STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

LAW ENFORCEMENT EMPLOYEES BENEVOLENT ASSOCIATION,

Petitioner,

- and -

CITY UNIVERSITY OF NEW YORK,

CASE NO. C-6248

Employer,

- and –

CITY EMPLOYEES UNION, LOCAL 237, INTERNATIONAL BROTHERHOOD OF TEAMSTERS,

Intervenor.

STUART SALLES, ESQ. and TRACEY L. KIERNAN, ESQ., for Petitioner

JANE M. SOVERN, GENERAL COUNSEL (KATHERINE RAYMOND of counsel), for Employer

COHEN WEISS AND SIMON, L.L.P. (JOSHUA J. ELLISON and JONATHAN F. HARRIS of counsel), for Intervenor

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Law Enforcement Employees Benevolent Association (LEEBA) to a decision of an Administrative Law Judge (ALJ) dismissing a petition to fragment 669 employees of the City University of New York (CUNY) in the titles of campus police officer (CPO), campus public safety sergeant (CPSS), and campus security specialist (CSS) (together, security titles) from a bargaining unit of approximately 2,400 employees holding a variety of blue-collar titles, including security titles at issue here, that has been represented by intervenor City Employees Union, Local 237, International Brotherhood of Teamsters (Local 237) for 30 years.[1] In

[1] 50 PERB ¶ 4010 (2017).

dismissing the petition, the ALJ found that the record did not establish a conflict of interest between employees in security titles and other employees in the bargaining unit or that security titles had been inadequately represented by Local 237.

EXCEPTIONS

LEEBA filed two exceptions to the ALJ's decision. Its first exception argues that the ALJ misapplied the standard for fragmentation both in establishing conflict of interest and in evaluating the adequacy of representation by Local 237 to the security titles. LEEBA's second exception asserts that the ALJ erred in considering the Board's ruling in *State of New York (Division of Parole)*.[2] LEEBA asserts that this case is irrelevant to the issues in front of the ALJ.

Local 237 and CUNY filed responsive briefs in support of the ALJ's decision. After receipt of the responses from Local 237 and CUNY, PERB received a letter from counsel for LEEBA, requesting that the Board reject the responses (which counsel for LEEBA incorrectly characterized as "cross-exceptions") as untimely pursuant to PERB's Rules of Procedure. Counsel for Local 237 responded, asserting that its response was timely. CUNY also responded. CUNY admitted that its response was served one day late, as the result of a mistaken calculation as to the filing period. CUNY requested that the Board nevertheless accept its response in the absence of a showing that LEEBA was prejudiced by the late filing.

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

PROCEDURAL HISTORY

The fragmentation petition in this case was filed on March 18, 2014. After conferences and an offer of proof from LEEBA, the ALJ granted a motion to dismiss filed

[2] 40 PERB ¶ 3011 (2007).

by Local 237 and joined by CUNY. LEEBA appealed the dismissal to the Board. The Board reversed the ALJ's decision in part and remanded "solely for clarification of the record and a determination" as to the issue of existence of a conflict of interest or inadequate representation by Local 237.[3] LEEBA did not except to the ALJ's finding that fragmentation of the security titles was not justified by the Board's cases holding that "fragmentation is appropriate for public employees who are police officers or hold a title that has also been granted police officer status by the Legislature and whose exclusive or predominant duties are the enforcement of the State's general criminal laws." As a result, the Board found that any such exceptions had been waived.[4]

After the Board's remand, the ALJ held a hearing on the issue of inadequate representation and conflict of interest.

FACTS

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

The petitioned-for titles of CPO, CPSS, and CSS are included in what is known as the "blue-collar unit," which consists of approximately 2,400 CUNY employees in titles such as motor vehicle operator, elevator operator, exterminator, gardener, CUNY custodial assistant, custodial assistant, city custodial assistant, custodial supervisor (CUNY), senior custodial supervisor, assistant principal park supervisor, principal park supervisor, supervisor, elevator starter, campus security assistant, campus security officer, stock worker and supervisor of stock worker. The three at-issue titles generally require certification as a peace officer pursuant to State law.[5]

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[3] 48 PERB ¶ 3021, 3072 (2015).
[4] *Id*, at 3071.
[5] Employees in the title CSS may be required to be a peace officer, depending upon their campus assignment.

The current blue-collar unit has existed and been represented by Local 237 for more than 30 years. The terms and conditions for the blue-collar unit titles have been governed by a series of collective bargaining agreements (CBAs) dating back to, at least, 1980.

At the hearing, LEEBA presented 11 witnesses, while Local 237 and CUNY each produced one witness. The ALJ summarized the testimony of each witness. We focus only on the testimony that is at issue in the exceptions.

Olivia Lingister has been a CPSS for the last 15 years. She is a shop steward for Local 237 and was on the negotiating committee in 2008. Local 237's business agent, Al Soto, was also on the team, along with two other security employees and three or four employees from other unit titles.[6] As a member of the negotiating team, Lingister solicited feedback and bargaining demands from the public safety officers. Local 237 then presented those demands at the bargaining table. Regarding Local 237's response, Lingister commented, "They always say put in 50 things and hope you get two."[7] Approximately 125 demands were presented to Local 237 by the security personnel. While unable to recall the entire list, Lingister noted that some dealt with salary and the fact that CPSSs stay at the same base pay throughout their service. They sought an increase in the base pay and steps, but that was not achieved. When asked what Soto's response was to those wage demands, Lingister could not recall; she only noted her sense that the possibility of success was "a little bleak," and said she felt that what was asked for would probably not be achieved.[8] Later in her testimony, she acknowledged that Local 237 proposed steps, but that was not accepted by CUNY.

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[6] Tr, at pp. 88-89.
[7] Tr, at p. 74.
[8] Tr, at p. 79.

Lingister also spoke of the uniform allowance provided by CUNY, stating that the most recent round of bargaining, culminating in 2016, produced an increase from either $550 or $650 to $1,000.[9] Longevity and an annuity benefit provided to all unit members, however, have not increased in the past two rounds of negotiations. The same is true of a night differential paid to security personnel, as well as a pay differential for officers assigned to a special force, called the SAFE team.

Regarding non-economic items, Lingister said that the officers in the past two negotiations requested language relating to seniority within their titles as it pertains to scheduling work shifts, vacation and other leave days. Asked about Local 237's response, Lingister was unclear, stating only that it was understood by members that some things would not be achieved.[10] She was unable to provide a name of someone from Local 237 who said words to that effect, however, and only noted that Soto was the union delegate at the table. Asked if any of the issues that she and the security personnel presented to Local 237 in 2008 were achieved, Lingister said that there was provision made for CUNY to pay for Master's Degree credits.

At times during the negotiations process, Lingister said, Soto would speak separately to those employees to whom an issue directly related; this was not specific only to the security representatives on the team.[11] She also said that Soto discussed CUNY's responses to the Local 237 proposals with the team members, but she never actually sat at the table while negotiations took place.

Lingister also testified about labor-management meetings from 2005 to early 2017. As a shop steward, she attended those, but said that on-going communications with Local 237 in her formal capacity as a union representative were intended to try to avoid labor-

[9] Tr, at pp. 80-81.
[10] Tr, at pp. 84-85.
[11] Tr, at p. 91.

management meetings by resolving problems in advance.[12] Nevertheless, she recalled issues that were raised repeatedly since 2005, which still have not been resolved. Lingister said she would discuss these topics with Local 237, and the union would discuss them with CUNY officials at the labor-management meetings, to no avail. One example she cited was locker room space.[13] Lingister testified that Local 237 had a discussion with CUNY about locker space; however, the issue was not satisfactorily resolved.[14]

Asked about Local 237's receptiveness to addressing issues of specific concern to security personnel, Lingister said that some of the three or four business agents she has dealt with over the past 12 years have been receptive, and some have not. As to those who have not been receptive, she explained that they have, at times, said that the security personnel will never get some of the things that they want.[15] She also testified that one or two of the Local 237 representatives had commented that since the CUNY security personnel are not police officers, they shouldn't request certain things.[16] While she characterized that as "negative feedback,"[17] she added that that was the response of only one or two business agents.[18]

Cross-examination established that security officers receive specialized training paid for by CUNY, and provided on CUNY time. Lingister said that she had requested Local 237's business agents to ask CUNY to provide additional training, but was vague in recounting Local 237's response. She could not recall what Soto said, but noted that his successor, George Serrano, was receptive, that he had commented that it was worth

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[12] Tr, at pp. 97-98.
[13] She explained that in some campus locations, security personnel have their own locker rooms, but at other sites, locker space is shared with the public.
[14] Tr, at p. 129.
[15] Tr, at pp. 100-101.
[16] Tr, at p. 102.
[17] *Id*.
[18] Asked to provide names, she offered only one, whom she identified as "Mr. Johnson." Tr, at p. 101.

taking a look at, and that he made a proposal accordingly.[19] The same was true of his successor, Jeanette Taveras.

With respect to the most recent round of negotiations, although Lingister did not participate, she acknowledged that the total economic package, agreed upon between Local 237 and CUNY, resulted in an increase of over ten percent for all unit employees.

Edward Hickey is a CPSS and was hired in 2002 as a CSO. He served as a member of Local 237's negotiating team in the most recent round of bargaining, which culminated in 2016. Todd Rubinstein was the chief negotiator and Taveras and Don Arnold participated as other representatives of Local 237. The team also included five other security officers and three employees from non-security titles within the unit.[20]

Hickey testified that he attended only one meeting, held prior to the actual onset of negotiations, at which Local 237's team discussed the bargaining process. Thereafter, approximately every two weeks, Hickey contacted Taveras and asked for a negotiations update. He testified that most of her initial responses were that she would get back to him, then eventually there was no response from her. Rubinstein, however, discussed the status of negotiations at membership meetings.

Prior to that first meeting of the team and the onset of negotiations, Hickey testified that he communicated with "90 percent" of the CPOs on all five campuses to get their feedback on proposals.[21] He prepared a list of demands and submitted that to Taveras,[22] but said he received no comment back from Local 237. He initially claimed that none of the demands were carried into the memorandum of agreement reached by the parties, but later acknowledged a uniform allowance increase had been included. He also noted a

[19] Tr, at p. 112.
[20] Tr, at p. 143.
[21] Tr, at p. 142.
[22] Petitioner Ex 1.

seven-year salary step, retroactivity and a 10.4 percent increase in wages across the unit. Hickey said, however, that it remains that no CPSS earns the maximum salary set forth in the CBA. He claimed that when Local 237 officials, including Taveras, have been asked about that, the response has been that "it will never happen."[23] Asked specifically about the context in which such discussion took place, Hickey only generalized that union officials "just kind of closed it out; they want to shut it down. They want to say that it's not going to happen."[24]

Hickey said he disengaged from Local 237 when he received the ballot for the tentative CBA, citing both personal and professional reasons. He felt that the union never entertained the demands of the security personnel and, in fact, cited that as the impetus for the decertification petition.[25] That said, Hickey testified that he never attended a negotiations session after the first team meeting. When asked about specific requests made of Local 237, Hickey was vague, citing only "things we wanted to bring to the table, things that we would want better for our department and the officers."[26] When prompted to detail the specific requests made, Hickey said:

> [H]ow we handle certain things on the campus … some type of coverage for our officers if they get hurt on the job ... arresting equipment … safety equipment … more coverage ... more exams … more officers … more academics ... more instructors ….[27]

According to Hickey, Local 237 representatives responded that they would do the best they can, but nothing happened. The same has been true, he said, of requests by members for more locker space.

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[23] Tr, at p. 162.
[24] *Id.*
[25] Tr, at p. 166.
[26] Tr, at p. 177.
[27] Tr, at pp. 179-181.

Regarding membership meetings, Hickey conceded that they were held quite frequently, approximately every three months. He also noted that Local 237 held meetings with just the security personnel to update them about the status of negotiations and work-related matters that pertain only to them.

The ALJ found that Hickey's testimony reflected some confusion regarding what issues CUNY must negotiate with the union. For example, with respect to adding more security personnel, Hickey admitted that he did not know if CUNY had to negotiate staffing decisions. On cross-examination, Hickey also acknowledged already existing provisions in the CBA for paid time off from work for line-of-duty injuries. With respect to a proposal he made that all outside training be optional, he said he was referring only to training for the Fire Safety Director. He also conceded that all required training is paid for by CUNY.

Timothy Gramprey is employed as a CPO II and a member of the SAFE Team. In February 2015 he arrested a unit member, who worked as a CSA, for stealing police body armor out of the CPO locker room. The person arrested was also a shop steward for Local 237. Gramprey said he had no problem arresting him by virtue of the fact that they were in the same unit.

Todd Rubinstein has been Local 237's Grievance Counselor and General Counsel since 2008. Rubinstein is one of the lead negotiators on the CBAs with CUNY, and performed that function in the last round which produced the 2016 agreement.

As part of the bargaining process, members are asked to propose demands for Local 237 to consider. Rubinstein affirmed that he received two or three drafts of proposals from CUNY's security personnel, which he considered.[28] He testified that he explained to the members that some items might not be appropriate. For example, he said that if the corporal rank was removed from the CBA, as some had requested, those unit

[28] Tr, at pp. 430-431.

members who are serving as corporals would receive a pay decrease. He added, "[W]e would not be submitting a demand that could in any way lead to a decrease in pay for any of the members of the union."[29] Rubinstein also said that some of the demands presented to him were inappropriate for collective bargaining, either because they are prohibited by statute or because they are better discussed on an individual campus basis because they do not affect all locations. Lastly, he said that some demands might be inappropriate to raise in a bargaining context where money is very tight and bargaining on the economics is very complicated. He specifically spoke of longevity, and said it was explained to members that CUNY would not be able to fund that in addition to raises.

Rubinstein reviewed the CBA and identified negotiated items that apply only to CPOs and CPSSs. He specifically identified an arms differential, a canine unit differential and a SAFE Team Leader differential. He also cited the uniform allowance that was increased in the last round of negotiations.[30]

Rubinstein additionally addressed some issues regarding salary and advancement under the CBA. He explained that the corporal title, which is a level II position and is compensated at a higher rate of pay, is assigned based on the performance of specific tasks, such as being an EMT, a Fire Safety Director or a tour commander. He also addressed the seven-step salary scale, noting that Local 237 made a demand for parity with other security titles it represents and, in fact, argued that CUNY's security force is a better trained group and should earn more than security titles elsewhere. Rubinstein further addressed the testimony of LEEBA's witnesses to the effect that, despite the seven-step salary scale established in the 2007 CBA, no employee has reached the top of the schedule. That advancement to the top is within management's discretion and,

[29] Tr, at p. 431.
[30] Tr, at pp. 436-439.

according to Rubinstein, efforts by Local 237 to change that have not been successful. That said, CPOs advance to $40,723 based on years of service, and that amount is one dollar less than the maximum.

Regarding training, Rubinstein said that Local 237's position is that as long as CUNY is willing to pay for it and cover the member's time, CUNY can require as much training as it wants. Asked if Local 237 proposed enhanced training, Rubinstein said it had not because it viewed CUNY's training to be good; in fact, Local 237 has recommended that other agencies use the academy that CUNY uses.[31]

Locker space has not been addressed at the university-wide meetings, but rather at the labor-management meetings on those campuses where it is an issue. In fact, Rubinstein said that he thought the issue had been resolved.[32]

On cross-examination by LEEBA, Rubinstein asserted that he received the demands presented by the security personnel and discussed each with the employees who represented that group on the negotiating committee.[33] When a topic was not to be carried into negotiations, the membership was informed and an explanation was given. Addressing line of duty injuries, Rubinstein said that what the members wanted is already provided for in the CBA. He maintained that he explained that to members and they did not ask for anything else. He also affirmed that the security personnel have requested, at various times, a separate CBA, but that the unit is a multi-title unit established by PERB, so that was never proposed to CUNY. Similarly, the security personnel wanted a separate

[31] Tr, at pp. 457-458. When asked on cross-examination why additional training became mandated, Rubinstein explained that there was a change in legislation.
[32] Tr, at p. 462.
[33] Tr, at p. 468.

seniority list applicable to certain work assignments, such as tours, and Local 237 did not raise that with CUNY because Rubinstein believed it would be futile to do so.[34]

Additionally, Rubinstein testified that security titles requested more Civil Service exams, but that also was not proposed in collective bargaining because that is more appropriately raised in a labor-management meeting; in fact, it was raised by Local 237 in that forum. Security personnel also requested longevity pay, which Local 237 proposed during negotiations, but CUNY rejected that demand.

Rubinstein explained that in preparation for negotiations, he reviewed CBAs applicable to security officers at other employers, such as hospital police, Taxi and Limousine Commission inspectors, and school safety employees. He did not look at other university police contracts, such as those applicable to SUNY, he said, because those apply to police officers. There is no interest arbitration provision in the CUNY CBA because that is an issue controlled by statute.[35]

DISCUSSION

We first address LEEBA's argument that the Board should reject the responses to LEEBA's exceptions filed by Local 237 and CUNY. Section 213.3 of PERB's Rules requires that a response to exceptions be filed and served within seven working days after receipt of exceptions. Counsel for Local 237 did not receive the copy of LEEBA's exceptions that was initially timely mailed to him, due to a change of address. After its exceptions were returned to LEEBA as undeliverable, counsel for LEEBA contacted counsel for Local 237 and delivered a second set of exceptions. Local 237's response was filed within seven business days of receipt of this second set of exceptions.

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[34] He said that there is an expectation for CPOs to be available on a 24-hour basis and that Local 237 has never achieved seniority in tour assignments for security personnel. Tr, at p. 499.

[35] Tr, at p. 498. Rubinstein, nevertheless, refuted the claim that security personnel asked him for interest arbitration. Tr, at p. 504.

LEEBA argues that it did not receive notification of the change of address of counsel to Local 237, and that the timeliness of Local 237's response should be measured from the date LEEBA served its first set of exceptions. Although our record reflects receipt of notice of the change of address, the document did not bear the case name or number. We therefore have no basis to find bad faith by either party. Rather, LEEBA's exceptions were timely filed and served at the address LEEBA believed to be correct. While we agree that the better practice would have been for counsel for Local 237 to ensure that LEEBA received notification of counsel's move in the context of this case, our Rules measure the timeliness of a response from the date exceptions were received. There is no evidence or allegation that Local 237 intentionally avoided receipt of the exceptions. Under the circumstances here, we will accept Local 237's response, which was timely filed from the date it actually received the exceptions from LEEBA.[36]

We next address LEEBA's argument that the ALJ erred by finding that the record did not establish a conflict of interest between employees in security titles and other employees in the bargaining unit or that security titles had been inadequately represented by Local 237.

The Board's standard for fragmentation of an existing unit is well-established and was stated both in the Board's remand decision and by the ALJ. The policy of the Act mandates "the largest unit permitting for effective negotiations and that fragmentation of existing bargaining units will not be granted absent compelling reason of the need to do

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[36] We do reject CUNY's response, which it concedes was filed one day late. In any event, the response, in which CUNY simply joins the response filed by Local 237, would add little to our deliberations.

LEEBA also asserted that Local 237's response was sent via email, which our Rules currently do not allow. Local 237's proof of service, however, shows that Local 237's response was also sent via overnight delivery, in compliance with Rule 213.3.

so."[37] The Board has long "held that compelling need is generally established by proving the existence of a conflict of interest or inadequate representation."[38]

Inadequate representation has generally required a showing of either "the type of systematic and intentional disregard of the interests of the petitioned-for group" or "neglect or indifference to the interest of the group that would warrant the fragmentation sought."[39] Such inadequate representation has been established by sufficient evidence that the incumbent has more than incidentally "given low priority in the negotiations" to the group whose fragmentation is sought.[40]

Having carefully reviewed the record, we affirm the findings and conclusions of the ALJ. Although LEEBA argues that the ALJ misapplied the Board's precedent, we find her analysis to be fully consistent with our prior cases. The ALJ carefully reviewed the witnesses' testimony and fully explained the reasons for her conclusions. We do not repeat that analysis here. It is sufficient to say that we agree with the ALJ that LEEBA has not sufficiently supported its claim of inadequate representation or a conflict of interest to warrant fragmentation. The record overall demonstrates that Local 237 has given reasonable good-faith responses to those concerns of the security employees that have been brought to its attention and that Local 237 has not demonstrated neglect or indifference to the interests of the security employees. Employees in security titles have been well-represented on Local 237's negotiating committee, and the credited testimony

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[37] *CUNY*, 48 PERB ¶ 3021, at 3071; *Town of Southampton,* 37 PERB ¶ 3001, 3004 (2004), (quoting *State of New York (Long Island Park, Recreational and Historical Preservation Comm),* 22 PERB ¶ 3043, 3098 (1989)); *see also County of Ulster*, 22 PERB ¶ 3030, 3073 (1989).

[38] *Town of Southampton*, 37 PERB ¶ 3001, at 3004 (quoting *State of New York*, 22 PERB ¶ 3043, at 3098).

[39] *State of New York*, 22 PERB ¶ 3043, at 3099; *see also Ichabod Crane Cent Sch Dist*, 33 PERB ¶ 3042, 3108 (2000), *cond sub nom Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO, Ichabod Crane Cent Sch Dist CSEA Unit v NYS Pub Empl Relations Bd*, 300 AD2d 929, 35 PERB ¶ 7020 (3d Dept 2002).

[40] *East Syracuse-Minoa Cent Sch Dist*, 14 PERB ¶ 3022, 3040 (1981).

(primarily from Rubinstein, but also from other employees) shows that Local 237 has made efforts to present proposals on behalf of the security titles and has not disregarded their interests.

In this respect, it is important to distinguish, as the ALJ did, between a bargaining agent's disregard of the concerns and interests of a particular employee group and a lack of success in attaining the goals of the employee group. As the Board has previously recognized, it is simply not possible in the bargaining process to satisfy all the interests of a subgroup all of the time.[41] That Local 237 has not been successful in attaining CUNY's agreement to all of the security employees' proposals does not demonstrate a systematic and intentional disregard of the interests of employees in security titles. We recognize that at least some employees in the security titles are frustrated by Local 237's failure to attain more of their goals. That frustration, however, does not warrant severance from an otherwise appropriate unit.[42]

LEEBA argues that the testimony of Hickey and Lingister demonstrates a systematic disregard by Local 237 for the interests of employees in security during bargaining and that the ALJ erred by relying on the testimony of Rubinstein. The ALJ found Hickey not to be a credible witness, while she found Rubinstein to be credible, particularly with respect to Local 237's response to proposals from employees holding security titles and a profane statement that Hickey alleged Rubinstein made. 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

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[41] *Town of Southampton*, 37 PERB ¶ 3001, 3004; *State of New York (Long Island Park, Recreational and Historical Preservation Comm)*. 22 PERB ¶ 3043, 3099 (1989).
[42] *County of Albany and Albany County Sheriff*, 19 PERB ¶ 3054, 3115 (1986).

incorrect."[43] This is especially true where, as here, the credibility determination rests in part on the witness' demeanor."[44] Here, LEEBA has not provided any such objective evidence that establishes that the ALJ manifestly erred. We see no reason to disturb the ALJ's credibility resolutions or the conclusions she drew from Hickey and Rubinstein's testimony.

Moreover, the ALJ assessed Lingister's testimony and found that, to the extent it addressed specific requests and proposals, it actually supported Local 237's contention that it gave significant attention to the concerns of security employees and advocated on behalf of their interests to the extent it was practical by, for example, having employees in security titles participate on the negotiating committee and by presenting proposals on behalf of security titles. This is an accurate summation of Lingister's testimony,[45] and we affirm the ALJ's conclusions based upon it.

We reject LEEBA's argument that there is "inherent inadequacy of representation" because security employees represent a minority of employees in the unit and that "[t]he minority inevitably gets put low on the priority list when it comes to representation in

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[43] *State of New York (DOCCS)*, 50 PERB ¶ 3037, 3154 (2017) (quoting *Village of Scarsdale*, 50 PERB ¶ 3007, n. 51 (2017) (quotation and editing marks omitted)); *see also Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014) (quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019, *confd and modified in part sub nom Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶ 3016 (2009), quoting *County of Nassau*, 24 PERB ¶ 3029 (1991)); *see also County of Tioga*, 44 PERB ¶ 3016, at 3062; *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977).

[44] *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3077 (quoting *UFT (Cruz)*, 48 PERB ¶ 3004 (2015)); *see also County of Clinton*, 47 PERB ¶ 3026, 3079 (2014) and *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019; *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990).

[45] The ALJ did not credit certain portions of Lingister's testimony, such as her claim that she had arrested a fellow Local 237 member. Again, LEEBA has not provided any objective evidence that the ALJ manifestly erred in making this credibility determination.

contract negotiations and the handling of grievances."[46] Accepting LEEBA's argument would appear to mean that employees in any job title that composed a minority of unit members could seek fragmentation from the overall unit. Such an approach runs counter to the policies of the Act, which mandate the largest unit permitting for effective negotiations. Again, absent a compelling reason for fragmentation, we will not disrupt a long-standing and productive bargaining relationship.

Although conceding that security employees are not entitled to fragmentation based on their "law enforcement" duties, LEEBA argues that there is a "clear and complete lack of overlap in job duties and responsibilities with all other members of the bargaining unit" and that there is no "community of interest" between security employees and other employees in the unit.[47] LEEBA argues that there is a potential for conflict when part of security employees' duties includes the power of arrest and there is "a real probability, not just possibility, that this could lead to the arrest of a CUNY employee who is within the same bargaining unit represented by [] Local 237."[48]

We reject the assertion that there is no community of interest between security employees and the other employees in the unit. As the Board explained in *City of Buffalo*,[49]

> Our consideration of community of interest is and must be different under a petition to fragment an existing unit than it is under a petition for initial uniting of unrepresented employees. Community of interest is considered under both types of petitions, but, in the context of a fragmentation petition, it is the absence of conflict within a long-standing unit which establishes a community of interest sufficient to preserve an existing unit. In the absence of a conflict of interest, whatever real or perceived differences there may be in working conditions, goals or concerns among subgroups of unit employees are not enough to overcome that shared community of interest.

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[46] LEEBA Memo of Law in Support of Exc, at 5.
[47] *Id*, at 4 & 9.
[48] *Id*, at 4.
[49] 26 PERB ¶ 3001, 3002 (1993).

Even if a separate unit of security employees would have been appropriate in an initial uniting situation (an issue we need not, and therefore do not, decide), we will not fragment a unit where there has been a long-standing history of meaningful and effective negotiations for all employees in the existing unit.[50] Because we find just such a long-standing history of meaningful and effective negotiations for all employees here, no basis for fragmentation has been demonstrated.[51]

We do not find that there is a sufficient showing of a conflict of interest because security employees may be called upon to arrest members of the bargaining unit. The ALJ found that this scenario has in fact arisen on one occasion, where Gramprey arrested a fellow unit member. Gramprey testified, however, that there was no interference by Local 237 or other adverse impact that he or the unit experienced. In these circumstances, we do not find that the mere speculative possibility of a conflict of interest to be sufficient to justify the fragmentation of the unit.[52]

Finally, we address LEEBA's argument that the ALJ erred by discussing the Board's ruling in *State of New York (Division of Parole)*.[53] Contrary to LEEBA's assertion, we see no error in the ALJ's citation of this case. As the Board's decision stated (and as the ALJ emphasized), law enforcement-related duties do not of their own weight warrant fragmentation where the employees at issue have not been granted police officer status.

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[50] *See State of New York*, 39 PERB ¶ 3032, 3104 (2006); *Marcus Whitman Cent Sch Dist*, 26 PERB ¶ 3018, 3031-3032 (1993); *Town of Smithtown*, 8 PERB ¶ 3015, 3017 (1975), *confd sub nom Long Island Public Service Employees v Helsby*, 53 AD2d 805, 9 PERB ¶ 7014 (3d Dept 1976).

[51] *See Town of Islip*, 43 PERB ¶ 3003, 3011-3012 (2010), where the Board rejected fragmentation of security guards and park rangers (peace officers, as are the security employees here) from a blue-collar unit.

[52] *See generally Regional Transit Service, Inc*, 35 PERB ¶ 3022, 3058 (2002) (finding, in the context of a unit placement petition, that even if employees were security personnel, that was not sufficient basis to exclude them from the bargaining unit in the absence of a demonstrated conflict of interest).

[53] 40 PERB ¶ 3011 (2007).

Given LEEBA's argument that the security employees at issue here performed unique duties that gave them a separate community of interest from other employees in the unit, the Board's holding bears repeating. Moreover, even if *State of New York (Division of Parole)* is not necessary to the ALJ's ultimate holding, her discussion of the case in explaining the law in this area provides no basis for reversing her decision.

In sum, we agree with the ALJ that the record does not demonstrate the existence of a conflict of interest or inadequate representation by Local 237, and we affirm her finding that fragmentation of the security employees is not warranted.

Based upon the foregoing, we deny LEEBA's exceptions and affirm the decision of the ALJ.

IT IS, THEREFORE, ORDERED that LEEBA's petition is dismissed.

DATED: April 25, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TRANSIT WORKERS UNITED LOCAL 100A,

Petitioner,

- and -

MTA BUS COMPANY, **CASE NO. C-6456**

Employer,

- and -

AMALGAMATED TRANSIT UNION, LOCAL 1181-1061, AFL-CIO,

Intervenor/Incumbent.

STUART SALLES, ESQ. and TRACEY L. KIERNAN, ESQ., for Petitioner

PAIGE GRAVES, GENERAL COUNSEL (THOMAS J. DEAS of counsel), for Employer

MEYER, SUOZZI, ENGLISH & KLEIN, P.C. (ROBERT MARINOVIC of counsel), for Intervenor

BOARD DECISION AND ORDER

On March 23, 2017, the Transit Workers United Local 100A (petitioner) filed, in accordance with the Rules of Procedure of the Public Employment Relations Board, a timely petition seeking certification as the exclusive representative of certain employees of the MTA Bus Company (employer).

Thereafter, the parties executed a consent agreement in which they stipulated that the following negotiating unit was appropriate:

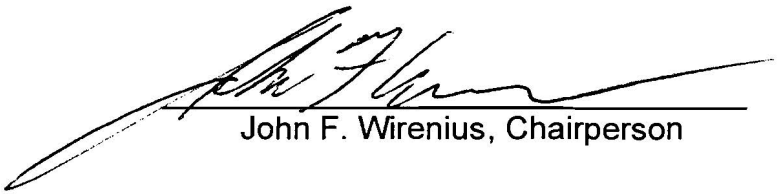
Included: Employees in the job titles of bus operator (including part-time bus operator), maintainer, cleaner/helper, helper, stock worker, and assistant stock worker employed by MTA Bus at 12755 Flatlands Avenue, Brooklyn, New York, known as the Spring Creek Depot.

Excluded: Supervisors, managers, clericals, two (2) fare box repairers, and all other employees not otherwise included in the description above.

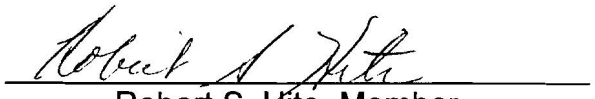
Pursuant to that agreement, a secret-ballot election was held on February 12, 2018, at which a majority of ballots were cast against representation by the petitioner.

Inasmuch as the results of the election indicate that a majority of the eligible voters in the unit who cast ballots do not desire to be represented for the purpose of collective negotiations by the petitioner, the incumbent remains the exclusive representative of the unit employees and IT IS ORDERED that the petition is dismissed.

DATED: April 25, 2018
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TRANSPORT WORKERS UNION OF AMERICA, LOCAL 100,

Petitioner,

-and- **CASE NO. C-6486**

MANHATTAN AND BRONX SURFACE TRANSIT OPERATING AUTHORITY,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Transport Workers Union of America, Local 100 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: Associate Transit Customer Service Specialist I and Associate Transit Customer Service Specialist II.

Excluded: The Associate Transit Customer Service Specialist II that reports in a confidential capacity to the Senior Director of the Travel Information/Call Center and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Transport Workers Union of America, Local 100. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 25, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEAMSTERS LOCAL 317,

Petitioner,

-and- **CASE NO. C-6493**

VILLAGE OF FAYETTEVILLE,

Employer.

CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE

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

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

IT IS HEREBY CERTIFIED that the Teamsters Local 317 has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time employees in the titles of Automotive Mechanic, Laborer I, and Public Works Maintenance Worker.

Excluded: All other Village employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Teamsters Local 317. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: April 25, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

MARIA A. GIAMMARELLA,

Charging Party,

-and-

CASE NO. U-34073

PROFESSIONAL STAFF CONGRESS OF THE CITY UNIVERSITY OF NEW YORK,

Respondent,

-and-

CITY UNIVERSITY OF NEW YORK,

Employer.

MARIA A. GIAMMARELLA, *pro se*

PETER ZWIEBACH, DIRECTOR OF LEGAL AFFAIRS, for Respondent

JANE SOVERN, INTERIM GENERAL COUNSEL (DANIEL R. SIMONETTE of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Maria A. Giammarella to a decision of the Assistant Director of Employment Practices and Representation (Assistant Director) dismissing Giammarella's amended improper practice charge in which she alleged that the Professional Staff Congress of the City University of New York (PSC) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act).[1] The amended charge alleged that PSC breached its duty of fair representation by declining to file a grievance on her behalf regarding her reassignment to the City University of

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[1] 50 PERB ¶ 4539 (2017). Charging Party's surname changed from Rodriguez to Giammarella during the events alleged; for the sake of clarity, we refer to her as "Giammarella" throughout.

New York's (CUNY) Psychology Department and its "SEEK" Program.

After two days of hearing and post-hearing submissions, the matter was reassigned to the Assistant Director for decision pursuant to § 212.4 of our Rules of Procedure (Rules) due to the departure from PERB of the Administrative Law Judge who had conducted the hearing.

EXCEPTIONS

Giammarella's exceptions fall into two categories. First, she contends that the ALJ erred in two evidentiary rulings. The first such exception contends that the ALJ erred by reversing her own initial ruling allowing Giammarella's Exhibits 6 through 6G into evidence only to subsequently exclude them.[2] The second such exception argues that the ALJ erred in denying Giammarella's attempt to offer into evidence affidavits regarding the transfers of two former faculty counselors to establish a uniform transfer process that was not applied in her case.[3]

In the second category of exceptions, Giammarella argues that the Assistant Director erred in her ultimate conclusion that PSC did not breach its duty of fair representation. Giammarella argues that the Assistant Director's finding is not based on consideration of the entire record, including the amended charge. Giammarella also argues that the Assistant Director drew directly from PSC's post-hearing brief, without attribution, and that the brief "presented false, misleading, and irrational statements, and were contrary to the documentary evidence submitted and the Record".[4] Giammarella

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[2] Exception No. 2; *see* Brief in Support of Exceptions at 23-24.
[3] Exception No. 3; *see* Brief in Support of Exceptions at 24.
[4] Exception No. 1, at 2.

also contends that the Assistant Director's decision, in part, completely and entirely contradicts the preliminary determination of the then-Director of Public Employment Practices and Representation, under § 204.2 of the Rules that her charge alleged facts that may constitute a violation of the Act.[5] As a result, Giammarella asserts, "the conclusions reached by [the] Assistant Director [] were outright invalid."[6]

PSC submitted a letter brief supporting the Assistant Director's decision.

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

FACTS

Dr. Maria Giammarella is currently employed at Hunter College, a college comprising a part of the City University of New York (CUNY). In 1982, Giammarella was appointed in the Department of Academic Skills at Hunter College, received tenure in 1995, and was subsequently promoted to Associate Professor.[7] The Department of Academic Skills was re-established and renamed the SEEK Department on February 6, 1995.[8]

From her initial appointment to the abolition of the SEEK Department on February 27, 2012, Giammarella's appointment was as a faculty counselor.[9] Her duties included teaching, as the SEEK department "had course offerings and it also provided counseling services."[10]

On February 27, 2012, the Board of Trustees passed two resolutions. The first

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[5] *Id.*
[6] *Id*.
[7] Brief in Support of Exceptions at 5-6.
[8] *Id* at 6; Charge, Ex 10; Charging Party Ex 22.
[9] Tr, at pp. 72-73; pp. 200-201.
[10] Tr, at p. 192.

resolved that "the SEEK Department be abolished and that the Percy Ellis Sutton Program of SEEK be established at Hunter College, effective February 1, 2012."[11] This resolution reflected the College's determination that SEEK students will be better served by a program, reporting to the Office of the Provost, that provides academic support services throughout the year."[12] The second resolution transferred Giammarella from the SEEK Department and appointed her to the Department of Psychology.[13] PSC filed a grievance.

On February 28, 2012, Provost and Vice President for Academic Affairs Vita C. Rabinowitz sent a letter reading, in pertinent part:

> [T]he resolution to change the status of the Hunter College Department of SEEK from an academic department to a program was approved by the Board of Trustees of the City University if New York on February 27, 2012 along with the companion resolution to transfer the SEEK faculty to new academic department homes.
> . . . .
> Accordingly, this letter of transfer formally notifies you of your appointment to the Department of Psychology, in the School of Arts & Sciences, effective retroactively to February 1, 2012 in the title of Associate Professor. Please be advised that your budget line will remain in the SEEK Program and you will be fully released from any teaching responsibilities and reassigned for your 30 hour workweek to provide counseling and academic support services in the SEEK program.[14]

According to Giammarella's testimony, her duties remained the same after the abolition of the SEEK Department, the creation of the SEEK Program, and her transfer

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[11] Charging Party Ex 2.
[12] *Id*.
[13] Charging Party Ex 3.
[14] Charging Party Ex 9.

to the Department of Psychology.[15]

On January 16, 2014, Giammarella wrote to Howard Prince, a grievance counselor for PSC, regarding an announced change to the methodology by which students evaluated SEEK Program faculty, asking if was consistent with the parties' collective bargaining agreement. The next day, Prince replied that his "initial reaction is the evaluation violates past practice regarding student evaluations of faculty and should be challenged," but that he would discuss the matter with Debra Bergen, PSC's Director of Contract Administration and university-wide grievance counselor.[16]

Later that same day, January 17, 2014, Giammarella raised other concerns that the SEEK Director, Sunday Coward, was seeking to apply timekeeping methods proposed for non-faculty employees to the faculty working within the SEEK program. In her email, Giammarella added that, as she saw it, "all of these issues have emerged as a result of the fact that faculty counselors were transferred from the SEEK Department to various academic departments by Board resolution but reassigned to the SEEK Program, an administrative unit of the college" by the Provost without Board approval, which she believed to be required.[17]

Prince declined to revisit the dissolution of the SEEK Department, contending that the "College followed the governance process, and had the right to transfer the faculty to academic departments, and the Board of Trustees subsequently approved the

[15] Tr, at pp. 194-195.
[16] Charging Party Ex 10, p. 7.
[17] *Id*, at 5.

actions."[18] He further stated that the "grievance we filed had virtually no chance in prevailing in arbitration," but that by preserving the SEEK course, PSC had "assured the continuity of employment for the Seek [*sic*] counselors."[19]

In response, Giammarella clarified that she was "not requesting that the Union go back and revisit the grievance related to the improper arbitrary and capricious dissolution of the SEEK Department," but rather contending that she and her colleagues were "being denied full integration into our respective academic departments similar to other faculty transfers."[20] She specified that "the Union is recognizing the unauthorized reassignment to the SEEK Program, an administrative unit of the college," resulting in the issues she complained of, and reiterated her belief that "[c]ontrary to the Union's position, I do believe the facts and circumstances provide the basis for a grievance."[21]

Prince replied that the "College had a right to transfer you to an academic department and maintain your functional assignment in the Seek [sic] Program to which you are and remain assigned."[22] Giammarella responded at length, setting out her argument that only the Board of Trustees could reassign her and that reassignment had been to the Psychology Department. She also raised concerns about the terms and conditions of employment in the SEEK program, and she expressed her concern that the SEEK course would in fact be abolished .[23] She pointed out that all of her SEEK colleagues were members of protected classes, and asserted that Hunter's actions

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[18] *Id.*
[19] *Id.*
[20] Charging Party Ex 10, p. 5.
[21] *Id*.
[22] *Id*, at 4.
[23] *Id,* at 1-4.

were "unacceptable and discriminatory."[24] She closed her email by requesting PSC to file a grievance challenging "the core issue: the unauthorized reassignment of my faculty colleagues and I to the SEEK Program by the Hunter administration without approval of the Board of Trustees," and them not being integrated into their new academic departments in a full-time teaching mode.[25]

Prince answered this email, stating that the decision to transfer Giammarella's line, and that of her colleagues, rests in part on an arbitration award, and that "despite the administrative transfer of your line to the Psychology Department, your functional responsibility at Hunter has not changed," and that "[t]here is no violation of the collective bargaining agreement and or the CUNY bylaws in this matter," informing her that Bergen would be responding to her concerns.[26]

Giammarella testified that:

> Back during the period of January 16, 2014 to January 27, [2014] correspondence with Howard Prince, the grievance counselor for the central office, PSC CUNY, I raised these concerns to him because my terms and conditions were such that they were constantly being changed as an associate professor, arbitrarily and I went to the union and I raised this with them for the various issues that I was facing and Mr. Prince indicated that my transfer was for administrative purposes.[27]

In a January 31, 2014 e-mail, Bergen explained to Giamarella that PSC had concluded that a grievance challenging the reassignment to the SEEK Program lacked merit and advising her that she had the right, pursuant to Article 20.4 of the collective

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[24] Charging Party Ex 10, p. 4.
[25] *Id*.
[26] *Id*, at 1, citing *Puccio v KCC*, Case No. 13-390-0244-10.
[27] Tr, at pp. 51-52.

bargaining agreement, to file a grievance challenging her transfer on her own.[28] Bergen's email explained PSC's reasoning, stating, in part:

> Your assignment to the SEEK Program by the Hunter administration does not require approval of the Board of Trustees. I have attached an arbitration decision in the matter of *Lervold v. Lehman College* in which . . . . Prof. Lervold had been appointed to the Department of Puerto Rican Studies and was assigned to the Admission Office rather than to teach courses in her department. Arbitrator Eischen ruled that the college did not violate the contract or CUNY BOT bylaws 6.8 (now 6.5) when they assigned Prof. Lervold to a position outside of her department. He wrote that is was clear that the college was authorized under Section 6.8 of the Bylaws to assign her to "any appropriate position on the staff". Therefore, her assignment to a position outside of her academic department was not a violation of the Agreement or the Bylaws. However, he did rule that the position to which she was transferred was clerical in nature and not appropriate to a member of the instructional staff.[29]

Bergen further explained in her email that, "unless there is a reasonably good chance of prevailing in arbitration," pursuing such grievances is not in the interests of the instructional staff.[30] Citing *Lervold*, potential harm to future cases, and the opinion of counsel, PSC declined to file a grievance challenging Giammarella's assignment to the SEEK Program.[31]

On April 28, 2014, PSC filed a grievance on behalf of "Maria Rodriguez-Giammarella and all others similarly situated," challenging Hunter's requiring faculty counselors to report to work during spring break (April 14–April 22, 2014) without additional compensation, in violation of past practice, and was based on, inter alia,

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[28] Charging Party Ex 18.
[29] Charging Party Ex 11; *see also* Charging Party Ex 12, pp. 27-28.
[30] *Id*.
[31] *Id*.

Article 15.4 of the collective bargaining agreement (spring recess grievance).[32] Article 15.4 is entitled "Workload for non-classroom members of the Instructional Staff, including members of the Instructional Staff assigned to the libraries, Student Personnel Staff, *Counselors*, HEOs, Registrars, College Laboratory Technicians, and Research Assistants."[33]

Bergen testified that § 15.4 of the collective bargaining agreement was the applicable provision for counselors assigned to the SEEK Program grievance at CUNY, and that non-teaching faculty can be in the same department as classroom faculty. Bergen testified that Giammarella was not entitled to have the work load outlined under § 15.1. Giammarella disputes this testimony, and contends that, pursuant to her transfer to the Psychology Department, she should be deemed classroom teaching staff, under the provisions of § 15.1.

On April 29, 2014, Giammarella wrote an email to Prince raising her disappointment with PSC not challenging her "unauthorized reassignment to the SEEK Program, an administrative office of the college," in the context of discussing the spring recess grievance.[34] Bergen responded to Giammarella's e-mail on the same date, reiterating that, where the union finds a grievance lacking in merit, "you had the right under article 20 to file a grievance on your own behalf. . . . If you want to file a grievance on your own behalf you are free to do so."[35] At the hearing, Bergen specifically testified

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[32] Charging Party Ex 1.
[33] Charging Party Ex 19, p. 29, Art 15.4 (emphasis added); *see also* Tr, at pp. 248-251 (Bergen testimony that this article applied to counselors, including Giammarella).
[34] Charging Party Ex 13 A.
[35] *Id*.

that such assignments may be made by, in addition to the Chairperson of a Department, the college president or the provost.[36]

On June 23, 2014, approximately seven months before Giammarella filed this charge, Prince responded to Giammarella's workload complaint as follows:

> Maria: Unless we can prove "excessive workload" a new grievance will not be possible. We will need to show the combination of work assignments in both SEEK and Psychology (in your case), as well as for the SEEK counselors whose line was "transferred" to other departments, adds up to an "excessive workload". The burden of proof rests entirely upon the grievants and PSC. I am not foreclosing a grievance but all the SEEK counselors would have to participate and show concrete evidence of excessive workload in their collective assignments.
>
> I am aware that you very much want to become a full-professor and I am very willing to assist your endeavors in that regard, including scheduling a meeting with the Labor Designee and/or Psychology Chair to clarify your workload and determine how much scholarly publication would be necessary for you to qualify for that rank. Call me to discuss this issue for yourself separately. I do not believe the other SEEK Counselors are interested in pursuing professorial status.
>
> At this point I want to focus on the Spring break grievance. I am waiting for you and the others to respond to the information Sandra Nunez attained from Sunday Coward in order to refute her response to the grievance.[37]

Giammarella did not call Prince to discuss scheduling a meeting with the Labor Designee or the Chair of the Psychology Department.

In an October 1, 2014 e-mail exchange between Prince, Giammarella, and her colleagues, Prince provided a copy of the adverse Step 1 decision, asking for feedback

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[36] Tr, at pp. 251, 332-334.
[37] Charging Party Ex 18.

and adding: "I am inclined to file the case to Step 2 of the process, but wish to hear your reactions to the Step 1 findings."[38] Giammarella responded by e-mail, dated October 3, 2014, in which she raised several issues regarding the Step 1 decision.

First, she noted that Laura Herzog and Sandra Nunez, the College's Labor Designees, did not refer to her consistently, using Dr. Maria Rodriguez-Giammarella, Dr. Maria Giammarella, and Ms. Maria Giammarella in different places in the Step 1 decision. She asked PSC to request that "this incongruity/lack of consistency by the Labor Designee be corrected."[39]

Giammarella also contended that her employment history, as presented by the Labor Designee, was incorrect, not reflecting her appointment first to the SEEK Department and then to the Psychology Department and "the unilateral reassignment to an administrative office, the SEEK Program."[40] Giammarella also wrote that, contrary to the Step 1 decision, she had previously objected to reporting to work in the SEEK Program during the winter recess, although her colleagues had been given a different schedule than had she. Finally, Giammarella pointed out that the Step 1 decision did not include information provided by Giammarella and her colleagues.

In his response to Giammarella's comments, Prince agreed to have her surname corrected going forward. He noted that neither the abolition of the SEEK Department and transfer of SEEK counselors or the Winter Session were at issue in the spring

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[38] Charging Party Ex 15 at 5. The complete text of the email exchange is reproduced in the ALJ's decision. 50 PERB ¶ 4539, at 4609-4610.
[39] *Id*, at 3.
[40] *Id*, at 4. Giammarella raised the same concerns on behalf of her colleagues and co-grievants.

recess grievance. He also stated that PSC does not "direct the labor designees to correct anything written in Step 1 decisions," but rather point out the errors, misstatements, and faulty contractual interpretations at the Step 2 hearing.[41] He asserted that he had "no control over" what the Labor Designee writes in such a decision.[42]

Prince then turned to the merits of the spring recess grievance, stating that he had presented all the evidence relevant to the primary issue, "that no one was given a specific 'assignment,'" which he described as the basis for the *Puccio v KCC* arbitration award.[43] He agreed that the Step 1 decision did not sufficiently or adequately address that point, and stated that the College had not adduced evidence of any specific spring break assignments. Prince invited Giammarella to review the documents he had submitted, and stated that additional documents could be submitted at Step 2. He requested that she make an appointment with him, and "assure[d her] that the case is not lost," and that he intended to go forward, expressing his hope that she would participate.[44]

Later that day, Giammarella wrote back to Prince stating that she "expect[ed] that any errors of fact that are contained in the step 1 decision are corrected, in writing."[45] She also wrote that "[f]or the Union to not even attempt to correct the employment

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[41] *Id*, at 2.
[42] Charging Party Ex 15, p. 3.
[43] *Id*.
[44] *Id*.
[45] *Id*, at 2. The complete text of Giammarella's email appears in the ALJ's decision, 50 PERB ¶ 4539, at 4611.

history record, in writing is unacceptable."[46] She disagreed with his statement that the winter session is not at issue, arguing that as it was referenced in the Step 1 Decision, facts relating to it are therefore relevant, and "have to be addressed, in writing, as I indicated previously."[47] She expressed a lack of understanding of why PSC would not produce its response and evidence in writing, and asked him to let her know if and when PSC would do so.[48]

On October 4, 2014, Bergen, who, along with Giammarella's fellow SEEK counselors, had been included among the recipients of these emails, wrote to Giammarella. In her email, Bergen stated that "the union does not respond to step one determinations in writing," and explained that "[i]t is the purpose of the step two hearing for the union to present its case to the Chancellor's designee including our response to the college's step one decision."[49] Bergen also wrote that "[w]e will review our arguments and presentation with you and your colleagues prior to the step two hearing," and that "Howard will be contacting you to arrange for that meeting as soon as possible."[50]

Giammarella testified that "given the fact that I was being dismissed by Howard Prince and Debra Bergen, I decided to take it upon myself to correct the record."[51] In an memorandum sent via email dated October 9, 2014, Giammarella wrote directly to Laura Herzog, the Labor Designee who had signed the Step 1 decision, requesting the

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[46] *Id*.
[47] *Id*.
[48] *Id*.
[49] Charging Party Ex 15, p. 1.
[50] Charging Party Ex 15.
[51] Tr, at pp. 86-87.

corrections to the Step 1 decision that she had requested PSC to seek, copying Bergen and Prince. Bergen responded the same day by e-mail, advising Herzog that Giammarella's e-mail did not represent the position of PSC and that PSC would respond to the Step I decision at the Step II hearing. Bergen also indicated in her response that Prince was in discussion with Herzog's office to resolve the issue "without the need for further proceedings."[52]

On or about October 19, 2014, PSC sent an e-mail to Giammarella and her colleagues to schedule a meeting in preparation for a Step II grievance hearing. The PSC indicated that CUNY was proposing mediation of the issues, including assignments for the spring and winter recess. According to Giammarella, she thought it was unusual that a process, which was not part of the grievance procedure, was being suggested, and she believed that PSC should have advised her that she could have proceeded to Step II on her own.[53]

Giammarella testified that because PSC was not representing her properly, despite having all the evidence, she expressed a lack of confidence in the representation she was receiving. As a result, she "withdrew from the grievance. I indicated, after I indicated that Debra Bergen sent me an e-mail indicating that she was going to send me a form to fill out to make my withdrawal official. I never got that form.[54]

Giammarella also testified that Bergen put in writing that the college followed the appropriate procedures, and that Giammarella's transfer was in compliance with the

[52] Charging Party Ex 24.
[53] Tr, at pp. 105-106.
[54] Tr, at pp. 108-109.

CUNY bylaws and the CBA. Giammarella asked Bergen to support those statements. Bergen said she would get back to her on the matter, but has not done so. According to Giammarella:

> They wanted me to basically pretend that that is not relevant and enter into an alternative process that would certainly take the time issue, bring the time issue into play, but for the remaining individuals at stake in the grievance, they did not file a timely step two. As of the current date, today, there never was anything timely in terms of the step two filing, where we would have been able to correct the record.[55]

DISCUSSION

Because Giammarella has excepted to the ALJ's decision on, among other grounds, the contention that the ALJ did not review the entire record, we have undertaken our own fresh and comprehensive review of the record. For the reasons stated below, we affirm the ALJ's decision.

As a threshold matter, we note that Giammarella's claim that the Director's processing of her amended charge is somehow authoritative in establishing either the relevant facts or the existence of a violation of the Act in proceedings before the ALJ 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 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."[56] In that review, the Director is required to assume

[55] Tr, at p. 111.
[56] Rules, § 204.2 (a) (1) (emphasis added).

the truth of the facts asserted in the charge."[57] 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."[58]

Another threshold issue, the evidentiary rulings complained of by Giammarella, may also be swiftly dismissed. The ALJ did not abuse her discretion in finding that Giammarella could not introduce further evidence, including affidavits, after she and the College rested. Giammarella was aware of her right to call additional witnesses during her case-in-chief, as PSC's Director of Legal Affairs reminded her in objecting to her effort to move documents into evidence without witnesses to establish their relevance.[59] More to the point, no reason was provided why further testimony was required after the College called only one of the two witnesses it had informed Giammarella might be called.

Likewise, the ALJ did not err in excluding from evidence the various course catalogues reflecting transfers of staff within CUNY Colleges. The catalogues

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[57] *See eg, Town of Greenburgh*, 32 PERB ¶ 3025 (1999), citing *Jacob Javits Convention Ctr of New York*, 20 PERB ¶ 3030 (1987).
[58] 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).
[59] Tr, at p. 26.

themselves only demonstrated movement on the part of the individuals involved and did not, absent connecting testimony which Giammarella did not proffer or call, establish an alleged past practice of integrating transferred faculty members into their new departments in a teaching role. Absent testimony to support the assertion, the course catalogs were not probative of any fact at issue here.

Moving to Giammarella's more substantive contentions, we find that many of the factual allegations in the amended charge are untimely, and thus admissible only as background. Under § 204.1 (a) (1) of our Rules, "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."[60] Where, as here, the alleged violations are PSC's refusals to bring specific grievances, and its handling of others, the limitations period is measured from when PSC notified Giammarella of the decisions at issue.[61]

Because the original charge in this matter was filed on January 17, 2015, allegations of events taking place prior to September 17, 2014 are time barred. Thus, the ALJ correctly found that the only timely allegations are those involving PSC's response to the Step 1 decision in the spring recess charge, distributed by Prince to Giammarella and her co-grievants on October 1, 2014. We also find that the ALJ did

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[60] *CSEA (Metzger)*, 50 PERB ¶ 3026, 3100 (2017); *see also UFT (Fearon)*, 38 PERB ¶ 3009, 3032 (2005).

[61] *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, 3161 (2017); *see also District Council 37 (Bacchus)*, 50 PERB ¶ 3013, 3057-3058 (2017); *UFT (Davis)*, 50 PERB ¶ 3014, 3059 (2017); *New York State Thruway Auth*, 40 PERB ¶ 4533, 4595 (2007); *Civil Service Employees Assn, Inc., Local 1000, AFSCME, AFL-CIO*, 28 PERB ¶ 3072, 3168, n. 4 (1995).

not err in admitting the earlier facts to provide background and context.[62]

We note that Giammarella has argued on multiple grounds that the limitations period should be deemed tolled or extended with respect to the allegations which the ALJ admitted as background. These arguments are not persuasive.

According to her own exhibits and testimony, Giammarella asked PSC to grieve her treatment by the administrator of the SEEK Program as stemming from what she believed to be an improper assignment to that program on January 17, 2014. Prince declined to do so, and the matter was discussed in a series of emails between them running through January 27, 2014. By January 31, 2014, at the latest, PSC had definitively refused to bring such a grievance, as evidenced by Debra Bergen's email, which both categorically refused to represent Giammarella in such a grievance and informed her of her right under § 20.4 of the collective bargaining agreement to bring such a grievance herself. Therefore, Giammarella's improper practice charge, filed on January 17, 2015, is untimely to the extent it complains of acts prior to September 17, 2014, including PSC's decision not to pursue that grievance.

Moreover, "subsequent reiterations of the union's initial decision not to grant a request do not extend the filing period or create a new one."[63] Nor has the Board adopted a "continuing violation" doctrine.[64] Giammarella's argument in favor of the

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[62] *Town of Henrietta*, 28 PERB ¶ 3079, at 3180 (1995).
[63] *UFT (Fearon)*, 38 PERB ¶ 3009, at 3032; *DC 37 (Fonseca)*, 50 PERB ¶ 3038, at 3161; *CSEA (Metzger)*, 50 PERB ¶ 3026, at 3100; *see also NYCTA (Rosado)*, 37 PERB ¶ 3036, 3108 (2004); *UFT (Paul)*, 23 PERB ¶ 3038, 3077 (1990).
[64] *State of New York (Office of Medicaid Inspector General)*, 50 PERB ¶ 3018, 3076, citing *City University of New York,* 40 PERB ¶ 3004, 3013 (2007); *New York City Transit Auth,* 26 PERB ¶ 3081, 3157 (1993); *City of Yonkers,* 7 PERB ¶ 3007, 3011 (1974).

application of such a doctrine, based on a well-respected treatise on the practice in arbitration, does not address the reasoning in our prior cases or the statutory policies upon which those decisions are based, and we decline to overturn the Board's prior rulings here.

Although "the Board has found a respondent to be equitably estopped from asserting a timeliness defense where the respondent has, through its conduct, induced the charging party to delay filing a charge until the filing period has passed," that limited exception does not apply here.[65] Indeed, far from inducing Giammarella to delay filing a charge, PSC has on multiple occasions advised her in writing that it would not file a grievance challenging her assignment to the SEEK Program, or one asserting the alleged impropriety of that assignment as the foundation or background of an alleged violation of the collective bargaining agreement or the bylaws. As was the case in our recent decision in *District Council 37 (Javed)*, "[i]t is clear that [Giammarella] disagreed with [PSC's] position, but if [s]he wished to challenge [PSC's] position as a violation of its duty of fair representation under the Act, [s]he had a four-month time period in which to do so."[66]

Thus, the only timely aspect of the amended charge is the sequence of events surrounding Giammarella's concern with PSC's proposed response to the Step 1

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[65] *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, at 3161, citing *UFT (Davis)*, 50 PERB ¶ 3014 (2017); *DC 37 (Bacchus)*, 50 PERB ¶ 3013, citing *County of Onondaga*, 12 PERB ¶ 3035, 3065 (1979), *confd sub nom County of Onondaga v NYS Pub Empl Relations Bd*, 77 AD2d 783, 13 PERB ¶ 7011 (4th Dept 1980); *Great Neck Water Pollution Control District*, 27 PERB ¶ 3057, 3134 (1994).

[66] 50 PERB ¶ 3028 (2017). We note that, were we to review the untimely allegations, admissible only as background, they suffer from the same deficiencies as to proof as do the timely allegations discussed below.

decision involving the spring recess grievance. We have often reaffirmed that "to establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization's conduct or actions are arbitrary, discriminatory or founded in bad faith."[67] 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-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.[68]

Thus, "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."[69]

The record reflects that, with the exception of the inconsistency regarding Giammarella's surname, Prince and Bergen each declined to respond in writing to the Step I decision, and instead were prepared to advance the grievance to Step II, a

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[67] *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, at 3161, quoting *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016); *see also UFT (Cruz)*, 48 PERB ¶ 3004, 3010, *petition denied, Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct NY Co 2015) (internal quotation and editing marks omitted), quoting *UFT (Munroe*), 47 PERB ¶ 3031, 3095 (2014), *petition denied*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (*quoting CSEA* (*Bienko)*, 47 PERB ¶ 3027, 3082-3083 (2014)); *see District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).

[68] *Id.,* citing *District Council 37 (Calendario)*, 49 PERB ¶ 3038, at 3161 (2016); *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)).

[69] *Id.*

process in which Prince expressed his hope that Giammarella would participate. Prince expressed his belief that the Step I decision was flawed, and that "all [was] not lost." He also stated that he could not control what the College's Labor Designee wrote in the Step I decision, and that the place to challenge it was at Step II, which Bergen confirmed. Giammarella was dissatisfied with that course of conduct, and repeatedly demanded that PSC address her employment history and the abolition of the SEEK Department and transfer of the SEEK counselors. Finally, she demanded this be done in writing.

Giammarella has not adduced any basis upon which this disagreement as to how to proceed could be deemed to be arbitrary, discriminatory, or in bad faith on the part of PSC. Indeed, she has not even shown that PSC was in error in declining to seek modification of the Step I decision from the College's Labor Designee. Article 20 of the Collective Bargaining Agreement, which provides for the grievance procedure, does not provide for any written response to the Step I Decision other than pursuing the grievance to Step II, which Prince and Bergen agreed to do.[70]

Likewise, when Giammarella, in her own words, "decided to take it upon myself to correct the record" in an email memorandum to the College's Labor Designee Laura Herzog, Bergen's email to Herzog simply advised Herzog that Giammarella's e-mail did not represent the position of PSC, and that PSC would respond to the Step I decision at the Step II hearing. Giammarella also contends that the effort to settle the grievance, rather than prosecute it to Step II shook Giammarella's confidence in PSC's

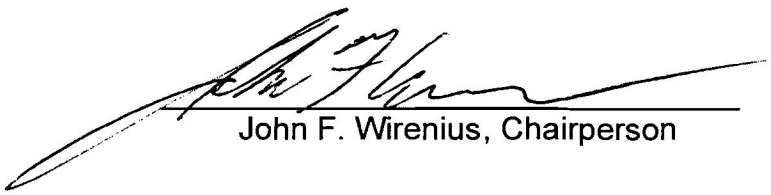
[70] Charging Party Ex 19, p. 39.

representation. Finally, Giammarella claims that PSC should have alerted her that she had the right to pursue the Step II grievance independently from PSC, although Bergen had already provided that information to Giammarella, in January 2014, in the context of grieving her assignment to the SEEK Program.

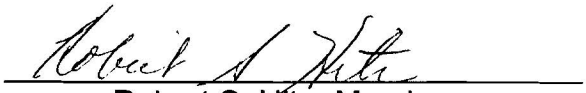
None of these acts or omissions demonstrates arbitrariness, discrimination, or bad faith. The record shows that throughout its representation of Giammarella, PSC, whether through Rubin or Bergen, was responsive to her inquiries, provided rationales for its decisions, and addressed her concerns. At the end of the day, all that the record evinces is Giammarella's "mere disagreement with the tactics utilized or dissatisfaction with the quality or extent of representation," which we have repeatedly held does not constitute a breach of the duty of fair representation.[71]

Accordingly, the amended charge must be, and hereby is dismissed.

DATED: April 25, 2018
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

[71] *DC 37 (Fonseca)*, 50 PERB ¶ 3038, at 3161; *see also District Council 37 (Calendario)*, 49 PERB ¶ 3015, at 3060.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CICERO POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party, **CASE NO. U-35369**

- and -

TOWN OF CICERO,

Respondent.

JOHN M. CROTTY, ESQ., for Charging Party

HANCOCK ESTABROOK, LLP (JOHN F. CORCORAN of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Cicero Police Benevolent Association, Inc. (PBA) to an Administrative Law Judge (ALJ)'s granting a post-hearing motion made by the Town of Cicero (Town) which allowed the Town to delete or amend proposals that had been made in interest arbitration. The PBA also excepts to the ALJ's decision dismissing a charge alleging that the Town violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by withdrawing its meal allowances and shift differential proposals from interest arbitration.[1]

EXCEPTIONS

The PBA argues that the ALJ lacked authority to grant the Town's motion to amend its interest arbitration demands, contending that such decisions are within the

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[1] 50 PERB ¶ 4592 (2017).

exclusive jurisdiction of the Director of Conciliation. Assuming that the ALJ has the authority, the PBA argues that the ALJ nevertheless erred in granting the motion because there is no authorization in our Rules of Procedure (Rules) for such amendments, because the motion was untimely, and because the motion improperly introduced new demands and withdrew a demand to the PBA's detriment. Finally, the PBA argues that ALJ's finding that the Town withdrew its meal allowances and shift differential proposals from bargaining is not consistent with the testimony adduced during a hearing on the charge.

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

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

FACTS

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

The PBA and the Town are parties to a collective bargaining agreement (CBA) that expired on December 31, 2015.[2] Prior to the expiration of the CBA, the parties began negotiations for a successor agreement.

The parties met on five dates to negotiate the successor agreement.[3] Richard Cushman, a town councilman and the lead negotiator for the Town, testified that at the final bargaining session on June 21, 2016, the Town made a proposal designed to "simplify" negotiations, dropping "all the other items and go[ing] down to just the three

[2] Joint Ex 1.
[3] Tr, at p. 27; Joint Ex 6.

main items that we thought were important."[4] Those three main items were the wage proposal, payment for health insurance after retirement,[5] and the 4/2, 5/2 schedule issue."[6] Cushman testified that the Town simplified its position at the final meeting because "we weren't making much progress and we thought that rather than hassle over nine, ten, eleven items, it would be easier just to simplify and take the three most important ones, which are those three that we presented them."[7]

On June 27, 2016, the PBA filed a Declaration of Impasse with the Director of Conciliation.[8] The Director appointed a neutral mediator and the parties conducted three mediation sessions, but they were ultimately unsuccessful in reaching an agreement on a successor collective bargaining agreement. Thereafter, the PBA filed a Petition for Compulsory Interest Arbitration (Petition) with the Director of Conciliation. Attached to the Petition is a document reflecting the PBA's interest arbitration demands. The Town filed a Response to Petition for Compulsory Interest Arbitration (Response).

Attached to the Response is the Town's reply to the PBA's demands contained in the Petition. It reads, in pertinent part:

> <u>Response to Unit Proposal:</u>
>
> 4. Wages: Counter proposal is for 2 year deal with 2% wage increases if back to 5/2. The step increase result in large percentage increases that far outweigh other units. The Cicero PD is the highest paid per officer in the County. No to step/shift differentials. Need to explain and expand upon this.
>
> 7. Travel and Meals: No change necessary.

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[4] Tr, at pp. 59-60.
[5] This demand is not at issue in this proceeding.
[6] Tr, at p. 60.
[7] *Id.*
[8] Tr, at p. 49; Joint Ex 6.

See Counter Position:
**Change to 5/2
Fix 207-c issue[9]

The PBA filed the instant improper practice charge on November 7, 2016, alleging that the Response violates § 209-a.1 (d) of the Act in several ways. The PBA asserted that the Town's proposal No. 4, for the first time links the 2% wage increase with a switch to the 5/2 schedule and, thereby, constitutes either a new or regressive bargaining position. The charge states that the Town's wage offer during negotiations was not conditioned on a change to the schedule.

The PBA also argues that Town proposals Nos. 4 and 7, rejecting an increase in shift differentials and meal allowances, constitute a regression. Finally, the PBA argues that the Town's "fix 207-c" demand is vague and, therefore, nonmandatory.[10]

After the May 31, 2017 hearing, the Town filed a motion to amend its interest arbitration Response. The amended Response unlinked the proposed 2% across-the-board wage increase from the 4/2 to 5/2 schedule change. It also withdrew the demand reading "fix 207-c issue."[11] The PBA opposed the motion to amend.[12] The Town filed a reply to the PBA's opposition.[13]

By letter dated August 31, 2017, the ALJ accepted the Town's proposed amendments to the Response.[14] In his subsequent decision, the ALJ confirmed his letter ruling.[15]

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[9] Joint Ex 3.
[10] ALJ Ex 1.
[11] ALJ Ex 5.
[12] ALJ Ex 6.
[13] ALJ Ex 7.
[14] ALJ Ex 8.
[15] 50 PERB ¶ 4592 (2017).

DISCUSSION

We first address the issues associated with the post-hearing motion. Initially, we find that the ALJ acted well within his authority by granting the motion. The PBA argues that decisions about the content of interest arbitration responses falls within the exclusive jurisdiction of the Director of Conciliation. We reject this argument. As a threshold matter, our decisions in *City of Rensselaer*[16] and *City of Ithaca,*[17] relied upon by the PBA, simply do not bear on this case. In *Rensselaer*, we approved the Director's prompt dismissal of a petition for interest arbitration after designating a panel but before proceedings had commenced upon his discovery that the petition improperly included employees not entitled to compulsory interest arbitration. In *Ithaca*, reaffirming *Rensselaer*, we explained that "eligibility determinations, which have been delegated by the Board to the Director, are questions of *who* is entitled to or may properly petition for interest arbitration, while arbitrability questions concern *what* may be submitted to interest arbitration, and are to be determined under the Rules through the vehicle of an improper practice or declaratory ruling proceeding."[18]

The question before the ALJ here was one of whether the specific proposals comprising the amended Response constituted new demands or otherwise violated § 205.6 (a) of the Rules. As we stated in *Ithaca*, "[a]rbitrability goes to the character of the substance of the dispute, while eligibility goes to the character of the parties." This case is clearly the former and not the latter, and thus the dispute falls well within the

[16] 49 PERB ¶ 3016 (2016).
[17] 50 PERB ¶ 3006 (2017).
[18] 50 PERB ¶ 3006, at 3029.

jurisdiction of the ALJ.[19] The PBA seeks to create a procedure, pursuant to which the Director would in every case decline to rule on the arbitrability of the proposed amendment, and refer it to an ALJ for determination, even though the matter is already pending before an ALJ. We decline to so squander the parties' time for no cognizable benefit beyond delay itself.

It is well established that, in the context of a pending improper practice proceeding, the ALJ may allow a party to amend, clarify, or withdraw IA demands, so long as the change does not result in a new demand or otherwise violate § 205.6 (a) of the Rules.[20]

Next, we find that the ALJ acted well within his discretion by granting the motion. We do not find the absence of a provision of our Rules explicitly allowing such amendments to be controlling. The Board has long held that parties may amend or clarify interest arbitration proposals,[21] and has never interpreted our Rules to bar such modifications. We decline to read such a restriction into our Rules.

The PBA points to the Board's decision in *Buffalo Municipal Housing Authority (Gilbert)*[22] to argue that the lack of provision in our Rules for amendments to IA responses dooms the motion here. In the adversarial context of the decertification

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[19] *Id*.
[20] *See Triborough Bridge and Tunnel Authority*, 29 PERB ¶ 3012, 3032 (1996) (affirming ALJ's grant of permission to amend, noting "that demands found by this Board to be nonmandatory subjects of negotiation may be amended, clarified, or otherwise modified and resubmitted if the demand as revised is not a new demand"); *Id,* at 3034, n. 3 ("We have allowed the amendment of demands made in a brief submitted to the Board, at a pre-hearing conference, and after a determination that the original demand was nonmandatory") (citations omitted), citing *Niskayuna PBA, Inc*, 14 PERB ¶ 3067 (1981); *Amherst Police Club, Inc*, 12 PERB ¶ 3071(1979).
[21] *Id*.
[22] 35 PERB ¶ 3009 (2002).

proceeding at issue in *Gilbert*, the Board held that representation petitions could not be amended because the Rules did not allow for such amendments. As we explained in *Gilbert*, "we have strictly enforced our rules in representation cases because they are intended to bring stability and certainty to a process which profoundly affects the employment rights and interests of many."[23] By contrast, interest arbitration is a procedure that is intended to assist parties in reaching an agreement.[24] We find that the policies of the Act would not be effectuated by an overly restrictive reading of our Rules that would preclude parties from modifying or updating their proposals in light of developments throughout the improper practice proceeding.[25]

The PBA also argues that the motion should not have been granted because it introduced a new wage demand (by removing the link between the wage offer and the schedule offer) and withdrew the "Fix 207-c issue" demand to the detriment of the PBA. We do not find these arguments persuasive.

The PBA's charge alleges that the Town introduced a new demand by conditioning its wage offer on a schedule change, which had not been previously negotiated.[26] The charge expressly states that "[t]he Town's wage offer during negotiations was not so conditioned." The Town, apparently agreeing with the PBA's position, has now removed that linkage. The charge did not allege that the wage

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[23] 35 PERB ¶ 3009, at 3018, citing *Franklin Square Union Free Sch Dist*, 28 PERB ¶ 3036 (1995); *Enlarged City Sch Dist of the City of Amsterdam*, 21 PERB ¶ 3042 (1988); *New York Convention Ctr Operating Corp*, 20 PERB ¶ 3063 (1987); *County of Rensselaer*, 11 PERB ¶ 3046 (1978).
[24] *Village of Wappingers Falls*, 40 PERB ¶ 3020, at 3083, quoting *Town of Haverstraw*, 9 PERB ¶ 3063, 3109 (1976).
[25] *See Triborough Bridge and Tunnel Auth*, 35 PERB ¶ 3010 at 3032-3033. For similar reasons, we also decline to strike the motion as untimely. Filing the motion after the close of the hearing, and the development of the full record, was reasonable.
[26] ALJ Ex 1.

demand, standing alone, was regressive or new, nor did the PBA seek to amend the charge. There is, therefore, no basis to find that the wage demand, as it now stands, violates the Act.

Despite asserting in the charge that the Town's wage offer during negotiations was not conditioned on a change to the schedule, the PBA makes precisely the opposite argument in its brief in support of exceptions, asserting that the Town's "substitution at arbitration of an unconditional wage demand for what was always an expressly conditional wage demand is a new demand . . . ." This statement is incompatible with the charge, the theory of the case presented by the PBA, and the positions taken by the PBA up to this point, and we do not find it to be a credible argument.

With respect to the withdrawal of the "Fix 207-c issue" demand, the PBA argues that the Town's withdrawal of this demand "narrowed the Town's exposure to a finding of impropriety."[27] While this may be true, we do not see why this should place a restriction on the Town's ability to withdraw demands from interest arbitration. The PBA cites to *PEF (Leemhuis)*,[28] in support of this argument, but we find this case to be inapposite. *Leemhuis* deals with the withdrawal of an improper practice charge pursuant to § 204.1 (d) of our Rules, not with the withdrawal of demands from interest arbitration. We can discern no reason why the Town should be obligated to submit demands to interest arbitration after it agrees with the PBA that such demands are new, regressive, and/or vague and therefore non-mandatory. Rather, we reaffirm the Board's longstanding holdings that a "party may correct observed deficiencies in a demand and

[27] Brief in Support of Exceptions, at 11.
[28] 17 PERB ¶ 3037 (1984).

seek negotiations on the amended demand, including submission of the amended demand to an interest arbitration panel, during the period of time that the interest arbitration proceeding is pending."[29]

While not strictly relevant to our decision, we note that it is axiomatic that, in order for any amendments to the response to be considered by the Panel, they must be, in fact, received by the Panel. Thus, the Town should forward its amended response to the Panel for its consideration.

Finally, we address the ALJ's finding that the Town did not violate § 209-a.1 (d) of the Act by rejecting increases in meal allowances and shift differentials in its interest arbitration Response. The ALJ, crediting and relying on Cushman's testimony, found that the Town had withdrawn these proposals during the final negotiations session between the parties. As a result, the ALJ found that the Town's Response did not present a regressive demand, as alleged in the charge. The PBA argues that ALJ's finding is not consistent with Cushman's testimony.

We affirm the ALJ's finding. Cushman testified that the Town's "proposal" was to "simplify," and to "forget all the other items and go down to just the three main items that we thought were important." [30] These three main items were wages, schedule, and the payment for health insurance after retirement—not meal allowances or shift differentials. This testimony is sufficient to support the ALJ's finding that the Town withdrew its proposals to increase the meal allowances and shift differentials at the final bargaining session. Because these proposals had been withdrawn, the Town's

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[29] *Triborough Bridge and Tunnel Auth*, 35 PERB ¶ 3012, at 3033, quoting *City of Schenectady*, 22 PERB ¶ 3018, at 3048 (1989).
[30] Tr, at pp. 59-60.

rejection of increases in its Response did not present either a new or regressive demand.

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

DATED: April 25, 2018
Albany, New York

John F. Wirenius, Chairperson

Robert S. Hite, Member

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

SHAHADAH SAINPAULIN,

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

- and -

CIVIL SERVICE EMPLOYEES ASSOCIATION, INC., LOCAL 1000, AFSCME, AFL-CIO, LOCAL 828,

Respondent,

- and -

COUNTY OF MONROE,

Employer.

SHAHADAH SAINPAULIN, *pro se*

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

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Shahadah Sainpaulin to a decision of the Director of Public Employment Practices and Representation (Director) dismissing her amended improper practice charge.[1] In her charge, as amended, Sainpaulin alleged that the Civil Service Employees Association, Inc, Local 1000, AFSCME, AFL-CIO, Local 828 (CSEA) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) by failing to file a timely grievance challenging Sainpaulin's termination.

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[1] 50 PERB ¶ 4580 (2017).

Pursuant to her responsibilities under § 204.2 (a) of PERB's Rules of Procedure (Rules), the Director notified Sainpaulin that her charge, dated March 25, 2017, was deficient. After granting Sainpaulin an opportunity to amend her charge, the Director dismissed the amended charge because the charge fails to allege sufficient facts that would arguably demonstrate that CSEA engaged in arbitrary, discriminatory, or bad-faith conduct that would constitute a violation of § 209-a.2 (c) of the Act.

EXCEPTIONS

Sainpaulin's exceptions argue, among other things, that CSEA's actions in failing to file a timely grievance on her behalf demonstrate arbitrary and bad-faith conduct. CSEA supports the Director's decision dismissing the amended charge.

Based on our review of the record and our consideration of the parties' arguments, we reverse the Director's decision in part.

DISCUSSION

Initially, we emphasize that our review of the Director's decision is limited to the record as it existed before the Director.[2] Facts and documents that are presented to us for the first time on exceptions cannot be considered by us in reviewing the correctness of the Director's decision. For this reason, we do not consider the facts and documents presented by Sainpaulin for the first time to us as part of her exceptions.

For purposes of determining Sainpaulin's exceptions, we assume the truth of the allegations in the original and amended charge, as supplemented and clarified by

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[2] *TWU (Ayala)*, 50 PERB 3017, 3074 (2017); *CSEA (Brewster)*, 50 PERB ¶ 3027 (2017); *Mt Pleasant Cottage UFSD*, 50 PERB ¶ 3002, 3009, n. 12 (2017); C*SEA (Josey)*, 49 PERB ¶ 3022, 3072 (2016); *Smithtown Fire Dist*, 28 PERB ¶ 3060, 3135 (1995); *State of New York (Rockland Psychiatric Center)*, 25 PERB ¶ 3012, 3031 (1992); *Board of Coop Educ Services of Sullivan Cnty*, 14 PERB ¶ 3101, 3170-3171 (1981).

documents submitted by her to the Director.[3] Our recitation of the allegations, however, should not be construed as final findings of facts or conclusions regarding the merits of the charge.

According to the allegations in Sainpaulin's charge and amended charge, Sainpualin received a letter terminating her employment, effective October 5, 2016. This termination date was subsequently revised to become effective on October 31, 2016. In the days and weeks following her termination, Sainpaulin made efforts to contact CSEA about filing a grievance challenging her termination. Attachments to the charge and amended charge demonstrate email exchanges between Sainpaulin and CSEA from late October 2016 through February 2017, and Sainpaulin alleges that she made further attempts to contact CSEA via telephone.

A grievance was eventually filed on December 29, 2016. On January 18, 2017, the grievance was denied. A copy of the denial letter was included as an attachment to Sainpaulin's charge. The denial stated that, pursuant to the collective-bargaining agreement (CBA), a grievance must be presented within fifteen business days from its known occurrence. Because Sainpaulin was terminated on October 31, 2016, but the grievance was not filed until December 29, 2016, the grievance was "denied for timeliness."[4]

Nothing in Sainpaulin's charge, amended charge, or attachments demonstrates any explanation from CSEA as to why the grievance was not filed in a timely fashion in compliance with the CBA.

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[3] *CSEA (Munroe)*, 46 PERB ¶ 3013, 3028 (2013); *Local 456, IBT (Rojas)*, 45 PERB ¶ 3031, 3070 (2012).

[4] Sainpaulin received notification of this denial on February 18, 2017. Her charge was received by PERB on March 27, 2017. The charge is therefore timely under § 204.1 of our Rules.

"A union may breach its duty when it fails to process a meritorious grievance in a timely fashion with the consequence that arbitration on the merits is precluded."[5] This rule does not, however, excuse the Charging Party from carrying its burden of proof. The Board has often reaffirmed that "to establish a breach of the duty of fair representation under the Act, a charging party has the burden of proof to demonstrate that an employee organization's conduct or actions are arbitrary, discriminatory or founded in bad faith."[6] 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-a. An honest mistake resulting from misunderstanding or lack of familiarity with matters of procedure does not rise to the level of the requisite arbitrary, discriminatory or bad-faith conduct required to establish an improper practice by the union.[7]

We agree with the Director's finding that 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. However, CSEA's failure to timely inform to Sainpaulin, upon request, as to the status of her request for representation is sufficient to "requir[e] the presentation by the employee

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[5] *United Fedn of Teachers, Local 2, AFT, AFL-CIO v NYC Bd of Collective Bargaining*, 51 Misc3d 817, 825 (Sup Ct NY Co 2016) (Bluth, J), *affd sub nom United Fedn of Teachers v City of New York*, 154 AD3d 548 (1st Dept 2017).

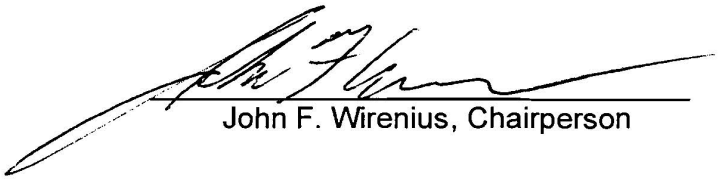
[6] *District Council 37 (Calendario)*, 49 PERB ¶ 3015, 3060 (2016), *quoting UFT (Cruz)*, 48 PERB ¶ 3004, 3010, *petition denied, Cruz v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7003 (Sup Ct NY Co 2015) (internal quotation and editing marks omitted), *quoting UFT (Munroe*), 47 PERB ¶ 3031, 3095 (2014), *petition denied*, 48 PERB ¶ 7002 (Sup Ct NY Co 2015) (*quoting CSEA* (*Bienko)*, 47 PERB ¶ 3027, 3082-3083 (2014)); *see District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008).

[7] *Id*; *see also Cairo-Durham Teachers Assn (DeOliveira)*, 47 PERB ¶ 3008, 3026 (2014), *confd sub nom DeOliveira v NYS Pub Empl Relations Bd*, 133 AD3d 1010, 48 PERB ¶ 7006 (3d Dept 2015) (*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)).

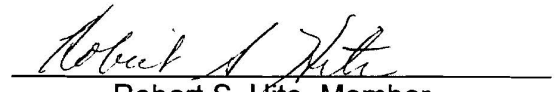
organization of an explanation for its failure to respond."[8] This failure, combined with CSEA's recognition that the grievance was potentially meritorious, as supported by its belatedly filing the grievance, raises the prospect that Sainpaulin may be able to establish that CSEA's conduct was sufficiently arbitrary to violate the duty of fair representation.[9] CSEA, in its answer, or, should a hearing be necessary, in testimony, may be able to establish that its failure was an honest mistake, or was the result of negligence or even gross negligence. Under these circumstances, we find that the charge is sufficient to pass the initial review called for under § 204.2 (a) of the Rules.[10]

We therefore reverse the Director's dismissal to the extent it dismissed Sainpaulin's claim that CSEA violated § 209-a.2 (c) of the Act when it filed a grievance challenging Sainpaulin's discipline outside of the time limitations provided in the CBA. We remand the case for further processing consistent with this opinion.

DATED: April 25, 2018
Albany, New York



John F. Wirenius, Chairperson



Robert S. Hite, Member

[8] *United Fedn of Teachers (Grassel)*, 23 PERB ¶ 3042, 3084 (1990) (ordering further processing where union did not respond to union member's request for information regarding his grievance).
[9] *See, eg, United Fedn of Teachers v City of New York*, 154 AD3d 548, at 549.