed his charge and amended charge) that "[p]rior to the scheduled date of any hearing, the designated administrative law judge shall hold a conference with the parties to the proceeding."²⁴

As the Director made clear in his correspondence dated February 27, 2014, the FAQs, as they appeared on the website, simply had not been edited to conform to existing practice which had eliminated the "second ALJ" as part of the processing of a charge. Indeed, using a single ALJ for conferencing and adjudicating a matter was the Board's practice at that time and was the practice as far back as 2012. As the FAQs and the Rules appeared together on the same website (and the Board is vested with sole authority to determine procedures for adjudicating matters before it), Trowbridge was on notice. There was nothing arbitrary and capricious in the Board's or the Director's actions nor in any action taken by following this established practice. Nor has Trowbridge identified any prejudice to him arising from the change in practice.

²³ Section 205.5 (1) of the Act vests the Board with sole authority to make rules and set procedures.

²⁴ Rules, § 212.2.

As a result of the conference, the ALJ elucidated the facts and clarified arguments. Trowbridge had an opportunity to present facts relevant to his charge and address the Village and CSEA's arguments. As a result of the conference he did submit an "offer of proof" that clarified the relevant dates and chronology upon which the decision by the ALJ ultimately rested.

Contrary to Trowbridge's expectations, neither the Act nor the Rules mandates an evidentiary hearing.²⁵ The Rules also vest authority with the Director to assign an ALJ or substitute an ALJ:

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. At any time, an administrative law judge may be substituted by the director for the administrative law judge previously assigned.²⁶

Trowbridge's claim that the ALJ had no "jurisdiction" or authority to dismiss the charge on the basis of it being untimely is therefore wholly without merit. He misconstrues Rule § 212.4 (l)²⁷ which governs the situation in which the facts as developed in the course of a hearing form the foundation for a challenge that a charge is untimely where that challenge has not otherwise been pleaded by the parties. The Rule ensures that parties, who must address such a claim, can effectively respond to

²⁵ *State of New York (Manhattan Developmental Center)*, 22 PERB ¶ 3049, 3114, n. 5 (1989).

²⁶ Rules, § 212.4 (a).

²⁷ Rules, § 212.4 (l) provides: "A motion may be made to dismiss an improper practice charge, or the administrative law judge may dismiss a charge, on the ground that the alleged violation occurred more than four months prior to the filing of the charge, but only if the failure of timeliness was first revealed during the hearing. An objection to the timeliness of the charge, if not duly raised, shall be deemed waived."

the challenge.²⁸

In the matter before us, CSEA effectively and clearly pleaded untimeliness as a defense in its answer. Trowbridge was placed on notice that CSEA was raising that defense and the ALJ properly addressed it. Thus, there is no legal foundation to reverse the ALJ's finding based on Trowbridge's exception that "[s]ince there has been no hearing, the timeliness of the charge has not been revealed and, since it has not been raised and revealed at a hearing, it cannot be considered by the ALJ and should be considered waived."²⁹

Were we to go beyond Trowbridge's narrow exceptions, we would be constrained to find that the record does not support the gravamen of Trowbridge's claim – that is to say, that CSEA breached its duty of fair representation.³⁰

To demonstrate a breach of the duty of fair representation, a charging party must prove that an employee organization acted in a manner that was arbitrary, discriminatory or in bad faith.³¹ Under the Act, an employee organization is afforded a broad range of reasonable discretion in determining which grievances to pursue and to what level of the negotiated grievance procedure.³² A mere disagreement with the

²⁸ See *City Sch Dist of City of New Rochelle*, 34 PERB ¶ 3028 (2001).

²⁹ Exceptions, contained in letter dated November 26, 2014.

³⁰ We do not need to address the issue of whether the matter was timely filed or whether Trowbridge had standing to file the instant matter.

³¹ *Nassau Community Coll Fed of Teachers, L 3150 (Staskowski)*, 42 PERB ¶ 3007 (2009).

³² See *Rochester Teachers Assn (False)*, 45 PERB ¶ 3033 (2012); *District Council 37 (Blowe and Watson)*, 42 PERB ¶ 3008 (2009); *Rochester Teachers Assn (Danna)*, 41 PERB ¶ 3003 (2008). See also *Symanski v East Ramapo Cent Sch Dist*, 117 AD2d 18, 19 PERB ¶ 7516 (2d Dept 1986).

contract interpretation or tactics of an employee organization is insufficient to demonstrate a breach of the duty of fair representation.³³ We will not substitute our judgment concerning the merits of a grievance for an employee organization's reasonable interpretation of its negotiated agreement with the employer.³⁴ Finally, an employee organization is not obligated to pursue a claim it believes, in good faith, to lack merit.³⁵

On a motion to dismiss, an ALJ must "assume the truth of all of charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts."³⁶ We must give all reasonable inferences to the content of the pleadings and offer of proof and determine if such facts as may be derived from that exercise demonstrate the existence of a cognizable claim.³⁷

Even if the record before the ALJ established that Trowbridge's claims were timely and that CSEA owed him a duty of fair representation, the record, including Trowbridge's comprehensive offer of proof, is void of any facts or evidence that CSEA breached such duty.

In determining whether a breach has been established, we are constrained in our

³³ *Amalgamated Transit Union, L1056 (Lefevre)*, 43 PERB ¶ 3027 (2010); *TWU (Brockington)*, 37 PERB ¶ 3002 (2004).

³⁴ *UFT (Morrell)*, 44 PERB ¶ 3030 (2011).

³⁵ *Law Enforcement Officers Union Council 82, AFSCME, AFL-CIO (Gardner)*, 31 PERB ¶ 3076 (1998).

³⁶ See *Rochester Teachers Assn (False)*, 45 PERB ¶ 3033, 3078 (2012); *County of Livingston*, 43 PERB ¶ 3018 (2010); *Bd of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶ 3010 (2010); *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶ 3020 (2009).

³⁷ *County of Rockland (CSEA)*, 45 PERB ¶ 3028, 3065 (2012).

analysis by the fact that the courts have:

rejected the standard that “irresponsible or grossly negligent” conduct may form the basis for a union’s breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.³⁸

In this matter, it is indisputable that CSEA first learned of Trowbridge’s concern in his May 23, 2013 letter. Before that time, Trowbridge had not asked CSEA to represent him in any manner or even sought its assistance.

By letter to Trowbridge dated September 12, 2013, CSEA's attorney proffered the reason for its actions:

You were not considered an employee by the Village, CSEA, or yourself for that matter, during the time period you provided services to the Village as a contract stenographer. Neither did you tender or seek to tender dues to CSEA, nor did you sign a dues authorization card or seek membership in CSEA. Moreover, by the time your letters were received by Mr. LaMorte, any action by CSEA on your behalf, had you been a member, would have been untimely. In addition, the determination by the DOL that you are entitled to unemployment insurance benefits does not mean you are considered an employee for all purposes. That determination is limited in scope to your entitlement, if any, to unemployment insurance benefits.

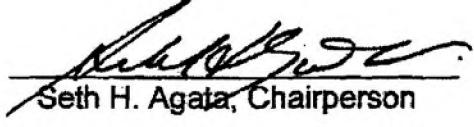
³⁸ *Id.*, at 3033-3034 (quoting *UFT (Monroe)*, 47 PERB ¶ 3031, 3095 (2014), *confd sub nom. Munroe v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (editing marks omitted)); *Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, 3026 (2014); see *Civ Serv Empl Assn, L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD 2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).

There is simply no evidence and no facts to indicate that this reasoned response, whether ultimately correct on the merits or not, was a pretext for more invidious reasons. Even if CSEA erred on Trowbridge's employment status, there is no proof whatsoever that CSEA was acting arbitrarily, in bad faith or discriminatorily.

Based upon the foregoing, we dismiss the charge in its entirety.

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

DATED: November 10, 2015
Albany, New York


Seth H. Agata, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

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

In the Matter of

RANDOLPH JONES,

Charging Party,

- and -

**CASE NOS. U-32847
U-33264**

**LOCAL 158, INTERNATIONAL UNION OF
OPERATING ENGINEERS,**

Respondent,

-and-

**ONONDAGA COUNTY RESOURCE
RECOVERY AGENCY,**

Employer.

RANDOPH JONES, pro se

FREDERICK K. REICH, ESQ., for Respondent

WILLIAM J. BULSIEWICZ, ESQ., for Employer

BOARD DECISION AND ORDER

These cases come to us on exceptions to a decision of an Administrative Law Judge (ALJ) dismissing the improper practice charges, as amended, filed by Randolph Jones alleging violations of §§ 209-a.2 (a), (b) and (c) of the Public Employees' Fair Employment Act (Act).¹ Jones' charges were predicated on his claims that his union, Local 156, International Union of Operating Engineers (Union), had breached its duty of fair representation by (1) failing to pursue a grievance in May 2013; (2) mishandling another grievance filed in June 2013 and then declining to pursue that grievance to arbitration; and (3) failing to pursue a grievance dated July 12, 2013 to the subsequent steps in the parties' grievance procedure.

For the reasons stated herein, we affirm the determination of the ALJ.

¹ 48 PERB ¶ 4517 (2015).

EXCEPTIONS

Jones excepts to the ALJ's decision on several grounds. First, he contends that the ALJ erred in that "she did not set forth any affirmative defense for the Respondent or the Employer, for which she could base her decision on."² Second, Jones claims that the ALJ wrongly stated that the Union was waiting for a federal judge to rule on a matter involving a side letter between the parties. Jones's third exception asserts that the ALJ erred in allowing the Union to submit a "Memorandum" instead of a brief, as required pursuant to Rule 212 of our Rules of Procedure (Rules). In his fourth and sixth exceptions, Jones claims that the ALJ incorrectly quoted Article 22b of the parties' collective bargaining agreement in place from 2011 through 2014 (Agreement), and failed to base her decision on the binding language of the Agreement. In his fifth, eighth, and ninth exceptions, Jones contends that the ALJ erred by treating a side letter as part of the Agreement, by basing her decision on the side letter, and by not addressing "the issue of the Side Letter, which the Respondent and the Employer say was part of the [Agreement] as page 54."³ Finally, Jones claims, the ALJ erred in not addressing the anti-discrimination provision of the Agreement.

As relief, Jones asks the Board to reverse the ALJ's decision, award him make whole relief, and order the Union and the Onondaga County Resource Recovery Association (OCRRA) to "refrain from stating that the side letter is part of the Agreement," and to "take down the side letter which is posted in the workplace."⁴

FACTS

The facts are fully stated in the opinion of the ALJ, and are only set forth here to the extent necessary to resolve the exceptions. Jones, who is employed by OCRRA in

² Exceptions at 1.

³ *Id.*, at 2.

⁴ Brief in Support of Exceptions at 16.

the title Motorized Equipment Operator (MEO) III and a member of the bargaining unit represented by the Union, alleges that the Union failed to pursue several grievances he had filed. These grievances alleged that OCRRA had violated the relevant provisions of the Agreement pursuant to which unit members would be selected to temporarily act as plant operators, another title within the bargaining unit represented by the Union.

Section 20.2 of Article 20 of the Agreement governs the filling of "Temporary Job Openings," that is, "jobs that periodically develop or vacancies that periodically develop because of sickness, vacation or leave of absences."⁵ Whenever such temporary vacancies occur:

OCRA may fill these positions by assignment, or reassignment and such assignments or reassessments shall be made on the basis of seniority and qualification. The temporary assignment will be offered, in descending order of seniority, to qualified employees at the worksite where the temporary vacancy exists. If the offer of the temporary assignment is not accepted by any qualified employee, OCRA will assign the least senior qualified employee at the worksite to fill the temporary vacancy or opening.⁶

Any employee "assigned to a temporary job opening or filling a vacancy in a higher qualification, shall be paid the wage rate established for that job," but, if assigned to a job for a lower classification will be paid "his/her on wage rate" or that of the job, "whichever is higher."⁷

In September 2012, the Union entered into a "Side Letter Agreement" which described itself as "a side letter to the 2011/2014 Agreement between OCRA and [the Union]," (Side Letter) which "details an agreement regarding the implementation of the training program, page 54, signed by [representatives of the parties] April 12, 2012."⁸

⁵ ALJ Ex 1B, DD; Agreement § 20.2 (A).

⁶ *Id.*, § 20.2 (B).

⁷ *Id.*, § 20.2 (C).

⁸ Charging Party's Ex 2.

This program involves the review of operating manuals as well as mentored and on-the-job (OJT) training, which can occur while temporarily assigned to a higher level position such as plant operator.

In particular, the side letter addresses the order of training:

Seniority will play the main role—*BUT NOT ALWAYS*. Availability of equipment, work demands, skill of person involved, absenteeism, OT [overtime] costs, etc., will also be decision criteria. The Union . . . shall be made aware[.] Management will first consider those SENIOR with sufficient knowledge to be entitled or asked to move into a higher slot when needed and they should be trained first. This is an irrefutable management decision. When management decides not to use the senior man they shall disclose the reason to the employee and steward at interest. As we will have much training to perform, the positions and/or equipment will first be decided on Management requirements for maximum flexibility.⁹

Jones' charges involve similar grievances alleging that OCRRRA's appointment of another employee, Ron Boardway, rather than Jones, as temporary plant operator violated Articles 20 and 28 of the Agreement. In his first charge, Jones claims that Local 158 either refused to file Jones's grievances or refused to proceed with his grievances beyond step three of the procedure. The ALJ found, and Jones has not excepted to such finding, that his testimony did not provide any factual basis for his claim that Local 158 breached its duty of fair representation other than the fact that Local 158 did not file or proceed on the grievances. The ALJ found that "Jones did testify that Local 158 officers and employees consistently told him that, based on the September 28, 2012 side letter, the grievances were without merit."¹⁰

Jones' second charge concerns Local 158's failure to process a December 28, 2014 grievance, purportedly on the ground that it was waiting for a decision in Jones'

⁹ *Id.*, at (B) (capitalization and emphasis in original).

¹⁰ 48 PERB ¶ 4517, at 4568.

discrimination suit against the County; statements made by Local 158 officers or employees refusing to investigate, file, or process discrimination grievances against the County; and Local 158's refusal to put its position in writing to Jones.

The ALJ, consolidating these cases, dismissed the charges, on the ground that Jones had failed to prove his claims that the Union breached the duty of fair representation.¹¹

DISCUSSION

As a threshold matter, Jones does not except to the partial dismissal of his claims on the basis that some of the acts and omissions alleged fell outside of the applicable limitations period. Accordingly, any such claims are not before us.¹²

We can dispose of Jones' procedural exceptions expeditiously. Jones' exception number 3, complaining that the ALJ allowed the Union to file a "Memorandum" instead of a "brief" in violation of § 212 of our Rules, is based on an understandable misapprehension on the part of a *pro se* litigant. The terms "memorandum of law" and "brief" are used interchangeably in practice before PERB, and, indeed, before the trial level courts.¹³ In sum, even without addressing the ALJ's discretion to control the proceedings before her, no violation of Rule 212 has been alleged, and no error has

¹¹ *Id.*

¹² *City of Lockport*, 47 PERB ¶ 3030, 3093, at n. 8 (2014), quoting *Village of Endicott*, 47 PERB ¶ 3017, at 3052, at n. 5 (2014) (citing § 213.2 (b) (4) PERB Rules of Procedure); *City of Schenectady*, 46 PERB ¶ 3025, at 3056, at n. 8 (2013), confirmed *sub nom Matter of City of Schenectady v NYS Pub Empl Relations Bd*, 47 PERB ¶ 7004 (Sup Ct Albany Co 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).

¹³ See, for example, *City of Albany*, 7 PERB ¶ 3078, 3133 (1974) ("the parties were requested to mail memoranda of law to us by December 6, 1974. Local 2841's brief was received on December 9, 1974 and the City's brief was received the following day."); see also *Beardsley v Ferris*, 40 Misc.3d 1236(A), 2013 N.Y. Slip Op. 51445(U) (Sup Ct Oswego Co Sept 3, 2013); *Tripp & Co., Inc. v Bank of NY*, 28 Misc.3d 1211(A), 2010 N.Y. Slip Op. 51274(U) (Sup Ct NY Co July 14, 2010) ("a statement of the relevant law and arguments belongs in a brief (*i.e.*, a memorandum of law)").

been established.

Likewise, Exceptions 1, 2 and 4 lack merit. The ALJ did not base her decision on any affirmative defense raised by the Union or OCRRA, or on any delay in action caused by waiting for the issuance of a federal court decision, or indeed any impact of such decision, but on Jones's failure to prove the elements of his charge, as to which he had the burden of proof. Moreover, Jones's reliance on the presumption of the truth afforded a charging party's allegations before a hearing does not avail here. As the Board has consistently held, and we again affirm, "[t]hat presumption of truth does not apply at a hearing, at which, 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."¹⁴

As we recently pointed out, the courts have:

reject[ed] the standard . . . that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.¹⁵

Here, the crux of the claimed breach of the duty of fair representation is that the Union declined to advance Jones's various grievances on the basis that the grievances

¹⁴ *UFT (Cruz)*, 48 PERB ¶ 3004, 3010, *petition denied*, *Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (2015) (internal quotation and editing marks omitted), quoting *UFT (Munroe)*, 47 PERB ¶ 3031, 3095 (2014), *petition denied*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (quoting CSEA (*Bienko*), 47 PERB ¶ 3027, 3082-3083 (2014)); see *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).

¹⁵ *Id.*, quoting *Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, 3026 (2014) (quoting CSEA, *L 1000 v NYS Pub Empl Relations Bd (Diaz)*, 132 AD 2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988)).

lacked merit in view of the terms of the Side Letter. Jones has argued, absent any authority or reasoned grounds, that the Side Letter could not properly be treated as part of the Agreement.¹⁶ Side agreements are routinely used to amend collective bargaining agreements, and a union may limit its representation in accordance with the terms of a side agreement.¹⁷

In *District Council 37 (Farrey)*, the Board rejected a claim that the terms of a side letter, along with the union's failure to present the side letter for ratification, established a breach of the duty of fair representation, as the evidence established that the union was "not improperly motivated" in entering into, and abiding by the agreement.¹⁸ No such showing of improper motivation has been attempted, let alone established, here, and thus Jones has not established any basis for his claim that the Union breached its duty of fair representation by entering into the Side Letter.¹⁹

Nor has Jones demonstrated that the Union's refusals to pursue his grievances on the ground that they were precluded by the Side Letter were arbitrary, discriminatory or founded in bad faith. As we have recently reaffirmed, "[i]t is well-settled that an employee organization is entitled to a wide range of reasonable discretion in the

¹⁶ We note, however, that contrary to Jones' exceptions numbers 8 and 9, the actual terms of the Side Letter do not purport to constitute page 54 of the Agreement; rather the Side Letter states that it "details an agreement regarding the implementation of the training program, page 54." That is, the Side Letter refers to a separate document, agreed upon between the parties, which it implements by supplementing the Agreement. To the extent these exceptions are predicated on the misreading of the Side Letter, they are dismissed.

¹⁷ *District Council 37 (Farrey)*, 41 PERB ¶ 3027, at 3120 (dismissing claimed breach of the duty of fair representation based on side letter in which union agreed to not raise claims under the Fair Labor Standards Act against employer); *NYC Transit Auth v NYS Pub Empl Relations Bd*, 232 AD2d 492, 29 PERB ¶ 7018 (2d Dept 1996) (side letter was effective for the duration of collective bargaining agreement to which it corresponded).

¹⁸ *Id.*

¹⁹ *Id.*; see also *UFT (Cruz)*, 48 PERB ¶ 3004, at 3010.

processing of grievances under the Act.”²⁰ In particular, “an employee’s mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation.”²¹ Here, Jones does not even argue that the Union’s conclusion was an erroneous application of the Side Letter, he merely argues that the Side Letter could not be treated as part of the Agreement, a claim for which he adduces no basis. Indeed, even if Jones’s legal argument were correct, he “would have at most asserted ‘an honest mistake resulting from misunderstanding,’ insufficient to constitute a breach of the duty of fair representation.”²²

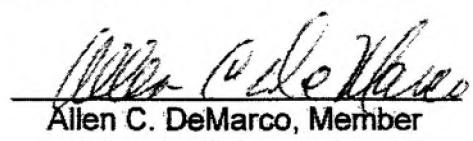
Based upon the foregoing, we deny Jones’ charge and affirm the decision of the ALJ.²³

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

DATED: November 10, 2015
Albany, New York



Seth H. Agata, Chairperson



Allen C. DeMarco, Member

²⁰ *UFT (Gibson)*, 48 PERB ¶ 3015 (2015) (quoting CSEA (*Munroe*), 47 PERB ¶ 3031, at 3095, citing *Amalg Transit Union, Local 1056 (Lefevre)*, 43 PERB ¶ 3027, 3104 (2010).

²¹ *Id.*, citing *TWU, L 100 (Brockington)*, 37 PERB ¶ 3002, 3006 (2004) (quotation marks omitted); *Civ Serv Empl Assn (Smulyan)*, 45 PERB ¶ 3008, 3017 (2012).

²² *UFT (Barnes)*, 48 PERB ¶ 3017 (2015), quoting CSEA (*Munroe*), 47 PERB ¶ 3031, at 3096 (quoting *Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008 at 3026; citing CSEA (*Kandel*), 13 PERB ¶ 3049 (1980)).

²³ Member Robert S. Hite took no part in the deliberations or disposition of this matter.

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

In the Matter of

ERIC SCOTT NEITHARDT,

Charging Party,

CASE NO. U-32919

- and -

ELWOOD TEACHERS' ALLIANCE,

Respondent.

STEWART LEE KARLIN, P.C., for Charging Party

BOARD DECISION AND ORDER

This matter comes to us on exceptions filed by Eric Scott Neithardt to a decision of an Administrative Law Judge (ALJ) finding that the Elwood Teachers' Alliance (ETA) did not violate §§ 209-a.2 (a) and (c) of the Public Employees' Fair Employment Act (Act) by agreeing to certain terms of employment for social workers, including Neithardt, employed by the Elwood Union Free School District (District).¹

EXCEPTIONS

Neithardt excepts to the ALJ's decision on the grounds that the ALJ had erred by finding that: (1) Neithardt had not alleged that the ETA was improperly motivated; and (2) the ETA did not breach its duty of fair representation noting, in particular, that an amendment to the collective bargaining in question was not voted on by the members of the ETA in violation of that organization's by-laws, that the ETA improperly waived the

¹ 47 PERB ¶ 4601 (2014).

rights of unit members to file a contract grievance, file charges with the Board or otherwise commence litigation over matters in question, and the agreement reached by the ETA with the District did not address Neithardt's concerns and was reached to punish Neithardt for engaging in protected activity.

FACTS

On August 7, 2013, Neithardt filed an amended improper practice charge alleging that the ETA violated §§ 209-a.2(a) and (c) of the Act by agreeing to terms of employment for social workers with respect to summer work that differed from the terms governing other members of the ETA.² Specifically, he alleged that the ETA breached its duty of fair representation by entering into two agreements with the District, one dated June 7, 2005, and the other dated June 18, 2013.³ He takes issue with the agreed-upon June and summer work requirements for social workers and their rate of pay, as well as the June 18, 2013 agreement's bar against ETA members grieving the terms of that agreement in any forum.⁴

The ETA denied violating the Act and asserted several affirmative defenses, including untimeliness.⁵ The ALJ held a hearing on July 9, 2014, at which time Neithardt and the ETA were represented, following which the parties filed post-hearing briefs.

² Neithardt withdrew his initial charge which included claims against the District (ALJ Ex 1). At issue is his amended complaint. ALJ Ex 2.

³ ALJ Ex 4.

⁴ ALJ Ex 2.

⁵ The ALJ, while noting that Neithardt became aware of perceived disparities in terms of employment as early as 2007 and voiced his concerns many times thereafter, found that the ETA president's ongoing efforts to seek revisions of the 2005 agreement served to toll the limitations period, since Neithardt reasonably could have expected that the agreement would be amended in response to his demands.

The ETA moved to dismiss the charges on the basis that Neithardt failed to state a *prima facie* case. The ALJ ultimately granted the ETA's motion after the submission of evidence and post-hearing briefs. In her decision, the ALJ addressed the merits of the charge, making findings of fact and concluding that no violation had been established. The facts are fully set forth in the ALJ's decision, and are repeated here only as necessary to address the exceptions before us.

Neithardt was the only witness to testify in support of his charge. He was one of four social workers and a member of the bargaining unit represented by the ETA along with other District employees (including guidance counsellors and psychologists).⁶ He testified that social workers were required to work until June 30 of each school year, as opposed to other unit members who were required to work only until the last day of classes, which occurred before June 30. Social workers, however, receive no additional pay for those extra work days, in contrast to other unit employees who are paid if they work beyond the last day of classes. In addition, the summer per diem rate of pay for social workers in the District is less than that for other bargaining unit members.⁷

Before June 2013, social workers received seven percent of their annual ten-month salary, compared to 1/200th as the per diem rate. The June 2013 agreement changed the rate of pay to 1/260th for social workers.⁸ Neithardt stated that over the course of "several years" before May 2013, he had complained to the ETA president Lorelei

⁶ALJ Ex 4, at Ex A (by consent agreement dated June 7, 2005, social workers affiliated with the ETA rather than another unit).

⁷ *Id.*

⁸ ALJ Ex 3, at Ex A.

Stephens about this alleged disparity, but the ETA did nothing.⁹ Also, in both spring of 2012 and of 2013, the District superintendent had requested that social workers reduce the number of days they worked in the summer due to budgetary concerns, stating that if the June 2005 agreement, which referenced social workers working 20 days during the summer, was to be strictly adhered to, it could lead to one person being excessed and a position eliminated. Neithardt took issue with the District's action and advocated with the District to notify social workers of how many days they had to work if the number was to be less than 20, so they could plan their time off in advance.¹⁰ Additionally, in June 2013, Neithardt learned that he and another social worker were the only two of the four social workers at the school who were required to work through June 30th.¹¹

On cross-examination, Neithardt testified that in 2007 he first began to express his concerns about the disparity in summer pay and work to June 30. That was a year or two after he became a unit member.¹² He also affirmed that he was paid the same as all other social workers, none of whom were paid 1/200th, as were other unit employees.¹³

Stephens testified that the 2005 agreement was the result of her efforts to have social workers included in the bargaining unit so they would get better benefits. She

⁹ Tr, at pp. 15-17, 57 (Neithardt testified he knew of the arrangement whereby social workers worked until June 30th as far back as 2007).

¹⁰ Tr, at p. 18.

¹¹ Tr, at pp. 37-38. The undisputed record shows that one of the social workers was on maternity leave and the other had only been hired recently and was unaware that she would be required to work past the last day of classes.

¹² Tr, at p. 57.

¹³ Tr, at p. 58.

also stated that no part of the agreement was intended to disadvantage any or all of the social workers. When Neithardt and another social worker came to her with concerns about the disparity between social workers and other unit members, she said she reminded them of the circumstances and terms of the June 2005 agreement, but agreed that since there was a disparity she would take the matter to the superintendent. She said she also felt that the social workers should have advance notice of the summer days they were expected to work.¹⁴ She not only met with the superintendent five or six times, but also with other administrators, such as the assistant superintendent for business, to try to resolve the issues. The number of people she met with, in fact, was the reason for her delay in getting back to Neithardt.¹⁵ Stephens testified said that she felt those meetings were her responsibility as unit president.¹⁶

On May 7, 2013, Neithardt and another social worker (who was not called as a witness) met with Stephens and collectively voiced their concerns. Stephens told them she would look into the matters on their behalf and on behalf of the other ETA members.¹⁷ On May 28, 2013, he sent Stephens a letter repeating his concerns and alleging that not all social workers in the unit were being treated similarly.¹⁸

Neithardt testified that he was told by another social worker, Joanne Sapp (who did not testify at the hearing), that Stephens was upset about his e-mail and felt he was going to "ruin it for all the social workers." Sapp allegedly advised him to "back off" for a

¹⁴ Tr, at p. 77.

¹⁵ Tr, at pp. 77-84, 96.

¹⁶ Tr, at pp. 85-88.

¹⁷ Tr, at p. 17.

¹⁸ Charging Party's Ex 3.

while since Stephens was very upset.¹⁹ Stephens testified that she felt that Neithardt "didn't understand what she was trying to do." She did not recall saying that Neithardt's conduct was going to "ruin it for all social workers."²⁰

Stephens sent Neithardt an e-mail that addressed a number of his perceptions, including the fact that social workers are 10-month employees rather than 11-month employees as are others in the unit. Stephens also wrote:

The tone of your correspondence, quite frankly, was rude and disrespectful. I represent every member and must prioritize my time.... Since our meeting, I have met with NYSUT [and four other individuals] regarding your concerns and demands.... You obviously have no concept of all that I do. I have spent the last twelve years as president of the Elwood Teachers Alliance and twenty-one years prior to that as a member of the Executive Board in many capacities. I have worked tirelessly for the rights of our members. I am responsible for social workers being able to join the ETA and enjoy all of its benefits.... The social worker agreement will be addressed, I assure you.²¹

Stephens subsequently had several meetings with the District's superintendent.²²

On June 3, 2013, Stephens met with all four social workers. At that meeting Stephens reportedly said that because Neithardt put his concerns in writing, she had to share them with the superintendent. She also reported that the superintendent said that if the employees wanted everything to be "fair," then all would have to work without compensation to June 30. One social worker reportedly said that she was not even

¹⁹ Tr, at p. 35.

²⁰ Tr, at p. 97; Stephen also testified that her concern was that bringing up the matter with the District, those two social workers who had not worked through the end of June would have to give back hours.

²¹ Charging Party's Ex 9.

²² Tr, at pp. 77-84, 96.

aware she was expected to work until June 30, and Stephens allegedly stated that it was also her duty to protect the two who had been working according to different terms. Stephens again said she would speak with the superintendent.²³

In an e-mail dated June 11, 2013, to all social workers, Stephens summarized an agreement she reached with the District on behalf of the ETA and with the express approval of the ETA's executive board pursuant to which: consistent with the existing agreement, all social workers were still required to work until June 30 of each school year with no additional compensation; the per diem summer rate for social workers would be set at 1/260th; summer days of work for social workers were to be posted by June 1 of each year; social workers could not grieve any action related to the agreement or bring a PERB charge relating thereto; and one social worker would be allowed to work five days during the summer of 2013 to make up for the expected days up to June 30, since she had other plans and no prior notice of the work requirement.²⁴

With respect to Neithardt's claim that two social workers (Sapp and Mitchell) were not required to work up to June 30 in 2013, Stephens said that they did not work beyond the last day of school that year because Sapp was on maternity leave and Mitchell was unaware of the requirement because she was a new employee and had not been advised of it when she was hired. Mitchell, however, did work five days during the summer to make up the days she did not work in June. Stephens testified that she made it clear that the two that did not work until June 30 would have to give back hours

²³ Tr, at p. 98.

²⁴ Charging Party's Ex 4.

to the District.²⁵

Stephens said that every year she tried to get the social workers paid at the 1/200th rate applicable to others in the unit, but was told by the superintendent that they had an agreement and he would not change it.²⁶ When she met with the superintendent in June 2013, she was focused on preserving jobs while achieving the best terms she could for unit members. While the rate of compensation did change, it was not to the level Neithardt wanted though Stephens said she raised the issue and pushed for parity among all unit members. She affirmed that she conveyed all of Neithardt's concerns, as well as those of other social workers in the unit, and the June 2013 agreement was the result of those discussions. Stephens testified that she believed the 2013 agreement was in the best interests of the unit overall and affirmed that her duty must be to the unit as a whole.²⁷

Neithardt testified that all social workers have been and continue to be paid at the same rate; his salary was not singled out for reduction.²⁸

DISCUSSION

Before us are exceptions to an ALJ's determination dismissing Neithardt's claim that the ETA breached its duty of fair presentation for failure to state a *prima facie* case. In considering the ETA's motion to dismiss, the ALJ correctly assumed the truth of the evidence before her and gave every favorable inference to that proof.²⁹ Moreover, the

²⁵Tr, at pp. 84-90, 98.

²⁶Tr, at p. 90.

²⁷Tr, at pp. 94-96, 107-109.

²⁸ Tr, at p. 58.

²⁹ *County of Nassau*, 17 PERB ¶ 3013 (1984).

ALJ also considered the complete record as developed in a full evidentiary hearing and also made findings based on the record as if she did not grant the motion to dismiss.

Before examining Neithardt's overarching exception to the ALJ's determination, we can briefly address two distinct matters he has raised. First, citing the ETA's constitution and by-laws, Neithardt alleges that the failure of the ETA to have a formal membership vote on the agreement reached by Stephens constitutes a breach of its duty of fair representation. However, the Board has long held that actions by a union relating to its internal affairs and management are beyond our jurisdiction. Thus, even if such concerns were valid and supported by evidence, which they are not, we will not address them in this context.³⁰

Second, Neithardt alleges that the ETA, in "bad faith and direct retaliation" for his letter of May 28, 2013, agreed with the District that any dispute arising out of the agreement reached in June, 2013 would "be finally determined by the Superintendent,

³⁰ *UFT (Leon)*, 48 PERB ¶ 3016 (2015) (citing *TWU, L 100 (Asamoah)*, 47 PERB ¶ 3033, 3101-3102 (2014)); see generally *CSEA (Bogack)*, 9 PERB ¶ 3064 (1976); *Cove Neck Police Benevolent Assn (Belardo)*, 24 PERB ¶ 3028 (1991); *Westchester County Dept of Correction Superior Officers' Ass'n, Inc. (Cummaro, et al.)*, 26 PERB ¶ 3077 (1993); as well as *Board of Educ of the City Sch Dist of the City of Syracuse and Syracuse Teachers Assn, Inc. (Willey)*, 7 PERB ¶ 4539 (1974) where the hearing officer analyzed the Act and its legislative history and concluded:

Viewed against this background, the Taylor Law was clearly designed by the Governor's Committee and the Legislature to protect only employee rights---to organize and to be represented in the determination of their employment conditions---and was not meant to control or regulate the internal relationship between organizations and their members. (footnote omitted).

See Tr. at pp. 92-93 wherein Stephens testified that she was unanimously authorized by the ETA's executive board to enter into the agreement. Whether this was all that is needed under the terms of the ETA's by-laws to effectuate such change in mid-term in a collective bargaining agreement is not for us to determine.

whose determination shall not be reviewable in any forum, including but not limited to the filing of a grievance, in arbitration, PERB proceeding, or litigation in any judicial or quasi-judicial tribunal.” There is not a scintilla of evidence or proffer of fact of any connection between this portion of the agreement and Neithardt’s actions, only conclusory language that this part of the agreement, which was reached mid-term of an existing collective bargaining addressing a discrete concern of four members of the bargaining unit, “must” have been agreed to in retaliation for his advocacy efforts. Such conclusory allegations are insufficient to plead, let alone prove, a violation of the duty of fair representation.³¹ Without addressing whether such an agreement is proper, as in the course of collective negotiations the parties may agree to waive a number of items, we note that contrary to Neithardt’s exceptions, this clause did not take “away . . . even the right to file this PERB proceeding.” He is not harmed by this particular clause. He has brought a claim and it has not been challenged under that portion of that agreement. As noted below, there is a complete absence of facts supporting his claim of a violation of the duty of fair representation. In such a context, the ALJ properly did not grant relief based on this claim.

Returning to the crux of his exceptions, the Board has long held that to establish a breach of the duty of fair representation under the Act, a charging party “has the burden of proof to demonstrate that an employee organization’s conduct or actions are

³¹ *UFT (Leon)*, 48 PERB ¶ 3018, at n. 19 (quoting *UFT (Munroe)*, 47 PERB ¶ 3031, 3095 (2014)); *confd sub nom Munroe v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (citing *PEF (Goonewardena)*, 27 PERB ¶ 3006 (1994)); see also *UFT (Arredondo)*, 48 PERB ¶ 3010, 3034 (2015) (same).

arbitrary, discriminatory or founded in bad faith.”³² As we recently noted, the courts have:

reject[ed] the standard . . . that “irresponsible or grossly negligent” conduct may form the basis for a union’s breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.³³

Mere disagreement with a union’s tactics or dissatisfaction with the quality or extent of representation does not violate the Act nor will negligence alone establish a breach of a union’s statutory duty.³⁴ In the record before the ALJ which is now before the Board, there is simply no evidence of bias, bad faith or discrimination.

Neithardt takes exception to the ALJ’s finding that “no allegation is made by Neithardt that the ETA was improperly motivated.”³⁵ He recites Ms. Stephens’ professed anger at his stating concerns over working conditions for social workers and

³² CSEA (*Munroe*), 47 PERB ¶ 3031, at 3095; CSEA (*Bienko*), 47 PERB ¶ 3027, 3082-3083 (2014), (quoting *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008)).

³³ CSEA (*Munroe*), 47 PERB ¶ 3031 at 3095; *Cairo-Durham Teachers Assn*, 47 PERB ¶ 3008, 3026 (2014) (quoting CSEA, *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)). We do not find Neithardt’s citations to cases decided under the National Labor Relations Act to be persuasive. We note that, under § 209-a.6 of the Act, “fundamental distinctions between private and public employment shall be recognized, and no body of federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.” Here, the issues raised by Neithardt’s exceptions are governed under our own well-settled precedent, and recourse to outside cases is unilluminating and unavailing.

³⁴ TWU, Local 100 (*Brockington*), 37 PERB ¶ 3002, 3006 (2004) (quotation marks omitted); CSEA (*Smulyan*), 45 PERB ¶ 3008, 3017 (2012).

³⁵ Exceptions, at p. 10.

draws a conclusion that what was negotiated and agreed to by the ETA and the District was improperly motivated.

However, the ALJ did consider these allegations, and expressly found that “[e]ven taking as true Neithardt’s claim that it was reported to him that Stephens was upset about his letter to her, that alone does not establish improper practice or bad faith.”³⁶ The ALJ found that a union leader’s possible anger with Neithardt’s behavior, in the context of no evidence of any arbitrary action, that is to say an action so far outside a wide range of reasonableness that it is wholly irrational, does not establish a *prima facie* case of a breach of the duty of fair representation. Indeed, this is the only fact proffered by Neithardt to establish animus.

The agreement reached by the ETA with the District, although not satisfactory to Neithardt, addressed the perceived unfairness to two social workers who would otherwise have been impacted by continuing the school year through June 30. The accommodation seems reasonable, not arbitrary, and the record is void of any malice towards Neithardt.

The ALJ also found that, even if Stephens were mistaken in her judgment, such action falls short of the conduct necessary to establish a claim against the ETA. Indeed, the ETA treated other similarly situated unit members the same and improved their terms of employment. Neithardt may have thought that treating social workers differently than other members of the unit was unfair but in the absence of any animus or arbitrariness on the part of the ETA, such results are not actionable.

³⁶ 47 PERB ¶ 4601, at 4895, at n. 19.

In essence, Neithardt objects to the District treating social workers differently than other members of the ETA and the ETA's handling of those concerns. It is hornbook law, as we have held in the past, that an employee organization has broad discretion in balancing the interests of all unit employees in formulating negotiating proposals and agreeing to terms and conditions of employment.³⁷ A union's compromise of employees' potential contractual benefits does not violate its duty of fair representation.³⁸ Absent evidence of bad faith or improper motivation, a union's discretion governs.³⁹ In this matter, the facts indicate that the union acted on behalf of its members as evidenced by the uncontested testimony of its president and her history of advocacy on behalf of ETA's members.

We have also long held that "[c]redibility determinations by an ALJ are generally entitled to 'great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.'"⁴⁰ In the instant case, no such objective evidence demonstrating that the ALJ's credibility determinations are manifestly incorrect has been adduced, and we therefore will not reverse them.

Thus, for the reasons stated herein, we affirm the ALJ's determination in full.

³⁷ *Civ Serv Bar Assn, L 237 v City of New York*, 64 NY2d 188, 196-197 (1984).

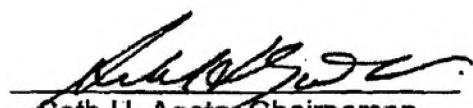
³⁸ *County of Erie and Erie County Sheriff and Teamsters Local 264*, 27 PERB ¶ 3081 (1994).

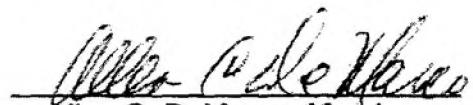
³⁹ *State of New York (Robinson)*, 14 PERB ¶ 3043 (1981); *Plainview-Old Bethpage Cent Sch Dist*, 7 PERB ¶ 3058, 3097 (1974); *ATU, Local 1342 (Lynch)*, 22 PERB ¶ 3058 (1989); *UFT, Local 2 (Kauder)*, 18 PERB ¶ 3048 (1985).

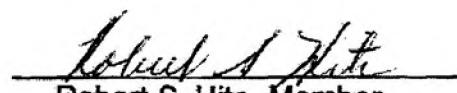
⁴⁰ *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014) (quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019 (2008), citing *County of Tioga*, 44 PERB ¶ 3016, at 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977)).

IT IS, THEREFORE, ORDERED that the ALJ's findings are affirmed and the charge is hereby dismissed.

DATED: November 10, 2015
Albany, New York


Seth H. Agata, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

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

In the Matter of

**COUNTY POLICE ASSOCIATION OF
CORTLAND, INC.,**

Charging Party,

CASE NO. U-33663

- and -

**COUNTY OF CORTLAND and CORTLAND
COUNTY SHERIFF,**

Respondent.

MARILYN D. BERSON, ESQ., for Charging Party

**COUGHLIN & GERHART, LLP (MARY LOUISE CONROW of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the County of Cortland and the Cortland County Sheriff (together, County) and on cross-exceptions filed by the County Police Association of Cortland, Inc. (Association) to a decision of an Administrative Law Judge (ALJ).¹ The ALJ found that the County violated § 209-a (1) (d) of the Public Employees' Fair Employment Act (Act) by unilaterally requiring employees represented by the Association to participate in an audit of the continued eligibility of insured dependents by providing specified documents to the County. Prior to the issuance of the ALJ's decision, Supreme Court, Albany County issued an order temporarily restraining the County from requiring members of the bargaining unit to comply with the

¹ 47 PERB ¶ 4592 (2014).

requirements of the audit.² Subsequently, the parties stipulated that the County would not enforce compliance until the Board issued a decision in this matter.

EXCEPTIONS

The County excepts to the ALJ's decision on five grounds.³ First, the County contends that the ALJ erred in her "implied findings of fact that the County was requiring full-non-redacted documentation."⁴ The County claims that the ALJ erred in finding that the County did not communicate to the affected employees the scope of permissible redaction of the documents, and thus wrongly concluded that significantly more information was being demanded than had been previously provided to the County.

The County asserts as its second exception that the ALJ erroneously concluded that the imposition of a new work rule that requires an employee to participate in the employer's investigation was perforce a mandatory subject of bargaining. Instead, the County argues, the ALJ should have balanced the parties' interests, finding the subject non-mandatory because participating in the audit had only a slight impact on the employees and had a major impact on essential management functions.

In its third exception, the County contends that the ALJ erred by finding participation in the audit to be mandatorily bargainable, even if it constituted a change to terms and conditions of employment, because it did not constitute a substantial change. According to the County, only a substantial change to terms and conditions of employment is mandatorily bargainable, and thus participation in the audit does not suffice to establish a violation of the Act.

² ALJ Ex 5.

³ The sixth exception re-asserts the bases of the preceding five to except to the finding of a violation.

⁴ Exceptions, at pp.1-2.

The County's fourth exception is that the ALJ's "implied refusal to consider the County's Health Insurance Plan document which gave the County the right to request the information as part of the verification process"⁵ constituted reversible error. The County contends that the document provides the County with the authority and the obligation to ensure that only legitimately covered dependents are provided coverage.

As its fifth exception, the County claims that public policy mandates a finding that participation in the audit is not a mandatory subject of negotiation. Citing the "prevalence of fraud throughout the health care industry"⁶ and the "public policy" of cases such as *Riggs v. Palmer* that "no one shall be permitted to profit from his own fraud,"⁷ the County argues that prophylactic measures to prevent such fraud and abuse should preempt negotiations here.

The Association filed cross-exceptions, in which it asserted that the ALJ did not reach its third argument, that the forced disclosure of personal information constituted a sufficient basis for finding a violation of the Act. In the event, the Board determined that the ALJ erred in finding a violation, the Association requests the Board to reach this contention. The Association takes further exception to the ALJ's remedial order to the extent that it did not order documents submitted by unit employees destroyed pursuant to the audit whether they are in the possession of the County or of its agent, BMI Audit Services, LLC, as well as any documents developed from such submitted documents.

FACTS

The Association represents a unit of approximately 31 employees of the County and the Sheriff in the titles of County Police Officer (Deputy Sheriff), County Police

⁵ Exceptions, at p. 6.

⁶ Exceptions, at p. 9.

⁷ 115 NY 506, 511-512 (1889).

Sergeant (Deputy Sheriff), County Police Lieutenant (Deputy Sheriff) and County Police Captain (Deputy Sheriff).⁸ Members of the bargaining unit and their eligible dependents receive health insurance coverage through and under the terms of the County Health Plan. The County, self-insured since 2004, uses a third party administrator, EBS-RMSCO, to administer its health plan.

The County has unilaterally promulgated a booklet, entitled the Cortland County Health Plan (Plan), which "is the Plan Document for the Cortland County Health Care Plan and is also intended to operate as your Summary Plan Description."⁹ The Plan defines a "dependent" as "your Child or legal spouse from whom you are not legally divorced or whose marriage has not been legally annulled."¹⁰ A "child" is defined as "your biological Child, stepchild, legally adopted Child or Child for whom you or your spouse are the legal guardian until they turn age 26."¹¹

The Plan provides:

If a spouse loses coverage due to a divorce, legal annulment, or if a Child loses coverage because the Child no longer qualifies as a Dependent, the Employee, spouse or Dependent must notify the Plan Administrator within 60 days of the Change in Status if they wish to continue coverage....Failure to notify the Plan Administrator within 60 days of the Change in Status will result in the Covered Family Member losing all rights to continue coverage under this Plan.¹²

The Plan further defines the discretion of the Plan Administrator, as encompassing "the absolute authority and discretion to construe any uncertain or

⁸ ALJ Ex 1; Tr, at p. 23.

⁹ Respondent's Ex 1, at p. 1.

¹⁰ *Id.*, at p.13.

¹¹ *Id.*, at p. 11. This definition also provides for coverage beyond age 26 for a child who is "mentally or physically handicapped, mentally ill, or developmentally disabled, as determined by the Social Security Administration, and incapable of self-sustaining employment...." *Id.*

¹² *Id.*, at p. 29.

disputed term or provision of the Plan.”¹³ Such discretion includes “[d]etermining whether an individual is [e]ligible for benefits under this Plan.”¹⁴ The County Administrator, the designated Plan Administrator, has delegated the duties of that position to Annette Barber, the County Personnel Officer.

To obtain coverage under the Plan, an employee must fill out an enrollment form, various versions of which have consistently required the name, date of birth, gender, and social security number of any spouse or dependent, and a representation that the information provided was, to the best of the employee’s knowledge, true, correct or accurate.¹⁵ Some versions of the enrollment form have required information concerning a spouse’s employment and health coverage provided through that employment. No version of the enrollment form has required documentary verification of dependent eligibility.

In July 2014, the County’s Personnel/Civil Service Department sent unit employees a notice stating that the County had contracted with BMI Associates to audit the dependent enrollment in the County’s Health Plan, and instructing them to cooperate with BMI’s requests pursuant to the audit.¹⁶ According to Barber, the County decided to perform the audit after its consultant pointed out that the use of such audits “seems to be a trend as people try to make sure there [are] no fraudulent dependents on the plan,” and the County Administrator attended a workshop at which the problem of

¹³ Respondent’s Ex 1, at p. 65.

¹⁴ *Id.* The Plan provides that the exercise of this discretion is “binding upon all interested parties, including, but not limited to, the Covered Family Member, the Covered Family Member’s estate, any beneficiary of the Covered Family Member and the County,” subject to review under an arbitrary and capricious or bad faith standard.

¹⁵ Tr, at pp. 68-78; Respondent’s Exhibits 2, 3, 4, 5, 6, 7.

¹⁶ Charging Party’s Ex 1; Tr, at p.19.

ineligible dependents receiving benefits was discussed.¹⁷

Subsequently, BMI mailed a three-page letter dated July 21, 2014 to all County employees enrolled in the health plan, which expressly stated that “[t]he audit review of your enrolled dependents is not optional.”¹⁸ The letter reiterated the Plan’s definition of eligible dependents, and required employees to identify and submit documentation to verify the continuing eligibility of dependents. Under the title “Helpful Information,” the July 21 letter provides a list of the documents that can be used to verify eligibility. Thus, to verify a spouse’s continued eligibility, employees were directed to file a valid marriage certificate or marriage license, and either a redacted Federal tax form 1040 or a “joint document dated within the last 6 months.”¹⁹ Examples of “joint documents” provided were a mortgage statement, bank statement, utility bill, rental/lease agreement, property tax statement, auto insurance statement or homeowners’ insurance.²⁰ Similar verification requirements were provided for a legally separated spouse, a natural or adopted child, an eligible stepchild, or to establish legal guardianship.

The July 21, 2014 letter includes a sample of the dependent verification form employees were to complete and submit. The form requires the employee to “certify that the information I am providing is true and complete. I understand that if I knowingly submit false and/or misleading information or documentation my employer may take appropriate disciplinary action.”²¹ Below the certification, the form provides: “FAILURE TO COMPLETE THIS AUDIT MAY RESULT IN CANCELLATION OF BENEFITS FOR

¹⁷ Tr., at pp. 90-91.

¹⁸ Charging Party’s Ex 2, at p. 1.

¹⁹ *Id.*, at p. 2.

²⁰ *Id.*, at p. 2.

²¹ *Id.*, at p. 3.

AN UNVERIFIED DEPENDENT.”²²

The form also provides for redactions, stating: “PLEASE REMOVE/ BLACKOUT/ REDACT/ ALL SOCIAL SECURITY NUMBERS AND FINANCIAL INFORMATION ON ANY DOCUMENTS SUBMITTED.”²³ With respect to redactions, the ALJ, after quoting the July 21, 2014 letter, summarized the testimony before her:

The County’s main witness, Annette Barber, testified that employees were permitted to redact information irrelevant to determining the eligibility of a spouse or dependent. For example, if a federal form 1040 was being submitted to verify the eligibility of a spouse, everything on the form other than the spouse’s name, social security number, filing status and dependent exemption box could be redacted.²⁴ Barber also acknowledged that none of the written communications with County employees stated this, and that employees would not know this unless they called to ask questions about redacting.²⁵

At the hearing, Barber agreed that the form portion of the July 21, 2014 letter does not “say that any information can be redacted other than financial information” or Social Security numbers.²⁶

The July 21 2014 letter mandates employees who do not have copies of the required documents obtain them as soon as possible and advises that the cost of obtaining copies will not be defrayed by the County or BMI.

Finally, the July 21, 2014 letter provides for an amnesty period:

It is important that you review the eligibility rules within your plan document to confirm that your covered dependents are eligible for coverage. Cortland County is allowing an amnesty period during which employees/retirees will have the opportunity to voluntarily identify any ineligible dependents and therefore avoid any penalties, legal action and/or discipline, provided that the ineligible dependent(s) does not incur any claims on or after 8/15/2014 and is

²² Charging Party’s Ex 2, at p. 3.

²³ *Id.* (emphasis in original).

²⁴ Tr, at pp. 47-48.

²⁵ 47 PERB at ¶4592, at 4583-4584.

²⁶ Tr, at pp. 104-105.

voluntarily removed by 9/19/2014.

Barber, who had ultimate responsibility for verifying the eligibility of dependents, testified that no similar comprehensive audit had been previously undertaken. She further testified that the County had intermittently required employees to provide documentation of changes in eligibility status, and gave at least two examples involving members of the Association. However, Barber did not review every health insurance file for every member of the bargaining unit represented by the Association. She did admit that, since 2004, the County had not required that a birth or marriage certificate be provided in order to add a dependent to the plan. Barber also acknowledged that the County had occasionally asked for the employment status of a spouse, or for the name and contact information of a spouse's employer. Barber's testimony on this point was consistent with that of Laurie Gosse, the County's Deputy Personnel Officer, who handled the day-to-day administration of the County Health Plan. The ALJ found, and no party has disputed, that "[t]he record is silent as to any contractual basis for the health benefits provided."²⁷

DISCUSSION

As a threshold matter, the County's first exception does not provide a basis upon which we could reverse the ALJ's determination, as the purported "implied factual finding" asserted plays no part in the ALJ's rationale for finding a violation. The ALJ did

²⁷ 47 PERB ¶ 4592, at 4852. In its brief in support of its exceptions, the County asserts that, subsequent to the close of the record, it has "found that there were ten ineligible dependents on the County health insurance plan for members from units other than the Association in this matter," and that one of those ineligible dependents had been divorced from the employee for over seventeen years." *Id.* at 22, n. 4. We do not question the veracity of counsel's representation, but such a representation does not constitute evidence, and, in any event, § 213.2 of our Rules of Procedure "limits our review of the ALJ's decision to the record before him or her." CSEA (*Bienko*), 47 PERB ¶ 3027, 3082 (2014).

not predicate her ruling in any way on the adequacy or inadequacy of the notification to employees by BMI or the County of their right to redact information not required to establish the eligibility of dependents. As neither the ALJ's analysis of the audit's negotiability nor our own is in any way impacted by the accuracy of the ALJ's factual finding on the issue of redactions, we decline to address this exception.²⁸

It is long been settled that the provision of health insurance to employees and their dependents is a mandatorily negotiable term and condition of employment.²⁹ The procedures by which benefits are altered or terminated are themselves mandatorily negotiable.³⁰

Against this backdrop, we examine the County's decision to implement the dependent eligibility audit at issue here. We begin by acknowledging that the prevention of fraud or even waste by the continued payment of benefits to ineligible persons as dependents is an entirely legitimate concern of the County. Indeed, we acknowledge that the decision to undertake such an audit does not in and of itself constitute a mandatory subject. We dare say that had the County approached the Association with its plan for an audit, issues of concern that appear to have caused this charge to be filed by the Association, would possibly have surfaced and satisfactorily

²⁸ See, e.g., *Centro, Inc. CNY*, 17 PERB ¶ 3035, 3058 (1984); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021, 3037 (2013).

²⁹ See, e.g., *Aeneas McDonald Police Benev Assn v City of Geneva*, 92 NY2d 326, 331-332 (1998) ("Health benefits for current employees can be a form of compensation, and thus a term of employment that is a mandatory subject of negotiation") (citing Board cases); *Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 95 AD3d 1479, 1481, 45 PERB ¶ 7006, 7023 (3d Dept 2012), *affd*, 21 NY3d 255, 266, 46 PERB ¶ 7008, 7021 (2013) (same); *Town of Haverstraw v Pub Empl Relations Bd*, 75 AD2d 874, 13 PERB ¶ 7006 (2d Dept 1980), *confd* 12 PERB ¶ 3064 (1979); see also *Lippman v Bd of Education, Sewanhaka Sch Dist*, 104 AD2d 123, 18 PERB ¶ 7503, 7514-7515 (3d Dept 1984).

³⁰ See, e.g., *County of Chemung*, 44 PERB ¶ 3026, 3095 (2011); *City of Watertown v NYS Pub Empl Relations Bd*, 95 NY2d 73, 33 PERB ¶ 7007 (2000).

addressed through negotiations before the commencement of the audit itself

However, the legitimate business reasons for the audit—here, the County's legitimate managerial obligation to account for use of public funds and to ensure against fraud and waste —do not negate negotiability under the Act of the procedures requiring employee participation in the audit to the extent that they involve or affect mandatory terms and conditions of employment. The Plan, which the County unilaterally promulgated and which the Association did not challenge, may reasonably be read to support an audit, but not to compel the employee participation at issue here.

As we explained in *New York City Transit Authority*:

An employer's reservation of rights to act unilaterally with respect to a term and condition of employment constitutes a mandatory subject. When an employer acts consistent with an unchallenged policy explicitly reserving for itself the unfettered discretion to determine whether to continue a specific term and condition of employment, the employer's decision to act pursuant to the reservation of right is not considered to be unilateral under the Act. Unlike contract reversion to a specifically negotiated provision, however, a reservation of right in an employer's policy does not stem from the employer satisfying its duty to negotiate under the Act. Therefore, the Board must strictly construe a policy-based reservation of right in order to effectuate the policies of the Act.³¹

The Plan grants the Administrator broad discretion, including, but not limited to, “[d]etermining whether an individual is [e]ligible for benefits under this Plan.” In view of the breadth of the delegation, we believe that this policy may reasonably be read to encompass the County auditing the eligibility of those receiving benefits. However, strictly construed as it must be under our decision in *NYC Transit Authority*, the Plan cannot be read to encompass the participation of all employees enrolled in family coverage in a broad, prophylactic audit to the extent that they involve or affect

³¹ 42 PERB ¶ 3012, 3039 (2009), *confd sub nom NYC Transit Auth v NYS Public Empl Relations Bd*, 78 AD3d 1184 (2d Dept 2010), *affd*, 19 NY3d 876 (2012).

mandatory terms and conditions of employment. Such a broad reading of the Plan would not, as we see it, effectuate the policies of the Act, but would, rather, allow for the extrapolation of corollary rights from an explicit reservation of right that is broader than permissible under the Act.³²

In *City of Schenectady*, the Board explained that a unilateral change to the employees' obligations to verify their compliance with the residency requirement violated the Act:

While certain changes in the method of recordkeeping may not rise to the level of a change in terms and conditions of employment, substantial changes in the type or amount of information recorded affect terms and conditions of employment and therefore must be bargained. Here, the employees have in the past been required to keep the City apprised of any changes in address, and have filed a form to do so. The City's argument that its right to impose the residency requirement carries with it the implicit right to employee participation in the compliance-tracking process need not, therefore, be decided. It already has a practice of employee participation in the recordkeeping process. The relevant inquiry is whether the at-issue form reflects merely, as the City asserts in its brief, a "mechanical," and not a qualitative, change in unit employees' participation. It does not. The at-issue form is substantially different from the one previously filed, including a monetary component, as the employee may have to pay a notary fee in order to get the required notarization, and the required provision of a voter registration card, which alone raises a significant privacy issue.³³

Similarly, in *City of Syracuse*, the Board found that the unilateral enforcement of the City's residency requirement through a "residency monitoring program, which mandated each employee to prepare, sign and submit, on a regular basis, a certification form attesting to his or her residence," with supporting documentation where the City deemed it necessary, violated the Act.³⁴ Relying on *Schenectady*, the Board found that

³² *Id.*, at 3039.

³³ 26 PERB ¶ 3025, 3042 (1993).

³⁴ 44 PERB ¶ 3017, 3065-3066 (2011).

the requisite provision of documents, potential payment of a notary fee, prospect of punishment for perjury, and loss of privacy in the documents required “constitute[d] a substantial change in the form and substance of recordkeeping delegated by the City to unit members.”³⁵

In *Board of Education of the City School District of the City of New York v Public Employment Relations Board*, the Court of Appeals upheld our finding that financial disclosure procedures were a mandatory subject of bargaining, reasoning “that monitoring corruption is sufficiently attenuated from the primary educational mission or function of the school district that it may be outweighed by the other interests involved,” including “strong and sweeping policy of the State” in favor of collective bargaining.³⁶ Here, as in that case, we “recognize that the [County] (like all public employers) ha[s] a significant interest in the integrity of its workforce,” but “give even greater weight to the employees’ interest in being able to negotiate the requirements proposed” by the County, which impact the innocent as well as the guilty, impose a new condition on receiving benefits, and impose cost and additional work on employees.³⁷ Similarly, procedures by which disabled police officers may challenge the employer’s determination that the officer is medically able to return to duty are mandatory subjects, even though the employer’s right to make that initial determination is expressly provided for by statute.³⁸ In sum, “while a desire to save money or increase managerial

³⁵ *Id.*, at 3066.

³⁶ 75 NY2d 660, 669 (1990), 23 PERB ¶ 7012, 7013 (1990).

³⁷ 75 NY2d at 670-671. See also *NYC Transit Auth v Pub Empl Relations Bd*, 19 NY3d 876, 45 PERB ¶ 7507 (2012) (unilateral imposition of more stringent rules as to dual employment of safety-sensitive employees violated Act); *City of New York v Bd of Collective Bargaining of City of New York*, 107 AD3d 612, 613, 46 PERB ¶ 7503 (1st Dept 2013) (unilateral changes to sick leave policy were not rendered non-mandatory because they were designed to ensure fitness for duty of crew).

³⁸ *City of Watertown v NYS Public Employment Relations Bd*, 95 NY2d 73 (2000).

efficiency are legitimate business motives[,] [s]uch motives are not relevant to the issue of negotiability.”³⁹

The unilateral imposition of a new condition or conditions upon receipt of a benefit violates the Act.⁴⁰ In the instant case, failure to comply with the requirements of the audit by an employee would potentially result in the termination of benefits for eligible dependents. Moreover, the audit contemplates that employees who do not have all responsive documents must obtain new copies on their own time and at their own expense, which the July 21, 2012 letter expressly states will not be reimbursed by the County or BMI.

The County’s contention that we should nevertheless determine the negotiability of the health insurance audit on an *ad hoc* basis based on the weighing of the parties’ interest here finds no support in our cases. We have long rejected the notion that negotiability of a subject under the Act “turns on a balance of employer-employee interests on the facts of each particular case.”⁴¹ Such a “facts-of-the-case approach to negotiability assessments would thus produce results which are destructive of the uniformity necessary for any reasoned conduct of collective negotiations by the parties to a bargaining relationship or to the administration of a collective bargaining statute.”⁴²

The County has also raised public policy as weighing against negotiability here,

³⁹ *City of Poughkeepsie v Newman*, 95 AD2d 101, 16 PERB ¶ 7021, 7030 (3d Dept 1983), *lv denied*, 62 NY2d 608, 17 PERB ¶ 7009 (1984); *NYS Thruway Authority*, 47 PERB ¶ 3032, 3099 (2014) (citing and quoting *Poughkeepsie*).

⁴⁰ See, e.g., *Schenectady Police Benevolent Assn v NYS Pub Empl Relations Bd*, 85 NY2d 480, 28 PERB ¶ 7005 (1995); *Village of Monroe*, 40 PERB ¶ 3013, 3052 (2007); *Town of Cortland*, 30 PERB ¶ 3031 (1997); *City of Mount Vernon*, 18 PERB ¶ 3050 (1985).

⁴¹ *State of New York (Department of Transportation)* 27 PERB ¶ 3056, 3131 (1994).

⁴² *Id.*

citing *Riggs v. Palmer*⁴³ and its progeny. We agree with the County that “[t]he principle that a wrongdoer may not profit from his or her wrongdoing is deeply rooted in this State's common law.”⁴⁴ However, as the Court of Appeals has made clear, *Riggs* does not invalidate statutory rights of parties whose affirmative claims or defenses do not arise directly from the transactions tainted by their illegal actions, but simply require the trier of fact and law “to apply the statute to the facts presented.”⁴⁵

Because the dependent eligibility verification audit extends to *all* employees with covered dependents, encompassing the innocent as well as those guilty of fraud or negligence, and because determining negotiability merely requires us to apply the statutory language of the Act to the facts applicable to all employees, we find that this is not a case where *Riggs* applies. Rather, the public policy claim advanced by the County, in essence, is similar to that described by the Court of Appeals in *Board of Education*: an “open-ended ‘public policy’ argument [that] is more aptly denominated a ‘public interest’ argument, for it is not based on statute, Constitution or even clear common-law principles—sources in which a public policy prohibition against a collective bargaining agreement might be found.”⁴⁶ As the Court of Appeals found in that case, so too here we recognize “that reasonable people might well disagree about what

⁴³ 115 NY 506, 511-512 (1889).

⁴⁴ *Matter of Edwards*, 121 AD3d 336, 339 (2d Dept 2014) (citing, *inter alia*, *Riggs*).

⁴⁵ *New York Hosp Medical Center of Queens v Microtech Contracting Corp*, 22 NY3d 501, 509 (2014) (holding that an employer's statutory rights under the Workers' Compensation Law are not extinguished merely because its injured employee is an undocumented alien; construing *Riggs* to not apply as “we are not being called upon to enforce or recognize rights arising from an illegal oral employment contract . . . and [defendant] Microtech is not raising any such employment contract as a defense to common-law contribution or indemnification”). The Court in *New York Hospital* applied its earlier decision in *Balbuena v IDR Realty LLC*, 6 NY3d 338, 363 (2006), holding “that an injured employee's status as an undocumented alien does not preclude recovery of lost wages in a personal injury action against a landowner under the State's Labor Law.” 22 NY3d 501, at 509.

⁴⁶ 75 NY2d at 669.

measures were appropriate to further the goal of eliminating corruption. We cannot discern a public policy that requires that employees, prospectively, be denied any voice in the matter.”⁴⁷

In *Board of Education*, the Court upheld our finding that requiring employees to participate in financial disclosure was a mandatory subject of bargaining. We accordingly reaffirm that the balance we struck in *Board of Education*, as affirmed by the Court, is and remains that applicable to the negotiability of procedures requiring employees to provide information in prophylactic investigations of possible financial abuse by employees.⁴⁸

We cannot adopt the County’s argument that the occasional request for verification of an insured’s representation as to change of status of a newly eligible or ineligible dependent brings the audit within the ambit of past practice. Even if the evidence established a consistent past practice of verification upon a qualifying event, the most that has been alleged, the audit goes well beyond that, requiring all employees with dependents to verify the continued eligibility of their dependents absent any particularized reason to believe their status has changed.⁴⁹

Finally, we reject the County’s argument that the change is insufficiently

⁴⁷ 75 NY2d at 669.

⁴⁸ *Id.* See also *New York City Trans Auth v New York State Pub Empl Relations Bd*, 19 NY3d 876 (2012); *City of New York v Bd of Collective Bargaining of City of New York*, 107 AD3d 612, 613 (1st Dept 2013).

⁴⁹ We reject, for similar reasons, the County’s arguments that the employees’ initial provision of information regarding dependents and that the Plan gives the County the right to request the information as part of the verification process. While the Plan may reasonably be read to permit the County to verify the eligibility of covered dependents, the County has not identified any language in the Plan imposing a duty on covered employees to participate in that verification process. Against this backdrop, we cannot find in the Plan a basis for finding either a waiver or a satisfaction of the right to negotiate over verification procedures. See *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, 3090 (2014).

"substantial" to constitute an improper practice. To begin with, the Board has long held that, in determining whether a change is properly deemed *de minimis*, the value of the benefit at issue is not judged by the Board; the only issue is whether it affects terms and conditions of employment.⁵⁰ Here, the imposition of a new condition on contractually-mandated benefits clearly affects terms and conditions of employment. Moreover, even viewed apart from the potential loss of benefits for non-compliance, our decisions in *Syracuse* and *Schenectady* preclude a finding that the change here is *de minimis*. Accordingly, we find here the requirement that the employees participate in the employer's audit sufficiently implicates terms and conditions of employment such that the change cannot be deemed *de minimis*.⁵¹ Indeed, the penalty of loss of benefits for non-compliance are wholly inconsistent with such a finding, as we have already explained.

The Association's cross-exceptions may be briefly addressed. As the ALJ's finding of a violation has been affirmed, we need not address the first cross-exception, which was pleaded as an alternate basis for affirmance of the decision below if we did not affirm the ALJ's findings in favor of the Association. The Association's second cross-exception, seeking a modification of the remedy, is well taken. However, we do not have before us a sufficient record to determine the need for or the propriety of, let alone fashion, a comprehensive remedy.

Accordingly, the decision of the ALJ is affirmed as to the finding of a violation, and the matter is remanded for further proceedings not inconsistent with this opinion.

⁵⁰ See *County of Nassau*, 32 PERB ¶ 3034 (1999) (provision of bottled water is a mandatory subject of bargaining); *County of Nassau*, 25 PERB ¶ 4555 (1992).

⁵¹ See *City of Syracuse*, 44 PERB ¶ 3017, at 3065-3066; *City of Schenectady*, 26 PERB ¶ 3025, at 3041, citing, *inter alia*, *Newburgh Enlarged City School Dist*, 20 PERB ¶ 3053 (1987); *Spencerport Cent School Dist*, 16 PERB ¶ 3074 (1983).

THEREFORE, IT IS HEREBY ORDERED that:

1. The County will forthwith cease and desist from implementing its directive to employees to provide documentation to support the continued eligibility of spouses and dependents for coverage under the County Health Plan;
2. The County will forthwith sign and post the attached notice at all physical and electronic locations used to post communications for bargaining unit employees; and
3. The matter is remanded to the ALJ for further proceedings to develop the record and determine any other appropriate remedy, including, if appropriate, make whole relief.

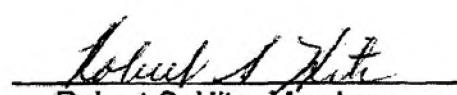
DATED: November 10, 2015
Albany, New York



Seth H. Agata, Chairperson



Allen C. DeMarco, Member



Robert S. Hite, Member

NOTICE TO ALL EMPLOYEES

**PURSUANT TO
THE DECISION AND ORDER OF THE**

**NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD**

and in order to effectuate the policies of the

**NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT**

we hereby notify all employees of the County of Cortland and Cortland County Sheriff in the unit represented by the County Police Association of Cortland, Inc., that the County of Cortland and Cortland County Sheriff will forthwith:

cease and desist from implementation of its directive to employees to provide documentation to support the continued eligibility of spouses and dependents for coverage under the County Health Plan and cease and desist from implementation of the directive.

Dated

By
on behalf of the County of Cortland and
Cortland County Sheriff

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.