

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

In the Matter of

TEAMSTERS LOCAL 294,

Petitioner,

-and-

CASE NO. C-6412

TOWN OF CORINTH,

Employer.

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;

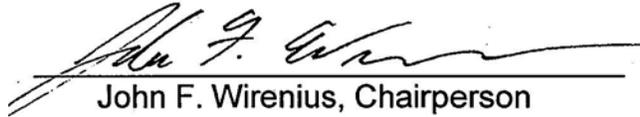
IT IS HEREBY CERTIFIED that the Teamsters Local 294 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All paid full and part-time Emergency Medical Technicians and Paramedics.

Excluded: Director, Emergency Medical Services and Medical Director, Emergency Medical Services, and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 294. 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: January 24, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

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

In the Matter of

**CAYUGA COUNTY COMMUNITY COLLEGE
EDUCATIONAL SUPPORT PROFESSIONALS,**

Charging Party,

CASE NO. U-32511

- and -

CAYUGA COMMUNITY COLLEGE,

Respondent.

SUSAN M. DeCARLO, LRS, for Charging Party

**BOND, SCHOENECK & KING, PLLC (COLIN M. LEONARD of counsel),
for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) finding that Cayuga Community College (College) violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when, after the retirement of members of the bargaining unit represented by the Cayuga Community College Educational Support Professionals (ESP), the College, without bargaining, reassigned work previously exclusively performed by unit members to retirees, who were re-hired on a part-time basis, and to other non-unit part-time employees.¹ For the reasons stated below, we affirm the ALJ's decision, except as to claims not raised in the charge, as to which we reverse the finding and modify the order.

EXCEPTIONS

The College excepts to the ALJ's factual findings as to the exclusivity of the work

¹ 47 PERB ¶ 4599 (2014).

performed by unit members in the Nursing and Physical Education Offices, the Academic Program Office (APO), and the Campus Support Office (CSO), and to the ALJ's finding that their reassigned duties were unchanged.² The College further contends that the ALJ erred in finding that the College violated the Act by transferring the work.³

The College also asserts that the ALJ erred in reaching facts and claims that were not pleaded in the charge.⁴ Additionally, the College objects to the ALJ's determination that "an employer has the duty to bargain prior to a transfer of work, regardless of any demand by the union."⁵ The College also contends that the ALJ erred in denying its affirmative defenses of waiver and duty satisfaction.⁶

Finally, the College argues that the ALJ erred in finding that the College's right to determine the scope of its work does not control where the services continue and are "simply reassigned to non-unit employees," that it had not established a reduction in services that an employer's means by which it makes changes to the non-mandatory subjects of staffing and levels of services are themselves mandatory, and that an employer's reasons of financial and operational efficiency do not impact the negotiability of the decision to transfer the work.⁷

FACTS

The parties agree that the bargaining unit represented by the ESP is limited to full-time employees, defined in the parties' collective bargaining agreement as those

² Exceptions Nos. 1-6, 8-9, 11-13, 14, 15, 16.

³ Exception Nos. 11-13, 22.

⁴ Exception No. 7.

⁵ Exception No. 10.

⁶ Exception No. 21.

⁷ Exception Nos. 17, 19, 18, 20.

employees working 37.5 hours per week.⁸

On December 31, 2012, six full-time employees in the bargaining unit retired. Rather than fill the full-time positions rendered vacant by these retirements, the College in January 2013 rehired three of the newly retired employees on a part-time basis, and hired two additional part-time employees. At issue before us are four of the former positions: (1) Janet Mudge, senior typist in the Nursing and Physical Education Offices; (2) Melanie Pasik, senior typist in the APO; (3) Darlene Nowey, principal stenographer in the APO; and (4) Sharon Bower, office manager of the Campus Services Office.

Before her retirement, Janet Mudge was employed full-time as a senior typist in the Nursing and Physical Education offices. The ALJ found that Mudge served as secretary to the director of nursing and to the athletic director and handled clerical work for both offices. When she was rehired on a part-time basis, her duties were limited to the Nursing Office. Christine Nichols was hired as a part-time typist in the Physical Education Office. After the filing of the charge, Nichols was laid off from her part-time position as typist on or about August 31, 2013.⁹

Steven Keeler, Chair of the Humanities Division, testified that Pasik and Nowey continued to perform the same clerical duties as they had as full-time employees, “including handling mail, scheduling meetings, making copies and maintaining division records, as well as responding to students who walk in to the office.”¹⁰ Keeler further testified that Nowey also continues to record minutes for academic area meetings.¹¹

⁸ Charge, ¶¶ 5(E), (F), and (I); Answer ¶¶ 5 (E), (F), and (I); see also Joint Ex 1, Art. I §§ 4, 6; Art. II § 1.

⁹ Tr, at p 31.

¹⁰ 47 PERB ¶ 4599, at 4884.

¹¹ 47 PERB ¶ 4599, at 4884; Tr. 132-133.

Additionally, ESP witness Patricia Hamberger, another unit member, testified that Pasik has continued her duties as secretary for the academic standing committee, including scheduling meetings at which student petitions for readmittance are considered and gathering the necessary student records prior to those meetings. Both Hamberger, and Keeler, testified that Pasik continues to be responsible for maintaining updates to the college syllabi, which are maintained on her computer.¹²

Vice President for Student Affairs Jeffery Rosenthal testified to his reduced need for clerical assistance as compared to his predecessor Deborah Moeckel, and to the increased use of technology having further reduced the need for clerical support. On two of the five days of the week, only one of the two was present, although that did not affect the hours during which the office was open.

Sharon Bower served as the office manager in the CSO for five years before her retirement on December 31, 2012. The ALJ described as “[t]he primary duties of the office manager in the campus services office, *ie*, the management responsibilities of scheduling and overseeing the work of the office and switchboard staff, as well as the management of the campus mailboxes and bulk mailings.”¹³ Bower took on some of that work herself, which was also performed by both unit members and part-time employees.¹⁴

As office manager, Bower reported directly to Whalen. Bower consulted with Whalen on office issues as she believed appropriate, including major scheduling concerns, such as an employee being out on extended leave. Bower testified that she

¹² Tr, at pp 133-135 (Hamberger); 142 (Keeler).

¹³ 47 PERB ¶ 4599, at 4886.

¹⁴ Tr, at pp 103-104.

was responsible for scheduling “continuous coverage six days a week” for the College’s switchboard, except for on holidays and Christmas and spring break.¹⁵ Additionally, Bower testified that she scheduled staffing of the CSO itself, which in conjunction with the switchboard scheduling, she testified, “took up a majority of the time because it was very fluid,” between vacation and employees calling in sick.¹⁶ Bower testified that, if she could not cover gaps, she had to fill them in herself. She additionally testified that “[f]rom time to time,” when scheduling issues such as presented by an employee on Workers’ Compensation arose, she would raise these issues with Whalen.¹⁷ Additionally, Bower testified that she had sole responsibility for bulk mailings.

After Bower’s retirement, Whalen took over scheduling SCO and switchboard staffing. Bower’s other supervisory duties have been assumed primarily by the full-time switchboard operator in that office, and part-time employees perform her bulk mailing and campus mailbox duties.

Whalen testified that the positions vacated by Mudge, Pasik, and Nowey had not been backfilled, because each of them “backfilled her own position.”¹⁸ He further testified that Bower’s position was not filled due to the College’s financial difficulties, and Diane Hutchinson described the significant financial distress the College was experiencing in 2012.

DISCUSSION

As a preliminary matter, we reject the College’s argument that “the charge should be dismissed in its entirety because ESP failed to demand bargaining over the subject,”

¹⁵ Tr, at pp 94-95.

¹⁶ Tr, at p 96.

¹⁷ Tr, at p 110-111.

¹⁸ Tr, at p 255.

despite having received notice of the impending change.¹⁹ The Board has long held that “[w]hile a demand is a necessary precondition to an obligation under the Act to negotiate the impact of an employer’s decision, the duty to negotiate a change to a mandatory subject of negotiations does not require a demand” as a precondition to the filing of a charge.²⁰ Likewise, a charge premised on a refusal to negotiate on demand is distinct from a charge “premised on a unilateral change in terms and conditions of employment,” and “[t]herefore, a demand to negotiate is not a condition precedent to the violation found” in the latter case.²¹ Rather, the Board has held that “a unilateral subcontract of unit work is itself a *per se* rejection of the bargaining process and a refusal to bargain. No demand to bargain is necessary in such circumstance.”²²

The College invites us to reject this well-developed and long-standing body of case law “as it is inconsistent with sound labor relations policy and well-established law in the private sector.”²³ As the Act expressly provides, however, “fundamental distinctions between private and public employment shall be recognized, and no body of

¹⁹ Brief in Support of Exceptions at 25.

²⁰ *City of Niagara Falls*, 44 PERB ¶ 3015, 3055 (2011) (footnotes omitted), *confd*, *City of Niagara Falls v NYS Pub Empl Relations Bd*, 45 PERB ¶ 7004 (Sup Ct Albany Co 2012) (Ceresia, J.), citing *Bd of Educ, City Sch Dist, City of NY*, 40 PERB ¶ 3002 (2007); *Great Neck Water Pollution Control Dist*, 28 PERB ¶ 3030 (1995); *see also City of Niagara Falls*, 31 PERB ¶ 3085, 3190-3191 (1998); *Germantown Cent Sch Dist*, 26 PERB ¶ 3003, at 3007 (1993), *annulled on other grounds, sub nom Germantown Cent Sch Dist v Pub Empl Relations Bd*, 205 AD2d 961, 27 PERB ¶ 7009 (3d Dept 1994).

²¹ *City of Niagara Falls*, 31 PERB ¶ 3085, at 3190, citing *Roma v Ruffo*, 92 NY2d 489, 495 (1998).

²² *Id*, quoting *Germantown Cent Sch Dist*, 26 PERB ¶ 3003, at 3007; *State of New York (UCS)*, 28 PERB ¶ 3014, 3039, n. 10 (1995); *see also Hewlett-Woodmere Union Free Sch Dist v NYS Pub Empl Relations Bd*, 232 AD2d 560, 20 PERB ¶ 7019 (2d Dept 1996) (“Where, as here, an improper practice charge is grounded upon a theory of unilateral subcontracting, the attempted initiation of negotiations by the employee organization is not a prerequisite to the filing of an improper practice charge”).

²³ Brief in Support of Exceptions, at 26; *see id* at 26-27.

federal or state law applicable wholly or in part to private employment, shall be regarded as binding or controlling precedent.”²⁴ In particular, the policy undergirding this provision is especially salient where, as here, “there is well-established case law under the Act,” and our adoption of private sector precedent would upend the parties’ long-settled expectation, working a forfeiture of rights.²⁵ Thus, we reject the College’s waiver argument,²⁶ and move on to its exceptions treating with the ALJ’s findings on the merits.

The parties relied upon, and the ALJ therefore treated with, a line of decisions holding that the unilateral abolition of full-time positions and the contemporaneous creation of part-time positions to perform the duties of those abolished violates the Act unless the employer demonstrates that the same level of services can be completed in fewer hours or establishes that the employer has made a good faith reduction in services. This line of cases, most recently explicated in *County of Erie*,²⁷ expands upon the Board’s decisions in *Central School District of the City of New Rochelle*,²⁸ and *City School District of the City of Oswego*.²⁹ *New Rochelle CSD* established the principle that the decision to lay employees off is non-mandatory, while *Oswego CSD* found that

²⁴ Act, § 209-a (6).

²⁵ *City University of NY*, 40 PERB ¶ 3004, 3013 (2007).

²⁶ In any event, the evidence does not support a finding of waiver as neither “the express relinquishment of specified rights [nor] the use of language that establishes ‘a clear, intentional, and unmistakable relinquishment of the right to negotiate the particular subject at issue’ by relieving the other party of the duty to negotiate on that subject” has been demonstrated. *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, 3089 (2014). Nor does the evidence establish that the “specific subject has been negotiated to fruition,” as necessary to establish duty satisfaction.” *Id.* Thus, we affirm the ALJ’s finding that neither waiver nor duty satisfaction apply here, and deny the exceptions to those findings.

²⁷ 43 PERB ¶ 3016 (2010), *confd sub nom County of Erie v New York State Pub Empl Relations Bd*, 81 AD3d 1313, 44 PERB ¶ 7002 (4th Dept 2011).

²⁸ 4 PERB ¶ 3060, 3075-3076 (1971).

²⁹ 5 PERB ¶ 3011, at 3023-3024 (1972), *confd sub nom City School Dist of City of Oswego v Helsby*, 42 AD2d 262, 6 PERB ¶ 7008 (3d Dept 1973).

New Rochelle did not permit the reduction of the hours and wages of positions absent proof that the same level of services can be completed in fewer hours or that the employer has made a good faith reduction in services.

In all of these cases, the interests advanced by the union was that of the unit members, whose hours had been reduced, and, concomitantly, their wages. To the extent that this matter has been litigated under the principles set forth in the *Erie* line of cases, the ESP has not established a violation. No employee's bargaining unit member's position was abolished by the College, nor has any bargaining unit member's hours and wages been reduced.

Moreover, with regard to the Academic Program Office, the College put forth evidence germane to one of the *Erie* criteria, that the work could be done in less time than it had been previously performed in. In addition to Rosenthal's testimony regarding the reduced use of clerical support after his predecessor's departure, and the increased use of technological resources to replace clerical services, the fact that Pasik and Nowey each only worked four days, with each being off on a different day, implicitly corroborates that the necessary hours in which the work is performed has decreased.³⁰ Under the facts before us, the College's showing might well be sufficient to defeat a claimed violation of the Act had the College reduced the hours and wages of unit members.

However, the claims before us more properly sound in a transfer of exclusive

³⁰ The value of such implicit corroboration should not be overestimated, however; as the College itself avers, the alleged change in the need for Pasik and Nowey's services "markedly decreased" on the retirement of Debbie Moeckel and her replacement by Jeffrey Rosenthal in 2010—at least 2 years before the conduct at issue took place. (Brief in Support of Exceptions at p. 9).

bargaining unit work, precipitated by the College's response to a series of voluntary retirements. The interests implicated in such a transfer case include any resultant "collective harm to the bargaining unit as well as individual harm to the bargaining unit members."³¹ In particular, "the rights of organization and representation, guaranteed by §§ 202 and 203 of the Act, can be diminished when the scope of the bargaining unit is unilaterally reduced."³² The collective harm at issue in transfer cases are the reason that, unlike in cases involving reduction of hours and wages, "[t]he asserted merits or demerits of a decision to transfer unit work, including the fiscal and operational wisdom of a decision . . . , are immaterial to whether the subject matter is mandatorily negotiable."³³ Accordingly, the decisions leading up to *Erie* shed no light on the live claims before us here.³⁴

As such is the case, the dispositive questions here are whether the work at issue was in fact bargaining unit work, and, if so, was the change nonetheless justified under the Act. In addressing these questions, we have recently reaffirmed that:

there are two essential questions that must be determined

³¹ *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3021 (2008), *confirmed and mod in part, sub nom Manhasset USFD v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittur*, 42 PERB ¶ 3016 (2009), citing *Niagara Frontier Transp Auth*, 18 PERB ¶ 3083 (1985); see also *State of New York (Div of Mil and Naval Affairs)*, 27 PERB ¶ 3027, 3068 (1994).

³² *Id.*

³³ *Id.*, citing *City of Niagara Falls*, 31 PERB ¶ 3085 (1998).

³⁴ *County of Erie*, 43 PERB ¶ 3016, at 3060; *County of Broome*, 21 PERB ¶ 4606, 4786 (1988), *affd*, 22 PERB ¶ 3018 (1989); *Vestal Cent Sch Dist*, 15 PERB ¶ 3006, *confd sub nom Vestal Teachers Assn v Newman*, 95 AD2d 940, 16 PERB ¶ 7020 (3rd Dept 1983). Likewise, our decisions regarding staffing levels do not involve the transfer of work outside the bargaining unit, and are thus not germane to the issues before us. See, e.g., *City of Canandaigua*, 47 PERB ¶ 3025, 3072 (2014) ("abolition of positions is a nonmandatory subject of bargaining and, as the duties of that position were not transferred outside the bargaining unit, the claimed breach of the unit's exclusivity has not been established").

when deciding whether the transfer of unit work violates §209-a.1(d) of the Act: a) was the work at-issue exclusively performed by unit employees for a sufficient period of time to have become binding; and b) was the work assigned to non-unit personnel substantially similar to the exclusive unit work. If both these questions are answered in the affirmative, we will find a violation of §209-a.1(d) of the Act unless there is a significant change in job qualifications. Where there is a significant change in job qualifications we must balance the respective interests of the public employer and the unit employees to determine whether § 209-a. 1(d) of the Act has been violated.³⁵

In *Manhasset Union Free School District*, the Board found other criteria “discerned from prior precedent, as providing guidance for determining whether a discernible boundary exists in transfer of unit work cases,” and listed those criteria as:

the nature and frequency of the work performed, the geographic location where the work is performed, the employer's explicit or implicit rationale for the practice, and other facts establishing that the at-issue work has been treated as distinct from work performed by non[-]unit personnel.³⁶

In terms of the duration of the practice, the Board has “never identified a specific period that is required to establish exclusivity ‘because the sufficiency of the duration depends upon the circumstances of each particular fact pattern.’”³⁷ Thus, in *City of New Rochelle*, the Board found that the exclusive performance of the at-issue duties for one year was sufficient to have become binding under the facts and

³⁵ *State of New York (Div of State Police)*, 48 PERB ¶ 3012, 3041 (2015), quoting *Town of Riverhead*, 42 PERB ¶ 3032, 3119 (2009); see generally *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3021-3022 (2008), *confirmed and mod in part, sub nom. Manhasset USFD v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittur*, 42 PERB ¶ 3016 (2009).

³⁶ 41 PERB ¶ 3005 at 3025; see also *Buffalo City Sch Dist*, 45 PERB ¶ 3002 (2012).

³⁷ *County of Columbia*, 45 PERB ¶ 3025, (2012) (quoting *City of New Rochelle*, 44 PERB ¶ 3002, 3027 (2011)); see also *Buffalo City Sch Dist*, 45 PERB ¶ 3002, at 3003.

circumstances,³⁸ while in *Buffalo City School District*, a unit member's "sole performance of the duties of the on-site help desk over the nine-month period [was] sufficient to demonstrate a binding past practice to establish exclusivity under the Act."³⁹ In each case, the question to be decided is "whether there is sufficient evidence that a reasonable expectation was created that the practice of [unit] members performing the work exclusively would continue."⁴⁰

Notably, "[t]he asserted merits or demerits of a decision to transfer unit work, including the fiscal and operational wisdom of a decision to privatize, are immaterial to whether the subject matter is mandatorily negotiable."⁴¹ The Board has long held that:

It is, however, precisely because [an employer's] decision turned upon the labor costs involved that the transfer of work is amenable to resolution in the collective bargaining process. The bargaining process affords the parties an opportunity, for example, to obtain general or specific salary and benefit compromises which might have eliminated the District's felt need to transfer the work outside the unit.⁴²

Had the College pleaded and proved an operational necessity defense, its financial circumstances may have been relevant, but it did not do so. Accordingly, the College's exceptions based upon the ALJ's refusal to consider the College's financial circumstances are, to the extent they are intended to relate to the transfer of unit work claim, and not to the question of reduction in services, denied.

³⁸ *City of New Rochelle*, 44 PERB ¶ 3002, at 3027.

³⁹ *Buffalo City Sch Dist*, 45 PERB ¶ 3002, at 3003.

⁴⁰ *Id.*

⁴¹ *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3021, citing *City of Niagara Falls*, 31 PERB ¶ 3085 (1998).

⁴² *Hewlett-Woodmere Union Free Sch Dist*, 28 PERB ¶ 3039, *confd sub nom Hewlett-Woodmere Union Free Sch Dist v NYS Pub Empl Relations Bd*, 232 AD2d 560, 20 PERB ¶ 7019 (2d Dept 1996); *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3021 (quoting *Hewlett-Woodmere Union Free Sch Dist*).

We now turn to the College's specific exceptions regarding the transfers of the at-issue work.

Nursing and Athletics Offices

The College does not contest the exclusivity to the unit of the work performed by senior typist Janet Mudge prior to her retirement from her position in the Nursing and Athletic Offices.⁴³ Rather, the College contends that when Mudge was re-hired on a part-time basis, her work was limited to the Nursing Department, with her former duties in the Athletic Office being assigned to a newly-hired part-time employee, Christine Nichols, who was subsequently laid off. Thus, the College maintains, Mudge's part-time position was a newly constituted position with different duties from those she performed prior to her retirement, and Nichols's layoff after the filing of the charge renders the status of her work non-justiciable.

However, this argument suffers from the fallacy of assuming that the interests at stake are solely those of the individuals performing the work, and not those of the bargaining unit as a whole. As the Board explained in *Germantown Central School District*:

To accept the District's argument would permit it and all other public employers to avoid any bargaining duty regarding a decision to transfer unit work simply by timing the transfer to take effect at a time after the unit employees

⁴³ Although the College formally "[e]xcepts to the ALJ's determination that the College does not dispute ESP's exclusivity over the work at issue in Nursing, PE and APO," none of the transcript references provided refer to testimony that, prior to Mudge's retirement, any non-unit employee performed the same work as Mudge. Exceptions, No. 13, citing Tr, at pp 119, 120-122, 136, 146, 252. The only cited transcript page to discuss Mudge, or the Nursing or Athletics Offices contains no such testimony, and only discusses the nature of her work in general terms. Tr, at p 252. Nor do the relevant sections of the College's Brief in Support of Exceptions contain any such assertion. *Id.* at pp 11, 15-16.

have been removed from their jobs. Furthermore, the District's argument ignores that the violation turns on the transfer of bargaining unit work, not the loss of any individual's position.⁴⁴

Rather, “[u]nless the qualifications for the position have been changed significantly, the loss of unit work is sufficient for the finding of a violation.”⁴⁵ As no such significant change in qualifications has been demonstrated, the transfer of the work outside the unit is sufficient to establish the violation.

The College claims that the “[t]here is no showing in the record that the duties relating to the Athletics Department are being performed outside of the unit (following the layoff of Nichols).”⁴⁶ This contention does not negate the elements of the charge as found by the ALJ. Thus, the College has not demonstrated that the ALJ erred in finding that ESP carried its burden of proving the charge. Rather, the College has asserted grounds for the limitation of any remedy to the time period during which Nichols performed the Athletics Office work that Mudge had performed prior to her retirement.

As the Board has long held, “subsequent compliance does not cure the statutory violation by the employer. It merely goes to the nature of the remedy to be afforded to the” charging party.⁴⁷ The College’s showing would not negate the finding of a violation, although it could limit the scope of, or even obviate the need for, make

⁴⁴ 26 PERB ¶ 3003, at 3007; see also *Niagara Frontier Transp. Auth*, 18 PERB ¶ 3083, 3182 (1985); *County of Erie*, 39 PERB ¶ 3016, 3057 (2006).

⁴⁵ *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3022.

⁴⁶ Brief in Support of Exceptions, at 16.

⁴⁷ *Bd of Educ of the City of Buffalo*, 4 PERB ¶ 3090, 3757 (1971); see generally *Levittown Union Free Sch Dist*, 14 PERB ¶ 3019, 3035 (1981); *Plainedge Union Free Sch Dist.*, 31 PERB ¶ 3063, 3140 (1998), citing *Wappingers Cent Sch Dist v Pub Empl Relations Bd*, 215 AD2d 669, 670, 28 PERB ¶ 7007, 7017 (2d Dept 1995).

whole relief under the ALJ's remedial order.⁴⁸

Finally, the College does not in any way adduce evidence or argument that the qualifications for the positions have in any material way been altered. Indeed, in view of the fact that the transferred duties were precisely the same, and Mudge was re-hired to perform half of them, and no evidence suggests that Nichols had different qualifications for the position, no support for such an argument can be gleaned from the record.

The College did not plead or prove the elements of what the Board has previously characterized as a compelling need defense, in that it has not offered evidence "that it had no other options open to it but to transfer [ESP's] unit work, that it had negotiated that transfer to impasse with [ESP], or that it was willing to continue negotiations after the transfers."⁴⁹ The record in this case is devoid of evidence that the College had no other options available to it, or that the College made any attempt to negotiate the transfer of the at-issue functions to part-time employees. In so concluding, we are not implying that the College must designate and remunerate as a full-time employee an individual to perform part-time duties. Rather, we simply hold that the College could not unilaterally transfer bargaining unit work to persons occupying non-unit part-time positions without satisfying its duty to negotiate with ESP.

The Board has long recognized that subcontracting of bargaining unit work is "a technique that can be used by management to undermine its agreement and/or duty to

⁴⁸ *Id.*

⁴⁹ *New York City Transit Auth*, 30 PERB ¶ 3004, 3009 (1997), citing *City of Rochester*, 27 PERB ¶ 3031 (1994); *New York City Transit Auth.*, 19 PERB ¶ 3043 (1986); *Wappingers Cent Sch Dist*, 19 PERB ¶ 3037 (1986). See also *Town of West Seneca*, 19 PERB ¶ 3028 (1986).

reach agreement on other terms and conditions of employment.”⁵⁰ Taken to an extreme in this case, if the College were to replace all full-time positions with non-unit part-time positions, it would effectively be able to avoid its obligations under the collective bargaining agreement as well as its duty to negotiate with ESP under the Act.

Accordingly, the College’s exceptions to the ALJ’s decision as they relate to the transfer of unit work in the Nursing and Athletic Offices lack merit, and the ALJ’s findings as to this transfer are affirmed.

Academic Programs Office

The College contests that the work performed by senior typist Melanie Pasik and principal stenographer Darlene Nowey was exclusive to the unit, arguing that “the record evidence established that, historically, the APO was staffed with full-time and part-time (non-unit) clerical staff.”⁵¹ The College specifies that “ESP presented evidence that Ms. [Patricia] Hamberger, as a *part-time, non-unit* employee in APO performed the *same* duties as both Ms. Pasik and Ms. Nowey and that those duties have not changed.”⁵² However, Ms. Hamberger testified that she began employment at the College in the APO in 1992 and worked “in that office a total of five years,” serving between “’92 to ’97.”⁵³ Steven Keeler, Chair of the Humanities Division, and the supervisor of Pasik and Nowey, testified that, although he could not be sure of the exact year, five or six years prior to events in question, the part-time position in the APO was

⁵⁰ *Sommers Faculty Assn*, 9 PERB ¶ 3014 (1976).

⁵¹ Brief in Support of Exceptions at 16.

⁵² *Id* (emphasis in original).

⁵³ Tr., at pp 119, 121.

eliminated and a full-time bargaining unit position established.⁵⁴ Thus, the factual bases upon which the ALJ concluded that the work had been exclusive to the bargaining unit for that time period remain unrefuted, and no other grounds to defeat exclusivity as to the work in the APO has been established.

Nor has the College established that the ALJ's finding that Pasik and Nowey continued to perform their prior duties as part-time, non-unit employees constituted error. As the Board has often stated, "[c]redibility determinations by an ALJ are generally entitled to 'great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.'"⁵⁵ Here, no objective evidence has been raised compelling a contrary conclusion.

In the absence of any such contrary objective evidence, the ALJ did not err in crediting the testimony of Keeler and Hamberger that Pasik and Nowey continued to perform the same clerical duties as they had as full-time employees. While the College questioned the ESP's failure to call Pasik and Nowey themselves, none of the ESP's evidence as to the duties they performed was refuted. Indeed, the College's own witness, Whalen, testified that Nowey and Pasik each "backfilled her own position."⁵⁶ Nor does the College claim that the qualifications for the position have changed—unsurprisingly, as the work is being performed by the prior incumbents in the full-time

⁵⁴ Keeler testified on November 19, 2013, over 10 months after the events in question, that the part-time position was replaced with a full-time position "and that's got to go back maybe six, or seven years." Tr, at pp 146-147.

⁵⁵ *Dutchess Comm College*, 47 PERB ¶ 3018, 3056 (2014) quoting, *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019; *County of Tioga*, 44 PERB ¶ 3016, 3062 (2011); *Mount Morris Cent Sch Dist.*, 41 PERB ¶ 3020 (2008); see also, *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977).

⁵⁶ Tr, at p 255.

position.⁵⁷ Finally, as with the positions in the Nursing and Athletics Offices, the College has neither pleaded nor proved “operational necessity” sufficient to support what the Board has termed in some cases a compelling need defense. There is no evidence in the record that the College “had no other options open to it but to transfer [ESP’s] unit work, that it had negotiated that transfer to impasse with [ESP], or that it was willing to continue negotiations after the transfers.”⁵⁸ Accordingly, we deny the exceptions to the ALJ’s decision as they relate to the transfer of unit work in the APO, and the ALJ’s findings as to this transfer of exclusive unit work are affirmed.

Office Manager-Campus Services Office

The ALJ found to be exclusive to the unit “[t]he primary duties of the office manager in the campus services office, *ie*, the management responsibilities of scheduling and overseeing the work of the office and switchboard staff, as well as the management of the campus mailboxes and bulk mailings.”⁵⁹ This finding was predicated on the ALJ’s crediting Sharon Bower’s testimony, and finding that, during the

⁵⁷ The College does except to the ALJ’s finding that the level of services has not changed. However, as explained above, that contention relates to a claimed reduction of hours (and thus wages) of bargaining unit members, and not to a transfer of exclusive unit work outside the bargaining unit, absent a change of qualifications requiring balancing of the parties’ interests. As part-time employees are excluded from the bargaining unit here, this case is properly viewed as a transfer of unit work and not as a reduction of hours case. *Compare County of Erie*, 43 PERB ¶ 3016, at 3060, *with City of Canandaigua*, 47 PERB ¶ 3025, at 3072; *Burnt Hills-Ballston Lake Cent Sch Dist*, 25 PERB ¶ 3066 (1992).

⁵⁸ *New York City Transit Auth*, 30 PERB ¶ 3004, 3009 (1997), citing *City of Rochester*, 27 PERB ¶ 3031 (1994); *New York City Transit Auth.*, 19 PERB ¶ 3043 (1986); *Wappingers Cent. Sch. Dist.*, 19 PERB ¶ 3037 (1986). See also *Manhasset Union Free School District*, 41 PERB ¶ 3005, at 3107 (“Indeed, it is well-settled that an employer may not unilaterally change a term and condition of employment unless it has negotiated the change in good faith to the point of impasse, has an urgent need to do so, and continues to negotiate thereafter to an agreement”).

⁵⁹ 47 PERB ¶ 4599, at 4886.

five years Bower had held the position, “no non-unit employees had performed these tasks prior to January 2013.”⁶⁰ More specifically, Bower testified that she would consult Whalen on non-routine scheduling difficulties and allocation of scarce mailboxes, which they would resolve together, and that she kept him informed of other matters. As was the case in *County of Columbia*,⁶¹ the subordinate performed tasks under the direction of her supervisor, and with his occasional involvement when necessary. As was the case in that matter, so too here “we are unwilling to infer from [Whalen’s] general supervisory responsibilities over” the CSO, and “his incidental performance” of scheduling, that the ESP lacks exclusivity over the work performed.⁶²

However, the College correctly notes that the Board has “long held that we will not find a violation of the Act upon an allegation which has not been pleaded, even if that allegation has been litigated.”⁶³ The charge clearly asserts that the College distributed Bower’s duties to two other employees, Whalen “and one full-time ES Professional.”⁶⁴ Thus, the ESP is bound by its charge, and we grant the College’s exception to the extent that we modify the ALJ’s finding to dismiss any claim arising out

⁶⁰ *Id.*

⁶¹ 45 PERB ¶ 3025 (2012).

⁶² 45 PERB ¶ 3025, at 3058; see also *County of Onondaga*, 27 PERB ¶ 3048 (1994).

⁶³ *UFT (Cruz)*, 48 PERB ¶ 3004 (2015) *petition denied*, *Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (2015) (internal quotation marks omitted) (quoting *County of Rockland*, 31 PERB ¶ 3062, 3136 (1998)); see also *County of Nassau*, 29 PERB ¶ 3016 (1996); *Arlington Cent Sch Dist*, 25 PERB ¶ 3001 (1992); *City of Buffalo*, 15 PERB ¶ 3027 (1982); *City of Mt. Vernon*, 14 PERB ¶ 3037 (1981). Indeed, even when a motion is made to conform the pleadings to the proof, the motion “is essentially a request to amend the charge. Leave to amend is not available if the effect is to add a new substantive claim otherwise barred by PERB’s four-month statute of limitations.” *County of Monroe*, 36 PERB ¶ 3002, 3005 (2003) (citing Rules § 204.1(a) (1); *Town of Brookhaven*, 26 PERB ¶ 3066 (1993).

⁶⁴ Charge, at ¶ Z. As defined in the charge, “ES Professionals” denotes the ESP and is also used to refer to its members. *Id.* at ¶¶ B, CC.

of Bower's work other than the scheduling reallocated to Whalen. Moreover, Bower's testimony that her non-supervisory tasks, other than scheduling, were performed by both full-time and part-time employees, negates the predicate for finding such tasks exclusive to the bargaining unit.

Accordingly, the ALJ's decision is affirmed as modified.

IT IS, THEREFORE, ORDERED that the College forthwith:

1. To the extent, if any, the work of the typist in the Nursing and Physical Education Offices is still being performed and has not been returned to full-time employees in the ESP unit, return such work to full-time employees in the ESP unit, unless and until the parties reach an alternative arrangement through negotiations;
2. Return the work of the senior typist and principal stenographer in the Academic Programs Office, and the scheduling work of the office manager of the Campus Services Office, to full-time employees in the ESP unit, unless and until the parties reach an alternative arrangement through negotiations;
3. Cease and desist from assigning exclusive ESP unit work to non-unit employees without negotiating with ESP;
4. To the extent that any affected employees are identified, make whole such employees for loss of wages and benefits, if any, with interest at the maximum legal rate; and
5. Sign and post the Notice attached at all physical and electronic locations where the College customarily posts notices to employees represented in

the ESP unit.

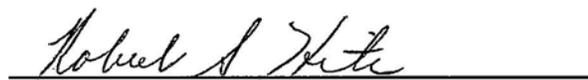
DATED: January 24, 2017
Albany, New York



John F. Wirenius, 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 Cayuga Community College represented by the Cayuga County Community College Educational Support Professionals (ESP) that Cayuga Community College will:

1. return the work of the Senior Typist in the Nursing and Physical Education Offices, Senior Typist and Principal Stenographer in the Academic Programs Office, and the scheduling work of the office manager of the Campus Services Office to full-time employees in the ESP unit, unless and until the parties reach an alternative arrangement through negotiations;
2. not assign ESP unit work to nonunit employees, unless and until the parties reach an alternative arrangement through negotiations; and
3. to the extent any affected employees are identified, make such employees whole for loss of wages and benefits, if any, with interest at the maximum legal rate.

Dated

By
on behalf of **CAYUGA COMMUNITY COLLEGE**

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

**COUNTY OF CHENANGO and CHENANGO
COUNTY SHERIFF,**

Charging Party,

CASE NO. U-33921

- and -

**CHENANGO COUNTY LAW ENFORCEMENT
ASSOCIATION, INC.,**

Respondent,

**HANCOCK ESTABROOK, LLP (JOHN F. CORCORAN of counsel), for
Charging Party**

JOHN M. CROTTY, ESQ., for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions to a decision of an Administrative Law Judge (ALJ) finding that the Chenango County Law Enforcement Association, Inc. (LEA) violated § 209-a.2 (b) of the Public Employees' Fair Employment Relations Act (Act).¹ The ALJ found that the LEA violated the Act by submitting to compulsory interest arbitration certain proposals that are not arbitrable under § 209.4 (g) of the Act.

EXCEPTIONS

The LEA excepts to the ALJ's decision on each of its three proposals and argues that all of its proposals are directly related to compensation and are therefore arbitrable. In addition, the LEA argues that, to whatever extent the Board finds any of its demands to be unitary in nature, the Board should reexamine and reverse its doctrine concerning

¹ 48 PERB ¶ 4556 (2015).

“unitary demands” explained in, *inter alia*, *County of Tompkins and Tompkins County Sheriff*.² The LEA argues that the “unitary demand” doctrine leads to unpredictable and inconsistent results that are punitive and contrary to the policies of the Act.

For the following reasons, we affirm in part, and reverse in part, the ALJ's decision.

DISCUSSION

Section 209.4 (g) of the Act limits the availability of interest arbitration for “members of any organized unit of deputy sheriffs who: (1) are engaged directly in criminal law enforcement activities that aggregate more than” 50% of their service, and (2) are encompassed within the definition of “police officers” pursuant to § 1.20 (34) of the Criminal Procedure Law, with certification requirements for both qualifications. For such employees, inclusive of the unit members at issue here, interest arbitration:

shall only apply to the terms of collective bargaining agreements directly relating to compensation, including, but not limited to, salary, stipends, location pay, insurance, medical and hospitalization benefits; and shall not apply to non-compensatory issues including, but not limited to, job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation which shall be governed by other provisions [prescribed] by law.

In construing this language, the Board has repeatedly reaffirmed the test for determining whether a particular demand is directly related to compensation, and therefore arbitrable under § 209.4 (g) of the Act, first articulated in *New York State Police*:

The degree of a demand's relationship to compensation is measured by the characteristic of the demand. If the sole,

² 44 PERB ¶ 3024 (2011).

predominant or primary characteristic of the demand is compensation, then it is arbitrable because the demand to that extent *directly* relates to compensation. A demand has compensation as its sole, predominant or primary characteristic only when it seeks to effect some change in amount or level of compensation by either payment from the State to or on behalf of an employee or the modification of an employee's financial obligation arising from the employment relationship (e.g., a change in an insurance copayment). If the effect is otherwise, then the relationship of the demand becomes secondary and indirect and the subject is, therefore, excluded from the scope of compulsory arbitration under the language of § 209.4 [g].³

As the Board further explained in *County of Orange*:

Under that test, each proposal must be examined separately to discern whether its sole, predominant or primary characteristic is a modification in the amount or level of compensation. Consistent with *State Police*, in applying that test, we will compare a proposal with the subjects specifically identified by the Legislature as being arbitrable: “salary, stipends, location pay, insurance, medical and hospitalization benefits.” In addition, we will compare the proposal with those subjects declared by the Legislature to be nonarbitrable: “job security, disciplinary procedures and actions, deployment or scheduling, or issues relating to eligibility for overtime compensation.”⁴

In the instant case, the LEA challenges the ALJ’s ruling that three of its proposals were not “directly related to compensation” and thus not arbitrable under § 209.4 (g) of the Act. We address each in turn.

Proposal No. 8, Article 12 – Holidays

In its Proposal No. 8, the LEA sought to amend § 12.02 of the parties’ collective-bargaining agreement to increase the number of holidays for which employees are paid

³ 30 PERB ¶ 3013, 3028 (1997), *confd sub nom New York State Police Investigators Assn v NYS Pub Empl Rel Bd*, 30 PERB ¶ 7011 (Sup Ct Albany County 1997) (emphasis in original); see also *Madison County Deputy Sheriff’s PBA*, 49 PERB ¶ 3029 (2016); *County of Broome*, 44 PERB ¶ 3046, 3137 (2011).

⁴ 44 PERB ¶ 3023, 3080 (2011).

at one and one-half times their applicable hourly rates to 13 days from the current six days. The LEA also proposed adding a new paragraph to § 12.02 stating that employees who are regularly scheduled off on any of the named holidays shall be paid eight hours of pay. Finally, the LEA proposed adding language to § 12.08 stating that an employee who is not regularly scheduled to work on any of the 13 holidays but who does work shall be paid two and one-half times the applicable hourly rate for all hours worked.⁵

The ALJ found that the first component of Proposal No. 8 was not arbitrable because it proposed “an increase in the number of paid holidays for certain unit members” and was therefore a demand for additional time off from work without loss of pay. The ALJ found that the second and third component of the LEA’s proposal were directly related to compensation and therefore would normally be arbitrable, but that the two components were inseparable from the paid holiday component, thus rendering the proposal’s components unitary in nature and therefore not arbitrable.⁶

Contrary to the ALJ, we find that the LEA’s proposal to increase the number of holidays for which employees are paid at one and one-half times their applicable hourly rates is directly related to compensation. Unlike the demands at issue in *New York State Police*,⁷ cited by the ALJ, the LEA’s proposal does not seek time off from work without loss of pay. Instead, the sole characteristic of the LEA’s proposal is that

⁵ Ex. 3, at 3-4.

⁶ When a unitary demand contains an inseparable nonarbitrable component, the demand does not satisfy the arbitrability test under § 209.4 (g) of the Act. See *County of Orange*, 44 PERB ¶ 3023, at 3081.

⁷ 30 PERB ¶3013, at 3029.

employees will receive increased compensation for particular days worked.⁸ Because the “sole characteristic” of the LEA’s proposal is a modification in the amount of compensation, we find that this component is arbitrable.⁹

As the ALJ correctly found, the second and third components of Proposal No. 8 are both directly related to compensation and are thus arbitrable. Even assuming that the three components of Proposal No. 8 constitute a unitary demand, then, the entire proposal is properly submitted to arbitration.¹⁰

Proposal No. 15, Article 26 – Workers’ Compensation

Proposal No. 15 seeks to amend existing §§ 26.01 and 26.02 of the CBA to state that all employees shall be covered by Workers’ Compensation Law (WCL) and to incorporate General Municipal Law Section 207-c procedures into the CBA.¹¹ We find that the ALJ properly concluded that this proposal was nonarbitrable. As the ALJ found, the Board addressed a similar proposal in *County of Tompkins*.¹² The Board found that, although compensation was a component of the proposal, the proposal was neither a wage payment procedure nor purely compensatory in nature. We follow that holding here. Because the proposal addresses subjects that are not directly related to

⁸ Other provisions of § 12.02 of the parties’ collective-bargaining agreement do provide paid holidays off for certain employees. However, the LEA’s proposal does not affect those provisions and does nothing to change paid holidays off for those employees.

⁹ *County of Tompkins*, 44 PERB ¶ 3024, at 3089.

¹⁰ We decline the LEA’s invitation to revisit and/or reverse the “unitary demand” doctrine. As explained in *County of Tompkins*, 44 PERB ¶ 3024, at 3088, such an approach is necessitated by the Legislature’s public policy choice of dividing the subject matter of proposals for deputy sheriffs into two classes with distinct impasse procedures. See also, *County of Orange*, 44 PERB ¶ 3023, at 3088. Here, all three components of the LEA’s proposal are mandatory subjects of bargaining and are directly related to compensation. As a result, all three components are arbitrable.

¹¹ Ex. 3, at 5.

¹² 44 PERB ¶ 3024, at 3088.

compensation (such as the content of the medical information release form), it is nonarbitrable.¹³

Proposal No. 22, paragraphs 5 through 8 – New Article – Canine Unit

At issue with respect to Proposal No. 22 are the following paragraphs:

5. The following expenses associated with the K-9 unit shall be provided by the County at no cost:

- a. The purchasing of the dog(s).
- b. A marked take home police vehicle for transporting the police dog(s), which shall remain the property of the County. The police vehicle shall contain a cage for the dog(s).
- c. A chain link fence for enclosing an area for the dog(s) to live at the K-9 employee's residence, which, if feasible, shall remain the property of the County.
- d. A "dog house" which shall remain the property of the County.
- e. Alternate kennel arrangements for housing the dog(s) when the K-9 employee is unavailable, or as otherwise becomes necessary (i.e. vacation, illness, etc.).
- f. All veterinary service(s) and related expenses for the care of the dog(s) which shall receive the prior approval of the Sheriff or designee.
- g. All necessary and required equipment which shall receive the prior approval of the Sheriff or designee.
- h. All dog food.

6. The County agrees that the employee(s) assigned to the K-9 unit shall be considered "on duty" for the purposes of receiving General Municipal Law Section 207-c status, and applying to the New York State Employees' Retirement System, with respect to becoming disabled whenever that employee is performing tasks or activities "off duty" necessary and reasonable involving the training, care and maintenance of the dog(s), regardless of where or when these tasks or activities are performed.

7. The County will defend and indemnify each employee assigned to the K-9 unit for any injuries or damages caused by his/her dog(s) which occur or are claimed to have occurred in the performance of his/her duty during the period in which such employee is or was assigned to the K-9 unit.

¹³ Id.

8. All dogs purchased and provided to the K-9 unit shall remain the property of the County until the retirement of the dog(s) from the K-9 unit. At that time, the K-9 employee assigned to that dog(s) shall be offered the opportunity to purchase the dog(s) from the County for the sum of one dollar (\$1.00), and, if purchased, shall become the owner of the dog(s).¹⁴

The ALJ analyzed each of the four paragraphs above and, with the exception of paragraph 5 (f), found that the proposal was nonarbitrable.

With respect to paragraph 5, we agree with the ALJ that certain of the items are requests for equipment and are thus nonarbitrable.¹⁵ Specifically, we find that the demands contained in paragraph 5 (b), (c), (d), and (g) are requests for the use of County property and are not directly related to compensation.

As the LEA points out in its exceptions, the Board has previously found the provision of veterinary care and food for out-of-service canines to be “an economic benefit and thus a form of compensation for unit employees,” making both mandatory subjects of bargaining.¹⁶ We find that the same rationale applies to in-service canines, making the LEA’s demands in paragraphs 5 (f) and (h) mandatory subjects of bargaining. However, finding that a contract term is mandatorily negotiable does not necessarily resolve issues of arbitrability under § 209.4 (g), which requires a separate and more stringent analysis to determine whether a demand is directly related to compensation.¹⁷ We find that the LEA’s proposals for veterinary care and dog food are directly related to compensation. Both of these proposals relate to costs inherently

¹⁴ Ex. 3, at 9-10.

¹⁵ *County of Tompkins*, 44 PERB ¶ 3024, at 3089.

¹⁶ *City of Kingston*, 40 PERB ¶ 3015, 3058 (2007).

¹⁷ *See County of Putnam*, 38 PERB ¶ 3031, at 3104.

associated with the care and custody of an animal which, if not paid for by the County, must be paid for by the unit employee. The same analysis applies to expenses arising out of alternate kennel arrangements for housing the police dog(s) when the K-9 employee is unavailable. As a result, we find that the primary characteristic of paragraphs 5 (e), (f), and (h) of the LEA's Proposal No. 22 are compensation, and these proposals are therefore arbitrable. Moreover, we find that paragraph 5 (a), related to the purchasing of dogs, requires payment from the County on behalf of employees. This paragraph is therefore directly related to compensation and arbitrable.¹⁸

We affirm the ALJ's finding that paragraph 6 is nonmandatory and, therefore, not arbitrable because the proposal would deprive the Joint Employer of its statutory right to make initial General Municipal Law § 207-c eligibility determinations.¹⁹ We also find that paragraph 7, while a mandatory subject of bargaining,²⁰ is not directly related to compensation and therefore is not arbitrable. This is especially true because, as the ALJ found, the proposal "would deprive the County of the right to challenge a claim for indemnification on the basis that the injuries or damages did not occur while [the] K-9 officer was on duty."²¹ This aspect is more akin to a procedural demand that determines eligibility for indemnification and does not relate to compensation.²²

Lastly, we find that paragraph 8's primary characteristic relates to the disposition of County property and does not seek to effect a meaningful change in the amount or level of compensation. As a result, we affirm the ALJ's finding that paragraph 8 is not

¹⁸ *State Police*, 30 PERB ¶ 3013, at 3028.

¹⁹ *See Chenango County Law Enforcement Association*, 45 PERB ¶ 3003, at 3005.

²⁰ *See Patrolmen's Benev Assn of Newburgh New York, Inc.*, 18 PERB ¶ 3065 (1985).

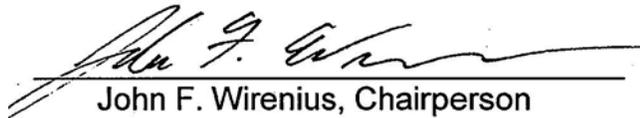
²¹ 48 PERB ¶ 4556, at 4705.

²² *See Madison County Deputy Sheriff's PBA*, 49 PERB ¶ 3029.

directly related to compensation and is also not arbitrable.

In sum, we affirm the ALJ's finding that the LEA violated § 209-a.2 (b) of the Act by submitting Proposal No. 15 and paragraphs 5 (b), (c), (d), and (g) of Proposal No. 22 to compulsory interest arbitration. We also affirm the ALJ's finding that paragraph 5 (f) of Proposal No. 15 is arbitrable. We reverse the ALJ and find that paragraphs 5 (a), (e), and (h) of Proposal No. 22 and Proposal No. 8, in its entirety, are arbitrable.

DATED: January 24, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

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

In the Matter of

DIANE PAYSON,

Charging Party,

CASE NO. U-33647

- and -

**MOUNT PLEASANT COTTAGE UNION FREE
SCHOOL DISTRICT,**

Respondent.

**GLASS KRAKOWER LLP (BRYAN D. GLASS of counsel),
for Charging Party**

**SHAW, PERELSON, MAY & LAMBERT, LLP (STEVEN M.
LATINO of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Diane Payson to a decision and order of an Administrative Law Judge (ALJ) dismissing her improper practice charge, in which she alleged that the Mount Pleasant Cottage Union Free School District (District) retaliated against her in violation of §§ 209-a.1(a) and (c) of the Public Employees' Fair Employment Act (Act) by terminating her internships and reducing her duties and hours.¹ The ALJ found that Payson had failed to establish a *prima facie* case of retaliatory motive. Specifically, the ALJ found that Payson had failed to show that the District had knowledge of her protected activity. Independently, the ALJ found that Payson failed to present evidence sufficient to support an inference that unlawfully motivated interference or discrimination was the cause of the District's decision to stop supporting Payson's internships and to reduce Payson's hours and duties. Further,

¹ 48 PERB ¶ 4584 (2015).

even assuming that Payson had effectively established a *prima facie* case, the ALJ found that the District proved that it acted for legitimate business reasons.

EXCEPTIONS

Payson's exceptions boil down to an argument that the ALJ erred in finding Superintendent James Gaudette's testimony credible. Specifically, Payson argues that Gaudette made untrue statements regarding how the District is reimbursed by New York State for certain positions within the district. Payson also argues that the ALJ omitted or mischaracterized certain evidence. In sum, Payson argues that there was "more than a sufficient basis to find Superintendent Gaudette retaliated against Payson following her union involvement" The District supports the decision of the ALJ and contends that no basis has been demonstrated for reversal.

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

FACTS

The facts are fully set forth in the ALJ's decision, and are discussed here only as far as is necessary to address the exceptions. The District is a special act school district. Gaudette has been superintendent since July 2011. Monica Baron was hired in 2012 as chairperson of the Committee on Special Education, and she became principal in September 2013.

Payson was hired in April 2003 as a full-time school counselor. Payson's job duties changed from school counselor to full-time guidance counselor in August 2011. In the 2012-2013 school year, Gaudette assigned Payson to extra duties as test coordinator and "Ease of Entry" coordinator. In August 2013, he recommended her for

an administrative internship involving both a building-level and a district-level internship.²

In January 2014, Payson became more involved in the union and spoke at membership meetings held in January and February. Payson was also involved with a committee that was preparing a school climate survey which, when completed, would be submitted to Gaudette and the District's board.

In March 2014, Payson was advised by Terry Ott, who administered the program that sponsored her internships, that the building internship was being postponed so she could focus on her guidance activities.

On April 4, 2014, Baron called Payson to her office and advised her to bring union representation. At the meeting, Baron advised Payson that all of her duties except completing senior graduation assignments were being reassigned to a school social worker and a psychologist. Baron explained that Gaudette had instructed her to lighten Payson's load.

On April 29, 2014, Gaudette informed Payson that he would no longer support her district-level internship.³ Then, in May 2014, Payson received a letter from Gaudette advising that her position was reduced to a .15 full-time equivalent (FTE), consisting of one day of work a week, for four hours.⁴ The letter cites "economy and efficiency" as the reasons for the reduction in hours.

When Gaudette became superintendent, the District had a budget deficit of close

² Charging Party's Exhibit 15.

³ Charging Party's Exhibit 27.

⁴ Charging Party's Exhibit 30.

to \$5.8 million,⁵ and there was discussion about budget concerns and potential job cuts from the time Gaudette started at the District. Referencing the School Age Staffing Standard Model,⁶ Gaudette testified that he studied rate reimbursement schedules and looked for ways to utilize staff so as to maximize available money. Gaudette's testimony specifically referred to pages 7 and 16 of the School Age Staffing Standard Model, which address reimbursement methods for guidance counselors and social workers, noting that reimbursement for guidance counselors is made according to the number of students in a caseload, whereas for social workers and psychologists it is based on the number of clinical sessions per student.

Gaudette further explained that the tenure line is what defines the reimbursement rate. Also, certified guidance counselors are required in only certain circumstances and Part 100 of the Commissioner's Regulations applicable to schools in New York State does not require that guidance counselors perform all of the traditional guidance counselor functions. Gaudette testified that he determined that if he used staff members other than Payson to perform her functions, he could yield a better reimbursement rate. Gaudette also testified that no one ever reported to him what occurred in union meetings or the nature of any staff member's involvement in union matters.

On rebuttal, Payson disputed Gaudette's testimony regarding the state reimbursement formula based on a document she obtained through a FOIL request and an alleged discussion with an unnamed source at SED.⁷

⁵ Respondent's Exhibit 15.

⁶ Respondent's Exhibit 17.

⁷ Tr. 751-754.

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 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.⁸ These elements establish a *prima facie* case and give rise to an inference of improper motivation.⁹ Only “if the charging party can establish such an inference, does the burden of production shift to the respondent to present evidence demonstrating that its conduct was not improperly motivated.”¹⁰

Here, the ALJ found that Payson had failed to show that Gaudette, as the decision-maker, had knowledge of Payson’s union activity. The ALJ also credited Gaudette’s explanation of his reasons for eliminating Payson’s internships and for reducing her duties and position.

We find that the record adequately supports the findings of fact and credibility determinations made by the ALJ. 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

⁸ *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015); citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); see generally, *UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021 (2013); see also *City of Salamanca*, 18 PERB ¶ 3012 (1985).

⁹ See *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037.

¹⁰ *Id.*; see generally, *Littlejohn v City of New York*, 795 F3d 297, 307-308 (2d Cir. 2015).

where, as here, the credibility determination rests in part on the witness' demeanor."¹¹

Here, Payson has not provided any such objective evidence that establishes that the ALJ manifestly erred.¹² Even assuming that Payson's evidence establishes that Gaudette's understanding of how the District is reimbursed by New York State is incorrect, that evidence does not undermine the ALJ's finding that Gaudette held a good-faith belief that his interpretation was correct and acted accordingly when deciding to reduce Payson's position.¹³

Moreover, Payson has not pointed to any evidence in the record that even arguably demonstrates that Gaudette had knowledge of Payson's union activity. Because she has failed to demonstrate this element by a preponderance of the credible evidence, Payson has failed to establish a *prima facie* case of unlawfully motivated

¹¹ *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3002, at (quoting *UFT (Cruz)*, 48 PERB ¶ 3004 (2015)); see also *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).

¹² To the extent that Payson relies in her exceptions brief on evidence that was not introduced at the hearing, we disregard it. The Board has long held that "we will not consider allegations of fact made for the first time in exceptions when reviewing an ALJ's decision because our review is limited to the record as it was developed before the ALJ." *CSEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016) (quoting *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995)).

¹³ Payson also argues that Gaudette "intentionally made a false statement under sworn testimony that he was unaware of . . . Payson's certification in School Psychology." Contrary to Payson's argument, the fact that Payson holds a certificate in School Psychology and that this information in her personnel file does not provide objective evidence that Gaudette knew of her certification, only that his statement was incorrect. Payson's exceptions also argue that the ALJ failed to find all relevant facts concerning Baron's actions. We find any omissions to be immaterial, since the ALJ found that Gaudette alone made all decisions concerning Payson.

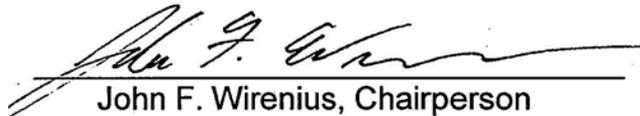
retaliation.¹⁴

In sum, on the record before us, we find that the ALJ's factual determination that the District lacked knowledge of Payson's union activity and was not motivated by anti-union animus was neither unsupported by the record nor manifestly incorrect.

Accordingly, we affirm the ALJ's decision to dismiss Payson's charge alleging that the District violated §§ 209-a.1 (a) and (c) of the Act.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.

DATED: January 24, 2017
Albany, New York


John F. Wirenius, Chairperson


Allen C. DeMarco, Member


Robert S. Hite, Member

¹⁴ In her exceptions, Payson states that she "attempted to subpoena Daria Kolesar as a hostile witness." Payson did not, however, seek a subpoena from the ALJ. See § 211 of the Rules of Procedure. Payson also did not seek an adjournment or otherwise attempt to enforce the subpoena that her attorney had apparently issued and served. As a result, there are no rulings of the ALJ in front of the Board for review.

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

In the Matter of

**NEW YORK STATE PUBLIC EMPLOYEES
FEDERATION, AFL-CIO,**

Charging Party,

CASE NOS. U-32893 & U-33274

- and –

**STATE OF NEW YORK (DEPARTMENT OF
TRANSPORTATION),**

Respondent.

**LISA M. KING, GENERAL COUNSEL (BARBARA S. NECTOW field
representative), for Charging Party**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J.
LODOVICE of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Department of Transportation) (State or DOT) to a decision and order of an Administrative Law Judge (ALJ) finding that the State violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by unilaterally terminating the practice of assigning State-owned vehicles to unit employees for commuting purposes. The ALJ also found that the State violated §§ 209-a.1 (a) and (c) of the Act by issuing revised W-2s to employees named in the charge in Case No. U-32893 in retaliation for their participation in that charge.¹

¹ 48 PERB ¶ 4569 (2015).

The ALJ ordered the State to make whole unit employees who were issued a revised W-2, to rescind and/or correct any documents in the employer's possession or provided by the employer to any other state or federal entity that do not accurately reflect the affected employees' taxable income for 2012, and to post a notice.²

EXCEPTIONS

The State excepts to the ALJ's decision on numerous grounds. In Case No. U-32893, the State argues, *inter alia*, that the change did not violate an established past practice because the grant of State-owned vehicles to unit employees for commuting purposes was conditional on its yearly determination of whether use of a State-owned vehicle to commute "is for the benefit of the State."³ In Case No. U-33274, the State argues that PEF failed to establish a *prima facie* case of retaliatory motive and that, even if a violation is found, the ALJ's remedy should be modified. PEF supports the ALJ's decision in all respects.

FACTS

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

Case No. U-32893

The employees at issue in this case are employed in the Region 8 DOT Highway and Maintenance Department and hold the titles of Assistant Resident Engineer, Permit Engineer, and Senior Equipment Operator Instructor. For a number of years, the affected employees had been assigned a State-owned vehicle on a full time basis that

² Id., at 4757.

³ State's Brief in Support of Exceptions, at 29.

could be used, in addition to work purposes, to commute to and from the employee's home. On or about May 10, 2013, DOT management notified affected employees that DOT was not approving employees' requests for full-time vehicle assignments, including use of the vehicles for commuting, for the time period April 1, 2013 to March 31, 2014.⁴

In order to be assigned a vehicle for commuting purposes, employees were annually required to complete and submit an "EM-30" form, which was labeled as a "request for permanent/temporary assignment of State-owned passenger vehicle".⁵ The form required the employee to indicate a "justification" for their vehicle assignment.⁶ The justification was required to comport with DOT's Manual Administrative Policies and Procedures (MAP).⁷ Section I of the MAP provides that "State-owned vehicles are provided to Department employees . . . for the benefit of the State, not the convenience of the employee." The MAP provides that an evaluation of the continued use of assigned vehicles is conducted at the beginning of each fiscal year.⁸ "The purpose of this review is to determine whether continuation of the assignment is appropriate."⁹ Finally, Section IV.D covers commuting in State vehicles, and states, among other things, that a State vehicle may be used to commute "when it can be demonstrated that such vehicle use is for the benefit of the State" ¹⁰ The MAP remained in effect and unchanged prior to and after the 2013 vehicle assignment denials.¹¹ Prior to the

⁴ ALJ Exhibit 1, ¶ 9; ALJ Exhibit 3, ¶ 1.

⁵ Transcript, pp. 48-50; Charging Party Exhibit 1.

⁶ Charging Party Exhibit 1.

⁷ Transcript, pp.49-53, 89-90.

⁸ Joint Exhibit 2, at § III.

⁹ Id.

¹⁰ Joint Exhibit 2, at § IV.D.2.

¹¹ Transcript, p. 201.

employee requests that were denied in 2013, the EM-30 forms were consistently signed and approved by the employees' direct supervisors and/or Peter Teliska, Regional Highway Maintenance Engineer.

Case No. U-33274

The charge in Case No. U-32893, discussed above, was filed on July 26, 2013. On September 24, 2013, a pre-hearing conference was held. Among those present at the conference was Ray LaMarco, DOT Director of Labor Relations.¹² On October 4, 2013, most of the employees named in the charge were sent letters from Michael Fazioli, DOT Director of Accounting.¹³ The letters stated that DOT's records indicated that the employee was assigned a State-owned vehicle that was also used for commuting and that the employee had not filed the appropriate form to report the taxable value of personal use of an employer-provided vehicle. This form, called an "AC-3173," provides a choice of three possible methods of computing taxable value and instructs that the employee is to select their preferred calculation method.¹⁴ The three computation methods are: (1) Cents-per-mile rule and valuation; (2) Commuting rule and valuation; and (3) Annual lease value rule and valuation.¹⁵

The letters from Fazioli went on to state that "[a] calculation was provided to the Office of the State Comptroller based on the mileage from your home to your official work station. . ." (that is, using the "cents-per-mile" method of computing taxable value) and that employees would be receiving revised W-2s based on the taxable valuation of

¹² ALJ Exhibit 7, ¶ 12; ALJ Exhibit 9, ¶ 1.

¹³ Transcript, p. 38; ALJ Exhibit 1, ¶ 7; Charging Party 6; Joint Exhibits 13, 19, 24, 29, 32, 36, 45, 54, 57, 62, 67.

¹⁴ Joint Exhibit 4.

¹⁵ Id.

their use of State-owned vehicles for commuting.¹⁶ The “cents per mile” valuation method chosen by DOT resulted in the maximum additional income as compared to either the “commuting rule” or the “annual lease value rule”.¹⁷ The letters indicated that carbon copies had been sent to “P.J. Snyder, Assistant Commissioner, Administrative Services” and “R. LaMarco, Director, Employees Relations Bureau.”¹⁸

Some of the employees who received letters from Fazioli had submitted the required AC-3173 forms and others had noted on their EM-30 forms that their assigned vehicles were not being used for commuting.¹⁹ Others were commuting in exempt vehicles and, pursuant to DOT guidelines, were not required to file AC-3173 forms.²⁰

Peter Snyder, the Assistant Commissioner for Administrative Services, is LaMarco's direct supervisor.²¹ On cross-examination, Snyder testified that he was given a copy of the charge in Case No. U-32893 and that after reviewing it, he ordered an audit on the employees named therein.²² Snyder testified that he believed that those employees constituted a “representative sample” of DOT employees, which would enable him to assess employee compliance of reporting taxable commuting benefits statewide.²³ Snyder testified that these employees were the only employees chosen for this audit.²⁴ He further testified that the purpose of the audit was to determine whether

¹⁶ See Charging Party Exhibit 6; Joint Exhibits 13,19, 24, 29, 32, 36, 45, 54, 57, 62, 67.

¹⁷ Transcript, p. 84.

¹⁸ See Charging Party Exhibit 6; Joint Exhibits 13,19, 24, 29, 32, 36, 45, 54, 57, 62, 67.

¹⁹ Transcript, pp. 111-113; Respondent Exhibit 8; Joint Exhibits 11, 14, 30, 31, 33, 37, 48, 60, 63, 64, 68.

²⁰ Transcript, pp. 105-107.

²¹ Transcript, pp. 214-215.

²² Transcript, p. 218.

²³ Transcript, pp. 210-211.

²⁴ Transcript, pp. 218-219.

the employees who had filed EM-30s requesting vehicle assignments had also filed the appropriate AC-3173 forms to report the taxable value of those vehicle assignments.²⁵

Snyder testified that the audit procedures were as follows:

The audit department contacted the payroll unit and inquired if the AC's had been filed by those people. The payroll unit reported that back to the audit group. The audit group recommended to the accounting bureau that these people need to file forms. They hadn't filed forms. So as the supervisor of the accounting bureau under which the payroll unit is organized in our department, Mr. Fazioli sent the letters to the employees.²⁶

Snyder testified that the "cents-per-mile" valuation rule was chosen "[b]ecause it was the most representative appropriate method that we could use."²⁷ On cross-examination, Snyder acknowledged that other valuation methods could have been used.²⁸

DISCUSSION

Case No. U-32893

The Court of Appeals has recently acknowledged and reaffirmed that "employee use of an employer-owned vehicle for transportation to and from work is an economic benefit and a mandatorily negotiable term and condition of employment; therefore, a public employer may not unilaterally discontinue a past practice of providing its

²⁵ Transcript, p. 209.

²⁶ Transcript, p. 124.

²⁷ Transcript, p. 212.

²⁸ Transcript, pp. 226-227.

employees with this benefit.”²⁹ In order to establish an enforceable past practice, a charging party must demonstrate that the practice at issue was unequivocal and continued uninterrupted for a period of time sufficient under the circumstances to give rise to a reasonable expectation among the affected unit members that the practice would continue.³⁰

Contrary to the ALJ, we find that PEF has not demonstrated an enforceable past practice of assigning State-owned vehicles for commuting purposes here, where employees had to annually request a vehicle for commuting purposes under a policy that allowed the State to make an annual determination on the request based on whether such an assignment was “for the benefit of the State.”

When a benefit is granted under an express reservation of right, which remains unchanged by subsequent negotiations, the modification or cessation of the benefit in accordance with the retained right cannot be considered an impermissible unilateral change.³¹ Here, the State expressly reserved the right to determine whether use of a State vehicle for commuting purposes is “for the benefit of the State” each year. This determination is akin to determining whether such use is in the State’s best interests.

²⁹ *Town of Islip v Pub Empl Rel Bd*, 23 NY3d 482, 491, 47 PERB ¶ 7002 (2014). The Board has long held that the provision of employer-owned vehicles to employees for personal use is an economic benefit and, therefore, a mandatory subject of negotiation. See, eg, *County of Nassau*, 38 PERB ¶ 3005, 3014 (2005), citing *County of Nassau*, 35 PERB ¶ 3036 (2002), *County of Monroe and Sheriff*, 33 PERB ¶ 3044, 3118 (2000), and *County of Nassau*, 26 PERB ¶ 3040, 3068 *confd sub nom County of Nassau v PERB*, 215 AD2d 381, 28 PERB ¶ 7011 (2d Dep't 1995).

³⁰ *Chenango Forks Cent School Dist*, 40 PERB ¶ 3012, 3046-3047 (2007), *confd sub nom Chenango Forks Cent Sch Dist v New York State Pub Empl Rel Bd*, 95 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *confd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013).

³¹ *County of Nassau*, 38 PERB ¶ 3030, 3101 (2005); *State of New York (Department of Health)*, 25 PERB ¶ 3005, 3018 (1992), *confirmed sub nom Public Empl Fedn v NYS Pub Empl Relations Bd*, 195 AD2d 930, 26 PERB ¶ 7008 (3d Dept 1993).

We have long held that where the evidence of a practice to extend a benefit to employees establishes that “a decision is made annually, and it is not automatic,” but rather is based on “the agency’s best interests” at the time, the practice at issue is one which vests discretion in the employer.”³² Because the State retained discretion to annually reevaluate whether employees would be assigned a vehicle for commuting purposes, we find, contrary to the ALJ, that employees could not have formed a reasonable expectation that they would always be assigned a vehicle for such use.

We hold that the State’s decision not to assign take-home vehicles in 2013 was consistent with its policy and practice and that employees were not, therefore, entitled to be assigned vehicles for commuting purposes in 2013. The ALJ’s decision and order with respect to charge U-32893 is accordingly reversed.

Case No. U-33274

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 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.³³ These elements

³² *State of New York (Office of State Comptroller)*, 48 PERB ¶ 3009, 3030 (2015); *State of New York (Department of Health)*, 25 PERB ¶ 3005, at 3018.

³³ *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015); citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); see generally, *UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021 (2013); see also, *City of Salamanca*, 18 PERB ¶ 3012 (1985).

establish a *prima facie* case and give rise to an inference of improper motivation.³⁴ A charging party can establish the existence of anti-union animus by statements or by circumstantial evidence, which may be rebutted by evidence of legitimate business reasons for the actions taken, unless those reasons are found to be pretextual.³⁵

We affirm the ALJ's finding that PEF established a *prima facie* case. The burden of establishing a *prima facie* case is a relatively low one, and the timing and context of an employer's conduct may be sufficient to establish an inference of improper motivation, thereby shifting the burden of production to the respondent to come forward with evidence demonstrating a non-discriminatory basis for the alleged conduct.³⁶ Here, PEF showed, on its case-in-chief, that 15 unit employees were named in the charge in Case No. U-32893 and that LaMarco attended the pre-hearing conference on this charge on September 24, 2013 and without doubt knew of these employees' protected activity in filing the charge. Against this background, DOT sent a letter dated October 4, 2013, copied to LaMarco, to the majority of the employees named in the charge, advising them that they would be receiving revised W-2s increasing their 2012 taxable income due to their use of State-owned commuting vehicles. This evidence is sufficient to raise the inference that the decision to issue revised W-2s to only those employees named in the improper practice charge was causally linked to their protected activity, establishing an inference of improper motivation.³⁷

³⁴ See *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037.

³⁵ See *State of New York (SUNY)*, 38 PERB ¶ 3019 (2005), *confirmed sub nom CSEA v New York state Pub Empl Rel Bd*, 35 AD3d 1005, 39 PERB ¶ 7012 (3d Dept 2006).

³⁶ *Jenkins*, 41 PERB ¶ 3007, at 3043.

³⁷ Because we find that PEF's evidence was sufficient to establish a *prima facie* case, we find that the ALJ did not err in denying the State's motion to dismiss.

The inference of retaliatory motivation was more than substantiated by Snyder's testimony on cross-examination, although not in the precise way suggested by PEF's case-in-chief. As the ALJ found, the only employees who received revised W-2s were those named in the charge in Case No. U-32893. Snyder, LaMarco's direct supervisor, testified that he provided these names to his audit department after reviewing the charge, and the ALJ declined to credit his proffered legitimate business reason testimony that these employees were a "representative sample" used to assess statewide compliance. By his own admission, Snyder's focus was on those whose names were listed in the charge. An audit of the taxable benefit for all of those department-wide who had been authorized to use state vehicles for personal purpose as a matter of broad fiscal propriety would more credibly support Snyder's claim that he was attempting to assess statewide compliance. The ALJ's decision was further supported by the State's not verifying whether employees had, in fact, filed AC-3173 forms, were actually commuting in State-owned vehicles, or were exempt from filing. In other words, the State failed to determine whether employees' W-2s required any adjustment, but simply made an across-the-board determination that employees named in the charge for Case No. U-32893 would receive a revised W-2, with the taxable benefit calculated at the highest rate possible. Nor has the State identified any "objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect."³⁸

In these circumstances, the record evidence amply supports the ALJ's finding that the State would not have issued the revised W-2s at issue here to employees but

³⁸ *County of Nassau*, 48 PERB ¶ 3023, 3084 (2015).

for the filing of the charge and employees' participation therein and that the State's asserted reasons for sending employees revised W-2s were pretextual.

Although we affirm the ALJ's finding of a violation, we modify the remedy to account for the unique circumstances here. In order to allow employees to recover overpayment of taxes that resulted from the State's discriminatory issuance of revised W-2s, we shall order the State to review affected employees' use of State-owned vehicle use for commuting purposes for 2012; to allow employees to select a lawful method from the options available to them for calculation of the taxable value of personal use of an employer-provided vehicle for 2012 if such a calculation is necessary; and to correct W-2s and any other documents in the employer's possession or provided by the employer to any other state or federal entity that do not accurately reflect the affected employees' taxable income for 2012, with copies to affected employees.

IT IS, THEREFORE, ORDERED that the ALJ's findings are affirmed in part, reversed in part, and the ALJ's order is MODIFIED AS FOLLOWS:

- 1) Cease and desist from retaliating against unit members for their engagement in protected activity, specifically participating in charges brought before the Board.
- 2) Review affected employees' use of State-owned vehicle use for commuting purposes for 2012; allow employees to select a lawful method from the options available to them for calculation of the taxable value of personal use of an employer-provided vehicle for 2012; and correct W-2s and any other documents in the employer's possession or provided by the employer to any other state or federal entity that do not accurately reflect the affected employees' taxable

income for 2012, with copies to affected employees, in order that employees may be made whole through recovering overpayment of taxes that resulted from the State's discriminatory issuance of revised W-2s; and

- 3) Sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: January 24, 2017
Albany, New York



John F. Wirenius, 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 State of New York (Department of Transportation) in the bargaining unit represented by the New York State Public Employees Federation, AFL-CIO that the State will:

- 1. Not retaliate against unit members for their engagement in protected activity, specifically participating in charges brought before the Board; and
- 2. Review affected employees' use of State-owned vehicle use for commuting purposes for 2012; allow employees to select a lawful method from the options available to them for calculation of the taxable value of personal use of an employer-provided vehicle for 2012; and correct W-2s and any other documents in the employer's possession or provided by the employer to any other state or federal entity that do not accurately reflect the affected employees' taxable income for 2012, with copies to affected employees, in order that employees may be made whole through recovering overpayment of taxes that resulted from the State's discriminatory issuance of revised W-2s.

Dated

By

(Representative)

(Title)

State of New York (Department of Transportation)

.....

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

**POLICE BENEVOLENT ASSOCIATION
OF NEW YORK STATE, INC.,**

Charging Party,

CASE NO. U-32560

- and -

**STATE OF NEW YORK (STATE UNIVERSITY
OF NEW YORK AT BUFFALO),**

Respondent.

**GLEASON, DUNN, WALSH & O'SHEA (PETER N. SINCLAIR of
counsel), for Charging Party**

**MICHAEL N. VOLFORTE, ACTING GENERAL COUNSEL (CLAY J.
LODOVICE of counsel), for Respondent**

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Police Benevolent Association of New York State, Inc. (PBA) to a decision of an Administrative Law Judge (ALJ), dismissing an improper practice charge filed by the PBA against the State of New York, specifically the State University of New York (State or SUNY).¹ The ALJ, after giving the PBA an opportunity to submit an offer of proof, dismissed the charge that the State violated §§ 209-a (1)(a) and (d) of the Public Employees' Fair Employment Act (Act). The ALJ found that the parties' collective bargaining agreement (Agreement) effectively waived the PBA's right to negotiate regarding "a subcontracting relationship between the State and a third party under which that third party provides goods or services which

¹ 48 PERB ¶ 4576 (2015). The State University of New York at Buffalo (SUNY at Buffalo) is an institution within SUNY.

had previously been provided by the State.”²

EXCEPTIONS

The PBA excepts to the ALJ’s decision on four grounds. First, the PBA contends that the ALJ erred in finding that the contractual language at issue constituted a waiver of the PBA’s right to negotiate the assignment of exclusive unit work to any non-unit entities. The PBA supports this contention by claiming that the term “contract out” in the Agreement is best understood as denoting an agreement with a private entity, and not assignments of work to other public employers. Moreover, the PBA relies on the fact that the decisions relied on by the ALJ “involve the *transfer* of pre-existing unit work to others, resulting in layoff of employees, while SUNY Buffalo’s addition of a downtown campus should have *expanded* the responsibilities of [the PBA’s] members.”³

The PBA asserts in its second exception that, under the Agreement, the term “contract out” should be interpreted to find no waiver of the right to negotiate where work was transferred between separate public employers. Thus, the ALJ erred in finding that a separate public employer as defined under the Act could be deemed a third party.

In its third exception, the PBA disputes the ALJ’s characterization of its charge as alleging that Roswell Park Public Security was a private entity, when in fact the PBA did not make such assumption. Based on the discovery of new information that “strongly indicate[s]” that Roswell Park Public Security employees “are actually employees of the State of New York,” the PBA asserts that the ALJ’s decision “was made in error due to a

² 48 PERB ¶ 4576, at 4774, quoting *State of NY (DOCS)*, 27 PERB ¶ 3055, 3124 (1994), *mod by consent*, 29 PERB ¶ 3014 (1996), *confd sub nom State of NY Dept of Corr Svcs v Kinsella*, 220 AD2d 19, 29 PERB ¶ 7008 (3d Dept 1996).

³ Exceptions at p. 4.

mistake of fundamental fact.”⁴ Finally, the PBA maintains that the ALJ erred in not granting its motion for reconsideration, premising this claim on its reliance on the State’s not clarifying the nature of Roswell Park Public Security, which the PBA argues led it to reasonably assume that Roswell Park Public Security was a private entity.

The State filed a response supporting the ALJ’s decision.

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

FACTS

The ALJ accepted the facts alleged in the charge and the offer of proof as true for the purpose of addressing the sufficiency of the pleading; these allegations are likewise accepted as true by us for the purposes of this decision. SUNY is empowered under the Education Law to appoint university police officers with the powers of police officers. SUNY’s exercise of that power has led to the creation of the New York State University Police. University Police officers assigned to various departments at SUNY facilities include employees in the titles University Police Officers I and II and University Police Investigators I and II who are members of the Agency Police Services Unit (APSU) and are represented by the PBA.⁵

SUNY at Buffalo has three campuses: the main or north campus in Amherst, New York; the south campus in the City of Buffalo; and the downtown campus, which is also within the City of Buffalo.⁶ According to the charge, APSU members “have for many years provided security and police protection to the University at Buffalo on an

⁴ Exceptions at p. 5.

⁵ The Charging Party has affirmatively alleged that the at issue employees were previously represented by the New York State Law Enforcement Officers Union Council 82 (Council 82). (Brief in Support of Exceptions at 2, citing 44 PERB ¶¶ 3000.11, 3000.d (2011)).

⁶ Charge, ¶ 12.

exclusive basis” at the north and south campuses.⁷ The charge alleges, however, that “[p]resently, members of the APSU bargaining unit do not provide security or police protection for the downtown campus.”⁸

On November 7, 2012, the PBA learned that SUNY at Buffalo had subcontracted with what it calls Roswell Park Public Security (RPPS) or Roswell Park Public Safety,⁹ to provide security services at the downtown campus when two APSU Investigators were sent to the downtown campus to investigate a suspicious package that might have contained illegally smuggled research specimens.¹⁰ In the course of interviewing the complainant, APSU investigators were informed that SUNY at Buffalo “had a contract with RPPS to provide security protection for the downtown campus.”¹¹

The charge does not specify how RPPS is constituted, or whether it is a public or private entity. The State’s answer quotes and appends a memorandum of understanding (MOU), entered into in August 2006 for a 30-year term, between the Roswell Park Cancer Institute Corporation (RPCI) and the Research Foundation of SUNY (Research Foundation), acting “for and on behalf of SUNY at Buffalo.”¹² The MOU defines Roswell Park Cancer Institute Corporation as a “New York Public Benefit Corporation” and the Research Foundation as “a corporation organized under the laws

⁷ Charge, ¶¶ 11, 13. The factual matter in this paragraph is accepted as true for the purposes of this decision; the legal characterization of exclusivity as to the work at issue is not.

⁸ Charge, ¶¶ 12, 17.

⁹ In its application for reconsideration, the PBA states that, although the “Improper Practice Charge and the ALJ’s Decision refer to ‘Roswell Park Public Security,’ PBA believes the security officers at Roswell Park are most commonly referred to as ‘Public Safety.’” *Id.* at n. 1. The terms will be treated as synonymous in this decision.

¹⁰ Charge, ¶¶ 18, 20.

¹¹ Charge, ¶ 21.

¹² Ans, Ex A.

of the State of New York.”¹³ The MOU governs the parties’ shared operation of part of the downtown campus, referred to as the “Medical Campus Area.”¹⁴ In particular, as the Answer expressly asserts, the MOU provides that “the Roswell Park Security Department will provide the same level of security, fire safety, and general safety service to the University’s Center of Excellence in Bioinformatics and Life Sciences that is provided to all occupied buildings on the RPCI campus.”¹⁵

The offer of proof contains no additional facts concerning the alleged subcontract with Roswell Park Public Security, although it does refer to “private security working at the Campus property at Roswell Park Cancer Institute.”¹⁶ The offer of proof does, however, allege that SUNY at Buffalo subcontracted with the City of Buffalo Police Department:

The PBA is aware of at least one specific incident concerning such subcontracting. On or about February 14, 2013, private security working at the [SUNY at Buffalo] property at the Roswell Park Cancer Institute contacted the [SUNY at Buffalo] University Police Chief concerning an alleged theft on campus. Rather than send bargaining unit members to provide police services, the [University Police Chief] instructed the private security to contact the [Buffalo Police Department] to investigate the crime and arrest the suspect. A hearing will be necessary to explore and establish other instances of such subcontracting.¹⁷

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*, Appx A; Ans, ¶ 14. That the Roswell Park Security Department denotes a subsection of RPCI is made clear by § 5 of the MOA, which provides that SUNY at Buffalo or Research Foundation “shall reimburse RPCI forty-six (46%) percent” of certain costs specified in Appendixes. Among the services so specified, but crossed out by hand, is “security.” Additionally, RPCI is defined in the MOU’s “whereas” clauses as “manag[ing] and operat[ing] a NCI designated Comprehensive Cancer Center on its campus in downtown Buffalo.” *Id.* at R 000011.

¹⁶ Charging Party’s Offer of Proof, at 2.

¹⁷ *Id.* For purposes of this decision this allegation is treated as true.

Article 25.8 of the 2005-2015 Agreement between the PBA and the State provides:

The Employer shall not contract out for goods and services performed by employees which will result in any employee being reduced or laid off without prior consultation with the Union concerning any possible effect on the terms and conditions of employment of employees covered by this Agreement.¹⁸

Applying prior Board precedent, the ALJ found that this contractual provision waived the PBA's right to negotiate the transfer of exclusive unit work to "third parties," that is, employees of private parties and of public employers other than the State. Based on the factual predicate that RPPS employees were employees of a "third parties" under the Agreement, the ALJ found that the waiver precluded the improper practice charge.

After the ALJ issued her decision, the PBA filed an application for reconsideration of the ALJ's decision on the basis that the "PBA now believes that Roswell Park Public Safety employees are employees of the State of New York."¹⁹ The PBA advanced two grounds for this belief. First, the PBA's Executive Director recounted in an affidavit a conversation he had with Harvey Strassburg, "who identified himself as Director of Public Safety for Roswell Park," and "stated to me that Roswell Park Public Safety employees were employees of the State of New York and members of the New York State Correctional Officers & Police Benevolent Association, Inc. (NYSCOPBA) bargaining unit."²⁰ After this conversation, the Executive Director viewed the Roswell

¹⁸ Ans, Exhibit B, at 63.

¹⁹ Application for Reconsideration, at 3.

²⁰ Affidavit in Support of Application for Reconsideration (Affidavit) at ¶ 6 (internal quotation marks omitted).

Park Cancer Institute website, and found a posting for a “Public Safety Officer” position. Although the Executive Director stated that “it was not clear whether this posting is for a position with the State of New York,” he “believe[d] it to be similar in nature to some positions held by NYSCOPBA members.”²¹ The posting lists as the employer “The RCPI Division of Health Research Inc. (HRI).”²²

On October 26, 2015, the ALJ denied the application for reconsideration, on the ground that the newly discovered evidence “could certainly have been obtained, with due diligence, prior to the record being closed in this matter.”²³

DISCUSSION

As the Board has long held, a motion for reconsideration is “properly entertained only if there is newly discovered evidence or the agency has overlooked or misapprehended relevant facts or that it has misapplied a controlling principle of law.”²⁴ Here, the PBA claimed that its newly discovered evidence warranted reconsideration. The Board has applied to such motions two strictures borrowed from similar motions before the courts: first, the Board denies such motions “when, with due diligence, the new evidence was available before the close of the original” hearing, and second, the introduction of the new evidence “would have probably produced a different result from [the] original holding.”²⁵

The PBA has not brought forth evidence sufficient to demonstrate that the ALJ

²¹ *Id.*, ¶ 8.

²² *Id.*, Ex A.

²³ ALJ letter decision, October 26, 2015, at 2.

²⁴ *State of New York (DOCS)*, 43 PERB ¶¶ 3035, 3130 (2010), quoting *Northport/East Northport Union Free School District*, 27 PERB ¶¶ 3061, 3141 (1994).

²⁵ *UTF (Zito)*, 35 PERB ¶¶ 3015, 3035 (2002); see also *UFT (Fearon)*, 38 PERB ¶¶ 3023, 3076 (2005).

erred in denying the motion for reconsideration. The PBA's contention that it reasonably relied on the State's failure to specify the nature of "Roswell Park Security" in litigating the matter to not allege that the State itself was the employer of the employees providing security is unpersuasive. The PBA did not exercise due diligence in investigating the nature of "Roswell Park Public Security" or, as the MOU calls it, Roswell Park Security Department. Indeed, to the extent that the PBA characterized the security provider in its brief as "private," it did not review the documents provided by the State in its Answer. Nor has the PBA identified any step which it did take, such as an information request, an internet search of RPCI in general or on the Department of State's website, or any other inquiry that could have timely resolved the question. Under these circumstances, we cannot find that the ALJ erred in finding that "the 'evidence' cited by the PBA [in the application for reconsideration] could certainly have been obtained, with due diligence, prior to the record being closed in this matter."²⁶

Moreover, the evidence submitted by the PBA in support of its application for reconsideration is not sufficiently probative that its timely submission would probably have led to a different outcome. The State's Answer affirmatively alleges that RPCI is a "corporation" and the attached MOU further specifies that RPCI is a "New York Public Interest Corporation." Far from supporting any assumption that Roswell Park Security employees were part of a private corporation, or of the State, the MOU is sufficient to put the PBA on notice that RPCI, as the employer of the Roswell Security Department, as it is identified in the MOU, is a "Public Benefit Corporation."²⁷

The PBA's evidence in support of its application for reconsideration, that is, the

²⁶ ALJ letter decision, October 26, 2015, at 2.

²⁷ See also *Roswell Park Cancer Institute*, 34 PERB ¶ 3040, 3095 (2001).

telephone call to the Director of Public Security at RPCI and the job posting, is insufficient to warrant reconsideration. The hearsay statement made to the PBA's Executive Director by the Director of Public Safety comes with no indicia of reliability, or explanation for the basis of knowledge of the speaker. Moreover, the MOU and its Appendix is entirely consistent with the job posting. Accordingly, we affirm the ALJ's denial of the application for reconsideration.

On the merits of the charge, we find applicable here the Board's holding in *State of New York (Department of Health) (DOH)* that § 25.8 of the Agreement "satisfies the duty to negotiate with [the PBA] the subcontracting of unit work to a third party."²⁸ We note that, as we have previously stated, "[p]rior Board decisions interpreting other contract language is generally not probative to determining a duty satisfaction, contract reversion or waiver defense in a subsequent case involving different parties and contracts."²⁹ However, this is not such a case.

The PBA has not provided a basis upon which to distinguish the contractual language negotiated by the PBA's predecessor in interest, Council 82, in the provision at issue in *DOH* or its progenitor, *State of New York (Department of Correctional Services (DOCS))*.³⁰ The language used in the provisions are identical, even to the

²⁸ 32 PERB ¶ 3067, 3158 (1999). The Board in *DOH*, applying the caselaw then current, which treated duty satisfaction as a kind of waiver, found both duty satisfaction and waiver. For the reasons set forth in the body, we do not find waiver, that is "a clear, intentional, and unmistakable relinquishment of the right to negotiate the particular subject at issue," but rather duty satisfaction. See *City of Ithaca*, 49 PERB ¶ 3030 (2016), quoting *Orchard Park Central School District*, 47 PERB ¶ 3029, 3089 (2014).

²⁹ *County of Nassau*, 48 PERB ¶ 3014, 3051 (2015).

³⁰ 27 PERB ¶ 3055, at 3124.

numbering.³¹ As was the case in *County of Nassau*, so too here, “*stare decisis* should be most stringently applied in cases involving contract rights because parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents.”³² As we phrased it in *County of Nassau*, “[i]n view of our multiple decisions construing this exact language involving these parties or their predecessors-in-interest, . . . we are loathe to disrupt the settled expectations of the parties.”³³ This is especially true where, as here, those expectations were set almost a quarter of a century ago.

Apart from the claims of *stare decisis*, we find that the adoption of this provision by the parties satisfies the duty to negotiate the issue of subcontracting to third parties. Although there is no self-executing test to establish whether a given contractual provision is sufficient to satisfy the duty to negotiate a specific subject, “duty satisfaction occurs when a specific subject has been negotiated to fruition.”³⁴

Duty satisfaction “may be established by contractual terms that either expressly or implicitly demonstrate that the parties had reached accord on that specific subject.”³⁵ Thus, in *State of New York (Racing and Wagering Board)*,³⁶ we applied “standard principles of contractual interpretation” to find that the “agreement demonstrated that the parties had reached an accord as to the extent to which the State Budget Director’s statutory discretion over wages would be constrained under specific circumstances, with the clear implication that absent those circumstances, the Budget Director could set the

³¹ Compare Answer, Exhibit B, at 63, with *DOH*, 32 PERB ¶ 3067, at 3157; *DOCS*, 27 PERB ¶ 3055, at 3124.

³² 48 PERB ¶ 3014, at 3051.

³³ *Id.*

³⁴ *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, at 3089.

³⁵ *Id.*

³⁶ 45 PERB ¶ 3041 (2012), *affd sub nom Kent v. Lefkowitz*, 46 PERB ¶ 7006 (Sup Ct Albany County 2013), *revd other grounds*, 119 AD3d 1208, 47 PERB ¶ 7003 (3d Dept 2013), *confd*, *Kent v Lefkowitz*, 27 NY3d 499, 506, 49 PERB ¶ 7005 (2016).

wages as he deemed appropriate.”³⁷

The analysis begins with the breadth and/or exhaustiveness of the language at issue, and, where the contractual language is ambiguous or does not itself resolve the inquiry, any bargaining history that would tend to evidence the parties’ understanding can establish duty satisfaction. Here, the language of § 25.8 does not clearly require a demonstration by the PBA of exclusivity, extending instead to any employee who faces reduction or layoff, but in return provides an obligation to “consult” the PBA, which falls short of negotiation in good faith under the Act. The structure of the provision suggests an intention to displace a statutory remedy, as such a remedy would render the contractual provision meaningless.

Moreover, the language negotiated by the State and the PBA’s predecessor in interest, had been authoritatively construed by the Board in two separate decisions, separated by five years. The parties were on notice as to the scope and import of § 25.8 in adopting it, and that understanding forms part of the bargaining history. By prohibiting wholly unilateral “contracting out” that would lead to layoffs or reduction of any of the PBA’s members, the Agreement specifically delineates the scope of the parties’ undertaking, implicitly satisfying the duty to negotiate that which is excluded. In other words, § 25.8 “comprehensively addressed the parties’ agreement with respect to limits on” the subject of subcontracting to third parties, and establishes that the

³⁷ *Orchard Park Cent Sch Dist.*, 47 PERB ¶ 3029, at 3089.

parties satisfied the duty to negotiate on that topic.³⁸ Thus, to the extent that such subcontracting falls outside of the Agreement's prohibitions, it is permissible at RPCI's discretion.³⁹ In sum, we find that our earlier interpretation of the language in *DOH* and *DOCS* is correct and provides the rule applicable here.

The PBA does not argue for the overruling or limitation of either *DOCS* or *DOH*; rather, it seeks to distinguish those decisions from the facts here. In *DOH*, we found that § 25.8 waived and satisfied the duty to negotiate a unilateral subcontract between the State and a private entity. In *DOCS*, the Board found that the section did not waive a claim based on a unilateral transfer of exclusive unit work to other state employees. Here, we must consider whether RPCI is a "third party" as employed by the Board in its decisions in *DOH* and *DOCS*. We find that it is.

We begin by noting that the Board did not, in either case, distinguish between private parties and public entities, other than the State itself. Rather, the Board in both cases "read the phrase 'contract out' as referring only to a subcontracting relationship between the State and a third party."⁴⁰ The nature of the "third party" contemplated by this phrase was not limited to a private entity, despite the fact that in each case, the nature of the entity was dispositive. So narrow a definition of "third party" would also

³⁸ *Kent v Lefkowitz*, 27 NY3d 499, 506, 49 PERB ¶ 7005, 7025 (2016), *confg State of New York (Racing & Wagering Bd)*, 45 PERB ¶ 3041 (2012). Here, as in *Kent*, the parties' negotiation of "specific items expressly limiting" the subject at issue (here, subcontracting, in *Kent* the discretion of the Budget Director to set wages for seasonal employees) "implicitly demonstrates that the parties had reached accord" with respect to the subject. 27 NY3d, at 506-507, 49 PERB ¶ 7005, 7025-7026.

³⁹ For this reason, the PBA's effort to distinguish cases that "involve the *transfer* of pre-existing unit work to others, resulting in layoff of employees, while SUNY Buffalo's addition of a downtown campus should have *expanded* the responsibilities of [the PBA's] members" is unpersuasive. The former are prohibited by § 25.8, violation of which may be redressed solely through contractual remedies; the latter are left to RPCI's discretion as a result of its satisfaction of the duty to negotiate. See *Kent*, 27 NY3d at 506-507, 49 PERB ¶ 7005, 7025-7026.

⁴⁰ *DOCS*, 27 PERB ¶ 3055, at 3124; *DOH*, 32 PERB ¶ 3067, at 3157 (defining the scope of the satisfaction of the duty and the waiver).

disregard the reality that public employers often contract and/or subcontract work to other public employers.⁴¹ Against that backdrop, we do not believe that the policies of the Act are best served by limiting the term “third parties” to third *private* parties. Rather, we find that the satisfaction of the duty to negotiate, and the scope of the resultant waiver, is delineated by whether the party with whom the State has subcontracted is a separate entity, whether public or private in nature, from the State itself. Here, such is the case.

As the Board has long held:

For the purposes of other statutes and the State Constitution, certain public benefit corporations and state public authorities may be agents of the State in the performance of their statutory duties. For the purposes of the [Act], however, all public benefit corporations and public authorities are defined as separate public employers.⁴²

Therefore, we find that RPCI is a “third party” as contemplated by our prior decisions in *DOH* and *DOCS*, and that, by the negotiation of § 25.8 of the Agreement,

⁴¹ See, eg, *City of Canandaigua*, 47 PERB ¶ 3015 (2014) (Finding a violation of the Act where City of Canandaigua unilaterally contracted with the City of Cheshire Volunteer Fire Company the performance of exclusive unit work of firefighting, pursuant to a contract with the Town of Canandaigua).

⁴² *State (DEC)*, 20 PERB ¶ 3046, 3097-3098 (1987) (notes and citations omitted); see also CSL § 201.6 (a) (including, among public employers governed by the Act, “a public authority, commission, or public benefit corporation...” The PBA’s contention that the State and the City of Buffalo’s standing as separate public employers under § 201.6 (a) of the Act erroneously imports a statutory definition into a contractual provision is unpersuasive for two reasons. First, the PBA does not provide any basis in the Agreement’s language or bargaining history for its proffered understanding that public employers other than the State must be considered to be the State. Indeed, were we not to apply the Act’s definition of public employers, the most obvious next step in an analysis would be to look at legal status, which would lead us to conclude that RPCI’s separate legal existence as a Public Benefit Corporation would be dispositive in finding it to be a “third party”. Finally, to the extent that the PBA bases its arguments on ALJ decisions interpreting different contractual language, “a decision of an ALJ is not binding on the Board and has no precedential value.” *County of Nassau*, 48 PERB ¶ 3023, at 3089, n. 89.

the parties fully satisfied the duty to negotiate the subject of contracting out unit work. The same reasoning, of course, supports the ALJ's decision in dismissing the allegation that work was also contracted out to the City of Buffalo. Just as RPCI is a "third entity" under *DOH* and *DOCS*, so too is the City of Buffalo. Regardless of whether the claimed subcontracting out of unit work was properly before the ALJ, the ALJ correctly dismissed the claim.

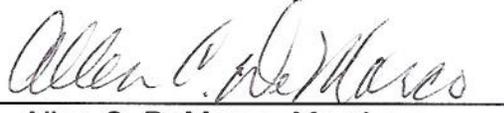
Accordingly, we affirm the decision of the ALJ, and the charge must be, and hereby is, dismissed.

IT IS, THEREFORE, ORDERED that the improper practice charge is dismissed.⁴³

DATED: January 24, 2017
Albany, New York



John F. Wirenius, Chairperson



Allen C. DeMarco, Member

⁴³ Member Robert S. Hite recused himself from consideration of this case.