In the Matter of

SHAHADAH SAINPAULIN,

Charging Party, **CASE NO. U-35644**

- and -

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, MONROE COUNTY PART-TIME EMPLOYEE UNIT LOCAL 828,

Respondent,

- and -

COUNTY OF MONROE,

Employer.

BETTY HUMPHREY, for Charging Party

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

BOLANOS LOWE PLLC (KARLEE S. BOLANOS of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Shahadah Sainpaulin to a decision of an Administrative Law Judge (ALJ) dismissing Sainpaulin's improper practice charge. The charge alleged that the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Monroe County Part-Time Employee Unit Local 828 (CSEA) violated § 209-a.2 (c) of the Public Employees Fair Employment Act (Act) when it failed to file a timely grievance on her behalf and to properly communicate with her throughout the grievance process.[1]

[1] 54 PERB ¶ 4529 (2021). The County of Monroe (County) was named as a "statutory party" pursuant to § 209-a.3 of the Act.

EXCEPTIONS

Sainpaulin filed four pages of unnumbered exceptions to the ALJ's decision. Sainpaulin asserts that there was no excuse for her grievance to be untimely filed, and that if Labor Relations Specialist Jennifer Rhee had responded to her calls and emails in early November of 2016, the grievance could and would have been timely filed. Sainpaulin further contends that the ALJ erred in crediting Rhee's testimony. Finally, Sainpaulin claims that "there has been retaliation and adverse actions especially noted around the hearing dates, up to current."[2]

CSEA claims that Sainpaulin's exceptions are deficient under § 213.2 of our Rules of Procedure (Rules). On the merits, CSEA supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

For the reasons that follow, we affirm the ALJ's decision.

FACTS

CSEA is the exclusive bargaining agent for a unit of part-time employees of Monroe County Hospital (MCH) in various job titles, including Nursing Assistants, Licensed Practical Nurses, Registered Nurses, and Nurse Supervisors.[3] The most recent collective bargaining agreement (CBA) between CSEA and the County containing terms and conditions of employment applicable to part-time employees at MCH covers the term of January 1, 2015 through December 31, 2019.[4]

Pursuant to Article 6, Section 6.1 of the parties' CBA, unit employees who wish to submit a grievance must do so in writing "within 10 calendar days following the act or

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[2] Exceptions, at 4.
[3] Joint Ex 1.
[4] *Id.*

omission giving rise to the grievance."[5] A timely grievance will be reviewed by either the employee's immediate supervisor or the Department Head at step one of the grievance procedure. The step-one decision may then be appealed to the County's Manager of Labor Relations. The decision of the County's Manager of Labor Relations is final and binding unless the grievance arises from a disciplinary suspension or termination imposed on an employee with more than five years of full-time equivalent County service. In such event, the eligible employee may appeal the decision of the Manager of Labor Relations to the County's Director of Human Resources, whose decision is then final and binding.

It is undisputed that Sainpaulin began her employment as a part-time per diem Certified Nursing Assistant (CNA) with MCH in March of 2015. Pursuant to applicable MCH policies and procedures, as a per diem employee, Sainpaulin was required to work two weekend shifts per schedule.[6] Each schedule runs over the course of four weeks.[7] Hence, at a minimum, Sainpaulin was required to work a total of 26 weekend shifts per year.

On April 28, 2016, Sainpaulin received a Notice of Discipline (NOD) regarding time and attendance issues.[8] In relevant part, the NOD indicated that Sainpaulin was not in compliance with the applicable two weekend shifts per schedule work requirement, in that she had only worked one weekend shift in each of the months of January, March, and April of 2016. The NOD directed her to make up for those deficiencies by working three additional shifts in the coming months, while still remaining compliant with the

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[5] *Id*.
[6] *See* the County's response to CSEA's offer of proof, attachment 2 (ALJ Ex 33).
[7] *Id*.
[8] Employer's Ex 3.

applicable two weekend shifts per schedule work requirement.

Effective with the pay period beginning July 16, 2016, the applicable per diem minimum work requirement was increased from 26 weekend shifts per year, to 30 weekend shifts per year.[9] By letter dated October 5, 2016, MCH notified Sainpaulin that her employment with the hospital was ending immediately due to her failure to meet the applicable per diem work requirement.[10] The termination letter states that, contrary to the directive contained in Sainpaulin's April 2016 NOD, she failed to make up her previous weekend shift work deficiencies. Further, the October 5, 2016 Notice of Termination states that Sainpaulin had only worked a total of 11 weekend shifts to date and, therefore, she would not be able to meet the 30 weekend shifts requirement by the end of the year.[11]

Sainpaulin testified that, on or about October 17, 2016, she contacted Rhee by telephone regarding the October 5, 2016 Notice of Termination.[12] Pursuant to Rhee's request, Sainpaulin emailed Rhee on October 25, 2016, and attached a copy of the October 5, 2016 Notice of Termination.[13] Rhee confirmed receipt of the attachment by email dated October 26, 2016.[14] Sainpaulin testified that, during the course of these

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[9] Employer's Ex 1.
[10] Charging Party's Ex 1.
[11] As of October 5, 2016, there were only 12 weekends left in the year. Hence, even if Sainpaulin worked one full shift on each of those weekends, she still would not have been able to meet the requisite standard under either the previous 26 or, more recent, 30 weekend shifts per year requirement (i.e., 11 + 12 = 23).
[12] As of October 17, 2016, ten calendar days had passed from the date of the October 5, 2016 Notice of Termination. However, Sainpaulin testified that it was her belief that she did not receive the October 5, 2016 Notice of Termination until October 8, 2016 (Tr vol 1, at 24). Assuming that to be accurate, the ten calendar-day-time-limitation for filing a grievance under Article 6, Section 6.1 of the parties' CBA would not have expired until October 19, 2016.
[13] Charging Party's Ex 6. *See also* Charging Party's Ex 1.
[14] Charging Party's Ex 8.

communications, she advised Rhee that, subsequent to the effective date of her termination, she had worked a weekend shift at the hospital for which she had not been paid. According to Sainpaulin, Rhee advised her that she would reach out to the hospital regarding the post-termination pay issue. In addition, they also discussed filing a grievance. Sainpaulin testified that Rhee gave her verbal assurances that she would file a grievance on her behalf challenging her termination.[15]

Rhee acknowledged that she spoke to Sainpaulin about each of the above referenced matters. She testified that, after her conversation with Sainpaulin, she spoke to Barbara Fragassi, whom Rhee described as the local's "office manager,"[16] about filing a grievance for Sainpaulin.[17] According to Rhee, she thought Fragassi filed a grievance on Sainpaulin's behalf, challenging the October 5, 2016 Notice of Termination.[18]

Rhee testified that, in addition to speaking with Fragassi, she also reached out to the County regarding Sainpaulin's post-termination pay issue.[19] As a result, the hospital adjusted the effective date of Sainpaulin's termination from October 5 to October 31, 2016, to ensure that she would be paid for time worked after October 5, 2016.[20] In addition, MCH issued a revised Notice of Termination dated October 31, 2016.[21]

Rhee testified that, on or about November 1, 2016, she received a voicemail message from Fragassi regarding the revised October 31, 2016 Notice of Termination.[22]

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[15] Tr vol 1, at 25, 42.
[16] Fragassi's actual title is Executive Administrative Assistant for Local 828 (*see* Charging Party's Ex 4).
[17] Tr vol 2, at 20.
[18] Tr vol 2, at 48, 61-62.
[19] Tr vol 2, at 20-21. Rhee could not recall to whom she spoke specifically.
[20] Tr vol 2, at 21.
[21] Charging Party's Ex 2.
[22] Tr vol 2, at 22-23.

Rhee stated that she talked to Fragassi about "filing a grievance."[23] When asked: "[W]hat was your understanding about who was going to actually file the grievance?" Rhee responded: "Barb [Fragassi] would have filed the grievance, because Barb handles pretty much any kind of paperwork for the part-time unit."[24]

Rhee testified that, in November of 2016, she began transitioning to a new field area that did not include responsibility over the part-time unit at MCH.[25] The change required her to move from CSEA's Rochester office to its Buffalo office location.[26] As a result, a different CSEA Labor Relations Specialist, Robbie Ellis, was assigned to her former field area, and he began to handle matters within the part-time unit at that time.[27] Rhee testified that she "briefly" gave Ellis a summary of Sainpaulin's case, "that there would be a grievance hearing coming up, and that [Rhee] would absolutely be in attendance for it."[28]

Sainpaulin testified that, on or about November 4, 2016, she attempted to contact Rhee by telephone to inform her that she received the revised Notice of Termination dated October 31, 2016. When she failed to receive a response from Rhee, Sainpaulin testified that she emailed Rhee on November 12, 2016, regarding the issuance of the revised Notice of Termination, and told her that she "would like to know what's going on."[29] On direct examination, Rhee was shown a copy of Sainpaulin's November 12, 2016 email[30] and was asked: "Does that refresh your recollection about when you next

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[23] Tr vol 2, at 23, 62.
[24] *Id*.
[25] Tr vol 2, at 25.
[26] *Id*.
[27] *Id*.
[28] Tr vol 2, at 32.
[29] Charging Party's Ex 10.
[30] *Id*.

spoke with Ms. Sainpaulin?" to which she replied: "Yes—by the date of the email, it was November 12."[31] Rhee was then asked: "[W]hat was your understanding when you spoke with [Sainpaulin] in November about whether or not a grievance had been filed?" Rhee responded: "I believe it had been filed at that point."[32] In addition, Rhee testified that, as of that time, it was her understanding that Sainpaulin had received payment for the shift she had worked on October 5, 2016.[33] Rhee testified further that after she spoke with Sainpaulin, she "checked on whether or not the grievance had been filed."[34] She stated that she found out that "it had not been," but could not recall exactly when or how she learned of that fact.[35]

Sainpaulin testified that on December 16, 2016, she reached out to Rhee again and spoke to her by telephone. Sainpaulin testified that, during that conversation, Rhee told her that she "was supposed to have returned back to MCH" and then asked Sainpaulin if "anybody from MCH contacted [her]," to which Sainpaulin responded "no."[36] Sainpaulin further testified that Rhee told her that "she would call MCH to see what was going on" and that, "she would call [her] back."[37]

Contrary to Sainpaulin's testimony, Rhee testified that she did not recall or believe that she would have told Sainpaulin during their December 16, 2016 telephone

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[31] Tr vol 2, at 24.
[32] *Id*.
[33] *Id*.
[34] Tr vol 2, at 26.
[35] Tr vol 2, at 26, 63.
[36] Tr vol 1, at 26.
[37] *Id*. In Sainpaulin's June 26, 2020 response to CSEA's offer of proof (ALJ Ex 32), she describes the December 16, 2016 telephone call with Rhee as being "about [their] conversation that [she] was supposed to return to work," and offers her follow-up email to Rhee dated December 19, 2016, in support of that proposition (*see* discussion, *infra*). She then goes on to argue that "[t]hat would have been the time for Ms. Rhee to correct any misunderstanding."

conversation that she should be returned to work "because she had been terminated at that point."[38] Rhee added that "[t]here would not have been a way for her to return to work after having been terminated."[39] Rhee was then asked the following question and responded as follows:

> Q: [D]o you recall ever discussing with Sainpaulin that she should return to work or that she should expect to hear from the County about returning to work?
>
> R: No, we did not discuss her going back to work.[40]

On December 19, 2016, Sainpaulin sent an email to Rhee as a follow-up to their December 16, 2016 telephone conversation. In it, Sainpaulin stated that she "would like to know what's going on."[41] She continued and stated "I can't be penalize[d] for not making up weekends when no one informed me to return to work . . . and no one from the [C]ounty contacted me by phone or mail stating to return to work."[42] Rhee responded by email that same day and indicated that she was "working on getting answers from the County" and would get back to her.[43]

Having not heard back from Rhee, Sainpaulin contacted CSEA's Region 6 Director, Robert Mootry, by email on December 27, 2016.[44] Mootry responded by email dated December 28, 2016, and indicated that he would have an answer for her "by week's end."[45] By email dated December 29, 2016, Mootry forwarded to Sainpaulin a copy of a grievance dated December 29, 2016, that CSEA filed on her behalf challenging

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[38] Tr vol 2, at 56-57.
[39] Tr vol 2, at 56.
[40] Tr vol 2, at 57.
[41] Charging Party's Ex 11.
[42] *Id*.
[43] Charging Party's Ex 12.
[44] Charging Party's Ex 13.
[45] Charging Party's Ex 14.

her termination.[46]

Rhee testified that, "despite the fact that the grievance was filed late,"[47] she spoke to Thomas Vasey, the County's Manager of Labor Relations, "about having a grievance hearing" on the merits.[48] Rhee stressed to Vasey that under the parties' negotiated grievance procedure, Vasey's decision would be final and binding since Sainpaulin held a per diem status and had less than five years of full-time service with the County. Rhee testified that Vasey agreed to permit the grievance to be heard on the merits with the understanding that the County reserved its position on timeliness.[49]

On January 11, 2017, a grievance hearing took place regarding Sainpaulin's termination.[50] Ellis and CSEA Local President Bess Watts were in attendance. Rhee, who did not attend, testified that she was never advised of the hearing date and only learned of it after the fact.[51]

Sainpaulin testified that, after the January 11, 2017 hearing, she was communicating with Mootry "[l]etting him know what was going on and asking him what was going on, because nobody was communicating with me."[52] On February 17, 2017, Ellis forwarded a "Quick Note" to Sainpaulin and attached a copy of Vasey's grievance response dated January 18, 2017.[53] In relevant part, Vasey's response states that Sainpaulin's December 29, 2016 grievance was "denied for timeliness."[54] The merits of

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[46] Charging Party's Ex 15. *See also* Charging Party's Ex 3 (grievance dated December 29, 2016).
[47] The grievance was filed on 12-29-16 (*see* Charging Party's Ex 3).
[48] Tr vol 2, at 28.
[49] Tr vol 2, at 29, 31.
[50] Charging Party's Ex 4.
[51] Tr vol 2, at 33.
[52] Tr vol 1, at 34.
[53] Charging Party's Ex 5.
[54] *Id*.

the grievance were not considered. No explanation was offered by the County as to why the merits of the grievance were not addressed, and Vasey did not testify.

DISCUSSION

We first address CSEA's claim that Sainpaulin's exceptions are deficient under § 213.2 of our Rules. We agree that Sainpaulin's exceptions do not "set forth specifically the questions or policy to which exceptions are taken," "identify that part of the decision . . . to which exceptions are taken," "designate . . . the portion of the record relied upon," or "state the grounds for exceptions," as required by our Rules. However, as we recently reaffirmed in *State of New York (Office of Temporary and Disability Assistance)*,[55] we will consider exceptions where the gravamen of the asserted error is clear; in particular, where we are able to discern the basis of the excepting party's arguments and identify the portions of the ALJ's decision that it disagrees with. Sainpaulin's exceptions here meet this standard.

We will not, however, consider Sainpaulin's new allegations, raised for the first time in her exceptions to the ALJ's decision, that there "has been retaliation and adverse actions especially noted around the hearing dates, up to current."[56] Sainpaulin's charge alleges only a breach of the duty of fair representation and does not include allegations of retaliation or other adverse actions by either CSEA or the County.

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[55] 54 PERB ¶ 3011 (2021).

[56] Exceptions, at 4. *See UFT (Imbert)*, 54 PERB ¶ 3020, 3065-3066, at n. 30 (2021) ("We do not consider facts regarding . . . raised in . . . exceptions but not set forth [in the charge] and thus not considered by the ALJ. Our review is limited to the record as it existed before the ALJ. *See also TWU (Mooney)*, 51 PERB ¶ 3001, 3002 (2018); *TWU (Ayala)*, 50 PERB ¶ 3017, 3074 (2017); *CSEA (Brewster)*, 50 PERB ¶ 3027, 3102 (2017); *Mt Pleasant Cottage UFSD*, 50 PERB ¶ 3002, 3009, n 12 (2017); C*SEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016); *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶ 3012, 3031 (1992); *Board of Cooperative Educational Services of Sullivan County*, 14 PERB ¶ 3101, 3170-3171 (1981).

Sainpaulin never sought leave to amend her charge to include additional allegations. We will not review conduct which is not alleged in a timely charge or amended charge.[57]

To establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization's conduct or actions are arbitrary, discriminatory or founded in bad faith.[58] As we have previously explained, the courts have:

> reject[ed] the standard . . . that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.[59]

Under this standard, "an employee's mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation."[60] However, "[a] union may breach its duty when it fails to process a meritorious grievance in a timely fashion with the consequence that

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[57] *See State of New York (New York State Police)*, 51 PERB ¶ 3037, 3166 (2018); *County of Rockland*, 31 PERB ¶ 3062, 3136 (1998); *NYCTA*, 31 PERB ¶ 3024, 3054 (1998); *International Brotherhood of Teamsters (Girolamo)*, 31 PERB ¶ 3008, 3015 (1998); *County of Nassau*, 29 PERB ¶ 3016, 3040 n 4 (1996).

[58] *UFT (Imbert)* 54 PERB ¶ 3020, at 3064; *Transportation Communications Union/IAM (Shah)*, 53 PERB ¶ 3016, 3081 (2020); *Professional Staff Congress of the City University of New York (Giammarella)*, 51 PERB ¶ 3010, 3048 (2018); *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, 3161 (2017), *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016).

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

[60] *Transportation Communications Union/IAM (Shah)*, 53 PERB ¶ 3016, at 3081; *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶ 3011, 3055 (2019).

arbitration on the merits is precluded."[61]

In the instant case, Sainpaulin has not provided any factual basis on which it could be concluded that CSEA's representation was tainted by discriminatory or bad-faith conduct sufficient to violate the duty of fair representation.[62] Thus, the only question before us is whether CSEA's failure to timely file a grievance on her behalf and any lapses in communication rise to the level of arbitrary conduct sufficient to find a violation of the duty of fair representation. Conduct by an employee organization will not be deemed arbitrary unless it is "so far outside a wide range of reasonableness that it is wholly irrational."[63]

In contending that CSEA's actions here were arbitrary, Sainpaulin asserts that the ALJ should not have credited Rhee's testimony, including her assertions that she believed a grievance had been filed on Sainpaulin's behalf and that she never told Sainpaulin that she should be returning to work. As we have 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."[64] Here, Sainpaulin has not presented any objective evidence that the ALJ erred in his credibility determination. Accordingly, we see no basis to overturn

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[61] *UFT v NYC Bd of Collective Bargaining*, 51 Misc3d 817, 825 (Sup Ct NY Co 2016) (Bluth, J), *affd sub nom UFT v City of New York*, 154 AD3d 548 (1st Dept 2017).
[62] *CSEA (Sainpaulin)*, 51 PERB ¶ 3011, 3051 (2018) (reversing the Director of Public Employment Practices and Representation's dismissal of Sainpaulin's amended charge).
[63] *UFT (Imbert)* 54 PERB ¶ 3020, at 3065, citing *Grassel v NYS Pub Empl Relations Bd*, 34 PERB ¶ 7035 (Sup Ct Kings County 2001), *affd* 301AD2d 522, 36 PERB ¶ 7002 (2d Dept 2003); *United Univ Professions (Yoonessi)*, 29 PERB ¶ 3075, 3179 (1996).
[64] 54 PERB ¶ 3022, 3074 (2021), quoting *Buffalo City Sch Dist*, 53 PERB ¶ 3015, 3074 (2020). *See also Pine Valley Cent Sch Dist,* 51 PERB ¶ 3036, 3160 (2018); *Village of Scarsdale,* 50 PERB ¶ 3007, 3037 n 51 (2017); *Rochester Housing Authority*, 52 PERB ¶ 3014, 3061 (2019); *Pleasantville Union Free Sch Dist,* 51 PERB ¶ 3024, 3100 (2018); *Village of Endicott,* 47 PERB ¶ 3017, 3051 (2014).

the ALJ's credibility finding.

We further find that CSEA's conduct here, even if negligent or grossly negligent, does not rise to the level of arbitrary conduct necessary to support a violation of the duty of fair representation. While failing to communicate with a member might, in some circumstances, evidence a breach of the duty of fair representation, the record here demonstrates that CSEA communicated with Sainpaulin throughout the process, that is, from about October 17, 2016 until February 17, 2017. Rhee emailed with Sainpaulin on October 26, 2016 and spoke with Sainpaulin on November 12, 2016 (when, based on her communications with Fragassi, Rhee was operating under the mistaken belief that a grievance had been filed), and December 16, 2016. Sainpaulin was also in communication with Ellis on February 17, 2017 regarding the outcome of the grievance hearing and with Mootry throughout the period from January 11 until February 17, 2017. Although Sainpaulin may have preferred more updates, we cannot find that CSEA's communication, in and of itself, rises to the level of arbitrary conduct necessary to support a finding that the duty of fair representation has not been met. Notably, additional communication with Sainpaulin would not have corrected Rhee's mistaken belief that a grievance had been filed. Further, Rhee's belief that a grievance had already been filed on Sainpaulin's behalf, even though mistaken, provides a rational basis for CSEA's actions. Rhee's mistake was an honest one, based on her communications with Fragassi, and cannot support a violation of the duty of fair representation, where the courts have held that even grossly negligent conduct is insufficient to find such a violation.[65] Thus, we find that CSEA's failure to timely file the

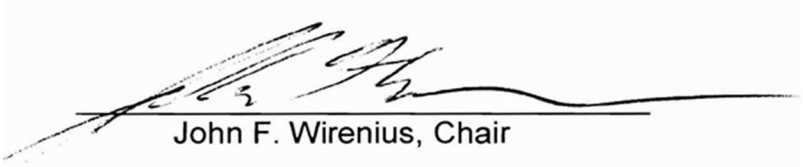
[65] *CSEA, L 1000 v NYS Pub Empl Relations Bd (Diaz)*,132 AD2d 430, 432, 20 PERB ¶ 7024, 7039 (3d Dept 1987), *affd on other grounds*, 73 NY2d 796, 21 PERB ¶ 7017 (1988).

grievance does not rise to the level of arbitrary conduct necessary to support finding a breach of the duty of fair representation.

Based on the foregoing, the exceptions filed by Sainpaulin are denied, and the ALJ's decision is affirmed.

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

DATED: January 13, 2022
Albany, New York



John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, Member

55 PERB ¶ 3001
B/R 54-4524

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

JOSEPH R. CEA,

Charging Party,

CASE NO. U-36967

- and -

WATERVLIET TEACHERS' ASSOCIATION,

Respondent,

- and -

WATERVLIET CITY SCHOOL DISTRICT,

Employer.

JOSEPH R. CEA, *pro se*

ROBERT T. REILLY, GENERAL COUNSEL (LAURA H. DELANEY of counsel), for Respondents

FERRARA FIORENZA, PC (MILES G. LAWLOR of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Joseph Cea to a decision of an Administrative Law Judge (ALJ) dismissing Cea's charge alleging that the Watervliet Teachers' Association (Association) and the New York State United Teachers, AFL-CIO (NYSUT, together the Respondents) violated §§ 209-a.2 (a) and (c) of the Public Employees' Fair Employment Act (Act) when NYSUT denied Cea's request to choose

his own attorney to represent him in a disciplinary matter brought against him by the Watervliet City School District (District) and to have NYSUT pay for Cea's chosen attorney.[1]

EXCEPTIONS

Cea filed six exceptions to the ALJ's decision. Cea's first exception asserts that his case involving the Respondents involved a matter of first impression and that other employees received free legal representation. Cea's second exception contends that the Respondents never presented evidence of a policy that they would not pay for an outside attorney, and that the document purportedly showing the policy had been "modified."[2] Cea's third exception claims that NYSUT delayed responding to his request for any and all policies regarding the use of outside attorneys for three months and that this delay forced Cea to hire an outside attorney.

Exception number four asserts that Reilly's reasons for not hiring Cea's preferred attorney were discriminatorily based on Reilly's perception of Cea and his preferred attorney's political opinions. Cea's fifth exception questions why the ALJ did not rule in his favor after finding that the basis of his request "may not have been unreasonable."[3] Finally, Cea's sixth exception argues that the ALJ ignored evidence of animus on the Respondents' part towards Cea and his preferred outside attorney.

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[1] 54 PERB ¶ 4524 (2021). The District was named as a "statutory party" pursuant to § 209-a.3 of the Act.
[2] Cea's Exceptions, at 4. Cea appears to be referring to Respondents' Exhibit 9.
[3] 54 PERB ¶ 4524, at 4673.

In his cover letter to his exceptions, Cea also complains that the decision was not issued in a timely manner. In both his cover letter and conclusion, he also questions why the decision was issued a week after "PERB" was notified of the passing of his attorney. Cea asserts that this timing made it less likely that he would appeal the ALJ's decision.

The Respondents claim that Cea's exceptions are deficient under § 213.2 of our Rules of Procedure (Rules). On the merits, the Respondents support the ALJ's decision and contend that no basis has been demonstrated for reversal.

Subsequent to Respondents' filing of their Response to Cea's Exceptions, Cea filed a reply brief. Section 213.3 of our Rules does not allow for the filing of reply briefs unless requested by the Board or filed with the Board's authorization. As the Board neither requested nor authorized Cea's additional filing here, we have not considered it.[4]

For the reasons that follow, we affirm the ALJ's decision.

FACTS

Joseph Cea was employed as a teacher in the District from 2002 through 2019.[5] During that entire time, Cea was a member of the Association and NYSUT.[6] Association officers informed Cea and other members, during union meetings, that

[4] *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶ 3011, 3052 (2019); *Amalgamated Transit Union*, 32 PERB ¶ 3053, 3126, n 2 (1999).
[5] Tr, at 33-34 (Cea).
[6] Tr, at 34 (Cea).

NYSUT had a policy of offering free legal representation in New York State Education Law (EL) § 3020-a disciplinary proceedings.[7] Cea was never informed that there was a particular process or procedure to be followed when asking for such representation.[8]

In 2014, Cea filed a charge with PERB alleging that the Association violated its duty of fair representation.[9] Cea testified that "NYSUT represented the WTA but did not represent me as an individual member. They were taking my money and paying counsel to come up with a defense against me. So I felt that was a conflict [in 2018]."[10]

Cea was served with EL § 3020-a charges in June of 2018. Michael Rowan is NYSUT's Regional Staff Director for the Capital District, and previously served as the Labor Relations Specialist (LRS) assigned to the Association for 21 years.[11] Rowan testified that in June of 2018, after the District brought disciplinary charges against Cea, Rowan met with Cea for an intake meeting. Rowan indicated that the LRS conducts a preliminary intake with the charged member and then transfers the case to NYSUT's Office of General Counsel (OGC).[12]

Cea's intake paperwork indicates that he filed a demand for a hearing and designated NYSUT General Counsel Robert Reilly as his representative. NYSUT's

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[7] Tr, at 35 (Cea).
[8] *Id.*
[9] The instant charge was filed on May 31, 2019. Thus, the four-month period of limitations under the Act begins on January 31, 2019. Events prior to this date are included only as background material and cannot themselves serve to support a finding of a violation of the Act.
[10] Tr, at 36 (Cea). *See* 47 PERB ¶ 4616 (2014).
[11] Tr, at 303-304 (Rowan).
[12] Tr, at 304-305 (Rowan).

intake paperwork also indicates that Cea requested representation by someone other than the two OGC attorneys who had represented the Association in the 2014 PERB proceeding in which Cea had alleged that the Association violated its duty of fair representation to him.[13] Rowan testified that when he met with Cea concerning the June 2018 charges, he gave Cea a copy of a letter which, in relevant part, advises that if a member declines the free attorney representation offered by NYSUT, and instead chooses to have a private attorney represent him, "NYSUT will not pay the cost of your private attorney, nor will NYSUT assign counsel to act as co-counsel with your private attorney."[14]

Cea received a letter from NYSUT indicating that there was a conflict of interest and that they were going to assign NYSUT-appointed outside counsel.[15] Cea believed that his NYSUT-appointed outside counsel Mark Mishler:

> did not have my best interest in mind. My defense was very valid, but he did not believe my defense. And I felt he did not have my best interest at heart . . . . I came to a mutual agreement that he would not represent me and I would not accept his representation.[16]

After parting ways with Mishler, Cea contacted NYSUT to request that attorney Richard Walsh be appointed to represent him.[17]

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[13] Tr, at 314 (Rowan); Respondents' Ex 12.
[14] Tr, at 318 (Rowan); Respondents' Ex 9.
[15] Tr, at 37 (Cea).
[16] Tr, at 37-38 (Cea).
[17] Tr, at 38 (Cea).

In response to this request, Cea received a call from a NYSUT attorney denying Cea's request.[18] During that call, the attorney informed Cea that NYSUT was not going to retain another outside attorney, as Cea had requested, but that if Cea waived any conflict of interest, NYSUT would appoint a staff attorney from its Office of General Counsel to represent him. Cea was unwilling to sign a waiver, and instead, had Walsh represent him in the June of 2018 disciplinary matter.[19] Cea recalled that during that phone call, the NYSUT attorney:

> kept trying to get me to sign a waiver for the conflict of interest. He kept trying to pressure me. Over and over again he kept repeating that.
>
> He was also – he kept repeating – kept asking me if I was denying representation from NYSUT. And I kept trying to explain to him over and over again that I was not denying NYSUT representation but I was not willing to sign a waiver.
>
> He kept over and over – he would not let me explain. He kept talking over me. He kept cutting me off. Eventually I got to the point where I was frustrated with him and told him where to go and cut him off.[20]

The day after that tense phone call, NYSUT General Counsel, Robert Reilly sent Cea a letter stating, in relevant part:

> My Associate General Counsel offered you to have this office represent you (contingent upon your execution of an agreement to waive certain conflicts of interest). You refused this office's offer to provide you with such representation. Further, when he attempted to explain to you the reason for such an agreement, you berated my Associate General Counsel with words I care not to use in this correspondence.

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[18] *Id.*
[19] Tr, at 83-84 (Cea).
[20] Tr, at 40 (Cea).

> Given your refusal of this office's offer to represent you, and further given your mistreatment of my Associate General Counsel yesterday, we will not represent you in the above referenced action. Accordingly, should you wish to switch outside attorneys, it will be at your own time and expense.[21]

Cea testified that, in anticipation of receiving a second set of EL § 3020-a charges in December of 2018, he wrote to Rowan on December 12, 2018.[22] In that letter, Cea requested "any and all policies, regulations and procedures that govern the assignment of counsel for NYSUT members including any circumstances where NYSUT can suspend this earned and purchased right and/or benefit for NYSUT members."[23] Rowan testified that he referred the letter to his supervisor for a response, that his supervisor referred it to the director of field, and then to Reilly for response.[24]

Cea testified that the day before writing to Rowan, he had hired Walsh "by the hour, like, informally, just to accomplish a couple of things," including accompanying him to the campus so that the District could serve him with disciplinary charges, and filing a demand for a hearing.[25] Cea indicated that around the time the charges were served against him, he asked Association Grievance Chairperson, Walter Bowden, to convey to the District that he had retained private counsel, and that the District should contact Walsh, and email the charges and documents to Walsh.[26]

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[21] Charging Party's Ex 1.
[22] Tr, at 46 (Cea); Respondents' Ex 4.
[23] Respondents' Ex 4.
[24] Tr, at 322 (Rowan).
[25] Tr, at 43-44, 47 (Cea).
[26] Tr, at 112 (Cea).

Cea was served with EL § 3020-a disciplinary charges in December, 2018. He let Bowden know that he had received the charges, and, in response, Bowden asked whether Cea intended to be represented by NYSUT: "I indicated to him at that time probably not but I needed a lot of information and I was still waiting on an answer from NYSUT about the policies and procedures."[27] Rowan never had an intake meeting with Cea concerning the December 2018 disciplinary charges because Cea never requested to be represented by NYSUT in that matter.[28]

Cea testified that, not having received a response from NYSUT, he had Walsh "write a letter to NYSUT and ask them about representation and about using you [Walsh] as my representative and whether or not they would pay for [Walsh]."[29] Walsh sent a letter to NYSUT on January 14, 2019 stating, in relevant part:

> it is my understanding that NYSUT normally would provide an attorney to defend Mr. Cea and also would pay (with the School District) the cost for any arbitrator. In this case, because of Mr. Cea's various actions against NYSUT, I believe NYSUT understands that it could be argued that a conflict exists between the two parties and that NYSUT will pay for an independent attorney to represent Mr. Cea. In fact, NYSUT has, once before, in an earlier case, assigned an outside attorney (Mark Mishler) to represent Mr. Cea. However, that representation didn't work out and Mr. Mishler asked to be removed.
>
> In this case, Mr. Cea has requested that I represent him and I have agreed. Mr. Cea would now request that NYSUT agree to this arrangement and appoint me, as the neutral attorney, to represent Mr. Cea [emphasis added]. I agree to accept NYSUT's payment rate.
>
> Would you please advise me that this is acceptable to NYSUT or if

[27] Tr, at 44 (Cea); Respondents' Ex 4.
[28] Tr, at 318 (Rowan).
[29] *Id.*

> you need anything else from myself or Mr. Cea, please advise me of that.[30]

Cea testified that he asked Walsh to send a second letter, dated February 8, 2019, to NYSUT, because he had received no response to the January 14, 2019 letter.[31] Cea testified that at that point, he retained Walsh:

> in order to finish this. If I had—even if I had thought about switching attorneys at this point, it would have been detrimental to my case. I think it would not have been in my best interest to switch attorneys at that point. So the best scenario for me would be to retain [Walsh] as my representative in this matter.[32]

Next, Cea sent his December 12, 2018 letter, and Walsh's January 14, 2019 and February 8, 2019 letters, by certified mail to Bowden, and also hand-delivered them to Rowan.[33]

On December 20, 2018, in a text message exchange, Bowden asked Cea, in relevant part: "Are you planning on asking NYSUT for any help/representation?"[34] Cea responded: "probably not on [NYSUT] but in my view they should fork over and pay for my attorney – tell Rowan I've paid enough dues – [I] did send a letter asking about how [NYSUT] chooses attorneys but he hasn't answered".[35] Bowden testified that it was his understanding that Cea was stating that "he would like NYSUT to pay for the attorney

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[30] Tr, at 48 (Cea); Charging Party's Ex 2.
[31] Tr, at 50 (Cea).
[32] Tr, at 51 (Cea).
[33] Tr, at 52 (Cea).
[34] Respondents' Ex 11.
[35] *Id.*

that he has already hired."[36] Bowden testified that he forwarded the text of Cea's messages to Rowan, and Association Co-President, Scott Emerson.[37]

NYSUT responded to Walsh's January 14 and February 8 letters on February 12, 2019, denying the request for NYSUT to pay for Walsh's representation of Cea in the disciplinary matter.[38] That letter explained that Cea's request was being denied because he "has not, in fact, requested legal representation from my office through NYSUT or his local union . . . . Rather, Mr. Cea chose to be represented by private counsel, and, it seems, he has retained your office to represent him."[39] Reilly's letter goes on to recount the falling out between Cea and his previously NYSUT-assigned outside counsel (Mishler), and explains that "had Mr. Cea requested representation through NYSUT's process, we likely would have assigned the matter, again at NYSUT's expense, to outside counsel, although no doubt to a different counsel than the one assigned last time." The letter concludes:

> However, as we are not familiar with you or your firm, we would not have assigned the matter to you. Please let me know if Mr. Cea wishes to have this office assign counsel to represent him in this matter. No doubt such counsel would request you to sign a substitution of counsel form.[40]

Cea testified that he had Walsh send another letter, dated February 21, 2019.[41]

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[36] Tr, at 289 (Bowden).
[37] Tr, at 292 (Bowden).
[38] Tr, at 53 (Cea); Charging Party's Ex 6.
[39] Charging Party's Ex 6.
[40] *Id.*
[41] Tr, at 53-54 (Cea); Respondents' Ex 4; Charging Party's Ex 4.

That letter acknowledges Reilly's denial of "Cea's request, through me, to pay the legal fees of the attorney he has chosen instead of one that NYSUT has chosen", and requests that Reilly: "please advise me as to NYSUT's 'process' so that Mr. Cea and I can properly request that NYSUT provide him with an attorney that he feels can properly represent him."[42]

By letter dated February 26, 2019, Reilly responded: "To my knowledge, Mr. Cea has not requested NYSUT representation in the instant matter, but, rather, has retained your firm directly in lieu of NYSUT representation in the instant matter. The process is not that the unit member shops for their own attorney and then sends NYSUT the bill."[43] Reilly's letter goes on to state:

> that even if Mr. Cea had used the process and requested NYSUT representation and NYSUT offered him representation, we would not have retained your firm . . . Mr. Cea did not ask for representation from NYSUT but chose instead to retain private counsel, and now wants NYSUT to pay for it. That is not the process.[44]

Cea testified that a hearing on the disciplinary charges was scheduled for April 4, 2019, and that the matter was settled that same date. Walsh billed Cea $68,125 for professional services related to handling the December 2018 disciplinary case.[45]

Reilly testified that NYSUT has a policy of providing free counsel to local

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[42] Charging Party's Ex 4.
[43] Charging Party's Ex 5.
[44] *Id.*
[45] Charging Party's Ex 7.

affiliates' bargaining unit members in EL § 3020-a proceedings.[46] Reilly explained that if he believes that the member had an actual or apparent conflict, potential conflict, or "we just thought it was an awkward situation, we would offer that member representation, but I would hire outside counsel at our cost."[47]

Reilly testified that NYSUT provides free representation in EL § 3020-a proceedings only when the member either: (1) accepts NYSUT's appointment of one of its in-house (i.e., Office of General Counsel) staff attorneys to represent the member, or (2) accepts NYSUT's appointment of one of Reilly's selected outside attorneys. Reilly confirmed that "[i]f they hire private counsel, I'm not going to pay for it."[48]

Reilly testified that he denied Cea's request because when he appoints outside counsel "I have to be satisfied with the attorney that I'm assigning to the member so I need to be comfortable with that attorney."[49] Reilly explained that he utilizes attorneys who he has "known, people that I know support the labor movement, have experience"[50]; "it's my satisfaction who I hire"[51]; "[i]t's just a question of my preference, my satisfaction."[52] Reilly testified that he does not have a written list of outside attorneys that he is comfortable with, but, for example, he has used two retired NYSUT

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[46] Tr, at 165 (Reilly).
[47] Tr, at 166 (Reilly).
[48] Tr, at 186-187 (Reilly).
[49] Tr, at 170 (Reilly).
[50] Tr, at 173 (Reilly).
[51] Tr, at 229 (Reilly).
[52] *Id.*

staff attorneys and Mishler to perform such work in the Capital District.[53]

Reilly testified that it was his understanding that Cea hired Walsh, and then requested that NYSUT pay for the attorney that he had already hired.[54] Reilly testified that he considered Walsh's January 14, 2019 letter to be a request to have NYSUT pay for Cea's privately-retained outside counsel.[55] He stated:

> . . . our process isn't that the member picks their own attorney and then has us pay for it. That's not the process. They request representation through us, usually assigned in-house. If there's a conflict, we choose the outside counsel.[56]

Reilly testified that even if Cea had followed NYSUT's process for asking for free representation, Reilly still would not have retained Walsh or paid for his services because Reilly was unfamiliar with Walsh.[57]

Reilly testified that clients of NYSUT's OGC do not get to select their own attorney, or to change attorneys, at will.[58] Reilly testified that, generally, clients of the OGC are informed, in writing, that they can decline OGC representation, and choose to be represented by private counsel, at their own expense:

> If you wish to decline this offer [of OGC representation], and have a private attorney represent you, you should notify us immediately. . . . If you choose private counsel, NYSUT will not pay the cost of your private attorney, nor will NYSUT assign counsel to act as co-counsel with your private attorney.[59]

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[53] Tr, at 172 (Reilly).
[54] Tr, at 200-201 (Reilly).
[55] Tr, at 205-210 (Reilly); Charging Party's Ex 2.
[56] Tr, at 230 (Reilly).
[57] Tr, at 227-228 (Reilly).
[58] Tr, at 239-241 (Reilly).
[59] Respondents' Ex 9.

Scott Emerson has been employed by the District for 28 years and has been co-president of the Association since 2008.[60] Emerson testified that since he has been co-president, there have been four cases in which bargaining unit members were issued disciplinary charges. In three of the four cases, the member was either represented by an attorney in NYSUT's OGC or a NYSUT-appointed outside attorney. In the fourth case, Cea retained private attorney Walsh to represent him.[61] Cea admitted that, to his knowledge, no bargaining unit member had hired private counsel which was paid for by NYSUT. Rather, NYSUT had previously appointed outside counsel of its choosing.[62]

DISCUSSION

We first address the Respondents' claim that Cea's exceptions are deficient under § 213.2 of our Rules. We agree that many of Cea's exceptions do not "set forth specifically the questions or policy to which exceptions are taken," "identify that part of the decision . . . to which exceptions are taken," "designate . . . the portion of the record relied upon," or "state the grounds for exceptions," as required by our Rules.[63] However, we are mindful that Cea is unrepresented and that his exceptions should be liberally construed.[64] Moreover, as we recently reaffirmed in *State of New York (Office*

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[60] Tr, at 344 (Emerson).
[61] Tr, at 347 (Emerson).
[62] Tr, at 122-123 (Cea).
[63] Rules, § 213.2.
[64] *Niagara Falls Police Club (Drinks-Bruder)*, 54 PERB ¶ 3018, 3054 (2021); *State of New York (New York State Police) (Oliver)*, 51 PERB ¶ 3037, 3166 (2018); *UFT (Leon)*, 48 PERB ¶ 3016, 3055 (2015); *UFT (Pinkard)*, 47 PERB ¶ 3020, 3061 (2014).

of Temporary and Disability Assistance),[65] we will consider exceptions where the gravamen of the asserted error is clear; in particular, where we are able to discern the basis of the excepting party's arguments and identify the portions of the ALJ's decision that it disagrees with. Cea's exceptions here meet this standard.

We will not, however, consider allegations and alleged facts that were not raised in the charge or before the ALJ and are raised for the first time in exceptions.[66] These include Cea's assertions that the Respondents' conduct was motivated by their feelings regarding Cea and his preferred attorney's political views, that an exhibit introduced by the Respondents was "modified,"[67] and Cea's claims regarding an off-the-record conversation between counsel. These arguments were not pleaded in the charge or otherwise raised before the ALJ, and we will not consider them now. Our review is limited to the record as it existed before the ALJ,[68] and we will not review conduct which

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[65] 54 PERB ¶ 3011 (2021).

[66] As we recently reaffirmed in *UFT (Imbert*), "[o]ur review is limited to the record as it existed before the ALJ." 54 PERB ¶ 3020, 3065-3066, n 30 (2021); *TWU (Mooney)*, 51 PERB 3001, 3002 (2018); *TWU (Ayala)*, 50 PERB 3017, 3074 (2017); *CSEA (Brewster)*, 50 PERB ¶ 3027, 3102 (2017); *Mt Pleasant Cottage UFSD*, 50 PERB ¶ 3002, 3009, n 12 (2017); C*SEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016); *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶ 3012, 3031 (1992); *Board of Cooperative Educational Services of Sullivan County*, 14 PERB ¶ 3101, 3170-3171 (1981).

[67] Respondents' Exhibit 9 was entered into the record without objection from Cea's then-attorney.

[68] *UFT (Imbert)*, 54 PERB ¶ 3020, 3065 n 30 (2021); *TWU (Mooney)*, 51 PERB ¶ 3001, 3002 (2018); C*SEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016); *Smithtown Fire District*, 28 PERB ¶ 3060, 3135 (1995); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶ 3012, 3031 (1992).

is not alleged in a timely charge or amended charge.[69]

Cea excepted to the length of time it took the ALJ to issue her decision (approximately 11 months from the time the last briefs were filed). Cea has not, however, specified any harm or prejudice purportedly resulting from the length of time it took the ALJ to issue a decision, and we do not believe that the lapse of time in issuing the decision provides a basis for overturning the decision. The length of processing time here is not sufficient, as a matter of law, to require setting aside the decision.[70]

To establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization's conduct

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[69] *See State of New York (New York State Police)(Oliver)*, 51 PERB ¶ 3037, 3166 (2018); *County of Rockland*, 31 PERB ¶ 3062, 3136 (1998); *NYCTA*, 31 PERB ¶ 3024, 3054 (1998); *International Brotherhood of Teamsters (Girolamo)*, 31 PERB ¶ 3008, 3015 (1998); *County of Nassau*, 29 PERB ¶ 3016, 3040 n 4 (1996).

[70] *See* *Louis Harris & Assocs, Inc v deLeon*, 84 NY2d 698, 703-704 (1994) (Court of Appeals held that a more than seven-year delay in issuing a final order by the New York City Commission on Human Rights was not so unreasonable as to establish prejudice as a matter of law to party); *Corning Glass Works v Ovsanik*, 84 NY2d 619 (1994) (eight 1/2-year delay by the State Division of Human Rights in processing a complaint of discrimination based on disability against party was not substantially prejudicial as a matter of law); *NYCTA (Burke)*, 52 PERB ¶ 3017, 3073 (2019) (finding that two year and four month processing time for an ALJ decision was not sufficient to require reversing the decision).

Issuance of the decision was not motivated by news of Cea's attorney passing. ALJ decisions are issued as they are completed. In the event that Cea wished to retain new counsel, § 213.7 of our Rules provide a process whereby a party can request an extension of time for filing exceptions. Indeed, Cea himself made use of this process.

or actions are arbitrary, discriminatory or founded in bad faith.[71] As we have previously explained, the courts have:

> reject[ed] the standard . . . that "irresponsible or grossly negligent" conduct may form the basis for a union's breach of the duty of fair representation as not within the meaning of improper employee organization practices set forth in Civil Service Law § 209.[72]

Under this standard, "an employee's mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation does not constitute a breach of the duty of fair representation."[73] When, as here, an employee organization has a policy of providing extra-contractual legal services and assistance, it must do so in a way that is not arbitrary, discriminatory, or in bad faith.[74]

According to Reilly's testimony, credited by the ALJ, NYSUT provides free legal representation in EL § 3020-a proceedings when the member either accepts NYSUT's appointment of in-house staff attorneys to represent the member, or accepts NYSUT's

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[71] *UFT (Imbert),* 54 PERB ¶ 3020, 3064 (2021); *Transportation Communications Union/IAM (Shah)*, 53 PERB ¶ 3016, 3081 (2020); *Professional Staff Congress of the City University of New York (Giammarella)*, 51 PERB ¶ 3010, 3048 (2018); *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, 3161 (2017); *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016).

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

[73] *Transportation Communications Union/IAM (Shah)*, 53 PERB ¶ 3016, at 3081; *Niagara Falls Police Club, Inc (Drinks-Bruder)*, 52 PERB ¶ 3011, 3055 (2019).

[74] *See United Steelworkers Local 9434-00 (Buchalski)*, 43 PERB ¶ 3002, 3008 (2010); *PEF (Hartner)*, 15 PERB ¶ 3066, 3103 (1982).

appointment of one of Reilly's selected outside attorneys.[75] NYSUT does not, however, pay for a member's own selection of a preferred outside counsel.[76] 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."[77] Here, Cea has not presented any objective evidence that the ALJ erred in her credibility determination. Accordingly, we see no basis to overturn the ALJ's credibility finding.

The record indicates that NYSUT has never paid for a member's preferred outside counsel in EL § 3020-a proceedings.[78] Cea was made aware of this policy in June, 2018.[79] We agree with the ALJ that Cea has not established that NYSUT's actions here, in adhering to its policy, were arbitrary, discriminatory, or undertaken in bad faith. The fact that the basis of Cea's request "may not have been unreasonable"[80] does not demonstrate that NYSUT's actions were arbitrary, discriminatory, or undertaken in bad faith. In his exceptions, Cea asserts that other employees received

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[75] 54 PERB ¶ 4524, at 4670, citing Tr, at 186-187.
[76] *Id*.
[77] *City of Utica*, 54 PERB ¶ 3022, 3074 (2021), quoting *Buffalo City Sch Dist*, 53 PERB ¶ 3015, 3074 (2020). *See also Pine Valley Cent Sch Dist,* 51 PERB ¶ 3036, 3160 (2018); *Village of Scarsdale,* 50 PERB ¶ 3007, n 51 (2017); *Rochester Housing Authority*, 52 PERB ¶ 3014, 3061 (2019); *Pleasantville Union Free Sch Dist,* 51 PERB ¶ 3024, 3100 (2018); *Village of Endicott,* 47 PERB ¶ 3017, 3051 (2014).
[78] Tr, at 86-187 (Reilly); 347 (Emerson).
[79] Any delay in responding to Cea's December 2018 request for "any and all policies, regulations and procedures that govern the assignment of counsel for NYSUT members" was immaterial, as Cea was already aware of NYSUT's policy of not paying for a member's preferred outside representative.
[80] 54 PERB ¶ 4524, at 4673.

free legal representation. However, these employees received free representation because they accepted NYSUT's appointed attorneys. They did not select their own preferred representative, to be paid for by NYSUT.[81] Contrary to Cea's assertions, his case was not one of "first impression." NYSUT had been faced in the past with possible conflict-of-interest situations and had appointed outside counsel in those cases.[82] Here, Cea was arguably in the same position and, had he requested representation, there is no indication that he would not have been assigned a representative from outside NYSUT's OGC. He would not, however, have been allowed to choose his own representative and have NYSUT pay that representative's attorney fees.

We find that NYSUT's actions in refusing Cea's request that his preferred attorney be essentially added to the "pool" of NYSUT's approved outside attorneys and then be appointed as his representative was not a breach of its duty of fair representation. NYSUT's actions were consistent with its policy and practice of not paying for a member's preferred representative, and despite Cea's assertions, there is no evidence that this action was motivated by animus towards Cea or was otherwise arbitrary, discriminatory, or undertaken in bad faith.[83] Reilly's letter regarding Cea's "mistreatment" of a NYSUT Associate General Counsel was in reaction to one particular situation and does not evidence ongoing or overarching animus towards Cea. We do

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[81] Tr, at 347 (Emerson).
[82] Tr, at 166 (Reilly).
[83] *Compare PEF (Levy)*, 31 PERB ¶ 3090, 3203 (1998) (charge concerning nonpayment of legal fees dismissed where employee organization's actions were "fully consistent with its existing policy and practices").

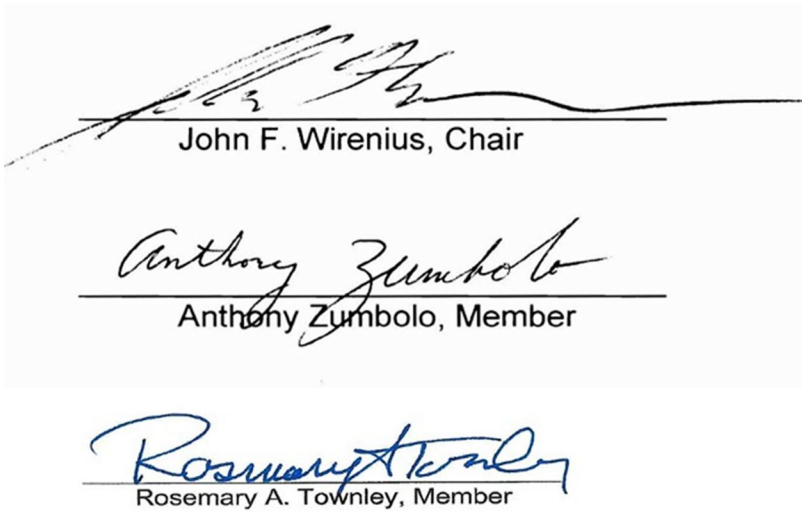
not opine on Reilly's process for selecting the pool of approved outside attorneys. This process is an internal union matter over which we lack jurisdiction.[84]

In sum, we find that Cea has not established that NYSUT's denial of Cea's request to choose his own attorney to represent him in an EL § 3020-a disciplinary proceeding and to have NYSUT pay for Cea's chosen attorney was arbitrary, discriminatory, or made in bad faith.

Based on the foregoing, the exceptions filed by Cea are denied, and the ALJ's decision is affirmed.

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

DATED: January 13, 2022
Albany, New York



[84] *See TWU (Asamoah)*, 47 PERB ¶ 3033, 3102 (2014); *United Transportation Union, Local 1140*, 30 PERB ¶ 3071, 3177 (1997); *CSEA (Liebler, Grzedzicki, Hejna)*, 17 PERB ¶ 3072, 3110 (1984).

In the Matter of

ROBERT RETTINO,

Charging Party,

-and- **CASE NO. U-35683**

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

Respondent.

GLASS & KRAKOWER LLP (BRYAN GLASS & JORDAN HARLOW of counsel), for Charging Party

KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS (ANJANETTE D. PIERRE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Robert Rettino to a decision of an Administrative Law Judge (ALJ) granting a motion to dismiss filed by the Board of Education of the City School District of the City of New York (District).[1] The ALJ dismissed Rettino's charge alleging that the District violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) when, in retaliation for Rettino's engaging in protected activity, the District filed New York State Education Law (EL) § 3020-a charges seeking his dismissal. The ALJ found that Rettino, through his offer of proof, had failed to allege facts sufficient to establish a *prima facie* case of retaliation.

EXCEPTIONS

Rettino filed seven exceptions to the ALJ's decision. Rettino asserts that he

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[1] 54 PERB ¶ 4537 (2021).

alleged facts sufficient to comply with the ALJ's directive on submitting his offer of proof and that any information he failed to provide was irrelevant.[2] Rettino also claims that further testimony would clarify and expand on his allegations and that the ALJ imposed too high a burden on an offer of proof.[3] Finally, Rettino contends that he offered more evidence than simply timing of the adverse action to support his allegation that the Act has been violated.[4]

The District supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

For the reasons that follow, we affirm the ALJ's decision.

FACTS

Because Rettino's exceptions seek reversal of the ALJ's decision granting a motion to dismiss, we "assume the truth of all of the charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts."[5] Rettino began teaching for the District in September of 2005, as a common branch teacher. As of April 11, 2017, Rettino had received only satisfactory or effective annual professional performance reviews.[6] During the 2014-2015 school year through the 2016-2017 school year, Rettino worked at Public School 97x. The

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[2] Exceptions Nos 1-4, 7.
[3] Exception No 5 and preface to exceptions.
[4] Exception No 6.
[5] *Board of Educ of the City Sch Dist of the City of New York (Imbert)*, 54 PERB ¶ 3020, 3062 (2021); *County of Chenango and Chenango County Sheriff*, 53 PERB ¶ 3006, 3019 (2020), *UFT (Spaulding)*, 51 PERB ¶ 3022, 3094 (2018); *CSEA (Trowbridge)*, 48 PERB ¶ 3024, 3093 (2015); *Town of Tuscarora*, 45 PERB ¶ 3044, 3112 (2012); *County of Livingston*, 43 PERB ¶ 3018, 3073 (2010); *County of Nassau (Unterweiser)*, 17 PERB ¶ 3013, 3030 (1984).
[6] Charge, ¶ 3.

principal of that school during those years was Kathleen Bornkamp.[7] During the period in question in this matter, Rettino was one of two co-teachers who taught the same elementary school classes.

Since May of 2015, Rettino filed five grievances, referred to as "APPR grievances," that challenged classroom observation reports.[8] Those APPR grievances include: a February 4, 2015 APPR grievance (pertaining to a January 7, 2015 classroom observation); a March 9, 2015 APPR grievance (pertaining to a February 10, 2015 classroom observation); a January 8, 2016 APPR grievance (pertaining to a November 10, 2015 classroom observation); a June 6, 2016 APPR grievance (pertaining to a May 5, 2016 classroom observation); and a March 17, 2017 APPR grievance (pertaining to an October 27, 2016 classroom observation).[9]

The documents Rettino attached to his offer of proof show that the first two APPR grievances challenged classroom observation reports issued by Assistant Principal Steven Nyarady.[10] The APPR grievance dated January 8, 2016 states that Rettino was observed on November 10, 2015, by four individuals, one of whom is identified as "Ms. Matias."[11] The observation report was written by Bornkamp.[12] The June 6, 2016 APPR grievance[13] challenged a classroom observation report issued by

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[7] *See* page 1 of the exhibits annexed to the Offer of Proof.
[8] Rettino Affidavit, at ¶ 3.
[9] Rettino Affidavit, at ¶¶ 3 and 4. *See also* pages 1-23 of the exhibits annexed to the Offer of Proof.
[10] *See* pages 1-9 of the exhibits annexed to the Offer of Proof.
[11] *See* page 22 of the exhibits annexed to the Offer of Proof.
[12] *See* pages 19-21 of the exhibits annexed to the Offer of Proof.
[13] *See* page 15 of the exhibits annexed to the Offer of Proof.

Assistant Principal Danielle Civitano.[14] The March 17, 2017 APPR grievance challenges an observation report conducted by Nyarady.[15]

In addition to the filing of APPR grievances, the charge alleges that Rettino engaged in activity protected under the Act when he "actively participated in union meetings and activities."[16] The charge further alleges that the "administration" was aware of that activity.[17] The ALJ directed Rettino to specifically identify in his offer of proof the meetings and activities referred to in the charge, the date of the activities or meetings, and the action(s) that Rettino undertook in the meetings or activities.[18] The ALJ also directed Rettino to "identify the individual within the administration referred to, and how that individual became aware of the alleged activity."[19] In his offer of proof, Rettino only alleges that he

> attended union meetings and rallies with the UFT Solidarity caucus and filed numerous UFT safety reports against the school for years since at least 2010, and more recently about April 2015 and March 2017.[20]

The charge further alleges that, since engaging in the foregoing "union activity," his "administration" issued "numerous unwarranted letters to file" against him and that the allegations in those letters are "false or exaggerated."[21] In his offer of proof, Rettino identifies three letters that were placed in his file. The first was issued by Nyarady, who

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[14] *See* pages 16-18 of the exhibits annexed to the Offer of Proof.
[15] *See* page 10 of the exhibits annexed to the Offer of Proof.
[16] Charge, ¶ 5.
[17] Charge, ¶ 5.
[18] *See* ALJ letter dated January 17, 2018.
[19] *Id*.
[20] Rettino Affidavit, at ¶ 5.
[21] Charge, ¶¶ 6-7.

states that Rettino engaged in misconduct on October 19, 2015, when he fell asleep during an IEP meeting in front of staff and parents.[22] Rettino filed a response admitting the allegation in that letter, stating that he briefly nodded off because he was sick and the room was warm.[23]

The second letter to Rettino's file was issued by Civitano, who observed the conduct. In her letter, she states that, when she walked by his classroom on March 9, 2016, she observed him sitting at a table, by himself, and that he appeared to be sleeping.[24] The third letter to Rettino's file was issued by Nyarady. In that letter, Nyarady states that on November 3, 2016, Rettino fell asleep in his classroom during instructional time.[25] On that occasion, Nyarady saw Rettino with his head down on a desk and took a photograph of Rettino in that position.[26] During the disciplinary meeting, Rettino stated that his eyes were closed because he had a headache, and that he was not sleeping.[27]

In response to the ALJ's direction that he identify how or why the foregoing letters are either "unwarranted, false, or exaggerated" as alleged in the charge,[28] Rettino states that the disciplinary letters "speak for themselves" and that he "disputes he was sleeping during the last two incidents," and that he was sick on the day he was first accused of sleeping and that he nodded off for a few seconds."[29]

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[22] *See* page 25 of the exhibits annexed to the Offer of Proof.
[23] *See* page 26 of the exhibits annexed to the Offer of Proof.
[24] *See* pages 23-24 of the exhibits annexed to the Offer of Proof.
[25] *See* page 27 of the exhibits annexed to the Offer of Proof.
[26] *Id*.
[27] *Id*.
[28] *See* ALJ letter dated January 17, 2018.
[29] Rettino Affidavit, at ¶ 7.

On or about December 21, 2016, disciplinary charges seeking Rettino's termination were initiated, pursuant to EL § 3020-a.[30] The charges sought Rettino's dismissal based on the three incidents in which he was accused of sleeping. An award was issued in Rettino's disciplinary case, finding that he did engage in misconduct when he fell asleep on two of the three occasions and imposing a fine.[31]

DISCUSSION

Initially, we find that the ALJ did not abuse her discretion in requiring that Rettino submit an offer of proof clarifying and expanding on the allegations in his charge and in basing her decision on Rettino's statements of what he intended to prove at a hearing. Requiring offers of proof falls within the ALJ's broad discretion to "regulat[e] the course of the proceeding."[32] When a party fails to set forth sufficient facts in an offer of proof that would demonstrate a violation under the Act, an ALJ does not err by declining to proceed to a hearing.[33]

Rettino's claim that it is "inconsistent" [34] for the ALJ to dismiss the charge based on an offer of proof after the Director of Public Employment Practices and Representation (Director) has processed the charge is simply incorrect. The standard applied by the Director in making the initial determination whether to process a charge is starkly different than that applied by an ALJ in actually deciding the merits of the

[30] Charge, ¶ 8; pages 29-50 of the exhibits annexed to the Offer of Proof.
[31] The award is annexed to the Offer of Proof, at pages 29-50.
[32] Section 212.4 (d) of our Rules of Procedure (Rules).
[33] *Board of Educ of the City Sch Dist of the City of New York (McDowall)*, 54 PERB ¶ 3012, 3037 (2021); *State of New York (Office of Temporary and Disability Assistance),* 50 PERB ¶ 3009, 3042 (2017); *CSEA (Davitt),* 45 PERB ¶ 3028, 3065 (2012).
[34] Exceptions, at 4.

same charge. For the Director, the only question is "whether the facts as alleged *may* constitute an improper practice as set forth in section 209-a of the [A]ct."[35] The ALJ's task, by contrast, is to resolve any disputed facts and to determine whether, under the Act, the charging party has carried the burden of proving that an improper practice in fact occurred. Thus, as the Board explained in *City of Ithaca*, "even after a charge is processed following the Director's initial review, the charge may be dismissed by an [ALJ] prior to or during a hearing when the charging party is unable to articulate sufficient facts in an offer of proof to the ALJ that, if proven, would demonstrate a violation under the Act."[36] In short, the Director's processing of a charge is not authoritative in establishing either the relevant facts or the existence of a violation of the Act in proceedings before the ALJ.[37]

> When an improper practice charge alleges 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. As we have often reaffirmed, the ultimate burden of proof always remains with the charging party.

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[35] Rules, § 204.2 (a) (1) (emphasis added).
[36] 45 PERB ¶ 3034, 3081 (2012), citing *County of Rockland (Davitt)*, 45 PERB ¶ 3028 (2012*); Bd of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶ 3010 (2010); *see also Dutchess Community College*, 41 PERB ¶ 3029 (2008), citing *Professional Fire Fighters Assoc, Local 274, IAFF*, 23 PERB ¶ 3021 (1990); *Chenango Forks Cent Sch Dist (Allen)*, 32 PERB ¶ 3060 (1999).
[37] *Professional Staff Congress of the CUNY (Giammarella)*, 51 PERB ¶ 3010, 3046 (2018).

> However, the initial burden of proof to establish a *prima facie* case (an inference of improper motivation) is relatively low, and a charging party can establish the existence of anti-union animus by statements or by circumstantial evidence.[38]

The adverse action alleged here is the initiation of EL § 3020-a charges against Rettino, not the placement of disciplinary letters into Rettino's file.[39] For purposes of this decision, we assume that Rettino has alleged sufficient facts to demonstrate both that he engaged in protected activity (filing APPR grievances)[40] and that the decision makers who initiated the EL § 3020-a charges were aware of that activity. We nevertheless find that Rettino has not alleged facts sufficient to demonstrate that EL § 3020-a charges would not have been initiated but for his APPR complaints. There is no allegation of statements made by the District or other circumstantial evidence, such as disparate treatment, which would support finding an inference of retaliatory motive has been raised. Indeed, Rettino does not allege any facts beyond timing that would support an inference of retaliatory motive on the District's part. As the ALJ found, it is well-established that temporal proximity, even assuming that the time lapse is sufficiently proximate to the adverse actions, alone is insufficient to establish the "but

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[38] *Board of Educ of the City Sch Dist of the City of New York (Cohn)*, 53 PERB ¶ 3011, 3053 (2020), quoting *Board of Educ, City Sch Dist City of New York (Elgalad)*, 52 PERB ¶ 3001, 3004-3005 (2019); *see also Board of Educ, City Sch Dist City of New York (Bagarozzi)*, 51 PERB ¶ 3032, 3140 (2018); *State of New York (Dept of Transportation)*, 50 PERB ¶ 3004, 3021 (2017), citing *State of New York (SUNY)*, 38 PERB ¶ 3019 (2005), *confd sub nom CSEA v NYS Pub Empl Relations Bd*, 35 AD3d 1005, 39 PERB ¶ 7012 (3d Dept 2006).

[39] *See* ALJ letter dated March 29, 2018. Rettino's charge was filed on April 13, 2017. Hence, the four-month period of limitations pursuant to § 204.1 of our Rules begins on December 13, 2016. The three disciplinary letters were placed into Rettino's file prior to this date and cannot serve as the basis of an improper practice finding.

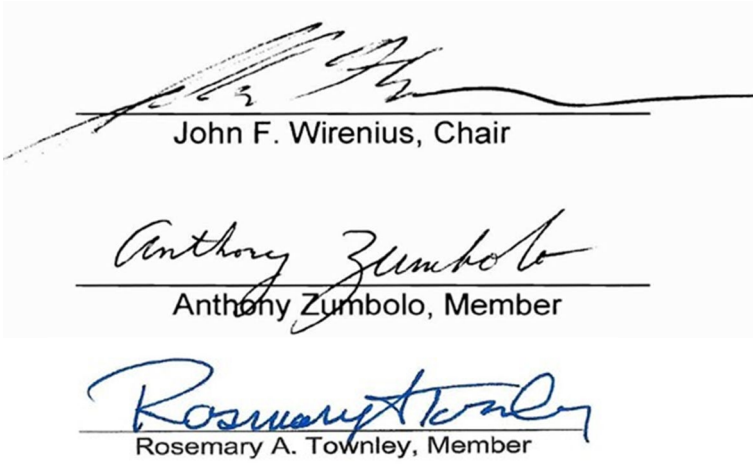
[40] In his exceptions, Rettino states that any additional union activity he engaged in is "superfluous." Exceptions, at 3.

for" element of a *prima facie* case.[41]

Based on the foregoing, the exceptions filed by Rettino are denied, and the ALJ's decision is affirmed.

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

DATED: January 13, 2022
Albany, New York



[41] *Board of Educ of the City Sch Dist of the City of New York (McDowall)*, 54 PERB ¶ 3012, at 3037; *State of New York (DOCCS)*, 52 PERB ¶ 3003, 3016 (2019); *Lawrence Union Free Sch Dist,* 50 PERB ¶ 3034, 3141-3142 (2017), *Bellmore-Merrick Cent High Sch Dist,* 48 PERB ¶ 3022, 3076 (2015); *Board of Educ of the City Sch Dist of the City of New York (Miller),* 35 PERB ¶ 3002, 3004 (2002); *Roswell Park Cancer Institute,* 34 PERB ¶ 3040, 3096 (2001).

55 PERB ¶ 3002 **STATE OF NEW YORK**
B/R 54-4528 **PUBLIC EMPLOYMENT RELATIONS BOARD**

In the Matter of

VILLAGE OF TUXEDO PARK POLICE BENEVOLENT ASSOCIATION,

Charging Party,

-and-

CASE NOS. U-35070 & U-35109

VILLAGE OF TUXEDO PARK,

Respondent.

LAW OFFICES OF JOHN K. GRANT, PC, (JOHN MICHAEL GRANT of counsel), for Charging Party

FEERICK NUGENT MACCARTNEY, PLLC (BRIAN D. NUGENT of counsel), for Respondent

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Village of Tuxedo Park (Village) to a decision of an Administrative Law Judge (ALJ).[1] The ALJ found that the Village violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally transferred exclusive bargaining work performed by members of the Village of Tuxedo Park Police Benevolent Association (PBA) to non-unit employees. The ALJ found that the Village violated the Act by transferring duties related to accepting, processing, and issuing resident tag requests to non-unit employees. The ALJ dismissed the allegation that the Village had also violated the Act by transferring duties related to vehicle monitoring, traffic control, gate control, and maintaining logs to

[1] 54 PERB ¶ 4528 (2021).

non-unit employees. The ALJ found that the PBA failed to meet its burden of demonstrating that these duties were exclusive to unit members.[2]

EXCEPTIONS

The Village filed two exceptions to the ALJ's decision. The Village's first exception contends that the ALJ erred in finding that a discernible boundary existed around a solely ancillary and minimal clerical task previously performed by unit employees and that no evidence was presented to identify the frequency of the task. The Village's second exception asserts that enforcement of the ALJ's order is unreasonable under the circumstances, where the Village has transferred the bulk of unit employees' substantive duties. The Village claims that the ALJ's proposed remedy would place the Village in a position where it would have to retain three full-time traffic guards merely to issue occasional vehicle tags to residents.

The PBA supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

For the reasons that follow, we affirm the ALJ's decision.

FACTS

The facts are set forth fully in the ALJ's decision and are repeated here only as necessary to decide the exceptions. Specifically, we exclude facts related to unit employees' duties associated with vehicle monitoring, traffic control, gate control, and

[2] No exceptions were filed to the ALJ's dismissal of this allegation. Any exceptions are therefore waived, and this finding is not before us for review. *See, eg*, *City of Yonkers*, 54 PERB ¶ 3016, 3048, n 45 (2021); *State of New York (Department of Civil Service)*, 51 PERB ¶ 3027, 3115 (2018); *Village of Westhampton Dunes*, 50 PERB ¶ 3035, 3146, n 8 (2017); *County of Chemung and Chemung County Sheriff*, 50 PERB ¶ 3022, 3090 (2017); *Village of Endicott*, 47 PERB ¶ 3017, 3052, n 5 (2014); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n 4 (2016) (citing cases).

maintaining logs.

The PBA represents a unit of full-time civilian traffic guards in the Village. For at least ten years, the unit has been composed of three members: Laurie Humenanski, Glenn Miller, and Denise Spalthoff. These three members worked Monday through Friday on three shifts.

The traffic guards filled out forms for individuals requesting resident tags. This tag is affixed to the license plate of a vehicle and allows the individual, a resident, to go through either of the two gates into the Village without being stopped. Processing these tag requests involved paperwork and the collection of a fee.[3] Humenanski, a full-time traffic guard from 2006 until her termination on June 1, 2016, testified that, as part of their duties, traffic guards had "[a] lot of clerical duties with the tags. When people wanted a tag each year, they had to come into us and fill out the paperwork and proper ID."[4]

Tag request duties were performed exclusively by the three full-time civilian traffic guards, for at least ten years.[5] All three traffic guards processed tag request forms.

On April 26, 2016, the Village Board adopted two resolutions that are relevant here. The first resolution provides that, effective May 31, 2016, full-time and part-time traffic guard positions are abolished.[6] The second Village Board resolution, dated June 7, 2016, appoints "Denise Spalthoff . . . to the full-time position of Deputy Village Clerk,

[3] Tr, at 18 (Humenanski).
[4] Tr, at 16-17 (Humenanski).
[5] Tr, at 20 (Humenanski), 65 (Miller), 86-87 (Dan Sutherland, President of the PBA).
[6] Respondent Ex 1.

effective June 1, 2016, as created and approved through the [Orange County] Civil Service Process."[7]

Since the full-time traffic guard position was abolished as of June 1, 2016, Spalthoff, as deputy village clerk (a non-unit position), has been performing the duties related to accepting, processing, and issuing vehicle tag requests.

DISCUSSION

It is well established that two essential questions must be addressed when determining whether a transfer of unit work violates § 209-a.1 (d) of the Act: (1) was the at-issue work exclusively performed by unit employees for a sufficient period of time to establish a binding past practice; and (2) was the work assigned to non-unit personnel substantially similar to that exclusive unit work.[8] If both these questions are answered in the affirmative, a violation of § 209-a.1 (d) of the Act will be found unless there has been a significant change in job qualifications. When there has been a significant change in job qualifications, the respective interests of the employer and the unit employees must be balanced to determine whether the Act has been violated.[9]

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[7] *Id,* at 5.

[8] *City of Yonkers*, 54 PERB ¶ 3016, at 3045; *Pine Valley Cent Sch Dist,* 51 PERB ¶ 3036, 3159 (2018); *County of Chemung and Chemung Co Sheriff*, 50 PERB ¶ 3022, 3089 (2017); *Cayuga Comm Coll*, 50 PERB ¶ 3003, 3012-3013 (2017); *Greater Amsterdam City Sch Dist*, 49 PERB ¶ 3011, 3046 (2016); *Town of Stony Point*, 45 PERB ¶ 3045, 3115 (2012); *Town of Riverhead*, 42 PERB ¶ 3032, 3119 (2009); *Niagara Frontier Transp Auth*, 18 PERB ¶ 3083, 3182 (1985). *See generally Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3021-3022 (2008), *confd and mod, in part, Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), on remand, 42 PERB ¶ 3016 (2009) (hereinafter *Manhasset*).

[9] *City of Yonkers*, 54 PERB ¶ 3016, at 3045-3046; *Pine Valley Cent Sch Dist,* 51 PERB ¶ 3036, at 3159; *Cayuga Comm Coll*, 50 PERB ¶ 3003, at 3012-3013*, quoting State of New York (Div of State Police),* 48 PERB ¶ 3012, 3041 (2015); *Town of Stony Point*, 45 PERB ¶ 3045, at 3115, *citing Town of Riverhead*, 42 PERB ¶ 3032 (2009).

The ALJ found that the only work at issue here—duties associated with the processing of resident tag requests—was exclusively performed by unit traffic guards. No exceptions were filed challenging this finding. Although processing resident requests may not have taken up a substantial portion of traffic guards' time, it was exclusive unit work that could not be transferred to non-unit employees without negotiating with the PBA.[10] The work transferred to the deputy village clerk was identical to the work of unit employees, and there is no assertion that there has been a significant change in job qualifications. As a result, we find that the Village violated § 209-a.1 (d) of the Act as found by the ALJ.

With respect to the remedy, we find that the ALJ properly ordered the work restored to unit employees. It is the work that is restored, however, not the employees. If it requires fewer than three full-time traffic guards to perform the duties associated with processing resident tags, the Village is not required to hire back all three traffic guards who were in the unit prior to June 1, 2016. We do not decide how many traffic guards the Village must restore. Our practice is to address factual issues regarding the application of a remedial order during a compliance proceeding following judicial enforcement of a PERB remedial order pursuant to § 213 (a) of the Act.[11] Moreover, we have found that in an overwhelming majority of our cases, the parties are able to resolve remedial issues following a final order finding a violation of the Act.[12]

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[10] *See Seaford Union Free Sch Dist*, 47 PERB ¶ 3034, 3105 (2014) ("unilateral transfer of exclusive bargaining unit work to nonunit personnel—even incidental tasks—violate[s] the Act").
[11] *City of New Rochelle*, 44 PERB ¶ 3002, 3028 (2011); *Manhasset Union Free Sch Dist*, 42 PERB ¶ 3016, 3048 (2009).
[12] *City of New Rochelle*, 44 PERB ¶ 3002, at 3028.

Accordingly, we affirm the ALJ's finding that the Village violated § 209-a.1 (d) of the Act when it unilaterally transferred the exclusive bargaining unit work of processing resident tags performed by members of the PBA to non-unit employees.

IT IS, THEREFORE, ORDERED THAT the Village shall forthwith:

1. Return to the bargaining unit the exclusive unit work of processing resident tag applications;

2. Stop assigning exclusive PBA bargaining unit work to non-unit employees without negotiating with the PBA;

3. Make whole any affected employees for loss of wages and benefits, if any, with interest at the maximum legal rate; and

4. Sign and post the attached notice at all physical and electronic locations customarily used to post notices to unit employees.

DATED: January 13, 2022
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, 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 Village of Tuxedo Park (Village) in the bargaining unit represented by the Village of Tuxedo Park Police Benevolent Association (PBA), that the Village will:

1. Return to the bargaining unit the exclusive unit work of processing resident tag applications;

2. Stop assigning exclusive PBA bargaining unit work to non-unit employees without negotiating with the PBA; and

3. Make whole any affected employees for loss of wages and benefits, if any, with interest at the maximum legal rate.

Dated . . . . . **By** . . . . . .
on behalf of Village of Tuxedo Park

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.

In the Matter of

ELIZABETH STICHT CASE,

Charging Party,

-and- **CASE NO. U-37276**

NEW YORK STATE CORRECTIONAL OFFICERS AND POLICE BENEVOLENT ASSOCIATION, INC.,

Respondent.

COOPER ERVING & SAVAGE, LLP (CARLO A.C. DE OLIVEIRA of counsel), for Charging Party

LIPPES MATHIAS WEXLER FRIEDMAN, LLP (ASHLEY M. EMERY of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Elizabeth Sticht Case to a decision of an Administrative Law Judge (ALJ) dismissing Case's improper practice charge alleging that the New York State Correctional Officers and Police Benevolent Association, Inc. (NYSCOPBA) violated § 209-a.2 (c) of the Public Employees Fair Employment Act (Act) when it "demonstrated gross negligence through its failure to train its union representatives properly."[1] The ALJ found that Case's charge was untimely filed.

EXCEPTIONS

Case filed four exceptions to the ALJ's decision. Case contends that the ALJ

[1] 54 PERB ¶ 4542 (2021).

erred in finding that her original charge and proposed amendment were untimely. She asserts that she discovered NYSCOPBA's breach of its duty of fair representation on June 7, 2019, but that the harm resulting from the breach did not materialize until October 11, 2019 when she resigned her employment.[2] Case further claims that the date when she learned of NYSCOPBA's breach is immaterial in light of the Board's decision in *Middle Country Teachers Association (Werner)* (hereinafter *Middle Country*)[3] and that the current facts are distinguishable from *Local 2028, International Longshoreman's Association*,[4] a case relied on by the ALJ.

NYSCOPBA supports the ALJ's decision and contends that no basis has been demonstrated for reversal.

For the reasons that follow, we affirm the ALJ's decision.

FACTS

The facts are drawn from Case's charge and attachments thereto, Case's motion to amend the charge, and her offer of proof. We assume the truth of the allegations in the charge, motion to amend the charge, and offer of proof, granting all reasonable inferences that can be drawn from the facts alleged in support of the charge.[5]

Case was employed by the New York State Department of Corrections and Community Supervision (DOCCS) as a corrections officer at the Shawangunk Correctional Facility. On March 24, 2019, while on duty, Case contacted Steven Marasco, her local NYSCOPBA representative, and disclosed to him that, on March 19,

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[2] Exceptions Nos 1 and 3.
[3] 21 PERB ¶ 3012 (1988). *See* Exception No 4.
[4] 32 PERB ¶ 3038 (1999). *See* Exception No 2.
[5] *County of Livingston*, 43 PERB ¶ 3018, 3072 (2010); *Board of Educ of the City Sch Dist of the City of New York (Grassel)*, 43 PERB ¶ 3010, 3033 (2010); *Niagara Frontier Transit Metro System, Inc.*, 42 PERB ¶ 3023, 3089 (2009).

2019, she had provided nutritional supplements to an inmate in exchange for recyclable containers that the inmate had obtained through his job on the utility gang. According to Case, after disclosing this information:

> [Marasco] was genuinely surprised and was silent for a moment. He said to me, "I have never had anybody do this." I told him I didn't know what to do. He asked me if he should go to a supervisor. I said, "Uh, okay – I don't know" for I had never been in this situation before. I was depending on his judgment, training and experience to guide me.[6]

After her conversation with Marasco, Case returned to her post and began escorting the nurse on the medication run. Approximately 15 minutes later, at 8:55 p.m., Marasco came to the medical unit and instructed her to go "up front" with him.[7] Marasco had contacted Sergeant Signorella, Case's supervisor, and advised Signorella of what Case had done. Signorella disclosed Case's confession to Lieutenant Boylan, the watch commander. Boylan directed Case to write a memorandum detailing what she had done. Marasco and Signorella accompanied Case while she wrote a statement. Marasco also wrote a statement setting forth Case's confession to him.[8]

Also on March 24, 2019, Case was interrogated by the Office of Special Investigations (OSI). Marasco accompanied Case during her interrogation. After she was questioned, Case was suspended with pay and escorted out of the facility by Signorella.

On March 27, 2019, Case was contacted by Investigator Matthew Terwilliger of the New York State Police, requesting that she come to Highland Barracks to make a statement. Case provided the same statement of facts to Terwilliger that she had

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[6] Letter from Case to Robert Cronin, dated August 27, 2019, attached to the charge and offer of proof.
[7] *Id.*
[8] Memorandum, dated March 24, 2019, attached to the charge and offer of proof.

provided to OSI.[9] On March 28, 2019, Case was arrested and charged with promoting prison contraband in the second degree and official misconduct. On April 19, 2019, Case was issued a notice of discipline and suspended without pay pending arbitration.[10]

On June 7, 2019, Case alleges that she learned "for the first time" that Marasco disclosed her confidential communications to her supervisors, prompting the disciplinary and criminal investigations.[11] She became aware of this information when she received documents from the New York State Unemployment Insurance Board, which contained Marasco's March 26, 2019 statement to DOCCS detailing Case's confession to him.[12]

Case's disciplinary arbitration was scheduled for October 24, 2019. On or about October 10, 2019, Case was advised by her criminal defense attorney that the Ulster County District Attorney would only accept a plea if she pleaded guilty to a misdemeanor offense. Due to Case's impending guilty plea in the criminal matter, NYSCOPBA representatives advised her to resign from her employment. Case resigned from her employment at DOCCS on October 11, 2019.

DISCUSSION

Section 204.1 (a) of our Rules of Procedure (Rules) provides that an improper practice charge must be filed within four months of when the charging party had actual or constructive knowledge of the conduct that forms the basis for the alleged improper practice.[13] Here, Case concedes that she had knowledge of Marasco's disclosure of

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[9] New York State police report, attached to the charge and offer of proof.
[10] Notice of discipline, dated April 18, 2019, attached to the charge and offer of proof.
[11] Offer of proof, at 2.
[12] *Id.*
[13] *See, eg*, *TCU (Shah)*, 53 PERB ¶ 3016, 3081 (2020); *Board of Educ of the City Sch Dist of the City of New York (Davis)*, 50 PERB ¶ 3014, 3059 (2017); *Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n 4 (1995).

her confession to him no later than June 7, 2019.[14] That would make her improper practice charge, filed on November 22, 2019, untimely.

Nevertheless, Case asserts that her charge is timely under the principles announced in *Middle Country*.[15] In that case, we held, *inter alia*, that a party in a breach of the duty of fair representation case has standing to file an improper practice charge within

> four months after notification of a decision to perform an action alleged to be violative of the Act. The party may also await performance of the action and file an improper practice charge within four months after the intended action is actually implemented and the charging party is injured thereby.[16]

Thus, a party may file a charge within four months of notice of a violation or within four months of implementation and injury.[17] In *City of Oswego*, we made it clear that notification of an action can coincide with injury/implementation.[18]

Contrary to Case's argument, we find that she was not first injured on October 11, 2019, when she resigned her employment. Case's injury occurred earlier, on March 24, 2019, when she was interrogated by OSI, suspended with pay, and escorted from the facility. Even were we not to consider this to be a cognizable injury, Case was unquestionably injured on April 19, 2019, when she was issued a notice of discipline and suspended without pay pending the result of arbitration. Thus, when Case learned

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[14] We find it unnecessary to resolve whether Case had knowledge of Marasco's conduct on March 24, 2019, as found by the ALJ, or June 7, 2019, as advanced by Case. Under either scenario, Case's improper practice charge was filed more than four months later.
[15] 21 PERB ¶ 3012.
[16] 21 PERB ¶ 3012, at 3026.
[17] *See Lanzillo et al v NYS Pub Empl Relations Bd*, 29 PERB ¶ 7003 (Sup Ct Albany County 1996).
[18] 23 PERB ¶ 3007, 3018 (1990). *See also Local 2028, Int'l Longshoreman's Assn (Runfola)*, 32 PERB ¶ 3038, 3087 (1999) ("a [duty of fair representation] breach and the actual harm resulting therefrom can, and often will, coincide . . . .").

of Marasco's disclosure, at the latest on June 7, 2019, the period of limitations within which she could file an improper practice charge began to run. Case did not file her improper practice charge until more than four months after that date.

As the ALJ found, Case's disciplinary arbitration is irrelevant to the timeliness analysis. Case does not complain of NYSCOPBA representation at arbitration, and the proceeding itself does not begin a new period of limitations within which Case could file her charge challenging Marasco's actions.[19]

Based on the foregoing, the exceptions filed by Case are denied, and the ALJ's decision is affirmed.

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

DATED: January 13, 2022
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, Member

[19] *Ghartey v St John's Queens Hosp*, 869 F2d 160 (2d Cir 1989), cited by Case, involves the question of when a cause of action accrues for an alleged breach of the duty of fair representation due to inadequate representation at an arbitration hearing. Again, that is not the cause of action alleged here, and the case is inapposite.

55 PERB ¶ 3004 **STATE OF NEW YORK**
B/R 54-4005 PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

NASSAU COMMUNITY COLLEGE,

Petitioner,

CASE NO. CP-1646

- and -

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 830,

Incumbent Employee Organization,

- and -

COUNTY OF NASSAU,

Employer.

INGERMAN SMITH LLP (JOHN H. GROSS of counsel), for Petitioner

DAREN J. RYLEWICZ, GENERAL COUNSEL (AARON E. KAPLAN of counsel), for CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, for Incumbent Employee Organization

LAMB & BARNOSKY, LLP (RICHARD K. ZUCKERMAN of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Nassau Community College (College) to a decision of the Director of Public Employment Practices and Representation (Director) dismissing a unit clarification petition filed by the College. The petition seeks to fragment a group of employees, employed jointly by the College

and the County of Nassau (County), from a bargaining unit of employees employed solely by the County.[1] Employees in the County-wide unit are represented by the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO, Local 830 (CSEA).

According to the facts contained in the College's petition, which we, like the Director, treat as true for purposes of our decision, the County-wide CSEA bargaining unit consists of approximately 8,000 members in various civil service competitive and laborer class titles employed throughout Nassau County, including at the College. At the College, there are 367 full-time employees and 130 part-time employees in CSEA's unit. The College and the County were determined to be joint employers in *Matter of the Petition of Nassau Community College Federation of Teachers*.[2]

The collective bargaining agreement (CBA) between CSEA and the County expired in 2017.

The College's petition asserts that the current bargaining unit is unlawful under *Jefferson County, Jefferson Community College v Public Employment Relations Board*[3] in that it encompasses employees jointly employed by the County and the College in addition to employees solely employed by the County. The College's petition claims that a separate unit for College/County employees (represented by CSEA), fragmented from the County-wide single-employer bargaining unit, should be created.

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[1] 54 PERB ¶ 4005 (2021).
[2] 30 PERB ¶ 3003 (1997).
[3] 204 AD2d 1001, 613 NYS2d 73 (2d Dept 1994).

The College's petition also asserts that it should be allowed to file a unit clarification petition instead of a certification/decertification petition because "there is currently no appropriate mechanism for an employer to seek fragmentation"[4] and because it is "simply looking to make a smaller unit consisting exclusively of College CSEA employees,"[5] a result that it claims would "create harmonious labor relations and allow the College to operate more efficiently without the County's interference."[6]

The petition also avers that the College and the County no longer satisfy the definition of a joint employer because, *inter alia*, the relationship has deteriorated and the County is "not at all involved in the operations of the College,"[7] but instead "interferes with and hinders the operation of the College."[8]

Pursuant to the initial investigation required by § 204.2 of PERB's Rules of Procedure (Rules), the College was advised by notice dated May 6, 2021 that the petition is deficient because: 1) neither PERB's Rules, nor PERB's current caselaw, allows for the fragmentation of an existing bargaining unit via the filing of a unit clarification (or unit placement) petition; and 2) the unit clarification petition was filed by only one of the two employers that comprise the joint employer.

The deficiency notice gave the College the choice of either withdrawing its petition or notifying the Director that it wished to preserve an opportunity to file

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[4] Petition, at ¶ 7.6.
[5] *Id*, at ¶ 7.12.
[6] *Id*, at ¶ 7.13.
[7] Petition, at ¶ 7.19.
[8] *Id*, at ¶ 7.30.

exceptions to the determination that the petition is deficient. The College advised that it would not be requesting withdrawal and that it instead intended to file exceptions to the determination that the petition is deficient. The Director subsequently dismissed the petition for the reasons given below.

The Director found that there was no question that the College is seeking to effectuate a fragmentation via the filing of a unit clarification petition. The Director found that neither § 201.2 (b) of our Rules nor our relevant caselaw permit fragmentation of a bargaining unit through the filing of a unit clarification petition.[9]

The Director found that filing a decertification/certification petition is the proper procedural mechanism for seeking a fragmentation. The Director correctly noted that § 201.3 (d) of our Rules only allow public employers to file decertification petitions during the pre-contract expiration "open window" period. Only employee organizations and public employees may file a decertification petition during the post-contract expiration period (120 days subsequent to the expiration of the contract, provided no

[9] The Director relied on *Sullivan County Comm Coll,* 42 PERB ¶ 4003, 4007 (2009), *affd* 42 PERB ¶ 3034 (2009); *Harrison Cent Sch Dist,* 36 PERB ¶ 4011 (2003) and cases cited at footnote 13 therein. These decisions stand for the propositions for which the Director cited them, and we see no error by the Director in citing them, but we note that decisions of the Director and Administrative Law Judges are not binding on the Board. *City of Utica*, 54 PERB ¶ 3022, n 40 (2021); *City of Yonkers*, 53 PERB ¶ 3014, 3067 (2020); *Central New York Regional Transportation Auth*, 52 PERB ¶ 3008, 3036, n 50 (2019); *State of NY (SUNY Buffalo)*, 50 PERB ¶ 3001, 3006, n 43 (2017); *Cayuga Comm Coll and County of Cayuga*, 49 PERB ¶ 3007, 3033 (2016); *Westchester County Department of Correction Superior Officers' Assn*, 26 PERB ¶ 3077 (1993). Nevertheless, as explained below, we agree with these decisions that a party may not fragment a bargaining unit through the filing of a unit clarification petition.

new agreement has been negotiated), pursuant to § 201.3 (e) of our Rules.[10] Because the CBA here expired in 2017, the Director noted that the College cannot, at this time, attempt to properly file a decertification petition.

The Director found that the issue of whether the College continues to enjoy a joint employer relationship with the County has no bearing on the fact that the College filed the incorrect type of petition to effectuate a fragmentation under PERB's Rules.

In a footnote, the Director noted that she was making the decision assuming, *arguendo*, that the College may file a unit clarification petition in a matter where the County, the joint employer, has not joined in the filing.[11]

EXCEPTIONS

The College filed two exceptions to the Director's decision. In its first exception, the College claims that the Director erred in finding that fragmentation of a bargaining unit could not be accomplished through the filing of a unit clarification petition. The College urges us to expand the use of a unit clarification petition for the limited purpose of permitting an employer challenge regarding the propriety of an illegally formed bargaining unit and asserts that, absent such a procedure, the College is left without recourse to seek the fragmentation of "the illegal and inappropriate existing bargaining

[10] *City of Albany*, 53 PERB ¶ 3004, 3012 (2020) (citing §§ 201.3 (e) and 201.6 (d) of our Rules, providing that "a petition for certification or decertification may be filed by an employee organization other than the recognized or certified employee organization . . . if no new agreement is negotiated, 120 days subsequent to the expiration of a written agreement between the public employer and the recognized or certified employee organization.")

[11] *See* footnote 9, 54 PERB ¶ 4005.

unit."[12]

The College's second exception contends that the Director erred to the extent that she imposed a requirement that the petition be filed or joined by the County. The County asks that we reverse the Director's decision and order a hearing on the appropriateness of fragmentation of the unit.

CSEA and the County support the Director's decision and contend that no basis has been demonstrated for reversal.

For the reasons given below, we affirm the Director's dismissal of the College's petition.

DISCUSSION

The purpose of a unit clarification petition is to "clarify whether a position is encompassed within the scope of an existing unit."[13] Similarly, the purpose of a unit placement petition is to "determine the unit placement of a position."[14] As the Director explained, in most instances unit clarification and placement petitions concern the status of unrepresented positions. There are very limited circumstances, involving challenges made in close proximity to the initial placement of a position in a unit, in which a unit clarification or placement petition may be filed to challenge the placement of a title into a bargaining unit.[15] As the petition itself alleges that the existing unit was

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[12] Exceptions, at 3, ¶ 8.
[13] Section 201.2 (b) of our Rules.
[14] *Id*.
[15] *See Syracuse City Sch Dist*, 37 PERB ¶ 3003, 3010 (2004); *City of Albany*, 53 PERB ¶ 3004, at 3012.

certified in 1968, such circumstances clearly do not pertain to the instant case.[16]

Fragmentation, by contrast, is the removal of positions from an existing bargaining unit, and is accomplished through the filing of a decertification/certification petition.[17] A determination of whether a position or positions should be fragmented from a unit is analytically distinct from whether a position currently is or should be placed in a unit, and requires the petitioner to show a compelling reason for fragmentation.[18] The Board has previously affirmed a Director's finding that a unit clarification/placement petition cannot be used to decertify a bargaining agent with respect to certain titles by fragmenting them from a bargaining unit.[19]

The College recognizes this precedent, but urges that we craft an exception to the general rule that fragmentation cannot be accomplished through the use of a unit clarification petition. We decline to do so.

Our Rules relating to the filing and processing of a certification or decertification petition, and likewise related to unit clarification and placement petitions, must be strictly

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[16] Petition, at ¶ 6.
[17] *See* § 201.3 (d) of our Rules; *County of Orange and Orange County Sheriff*, 25 PERB ¶ 3049, at 3104 (finding that fragmentation "raises representation questions which are most appropriately decided within the context of our procedures for certification/decertification"), *affd sub nom Orange County Deputy Sheriff's Assn*, 26 PERB ¶ 7004 (1993).
[18] *CUNY*, 51 PERB ¶ 3012, 3057 (2018); *CUNY*, 48 PERB ¶ 3021, 3071 (2015); *Town of Southampton,* 37 PERB ¶ 3001, 3004 (2004); *State of New York (Long Island Park, Recreational and Historical Preservation Comm),* 22 PERB ¶ 3043, 3098 (1989).
[19] *Sullivan County Comm Coll,* 42 PERB ¶ 4003, 4007 (2009), *affd* 42 PERB ¶ 3034 (2009). *See also County of Orange and Orange County Sheriff*, 25 PERB ¶ 3049, at 3104 ("a unit placement petition may not be used by a petitioner to fragment its own existing unit").

construed.[20] These Rules set the parties' expectations regarding when challenges are to be expected and filed, and were enacted to aid in the Act's purpose of promoting "harmonious and cooperative relationships between government and its employees" and fostering the stability of bargaining relationships.[21] As we have previously explained, "[i]f a party's purpose is to raise a question of unit appropriateness, the party must raise that question during the applicable window period [pursuant to § 201.3 (d) of our Rules]."[22]

We have previously found the College and the County to be joint employers of the employees that the College seeks to fragment. Although the College asserts that the joint employer relationship has deteriorated and that it is not involved in negotiations for the at-issue employees' terms and conditions of employment, we do not find that this provides a sufficient reason to allow for the filing of a unit clarification petition seeking to fragment these employees. Such fragmentation would not alter the joint employer relationship between the County and the College, and their internal relationship has no bearing on the type of petition that should be filed when seeking fragmentation. As discussed above, a fragmentation petition may only be filed by an employer, joint or otherwise, during an open window period pursuant to § 201.3 (d) of our Rules. We find that the length of time that the College must wait before filing such a petition does not

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[20] *Village of Washingtonville*, 38 PERB ¶ 3028, 3091 (2005); *County of Dutchess and Dutchess County Sheriff*, 26 PERB ¶ 3080, 3155 (1993); *City Univ of New York*, 20 PERB ¶ 3069, 3148 (1987).
[21] Section 200 of the Act.
[22] *Village of Washingtonville*, 38 PERB ¶ 3028, at 3091, quoting Jerome Lefkowitz, et al, *Public Sector Labor and Employment Law* 414 (2d Ed 1998).

provide sufficient grounds for departing from our Rules.

In light of our disposition of this case, we, like the Director, find it unnecessary to determine whether a petition may properly be filed by only one party to a joint employer relationship.

IT IS, THEREFORE, ORDERED that the Director's decision is affirmed and the petition is dismissed.

DATED: January 13, 2022
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

Rosemary A. Townley, Member

In the Matter of

CITY OF YONKERS,

Charging Party,

CASE NO. U-37312

- and -

YONKERS FIREFIGHTERS, LOCAL 628, IAFF, AFL-CIO,

Respondent.

COUGHLIN & GERHART, LLP (PAUL J. SWEENEY of Counsel), for Charging Party

ARCHER, BYINGTON, GLENNON & LEVINE LLP (PAUL K. BROWN of Counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of Yonkers (City) to a decision of an Administrative Law Judge (ALJ) dismissing the City's improper practice charge on the ground that it was moot, as sought by a motion filed by the Yonkers Firefighters, Local 628, IAFF, AFL-CIO (Local 628).[1] The City claimed in its charge that Local 628 violated § 209-a.2 (b) of the Public Employees' Fair Employment Act (Act) by submitting to binding interest arbitration demands that included nonmandatory subjects.

The ALJ granted Local 628's motion, finding that the issuance of the interest arbitration award rendered moot and academic any determination as to the mandatory or nonmandatory nature of the proposals addressed by the interest arbitration panel.

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[1] 54 PERB ¶ 4555 (2021).

EXCEPTIONS

The City excepted to the ALJ's decision on two distinct grounds. First, the City contends that "the controversy herein is not moot merely because an interest arbitration panel has issued an award regarding the same subjects of bargaining alleged to be nonmandatory in the [City's] IP Charge."[2]

The City also asserts that the ALJ erred in addressing Local 628's motion to dismiss as arguing mootness. The City claims that Local 628's letter motion, and, accordingly, the City's response, sounded in cases based on waiver, not mootness. The City further claims that the ALJ's error resulted in the parties not having been "given the opportunity to brief the issue of mootness in full."[3]

Local 628 supports the ALJ's decision in full and claims that no basis has been demonstrated for reversal. In particular, Local 628 quotes its June 16, 2021 letter motion as expressly stating that "[t]he enclosed interest arbitration award renders the issues in this case moot."[4]

For the reasons that follow, we affirm the ALJ's Decision.

FACTS

The facts are fully set forth in the ALJ's decision and are discussed here only as is necessary to address the exceptions. Local 628 represents all firefighters employed by the City's Fire Department. On July 5, 2017, Local 628 served the City with a letter demanding to bargain terms, conditions, and procedures to be used when the City was

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[2] Exception No. 1.
[3] Exception No. 2.
[4] Response to Exceptions at 2; *see also* Brief in Support of Exceptions at 10-11, quoting Corenthal Letter, June 16, 2021.

seeking to terminate a firefighter pursuant to Civil Service Law (CSL) § 71.

CSL § 71 provides, in pertinent part, that "[w]here an employee has been separated from the service by reason of a disability resulting from occupational injury or disease as defined in the workmen's compensation law, he shall be entitled to a leave of absence for at least one year."

Local 628's demand to negotiate a CSL § 71 procedure arose as a result of a the City's notifying a firefighter on leave pursuant to General Municipal Law (GML) § 207-a due to a line of duty injury, that it would seek to terminate his employment pursuant to CSL § 71.[5] The firefighter in question had been on GML § 207-a leave for more than one year.[6]

The parties met for negotiations on multiple dates, but failed to reach an agreement regarding a negotiated CSL § 71 procedure.[7] On December 20, 2018, Local 628 filed a declaration of impasse with PERB, asserting that the parties had failed to achieve an agreement.[8] The only issue presented for impasse resolution was that of the CSL § 71 procedure.[9] The parties engaged in mediation with a PERB-appointed

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[5] On June 27, 2017, Local 628 filed an improper practice charge (U-35820) alleging that the City violated the Act when, *inter alia*, it unilaterally implemented a CSL § 71 procedure to terminate a firefighter's employment. *See* improper practice Charge, ¶ 4.
[6] Pursuant to GML § 207-a.1, a firefighter injured, or taken sick, in the line of duty, so as to necessitate medical or other lawful remedial treatment, is entitled to payment, by the City, of "the full amount of his or her regular salary or wages until his or her disability arising therefrom has ceased." GML § 207-a.1 also makes the City "liable for all medical treatment and hospital care" furnished to the Fire Officer during such disability. *See also DePoalo v County of Schenectady*, 85 NY2d 527, 533 (1995).
[7] *See* the Declaration of Impasse, annexed to the improper practice charge as Ex B.
[8] *See* improper practice charge, ¶ 10; Compulsory Interest Arbitration Petition, annexed to the improper practice charge as Ex B. *See also* § 205.1 of PERB's Rules of Procedure (Rules), which addresses impasse procedures.
[9] Improper practice charge, ¶ 12.

mediator, but were unable to reach agreement.[10]

On December 5, 2019, the City filed a petition for compulsory interest arbitration.[11] On December 17, 2019, Local 628 filed a response to the petition for compulsory interest arbitration.[12] Local 628's proposals for a CSL § 71 procedure were annexed to its response to the petition for compulsory interest arbitration.[13] The improper practice charge at issue here alleges that Local 638 improperly submitted to interest arbitration five proposals related to CSL § 71 procedure.[14] On April 9, 2020, Local 628 filed amended proposals modifying the language of two of its proposals. The City did not object to the modifications, but argued that the proposals, as amended, were still not mandatorily negotiable.

An interest arbitration award pertaining to the matters set forth in the charge was issued and filed with PERB on May 24, 2021, covering the period from January 1, 2019 through December 31, 2020.[15] By letter dated June 17, 2021, the City advised that it would be moving to vacate the interest arbitration award. The ALJ issued her decision in this matter on November 16, 2021. On December 9, 2021, the Supreme Court, Westchester County, denied the City's petition to vacate the interest arbitration award, and confirmed the award.[16]

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[10] Petition for Compulsory Interest Arbitration, at ¶ 11, annexed to the improper practice charge as Ex B.
[11] *See* Rules, § 205.3 *et seq*, addressing compulsory interest arbitration procedures.
[12] *See* Ex C, annexed to the improper practice charge.
[13] *Id*. Local 628 denominated its demands as "Counter Proposals."
[14] Specifically, Proposals 1, 2, 3, 5, and 8.b.
[15] *See* the attachment to June 16, 2021 letter from Richard Corenthal.
[16] *City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, ___ Misc3d ___, Index No. 61013/2021 (Sup. Ct. Westchester Co., December 9, 2021) (Everett, J.). A copy of the Article 75 decision was attached to Local 628's Memorandum of Law in Response to the Exceptions as Exhibit A.

DISCUSSION

As a threshold matter, we note that the letter motion to dismiss expressly recites that the motion is grounded in whole or in part on the claim of mootness. Accordingly, that issue was squarely raised and properly before the ALJ, whatever defects in the selected authorities cited might be. For our purposes, the parties have fully briefed mootness.

As in similar circumstances, "[w]e begin by noting, as we have before, that strict application of New York or federal civil practice precedent may be inappropriate due to the distinct procedures in the Rules along with the public policies underlying the Act and therefore we do not consider ourselves bound to follow such precedents, especially when they conflict with those policies.'"[17]

As "we have long held that where 'the issues raised by improper practice charges are academic, we do not consider that the policies of the Act would be served by our consideration of the charges.'"[18] We reaffirm our statement in our most recent decision on this subject, *County of Chenango*, that "[o]ur decision in this respect is limited to the facts and circumstances of this case," and that "[w]e recognize that the application of a mootness concept is controlled by the particular facts of the case and applied only to the extent consistent with the policies of the Act."[19]

Here, as was the case in *County of Chenango*, "the ALJ correctly found this matter to be governed by our reasoning in *City of New York*, in which we held that the

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[17] *County of Chenango*, 53 PERB ¶ 3006, 3019 (2020).
[18] *East Meadow Union Free School Dist*, 48 PERB ¶ 3006, 3018-3019 (2015), quoting *City of Peekskill,* 26 PERB ¶ 3062, 3109 (1993).
[19] 53 PERB ¶ 3006, at 3020.

issuance by an interest arbitration panel of an arbitration award rendered moot exceptions to an ALJ decision on an application for a declaratory ruling that addressed the mandatory or nonmandatory nature of various proposals submitted to the panel."[20]

As before, so to here, Local 628's motion to dismiss the pending improper practice charges as moot, "in view of our inability to fashion any remedy to the benefit of [the City], is not without logic or precedent."[21] That is, were we to issue a finding on whether Local 628's proposal was a mandatory subject of negotiations, such a finding would have no effect on the legal positions of the parties.

In *City of New York*, we held that the "issuance by an interest arbitration panel of an arbitration award rendered moot exceptions to an ALJ decision on an application for a declaratory ruling that addressed the mandatory or nonmandatory nature of various proposals submitted to the panel."[22] As we explained in *County of Chenango*, "*City of New York* reaffirmed and expanded our prior holding that 'no purpose is served by making a scope determination at this time following the withdrawal of a proposal from interest arbitration.'"[23]

More to the point here, "[r]ather than limiting our reasoning to the discrete issue before us in *City of New York*, we also relied upon [judicial] decisions establishing that 'the parties' reaching a CBA renders moot disputes over terms at issue in the

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[20] *Id*, citing *City of New York*, 49 PERB ¶ 6501, 6501 (2016).
[21] East Meadow Union Free Sch Dist, 48 PERB ¶ 3006, at 3019.
[22] 49 PERB 6501, at 6501, citing *City of Buffalo*, 23 PERB ¶ 3036, 3073 (1990); *see also City of New York v NYS Pub Empl. Relations Bd.*, 54 AD3d 480, 41 PERB ¶ 7004 (3d Dept 2008), *lv denied*, 12 NY3d 701 (2009).

[23] *County of Chenango*, 53 PERB ¶ 3006, at 3020.

negotiations culminating in that agreement.'"[24] As discussed below, the differences in the factual contexts between the instant matter and *City of New York* and *County of Chenango* do not undermine the principles enunciated and reaffirmed in those cases.

Our application of the policies of the Act militates especially strongly for such a finding of mootness after either a negotiated contract or an interest arbitration award, as "the successful employment by the parties of the conciliation avenues open to them, and the negotiation process, has demonstrated that our reasoning for dismissing the charge cannot constitute prejudice to [the City] as the ALJ's decision has in no way altered the relationship between the parties."[25] This is, quite simply, because the resolution of the dispute by an interest arbitration award means perforce that "neither the outcome nor the reasoning has materially changed the legal landscape from that which would pertain" whatever an ALJ decided.[26]

We have previously held that the fact that the panel has issued its award, thereby resolving all issues between the parties, "does not bring this matter within any of the three exceptions to the mootness doctrine."[27] In particular, the exception to the mootness doctrine for matters of public importance capable of repetition yet evading review does not apply, due to the availability of declaratory rulings under our Rules, as

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[24] *Id*, citing *Suffolk County Comm Coll*, 18 PERB ¶ 3030 (1985), *confd*, 125 AD2d 307, 308, 19 PERB ¶ 7002 (2d Dept 1986); *Bd of Educ of the Yonkers City Sch Dist*, 8 PERB ¶ 3020 (1975), *confd sub nom*, *Yonkers Teachers Fedn v Helsby*, 8 PERB ¶ 7014 (Sup Ct Alb Co 1975).
[25] *Id*.
[26] *Id*.
[27] *City of New York*, 49 PERB ¶ 6501, at 6502, n 8.

indeed was the case in *City of New York*.[28] That is, the City could have filed a petition for a declaratory ruling about whether Local 628's proposal constituted a mandatory subject of negotiations at any point during negotiations. Had the City taken this course of action, it would have received a ruling well before the interest arbitration award was issued. A declaratory ruling petition would be particularly appropriate in the circumstances here, where the City essentially conceded the mandatory nature of the issue through negotiating, but objects to the specific language put forth by Local 628.

"[R]eopening these issues now would disserve the policies of the Act," as we reaffirmed in *Chenango.*[29] There as here, we stressed that "the core of the Taylor Law is the policy that governments should negotiate with and enter into written agreements with employee organizations representing employees."[30]

We likewise reiterate that "[a]n after-the-fact advisory opinion as to the efficacy of the parties' respective negotiating strategies could vitiate that core policy by discouraging parties from finding their own resolutions at the bargaining table in future negotiations."[31]

The City seeks to distinguish *County of Chenango* and *City of New York* on the grounds that the constellation of facts in those cases are very different from those at issue here. Those differences include that in the matter under review, the improper practice charge has not been withdrawn, the parties did not reach a negotiated contract,

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[28] *Id*. Notably, there is no claim that any of the issues presented in the charge were expressly "carved out" from the award, which could render the charge not moot to the extent such issues were excluded from the award. *County of Chenango*, 53 PERB ¶ 3006, at 3020.
[29] *County of Chenango*, 53 PERB ¶ 3006, at 3020.
[30] *Id*, quoting *City of New York*, 49 PERB ¶ 6501, at 6502, n 8.
[31] *Id*.

but rather the interest arbitration award panel imposed one. Another distinction, of course, is the City unsuccessfully sought to vacate the interest arbitration award in court under Civil Practice Law and Rules (CPLR), Article 75.

But these factual differences "cannot be held to distinguish this case from the previous decisions without giving effect to a distinction without a difference."[32] Where parties entitled to interest arbitration, as was the case here, avail themselves of it, the resultant award is effectively the parties' contract until it lapses or is renegotiated. That the City availed itself of the right to interest arbitration does not somehow create a right to reopen the award if it is not to its, or that of the employee associations, liking. Rather, "an interest arbitration award effectively substitutes for an agreement for its term for purposes of § 201-a(1) (e) of the Act," as well as setting the *status quo* until another agreement is negotiated or another award issued.[33]

Consistent with this, under our Rules, "[t]he conduct of the arbitration proceedings shall be under the exclusive jurisdiction and control of the arbitration panel."[34] After the interest arbitration panel issues an award, appeal is not to the Board, but to the courts pursuant to Civil Practice Law and Rules, Article 75, under the specific grounds enumerated in CPLR § 7511.[35] This is so even when the interest arbitration panel issues an award over the objection of one of the parties or in contravention of

[32] See, eg, Frederick du Bary & Co v State of Louisiana, 227 US 108, 110 (1913).
[33] *City of Ithaca*, 51 PERB ¶ 3020, 3085, 3086 (2018).
[34] Rules § 205.8; Act, 209.4 (c).
[35] *See, eg*, *Kotlyar v Khlebopros*, 176 AD3d 793, 795 (2d Dept. 2019).

§ 205.6 (d) of our Rules.[36] It is incumbent on the parties to raise such issues before the interest arbitration panel prior to the issuance of the award. Even error on the part of the interest arbitration panel does not confer authority on the Board or an ALJ to review the award.

Indeed, the City has already availed itself of its right to judicial review, before the Supreme Court, Westchester County. As set forth in the Court's decision, it denied the City's petition to vacate the interest arbitration and confirmed the arbitration award.[37] The City retains its right to pursue appellate remedies, unless and until the Supreme Court decision, is reversed or annulled. However, the Supreme Court decision is final in the sense required to grant it preclusive effect both as to *res judicata* (claim preclusion) and collateral estoppel (issue preclusion).[38] We need not speculate hypothetically as to the appropriate resolution of the substance of the improper practice charge should an appellate court vacate the Supreme Court's confirmation of the interest arbitration award. To do so would be purely hypothetical, and even more academic than the question squarely presented by the City.

Accordingly, and for the reasons given above, we affirm the decision of the ALJ,

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[36] Section 205.6 (d) of our Rules provides that "[t]he public arbitration panel shall not make any award on issues, the arbitrability of which is the subject of an improper practice charge or a declaratory ruling petition, until final determination thereof by the board or withdrawal of such charge or petition; the panel may make an award on other issues."

[37] *City of Yonkers v Yonkers Fire Fighters, Local 628, IAFF, AFL-CIO*, ___ Misc3d ___, Index No. 61013/2021 (Sup Ct Westchester Co, December 9, 2021) (Everett, J.). A copy of the Article 75 decision was attached to Local 628's Memorandum of Law in Response to the Exceptions as Exhibit A.

[38] *Simmons v Trans Express, Inc.*, 37 NY3d 107, 110-112 (claim preclusion), 112 (issue preclusion) (2021).

and dismiss the charge as moot.[39]

DATED: January 13, 2022
Albany, New York

John F. Wirenius, Chair

Anthony Zumbolo, Member

[39] Member Rosemary A. Townley recused herself from consideration of this case.