In the Matter of

POLICE BENEVOLENT ASSOCIATION OF NEW YORK STATE, INC.,

Charging Party, **CASE NO. U-32359**

- and -

STATE OF NEW YORK (OFFICE OF PARKS, RECREATION AND HISTORIC PRESERVATION),

Respondent.

GLEASON, DUNN, WALSH & O'SHEA (RONALD G. DUNN of counsel), for Charging Party

MICHAEL N. VOLFORTE, DIRECTOR (CLAY LODOVICE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the State of New York (Office of Parks, Recreation and Historic Preservation) (State) to a decision of an Administrative Law Judge (ALJ) finding that the State violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by unilaterally implementing a schedule for sergeants in the Long Island region of the division of park police for the time period of September 27, 2012 to May 8, 2013 (winter 2012-2013 schedule).[1] The ALJ ordered the State to restore the schedule to that which existed prior to September 27, 2012, to make whole affected unit employees represented by the Police Benevolent Association of New York State, Inc. (PBA), and to post a notice.[2]

EXCEPTIONS

The State excepts to the ALJ's decision on numerous grounds. The State argues that language in the parties' collective bargaining agreement (CBA) provides the PBA with a source of right with respect to setting of shift assignments, thus depriving the Board of jurisdiction over

[1] 48 PERB ¶ 4557 (2015).
[2] Because of the recusal of then Members Allen C. DeMarco and Robert S. Hite from this matter, the Board has not hitherto had a quorum to decide this case.

the current dispute. In the alternative, the State argues that the Board should defer to the parties' agreed-upon dispute resolution procedures and conditionally dismiss this proceeding. Also relying on the contract language, the State argues that it has satisfied any duty to negotiate over the winter 2012-2013 schedule and that the PBA has waived the right to further negotiate the winter 2012-2013 schedule.

In addition to its arguments related to the language in the CBA, the State argues that it has a past practice of implementing schedules without negotiating with the PBA and that the PBA has waived its right to object to this practice through acquiescence, that the PBA has not established that there was, in fact, any change to a mandatory subject of bargaining, and that the improper practice charge was untimely. In addition, the State challenges the ALJ's proposed remedial order. The PBA supports the ALJ's decision and remedial order in all respects.

Based upon our review of the record and our consideration of the parties' arguments, we affirm the ALJ's decision but modify the remedial order.

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 is the bargaining agent for the agency police services unit, which encompasses titles employed by the division of park police, including sergeant. The PBA and the State are parties to a CBA. Article 15.3 of the CBA, titled "Shift Changes," states that "[n]o employee shall have his shift schedule changed for the purposes of avoiding the payment of overtime," unless the employee receives notice of such change. Article 15.3 also provides that regularly scheduled days off shall not be changed for the purpose of avoiding overtime payments,[3] and that prior to making a final decision with respect to instituting a change in shift system from fixed shifts to rotating shifts or from rotating shifts to fixed shifts, the State must inform the PBA of

[3] Joint Exhibit 3.

such "contemplated change" and provide the PBA with an "adequate opportunity" to review the impact of such change at the appropriate level.[4]

Article 24.3 of the CBA states, in full:

> Where vacancies at a facility or region are known to exist, the Superintendent, appointing authority or designee shall announce the vacancy in writing for a period of 15 days in advance of making permanent assignment in order to allow employees to submit bids. The agency shall have the right to make any job and shift assignment necessary to maintain the services of the agency involved. Job and shift assignments shall be made in accordance with the employee's ability to properly perform the work involved. In the event of equal ability, seniority shall prevail. Grievances arising under this section shall be processed up to Step 3 of the grievance procedure[5] but not to arbitration. (Additional information concerning the filling of job and shift assignments is contained in a side letter of this contract.)[6]

Park police unit members work under a summer and a separate winter schedule. Until a statewide scheduling committee was created two or three years prior to the hearing, scheduling was determined locally by each of the regions which make up the division. Since creation of the scheduling committee, the statewide committee meets, with majors from various locations representing the State and PBA representatives participating, after communication between the parties on the regional level.

The parties confer regarding the creation of the summer and winter schedules, although the parties dispute whether these discussions constitute "negotiations." Specifically regarding the Long Island region, Richard O'Donnell, the chief of the division of park police, testified that he "would kind of set the wheels in motion"[7] and then the commanding officer on Long Island or

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[4] Id.
[5] Id. Under § 7.2 (a) of the CBA, Step 3 of the contractual grievance procedure is an appeal of a department or agency head's decision to the director of the Governor's Office of Employee Relations.
[6] Id.
[7] Tr, at p. 77.

that officer's designee "would ultimately make the…draw up the actual schedule document…."[8] After this initial process, O'Donnell explained, the commanding officer and staff would

> internally confer, determine what they need scheduling wise, and they would then submit it to me at headquarters and we would take a look at it. I would usually discuss it with the colonel, and if we were satisfied with what we saw, we would tell the local commander, "Schedule looks good."[9]

Regarding communication with the PBA on the schedule, O'Donnell acknowledged that the PBA "[g]enerally…comes to us, and in discussions about many things will say, 'we have an upcoming bid period approaching. We need to…get the new—the schedule ready. Can we meet to discuss it?'"[10] He continued, "in the past often we would come to them with the schedule already done and we would say, 'Hey, here's the schedule.' They would have an opportunity to give us some input on that, and that's historically how it worked."[11] Describing the PBA's "input,"[12] O'Donnell testified:

> [W]hen we would present the schedule that…we had in mind, the [PBA] might tell us that, you know, this particular assignment, a location in the past had certain pass days attached to it and the member who worked at that location liked those pass days and now he was going to be forced out of that location because he needs Tuesday, Wednesday off and we moved the Tuesday, Wednesday to another location. We would have many of those discussions.[13]

O'Donnell testified that sometimes PBA proposals regarding the schedules were accepted, while sometimes they were not, and that he "always retained the final say."[14]

Manny Vilar, the PBA's president and a park police sergeant, also testified about the process by which the schedules are created. According to Vilar, sometimes the State presents the initial schedule and sometimes the PBA would do so, but the parties "always tried to

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[8] Id.
[9] Tr, at p. 78.
[10] Tr, at p. 81.
[11] Id.
[12] Tr, at p. 82.
[13] Id.
[14] Id.

negotiate to a resolve."[15] When the parties met on the regional level, "they would discuss their schedules and would come to some sort of agreement and the schedule would be implemented, and that occurred everywhere in the state."[16] The state-wide committee:

> added another level of negotiation where once there was a consensus on the local level, there would now be…a more refined negotiation if there could not be a resolve on a local level…to try and see if we could reach resolution.[17]

In prior years, the parties, according to Vilar, "always reached a resolve."[18] When asked on direct examination if the State ever "simply imposed something," Vilar responded, "No."[19] On cross-examination, he similarly testified, "[e]very schedule that we've ever had we've agreed to."[20] Vilar acknowledged that the parties have never signed a document indicating their agreement to a schedule.[21]

The ALJ found that, in the past, the parties reached agreement on the summer and winter regional schedules pursuant to biannual joint regional and statewide meetings and that the State did not establish that it unilaterally set the summer and winter schedules. The ALJ found that, although the State established that the schedules put in place over the previous years were often the schedules it initially presented, such evidence did not prove that the schedules were set unilaterally by the State. The ALJ also found that the State's evidence was not in conflict with Vilar's testimony, which the ALJ also found credible, that the schedules were agreed to by the parties as a result of discussion at the scheduling meetings. The ALJ found that O'Donnell's testimony that he implements the schedule which the command staff of a region believes "necessary to the operation"[22] of that region and that he retains the "final say"[23] on the

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[15] Tr, at p. 29.
[16] Tr, at pp. 27-28.
[17] Tr, at p. 28.
[18] Tr, at p. 33.
[19] Id.
[20] Tr, at p. 45.
[21] Tr, at pp. 45-46.
[22] Tr, at p. 90.

schedules does not establish the contrary, as there is no record evidence that the parties have ever concluded their meetings in disagreement prior to the at issue schedule. Therefore, the ALJ found the fact that O'Donnell was successful in obtaining the schedules he wanted and believed he had "final say" without ever having had to exercise it does not overcome Vilar's testimony that the meetings concluded with the parties in agreement, as well as the absence of record evidence of past disagreement on the schedules being implemented.[24]

The specific work schedule at issue in these proceedings was the 2012-2013 winter schedule, which was effective from September 27, 2012 to May 8, 2013. The parties met, consistent with their past practice, and agreed on the schedules for all employees except the park police sergeants for the Long Island region.[25] The State implemented the schedule for these employees that it had initially presented to the PBA.

DISCUSSION

While it is an employer's prerogative to determine the number of employees on duty at a particular time, there are many different options to set schedules to satisfy the employer's staffing needs. The scheduling of shifts to do so is a mandatory subject of negotiations.[26] As a result, the State's decision to implement the 2012-2013 sergeant schedule absent the PBA's agreement constituted a violation of § 209-a.1 (d) of the Act, unless one or more of the defenses offered by the State have merit.

The State makes a number of arguments based on the language of the CBA. First, the State argues that the underlying dispute here is essentially contractual and that the Board lacks jurisdiction under § 205.5 (d) of the Act to make a finding on the allegations in the charge. Specifically, the State argues that scheduling for bargaining unit employees is comprehensively

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[23] Tr, at p. 83.
[24] 48 PERB ¶ 4557, at 4712.
[25] Tr, at pp. 31-33, and 88-90.
[26] *See, eg, City of White Plains*, 5 PERB ¶ 3008, 3015 (1972); *Town of Blooming Grove*, 21 PERB ¶ 3032, 3069-3070 (1988); *County of Columbia*, 41 PERB ¶ 3023, 3108 (2008).

covered by Articles 15.3 and 24.3 of the CBA and that, together with the agreed-upon dispute resolution process in the CBA, these provisions provide the PBA with a source of right with respect to the setting of shift assignments. In the alternative, the State argues that the ALJ should have deferred to the parties' agreed-upon dispute resolution procedures and conditionally dismissed the proceeding.

The Board has jurisdiction over alleged unilateral changes in terms and conditions of employment unless an existing contract gives a charging party a reasonably arguable source of right regarding the subject of its improper practice charge.[27] The jurisdictional limitation in § 205.5 (d) is implicated only when a term of the contract has arguably been violated by the respondent's action at issue under the charge.[28]

Nothing in the contract provisions cited by the State affords PBA unit members a contractual right to agree to schedules with the State. The PBA claims no such contractual right,[29] and the State argues that Articles 15 and 24 of the CBA are sources of right, not to the PBA, but to it, permitting it to unilaterally set schedules.[30] The State's defenses of waiver and duty satisfaction (discussed below) go to the merits of the PBA's charge, not to the ability of the

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[27] *State of New York (OMH-Roch Psyc Ctr)*, 50 PERB ¶ 3032, 3128 (2017); *County of Nassau*, 23 PERB ¶ 3051, 3108 (1990).

[28] *State of New York (Unified Court System)*, 25 PERB ¶ 3035, 3073 (1992); *County of Livingston*, 30 PERB ¶ 3046, 3106 (1997).

[29] The PBA argues that its right to negotiate over schedules derives from the Act, not the CBA.

[30] *State of New York (OMH-Roch Psyc Ctr)*, 50 PERB ¶ 3032, at 3128 ("However, if an agreement is a source of right to the employer, an issue of a waiver of the right to negotiate is presented," or one of duty satisfaction. Such arguments concern the merits of the charge, not jurisdiction.") (quotation marks and citations omitted); *see also County of Nassau*, 23 PERB ¶ 3051, at 3108, stating that if the agreement is a source of right to the employer, an issue of waiver of the right to negotiate may be presented. However, waiver of the right to negotiate is a matter which necessarily lies within PERB's jurisdiction. A determination whether a party has waived the right to negotiate an issue goes to the disposition of the charge on its merits, but not to PERB's power to reach those merits."

Board to hear the matter. The ALJ was, therefore, correct in holding that the unilateral change allegation is within our jurisdiction to decide on the merits.[31]

Similarly, because the CBA does not provide a reasonably arguable source of right to the PBA, we find that the ALJ did not err by refusing to defer to the dispute resolution process in the CBA.[32]

Next, the State asserts that Articles 15.3 and 24.3 establish both that it satisfied any duty it had to bargain over schedules and that the PBA waived any right it had to further bargain about scheduling.

Duty satisfaction occurs when a specific subject has been negotiated to fruition and may be established by contractual terms that either expressly or implicitly demonstrate that the parties had reached accord on that specific subject.[33] A satisfaction of the duty to negotiate necessitates record evidence of facts establishing that the parties negotiated an agreement upon terms which are reasonably clear on the subject presented to us for decision.[34]

In contrast to duty satisfaction, waiver involves either the express relinquishment of specified rights or the use of language that establishes "a clear, intentional, and unmistakable

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[31] We find the State's reliance on *State of New York, Dept of Correctional Services*, 23 PERB ¶ 4509 (1990) to be unavailing. As a threshold matter, "a decision of an ALJ is not binding on the Board and has no precedential value." *County of Nassau*, 48 PERB ¶ 3023, 3089, n. 89 (2015). Moreover, the contract language at issue in that case was materially different from that present in the current case. We have often held that "[p]rior Board decisions interpreting other contract language is generally not probative to determining a duty satisfaction, contract reversion or waiver defense in a subsequent case involving different parties and contracts." *County of Nassau*, 48 PERB ¶ 3014, 3051 (2015).

[32] *County of Rockland and Rockland County Sheriff*, 30 PERB ¶ 3020 n. 3, 3045-3046 (1997); *City of Utica*, 31 PERB ¶ 3039, 3087 (1998).

[33] *BOCES of Nassau County*, 51 PERB ¶ 3007, 3031 (2018); *County of Nassau*, 48 PERB ¶ 3014, 3051 (2015), citing *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, 3089 (2014).

[34] *BOCES of Nassau County*, 51 PERB ¶ 3007, at 3031; *Orchard Park*, 47 PERB ¶ 3029, at 3089; *New York City Transit Authority*, 41 PERB ¶ 3014, 3076 (2008).

relinquishment of the right to negotiate the particular subject at issue" by relieving the other party of the duty to negotiate on that subject.[35]

In short, duty satisfaction is found when the duty to negotiate the specific subject at issue has been in fact satisfied, while waiver relieves the beneficiary of the specified statutory duties, including the duty to negotiate under the Taylor Law.[36]

In determining whether an agreement contains a provision that satisfies a respondent's duty to negotiate or a waiver of a charging party's right to negotiate a mandatory subject, we apply standard principles of contract interpretation.[37] When the contract language is clear and unambiguous, evidence outside the four corners of the agreement will not be considered. However, where the language is susceptible to more than one reasonable interpretation, extrinsic evidence, such as negotiation history and/or a past practice, is admissible to clarify the ambiguity and thereby effectuate the intent of the parties.[38]

In the present case, the State argues that the clear and unambiguous language contained in Articles 15.3 and 24.3 demonstrates that, contrary to the ALJ's conclusion, the parties reached an agreement that allows the State to unilaterally set the summer and winter schedules. Specifically, the State points to the language in Article 24.3 that, "[t]he agency shall have the right to make any job and shift assignment necessary to maintain the services of the agency involved." The State argues that Article 15.3 places limitations upon the employer's ability to change either a shift assignment or a regular day off but evidences an agreement that the agency may change a unit employee's shift assignment or regular day off for any other reasons

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[35] *Orchard Park*, 47 PERB ¶ 3029, at 3089; *New York City Transit Authority*, 41 PERB ¶ 3014, 3076 (2008).
[36] Id. *See also County of Nassau*, 31 PERB ¶ 3064, 3142 (1998).
[37] *New York City Transit Authority*, 41 PERB ¶ 3014, at 3076; *County of Columbia*, 41 PERB ¶ 3023, 3106 (2008).
[38] Id.

without further negotiations.[39] The State argues that, together, Articles 15.3 and 24.3 comprehensively cover the setting of, bidding upon, and alteration of shift assignments. As a result, the State argues that it has satisfied any duty to negotiate the setting of shift assignments and that the PBA has waived the right to further negotiate setting of shift assignments. We affirm the ALJ's rejection of these arguments.

As explained above, Article 24.3 is contained in a section entitled "Seniority." Although the State points to language stating that "[t]he Agency shall have the right to make any job and shift assignment necessary to maintain the services of the agency involved," this language cannot be viewed in isolation. Read in context with the rest of the clause, it is clear that the statement refers to job and shift assignment changes that arise as a result of vacancies, not to the process of setting the summer or winter schedules. Article 24.3 simply gives the State the right to maintain coverage levels when vacancies arise, and it cannot be reasonably construed as constituting authority for the State to set the winter and summer schedules.

Article 15.3, on its face, speaks only to shift changes made for the purposes of avoiding the payment of overtime. The provision appears to be directed at individual, *ad hoc* changes, and neither the language nor the context suggests that it addresses the initial setting of the winter and summer schedules. As correctly found by the ALJ, Article 15.3 is simply not relevant to the issue before the Board, and it certainly cannot be read as embodying agreement on the subject matter of the biannual setting of the schedules.[40]

In sum, we find, first, that it is not reasonably clear from the language of the CBA that the parties reached agreement with respect to the process of setting the winter and summer

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[39] Brief in Support of Exceptions pp. 10-11.

[40] *Cf. BOCES of Nassau County*, 51 PERB ¶ 3007, at 3031-3032 (finding duty satisfaction defense established over subject of payment of accumulated annual leave to departing employees where contract comprehensively provided for circumstances unders which such leave would be paid).

schedules.[41] Second, we find that neither Article 24.3, nor Article 15.3, nor the two provisions together, constitute a clear, intentional, and unmistakable waiver of the PBA's right to negotiate the mandatory subject of scheduling.[42]

In addition to its exceptions based on the language of the parties' CBA, the State also argues that the schedule was implemented pursuant to a long established practice wherein the State unilaterally set work schedules. The ALJ rejected this argument, finding that the State had failed to establish a past practice of unilaterally implementing schedules. Instead, the ALJ found that the parties had a practice of meeting "biannually to fashion the work schedules" and that, in the past, "the parties reached agreement on the summer and winter regional schedules. . . ."[43] We affirm these findings. The ALJ reached this conclusion of fact predicated on his finding that the witnesses' testimony did not materially differ as to what had in fact happened at their meetings, and that O'Donnell's subjective belief that the State could unilaterally implement the schedule in the event of a failure to obtain a schedule by mutual agreement, was not probative, as it had never been tested. The ALJ's conclusions were based primarily on the testimony of witnesses for both the State and the PBA, both of whom he credited. We find that the record adequately supports the credibility determinations made by the ALJ, as well as the conclusions that the ALJ drew from the testimony. Credibility determinations by an ALJ are generally entitled

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[41] Because the State has not pointed to any CBA provisions that address the setting of the winter and summer schedules, or which so comprehensively set up a framework regarding scheduling that the exclusion is, in context, a deliberate choice leaving the matter to management's discretion, we cannot find that the CBA "implicitly demonstrates" that the parties had reached accord on the issue. *Cf. Kent v Lefkowitz*, 27 NY3d 499, 49 PERB ¶ 7005 (2016) (finding that agreement implicitly demonstrated that parties had reached accord with respect to limits on Budget Director's statutory discretion where agreement was "comprehensive in addressing all conditions of employment").

[42] The State argues that, to the extent that the language is unclear or ambiguous, the proceedings should be remanded to allow it to present parol evidence of how language identical to Articles 24.3 and 15.3 have been interpreted and applied by the State in other contexts. We find that parol evidence is inappropriate in this context. The language is neither unclear nor ambiguous; we find that it simply cannot be read as the State urges.

[43] 48 PERB ¶ 4557, at 4712.

to "great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect."[44] Here, the State has not provided any such objective evidence that establishes that the ALJ manifestly erred. In sum, we find that the State failed to prove that it had unilaterally set work schedules in the past.[45]

We also affirm the ALJ's finding that the charge is timely because it was filed within four months of the State's implementation of the 2012-2013 work schedule.[46]

Finally, we examine the State's exceptions challenging the ALJ's remedial order directing it to restore the winter sergeant schedule in the Long Island region of the division of park police to that which existed prior to the September 27, 2012 to May 8, 2013 schedule and to cease and desist from unilaterally implementing unit work schedules. The State argues that the remedy is overbroad and would require changes to non-mandatory subjects of bargaining, such as staffing levels.

The disputed schedule here was effective only for a limited, discrete period of time that has long since passed (September 27, 2012 to May 8, 2013). No evidence or allegations exist in the record to suggest that any recurrence of the unilateral setting of the schedule has taken place subsequent to that alleged in the charge. No effect of the winter 2012-2013 schedule on

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[44] *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3077 (quoting *UFT (Cruz)*, 48 PERB ¶ 3004 (2015)); *see also Village of Scarsdale*, 50 PERB ¶ 3007, n. 51 (2017); *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014); *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014); *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019 (2008); citing *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); *see also County of Ulster*, 39 PERB ¶ 3013, at 3045-3046 (citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7PERB ¶ 7005, 7009 (1st Dept 1974)) (deference due credibility determinations based on observation of witness's demeanor).

[45] As the record does not support such a finding, the State's past practice argument must fail. However, we note that the State's argument seems more aptly characterized as an additional (albeit unsuccessful) theory of waiver than it does a claimed past practice. Such a waiver can be established through silence, inaction, or conduct inconsistent with the exercise of a right to negotiate. *See, eg*, *Ithaca PBA, Inc*, 49 PERB ¶ 3030 (2016); *Orchard Park Cent Sch Dist*, 47 PERB ¶ 3029, 3089 (2014). Such waivers are not, of course, binding in perpetuity, and do not render nonmandatory the matter waived.

[46] *See New York Transit Authority*, 42 PERB ¶ 3012, 3039 (2009).

the parties' subsequent discussions, or on the schedules that eventuated has been either pleaded or proven. As a result, we find that restoration of the *status quo* ante is impossible and that it would not effectuate the purposes of the Act to order the State to restore the schedule to that which existed before September 27, 2012.[47] We find, however, that the ALJ properly ordered the State to cease and desist unilaterally implementing work schedules for bargaining unit employees and to make employees whole for wages and/or benefits lost, if any, as a result of the State's unlawful conduct.

IT IS, THEREFORE, ORDERED that the State shall forthwith:

1) Cease and desist from unilaterally implementing unit work schedules;
2) Make unit employees whole for wages and/or benefits lost, if any, as a result of its implementation of the September 27, 2012 to May 8, 2013 work schedule as to sergeants in the Long Island region of the division of park police, with interest at the maximum legal rate; and
3) Sign and post notice in the form attached at all physical and electronic locations customarily used to post notices to unit employees.

DATED: September 5, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[47] *Compare Manhasset Union Free School Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231,1235, 42 PERB ¶ 7004 (3d Dept 2009) (finding enforcement of PERB's order unreasonable where compliance might be impossible), *on remand* 42 PERB ¶ 3016 (2009).

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the State of New York (Office of Parks, Recreation and Historic Preservation) in the bargaining unit represented by the Police Benevolent Association of New York State, Inc.that the State will forthwith:

1. Not unilaterally implement unit work schedules; and

2. Make unit employees whole for wages and/or benefits lost, if any, as a result of its implementation of the September 27, 2012 to May 8, 2013 work schedule as to sergeants in the Long Island region of the division of park police, with interest at the maximum legal rate.

Dated . . . . . . **By . . . . . .**
(Representative) (Title)

State of New York (Office of Parks, Recreation and Historic Preservation)

. . . . . .

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

In the Matter of

USHER Z. PILLER,

Charging Party,

- and -

CASE NO. U-32952

STATE OF NEW YORK (OFFICE OF TEMPORARY AND DISABILITY ASSISTANCE),

Respondent.

BARRY MARKMAN AND ROBERT G. WRIGHT, for Charging Party

MICHAEL N. VOLFORTE, DIRECTOR (CLAY J. LODOVICE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Usher Z. Piller to a decision and order of an Administrative Law Judge (ALJ).[1] The ALJ dismissed Piller's improper practice charge to the extent it alleged that the State of New York (Office of Temporary and Disability Assistance) (OTDA) violated §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) when it directed Piller not to remain in the workplace during nonworking hours.[2]

EXCEPTIONS

Piller filed two exceptions to the ALJ's decision. In his first exception,

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[1] 50 PERB ¶ 4545 (2017).

[2] This the only aspect of the ALJ's decision to which exceptions were filed. Accordingly, the other aspects of the ALJ's decision are final and binding on the parties and not properly before us. *See* Rules of Procedure (Rules) § 213.10 (b).

Piller argues that the ALJ's finding of a legitimate business reason to bar Piller from the premises after hours rests on her erroneous factual finding that Piller was an overtime eligible employee, and that OTDA does not allow such employees to remain on premises after the conclusion of their workday. Piller's second exception contends that the ALJ erred by revoking a subpoena that he had requested, and which the ALJ had previously granted.

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

Based on our review of the parties' arguments, we reverse the ALJ's decision to the extent it is before us for review and remand for further processing consistent with our 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.

Piller has worked for OTDA since 1979 and has worked as a Management Specialist II in the Harlem office since approximately 2002. The New York State Public Employees Federation, AFL-CIO (PEF) represents various positions within OTDA, including Piller's. Piller is a PEF shop steward and council leader, and he has served as a PEF representative for 25 years. As a PEF representative, Piller performs various duties, including advocating for PEF members and representing them in grievances.

Donna Faresta has worked for OTDA's Bureau of Human Resources for

more than 30 years and has served as its director since approximately the end of 2012. Her office is responsible for all personnel-related matters, including the review of grievances and administration of collective bargaining agreements.

Piller, in his capacity as a PEF representative, had been representing Rafael Perez since 2012. Perez was a probationary employee who was terminated by OTDA on March 7, 2013, effective March 27, 2013. On July 18, 2013, Piller's direct supervisor, Andrew Georgides, told Piller that OTDA was imposing certain restrictions on him. The events leading to OTDA's decision to impose these restrictions are fully laid out in the ALJ's decision. Georgides read to Piller a list of restrictions that are set forth in a July 18, 2013 email by Faresta:

> 1. Cease and desist distributing any material referencing anything to do with justice for Rafael. This includes pens, stickers, flyers, etc.
>
> 2. Do not distribute any non-work related material in other employees [sic] work areas, including their inbox, on their desk and under the door to their office.
>
> 3. Repeat the directive to remove all Justice for Rafael stickers from the PEF bulletin boards.
>
> 4. Do not enter any work area, including on other floors, where he has no official business to perform.
>
> 5. Do not come in before his official start time – 9:30 a.m.
>
> 6. Leave the building promptly at the end of his work day – 5:30 p.m.[3]

Regarding the restriction that he limit his presence in the Harlem office to his scheduled worktime, Piller testified that everyone comes in early and stays

[3] Charging Party's Ex 10.

late and that, when he received the directive, he was the only employee to be so restricted.[4]

Faresta testified that overtime-eligible employees are not allowed to work outside their scheduled work hours.[5] She also testified that she imposed the restriction on Piller because of her concern that the distribution of information after regular work hours posed a safety and security threat. She stated that security is compromised if management is unaware that employees are in the building past their regular workday.[6] She further testified that it is OTDA's regular policy to direct its Harlem office employees to leave the building promptly at the end of their workday, and that employees have been counseled if they refuse to abide by that instruction.[7] Faresta stated that she considers the Harlem office to be in a location that is not safe, and that employees are also directed to leave the building promptly at the end of their workday for that reason.[8]

Faresta testified that during 2010 through 2013, the only employees who, to her knowledge, had remained in the Harlem office past their regular hours were Piller, Perez, and a former employee.[9] Faresta stated that the former employee was disciplined for not heeding the directive to leave promptly at the

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[4] Tr, at 62, 118.
[5] Tr, at 238.
[6] Tr, at 261.
[7] Tr, at 268.
[8] Id.
[9] *See* Charging Party's Ex 11. Piller testified that the only other employees to be instructed not to appear at work before or after their scheduled work day were Perez and the other former employee.

end of that employee's work hours.[10]

The ALJ granted Piller's pre-hearing subpoena duces tecum request for a

> complete copy of the report made in response to the discrimination complaint lodged by Mr. Usher Piller on or about August 13, 2013 on his own behalf with the OTDA Equal Opportunity and Diversity (EOD) office for an in camera inspection as to relevancy and materiality of the documents to the captioned charge and to hear any privacy objections.[11]

At the hearing, the ALJ revisited her decision and revoked the subpoena, finding that the subpoenaed report was not relevant because the complaint to the EOD office was made after the events at issue in the current case.[12] The ALJ also found that the report from the EOD office would not be binding on PERB and that the "better evidence" would be to have witnesses testify as to the allegedly improper actions.[13]

DISCUSSION

When an improper practice charge alleges retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the credible evidence: a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would not have been taken "but for" the protected

[10] Tr, at 268.
[11] ALJ Ex 5.
[12] Tr, at 27.
[13] Tr, at 29-30.

activity.[14] If the charging party can establish such an inference, the burden of production shifts to the respondent to present evidence demonstrating that its conduct was not improperly motivated.[15] The employer can dispel the prima facie case, and defeat the charge, through the presentation of "evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason."[16] If the respondent establishes a legitimate non-discriminatory reason, then the burden shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual.[17] When a charging party fails to meet its burden, a charge of improper motivation must be rejected and the charge dismissed.[18]

The ALJ found that Piller met his burden of establishing a prima facie case, but that OTDA demonstrated that it prohibited Piller from remaining in the workplace during nonworking hours for a legitimate, non-discriminatory business

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[14] *Lawrence Union Free Sch Dist*, 50 PERB ¶ 3034, 3141 (2017); quoting *Bellmore-Merrick Cent High Sch Dist*, 48 PERB ¶ 3022, 3976 (2015), citing *Village of Endicott*, 47 PERB ¶ 3017, 3050 (2014); *see generally, UFT, Local 2, AFL-CIO (Jenkins)*, 41 PERB ¶ 3007 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021 (2013); *see also City of Salamanca*, 18 PERB ¶ 3012 (1985).

[15] *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037; *see generally, Littlejohn v City of New York*, 795 F3d 297, 307-308 (2d Cir. 2015).

[16] *Catskill Housing Auth*, 49 PERB ¶ 3025, at 3080-3081; *Dutchess Community College*, 47 PERB ¶ 3018, 3056 (2014), *citing UFT (Jenkins)*, 41 PERB ¶ 3007, at 3018.

[17] *Bellmore-Merrick Cent Sch Dist*, 48 PERB ¶ 3022, at 3076.

[18] *Town of Tuscarora*, 48 PERB ¶ 3011, at 3037, *citing State of New York (SUNY Buffalo)*, 46 PERB ¶ 3021, 3040 (2013); *County of Tioga*, 44 PERB ¶ 3016 (2011).

reason, namely that OTDA expects overtime-eligible employees, such as Piller, not to work beyond their regular workday. OTDA also presented evidence, credited by the ALJ, that it considers employees remaining in the office past the regular workday to be "a security and safety issue."[19] Piller argues, and OTDA concedes, however, that the ALJ's finding is based on an error in her understanding of the facts. Specifically, it is undisputed that Piller is *not* an overtime-eligible employee.[20] Thus, the ALJ's finding regarding this aspect of OTDA's purported business justification is not supported.

Contrary to OTDA's assertion in its brief in opposition to Piller's exceptions, it is unclear from the ALJ's decision whether she found the security and safety concerns asserted by OTDA to be, independently, sufficient evidence of a legitimate business justification to demonstrate that OTDA was not improperly motivated in directing Piller not to remain in the workplace during nonworking hours. The ALJ's decision focuses on the treatment of overtime eligible employees, and only briefly alludes to Faresta's testimony that she considers it a security and safety issue when an employee remains in the office past the regular workday without management's knowledge. This is a determination for the ALJ to make in the first instance, and we remand the case for such an analysis based on the record as it currently exists.

Piller also argues that the ALJ made another factual error in finding that Piller failed to identify any employees, other than the deputy commissioner, who

[19] 50 PERB ¶ 4545, at 4625.
[20] Tr, at 191, 291.

have remained past work hours.[21] Piller did testify in a generalized manner that he was the only employee who was prohibited from remaining on OTDA premises outside his regular work schedule.[22] However, he also testified as to specific employees who he saw working beyond their regular work schedule.[23] It is not clear whether the ALJ took this testimony into account and/or whether she credited this testimony. On remand, we instruct the ALJ to explain the impact of this testimony on Piller's burden of proof.

We next address the issue of whether the ALJ erred by revoking the subpoena requested by Piller.

Piller sought a copy of the report made in response to his discrimination complaint with OTDA's EOD office. The basis of Piller's complaint to the EOD office appears to be that he was retaliated against based on his opposition to OTDA's discriminatory practices, specifically in the Perez case.[24] The retaliation alleged in Piller's complaint included, among other things, the instruction that Piller was not allowed to arrive at work prior to his scheduled start time and must leave promptly at his scheduled leave time. When Piller represented Perez, he was acting in his role as PEF steward and council leader.[25]

The ALJ revoked the subpoena because the complaint was not made to

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[21] 50 PERB ¶ 4545, at 4625.
[22] Tr, at 62, 118.
[23] Tr, at 214-215, where he testified to seeing Alex Siyahugh and "Kimberly", Tr, at 218 (Francisco Perez and Kelly Admisiyer), and Tr, at 220-221, where Piller indicated that he had further names to give.
[24] Tr, at 14, 19-20.
[25] Tr, at 19-20.

the EOD office until August 15, 2013, after the July 19, 2013 complained-of actions at issue in the improper practice proceeding. We agree with Piller that this was not a valid basis on which to deny the subpoena, where Piller complained to EOD about some of the same actions he alleges are unlawful here. The ALJ also found that the report from EOD would not be binding on PERB and that the "better evidence" would be to have witnesses testify as to the allegedly improper actions.[26]

An ALJ has the discretion to grant or deny a request for the issuance of an agency subpoena pursuant to § 211.2 of our Rules. We will not disturb a decision denying an application for a subpoena (or revoking a subpoena that has been granted) unless, upon our review of the entire record, we conclude that the ALJ abused his or her discretion resulting in prejudice to the requesting party's ability to present relevant and necessary evidence in support of a claim or defense.[27]

We find that the ALJ abused her discretion in revoking the subpoena at issue here, at least without examining the document in camera to determine whether it has any relevance to the proceeding. The report from EOD arguably could show that Piller was retaliated against for engaging in actions as a PEF steward and representative or could lead to the further production of evidence. While we agree with the ALJ that neither the facts of the report nor the

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[26] Tr, at 29-30.
[27] *NYCTA (Burke)*, 50 PERB ¶ 3015 (2017); *(Ruiz)*, 43 PERB ¶ 3022 (2010); *Oswego City Sch Dist (Carp)*, 25 PERB ¶ 3052 (1992).

conclusions drawn would be binding on her, we do find that the report might contain information that is relevant to Piller's claim and that he could suffer prejudice from not being allowed to subpoena this report. In these circumstances, we find that the ALJ erred in reversing her initial order that the report be produced for an in camera inspection as to relevance and materiality of the report to the improper practice charge and to hear any privacy objections.

In sum, we reverse the ALJ's subpoena ruling and remand this matter back to the ALJ for further processing consistent with this decision.

DATED: September 5, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

In the Matter of

POLICE BENEVOLENT ASSOCIATION OF NEW YORK STATE, INC.,

Charging Party, **CASE NO. U-33991**

- and -

STATE OF NEW YORK (STATE UNIVERSITY OF NEW YORK),

Respondent.

GLEASON DUNN WALSH & O'SHEA (RONALD G. DUNN of counsel), for Charging Party

MICHAEL N. VOLFORTE, DIRECTOR (CLAY J. LODOVICE of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Police Benevolent Association of New York State, Inc. (PBA) to a decision and order of an Administrative Law Judge (ALJ).[1] The ALJ granted a motion filed by the State of New York (State University of New York) (State or SUNY) to dismiss the PBA's charge on the ground that the PBA did not prove a *prima facia* violation of §§ 209-a.1 (a) and (d) of the Public Employees' Fair Employment Act (Act) when it allegedly unilaterally created and filled the positions of Administrative Captain and Technical Sergeant. The ALJ found that the PBA failed to meet its *prima facie* burden to show that the State, in fact, created new positions.

For purposes of this decision we emphasize that the PBA does not except to the ALJ's account of the facts, but argues that the ALJ erred in concluding that those facts do not make out a *prima facie* violation of the Act. Accordingly, we adopt the ALJ's account of the facts and do not reiterate them here.

[1] 51 PERB ¶ 4518 (2018).

DISCUSSION

We find it unnecessary to review the PBA's exceptions or the ALJ's granting of the State's motion to dismiss the charge. The creation and filling of new positions are management prerogatives that are not mandatorily negotiable.[2] For that reason, even if the PBA had met its *prima facie* burden of showing that the State created new positions, we would not find a violation of the Act.

Moreover, this record persuades us that no new positions were created. Rather, new in-house titles were given to several employees in recognition of their exemplary service without changes in their duties or terms and conditions of employment. Indeed, the record shows that the individuals' official civil service titles (University Police Officer I and II) were not changed. Giving the incumbents honorific titles with no concomitant change in their duties or related terms and conditions of employment does not amount to the creation of new positions.[3]

For the foregoing reasons, we dismiss the PBA's exceptions.

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

DATED: September 5, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[2] *See, eg*, *Churchville-Chili Cent Sch Dist*, 17 PERB ¶ 3055, 3085 (1984); *Town of Greece*, 26 PERB ¶ 3004, 3009 (1993); *see generally Saratoga Springs City Sch Dist v NYS Pub Empl Relations Bd*, 68 AD2d 202, 208 (3d Dept 1979) ("the good faith creation and abolition of job positions are not terms and conditions of employment and are not proper subjects of a collective bargaining agreement").

[3] We note that that one of the employee's weekend schedule was changed at the time he was granted the new title. There is no indication on this record, however, that the change in schedule had anything to do with his honorific title.

51 PERB ¶3024
B/R 50-4537

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

TEACHERS ASSOCIATION OF PLEASANTVILLE, NYSUT LOCAL 15140, AFT, AFL-CIO,

Charging Party,

CASE NO. U-34893

- and -

PLEASANTVILLE UNION FREE SCHOOL DISTRICT,

Respondent.

JOAN DEEM and ERIC MARSHALL, LABOR RELATIONS SPECIALISTS, for Charging Party

SHAW, PERELSON, MAY & LAMBERT, LLP (MARK C. RUSHFIELD of counsel), for Respondent

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the Pleasantville Union Free School District (District) to a decision of an Administrative Law Judge (ALJ), finding that the District violated §§ 209-a.1 (a), (b), (c), and (d) of the Public Employees' Fair Employment Act (Act).[1] The ALJ found that the District violated the Act by prohibiting employees represented by the Teachers Association of Pleasantville, NYSUT Local 15140, AFT, AFL-CIO (Association) from wearing Association t-shirts *en masse* in a concerted display of support for the Association, and by issuing a memorandum to unit members regarding the District's positions in bargaining and regarding the t-shirt

[1] 50 PERB ¶ 4537 (2017).

activity.

EXCEPTIONS

The District filed 31 exceptions to the ALJ's decision. Exceptions 1-15 argue that the ALJ erred in making certain specified factual findings. On the substantive merits, the District argues that it did not violate §§ 209-a.1 (a) or (c) of the Act by communicating to the Association and unit members that it viewed the plan for unit members to wear Association t-shirts as unlawful.[2] The District argues that wearing Association t-shirts was not protected activity and that, in any event, unit members did not suffer any adverse consequences. The District also argues that its actions did not violate § 209-a.1 (b) of the Act because none of the actions the District took affected the Association's independence.[3] Finally, the District argues that its memorandum to unit members did not violate §§ 209-a.1 (a) or (d) of the Act because the memo did not contain any threats of reprisal or promise of benefits.[4]

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

Based upon our review of the record and our consideration of the parties' arguments, we affirm in part, and reverse in part, the ALJ's decision.

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[2] Exceptions, Nos. 16-29, 31; Brief in Support of Exceptions, 10-23.
[3] Exceptions, No. 31; Brief in Support of Exceptions, 23-31. The ALJ dismissed the allegations that the District implemented a unilateral change to terms and conditions of employment in violation of §209-a (1) (d) of the Act. As a result, the District's arguments that its actions did not amount to a unilateral change are superfluous, and we do not address them.
[4] Exception 30; Brief in Support of Exceptions, 31-32.

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. We have carefully reviewed the record in light of the District's exceptions to the ALJ's factual findings and have modified the facts as recited by the ALJ in a number of respects.

The Association is the exclusive bargaining agent for all teachers, teaching assistants, and certified professional staff of the District. In October 2015, the Association and the District were at impasse in their efforts to reach a successor collective bargaining agreement (CBA) and proceeded, in November, to fact-finding after three unsuccessful mediation sessions.

On or about November 2, 2015, the Association leadership informed its members that it had purchased 240 t-shirts imprinted with a newly designed Association insignia on the front, and the quote "Teachers affect eternity; they can never tell where their influence stops. – Henry Brooks Adams" printed on the back.[5] The black and green t-shirts were paid for by a New York State United Teachers (NYSUT) fund known as "Vote COPE," to which NYSUT locals contribute to support political lobbying efforts. Notably, the quote on the back of the t-shirts was the same, in part, as a quote that was engraved on glass paperweights given to Association members by the District upon receipt of tenure. Those paperweights specifically read: "Teachers Affect Eternity"[6] and are displayed on many teachers' desks and the desk of at least one assistant principal.

[5] Charging Party's Exs Nos. 1 and 1A.
[6] Charging Party's Ex 12.

The Association requested that members in all three District buildings wear the shirts on November 25, 2015, the day before Thanksgiving recess and a day scheduled by the District for a planned student emergency rapid dismissal drill. Association president Lorraine Kearney (Kearney) testified that the activity was intended to build "solidarity" within the membership.[7] Association vice president Sara Lamar (Lamar) testified that wearing t-shirts was meant to show solidarity and "thankfulness" for members' work at the District.[8]

On November 9, 2015, Superintendent Mary Fox-Alter (Fox-Alter) summoned Kearney and Lamar to her office for a meeting. Fox-Alter informed the union officials that, according to legal counsel, wearing the t-shirts would be a violation of state regulations and the Act. She said it would be a distraction to students and warned that if unit members participated in the activity, retroactive pay would be off the table in negotiations.[9] When, after the meeting, the Association requested citations to the law supporting the superintendent's statements on illegality, none were provided.

On November 18, 2015, the Association distributed the shirts to its members, along with a letter from Kearney.[10] The letter said that the District, relying on PERB rulings,[11] had stated that teachers are not permitted to wear the t-shirts during the

[7] Tr, at pp. 18-19.
[8] Tr, at p. 152.
[9] Tr, at p. 50.
[10] Charging Party's Ex 8.
[11] No specific PERB cases were cited.

school day "because it is a distraction to the learning process."[12] The letter went on to state that the Association disagreed with the District's position, that the message on the t-shirts was "a very positive one about teachers and teaching," and that it was the Association's position that there was nothing distracting about the t-shirts. Kearney also noted that members of other local unions wear their union t-shirts on designated days. Kearney urged members to wear the shirts on November 25 "to … express your pride in being a teacher and in being a member of the Pleasantville Faculty."[13] There was no mention in the letter of negotiations with the District or of any labor relations dispute.

On November 24, 2015, at 3:53 p.m., Fox-Alter sent a message to Association negotiators, via District e-mail, "calling on" them to "convey the message to the faculty that they are **not** to wear the tee-shirts" in classrooms, student contact areas and public contact areas the next day.[14] She again claimed that the Act and PERB caselaw supported her position, without providing specific references, and added that the law prohibits enmeshing students in an adult labor dispute between the District and its teachers. She also said that she had been informed by some staff members that it was "important" for the community to see the t-shirts, but did not identify the source and could not recall the names of those persons at the hearing.[15] She went on to state that the emergency dismissal has as its only purpose "student safety" and is "NOT for

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[12] Id.
[13] Id.
[14] Charging Party's Ex 9 (emphasis in original).
[15] Tr, at pp. 178-179.

teachers to display a message about a labor impasse."[16] The email concluded by stating, "M[y] directive on this issue is clear. (Tee-shirts are not to be worn as stated above.) if you disagree, you may file an IP charge or grieve it but the directive must be followed."[17]

Within two hours, Kearney sent an email to members informing them of the superintendent's directive, noting the possible consequences of not following it and advising members to not wear the t-shirts as had been planned.[18] Kearney and Lamar testified that they feared charges of insubordination and other adverse consequences for Association members if they wore the t-shirts, as well as potential adverse consequences on bargaining.[19] The Association's bargaining committee also verbally told Association members not to wear the t-shirts.[20] Members complied and the t-shirts were not worn.

On November 30, 2015, Fox-Alter distributed a letter to Association members, informing them of the District's proposals made in negotiations and its position on

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[16] Charging Party's Ex 9.
[17] Id. The District's Exception No. 7 contends that the ALJ erred in holding that Fox-Alter sent a message "ordering" Kearney and Lamar to direct members to refrain from wearing the Association t-shirts. As these facts make clear, however, Fox-Alter's email contained a clear "directive" that "must be followed" that employees were not to wear the Association t-shirts. The email also "called on" Kearney and Lamar to convey this directive to employees. In these circumstances, we find the ALJ's characterization of Lamar's directive as an order to be accurate.
[18] Charging Party's Ex 10.
[19] Tr, at pp. 61-62, and 141.
[20] Tr, at p. 60.

certain proposals for the purpose of resolving the impasse between the parties.[21] According to Lamar, some of the items that the superintendent raised as items that the District was open to were not presented in the letter as they had been originally proposed to the Association team in bargaining.[22] Fox-Alter's letter also addressed the District's position regarding the t-shirt controversy and reiterated the District's position regarding the t-shirt activity. On that latter point, she wrote:

> While the specific tee-shirt message that [the Association] wanted to convey is one that supports the value of teachers, the [Association]-directed collective wearing of this T-shirt during unresolved labor negotiations sends a very different message. Wearing message tee-shirts in classrooms is uncharacteristic of Pleasantville teachers and is inconsistent with the manner of faculty dress to which our students are accustomed. The District is committed to settling the Contract through the Taylor Law processes, while maintaining a school environment that is positive for learning. I firmly believe that our negotiations-related energies are best spent at the negotiations table.[23]

According to Kearney, who has been a member of the Association's bargaining team since 2006, this was the first instance in which the District directly communicated with members about the bargaining process.

There is no dress code in place at the District, but, at least since 2011, there has been a general requirement that teachers dress and maintain a professional appearance.[24] Uncontradicted testimony from Kearney and Lamar established that

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[21] Administrative Law Judge (ALJ) Ex 3B.
[22] Tr, at p. 143.
[23] *Id.*
[24] Tr, at p. 84.

there have been a number of instances in which staff members have worn t-shirts with imprinted logos, including a yellow and green t-shirt bearing the Association logo and name.[25] At other times, members of the professional staff have worn t-shirts at work that expressed messages such as "Save Our Oceans" or contained sports logos.[26] Also, several Association members all wore the same t-shirts, distributed by the District and the PTA for certain occasions. One such example is a white t-shirt with a black paw print and lettering that reads "KEEP CALM because 5th GRADE ROCKS."[27] That t-shirt was provided to fifth grade teachers by the PTA and has been worn by them, individually and together on designated days, "to show we work as a team and we are proud to be a fifth grade team."[28] Teachers on the high school science team, along with the high school principal wore bright blue t-shirts on at least one day, memorialized in a photograph published on the District website.[29] These t-shirts had splatters of pink and white and the head of a black panther with its mouth open and teeth showing; it read "LINK CREW 2015."

Additionally, members of the social studies department wore t-shirts, again with a photo displayed on the school website, the preceding year.[30] These t-shirts were dark blue with black lettering for days of the week and, on one, an indecipherable

[25] Charging Party's Exs 5 and 5A.
[26] Tr, at pp. 38-40, 45-46, and 123-124.
[27] Charging Party's Ex 13.
[28] Tr, at p. 121.
[29] Charging Party's Ex 14. Tr, at pp. 125, 127, and 129.
[30] Charging Party's Ex 15.

message.[31] They were ripped around the waist and at the neck and the six teachers who were photographed wearing them also wore shark's head hats.

Yet another photo from the District website depicts a principal and an assistant principal in green, white and black smiley faced t-shirts, standing inside the front entrance of the elementary school.[32] A third person, identified as a school security guard, is also pictured with them, wearing a handwritten message on a piece of paper or cardboard attached to a string around his neck.[33] Lastly, Association members have on occasion worn buttons at work bearing the message, "School-Related Professionals, SRP's, Essential to Education, NYSUT."[34] Kearney said they are worn to show appreciation for the work of the school-related professionals, especially on SRP Appreciation Day which, according to Lamar, represents a "somewhat organized" effort insofar as Association members are told they can wear them if they like.[35]

DISCUSSION

We first examine the Association's planned activity of having unit members wear Association t-shirts and the District's role in discouraging that conduct. The ALJ found that the District's conduct independently violated §§ 209-a.1 (a) and (c) of the Act.

The District argues that the ALJ erred in finding a violation of §§ 209-a.1 (a) and (c) of the Act for two reasons—because the planned activity of wearing Association-

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[31] The message is indecipherable in the photo submitted as evidence.
[32] Charging Party's Ex 16.
[33] The message is indecipherable in the photo submitted as evidence.
[34] Charging Party's Ex 6.
[35] Tr, at p. 94-95.

affiliated t-shirts was not a protected activity and because no employees suffered actual discipline or other adverse consequences. We do not find these arguments to be persuasive.

In *State of New York (Division of State Police)*, the Board held that a public employee has a protected right under the Act to wear union insignia in the workplace, while on duty, unless the employer can show special circumstances that outweigh the employee's statutory right.[36] The Board relied on case law from the private sector finding that the right to wear union insignia is a "reasonable and legitimate form of union activity" as well as cases from other jurisdictions finding that public employees enjoy a similar right to employees in the private sector.[37]

Employees represented by the Association here planned to engage "in a protected activity by expressing their membership in and support of" the Association.[38] This is supported by the testimony, credited by the ALJ, that Association members intended to wear the t-shirts to build solidarity among members. The District has not identified any "objective evidence in the record compelling a conclusion that

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[36] 37 PERB ¶ 3020 (2004), *affd sub nom State of New York (Division of State Police) v PBA of the New York State Troopers, Inc*, 25 AD3d 963, 39 PERB ¶ 7001 (3d Dept 2006). The case involved the wearing of union insignia by employees while off-duty. The Board, however, explicitly found, and we agree, that employees also enjoy such a right while on duty. Id, at 3057.

[37] The Board cited *Republic Aviation Corp v NLRB*, 324 US 793 (1945) as well as *Sheriff of Worcester County v. Labor Relations Comm*, 60 Mass. App. Ct. 632, 805 NE2d 46 (2004); *State of California (Dept of Corr)*, 22 PERC ¶ 29100 (1998); *Orange-Seminole-Osceola Transit Auth*, 11 FPER ¶ 16241 (1985). Cited at 37 PERB ¶ 3020, fns 3 and 5.

[38] *State of New York (Division of State Police)*, 37 PERB ¶ 3020, 3027 (2004).

th[is] credibility finding is manifestly incorrect."[39] We also find that the District has not demonstrated any "special circumstances" which outweigh the employees' statutory rights.[40]

The District cites cases in which the Board has held that a school district may prohibit discussion of pending negotiations with the public on its property[41] and that conduct is unprotected which "enmeshes" students into a pending labor dispute.[42] We find that the conduct at issue here is fundamentally different from that at issue in these prior cases.[43] The message on the t-shirts here contains no reference, expressed or implied, to pending negotiations, to the fact that the parties were at impasse, or to any other labor dispute. The District argues that the Association intended to use its members as "human billboards" to express a message to both students and members

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[39] *Village of Scarsdale*, 50 PERB ¶ 3007, n. 51 (2017), quoting *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014).

[40] In particular, we note that no evidence has been adduced to establish that this "presumptively protected activity" may "be found to be unprotected under the Act," on the ground that "under the totality of the circumstances, the conduct is found to be impulsive, overzealous, confrontational, or disruptive." *East Meadow Union Free Sch Dist*, 48 PERB ¶ 3006, 3020 (2015).

[41] *Chateaugay Cent Sch Dist*, 19 PERB ¶ 3076 (1986); *New Paltz Cent Sch Dist*, 17 PERB ¶ 3108 (1984).

[42] *Kings Park Cent Sch Dist*, 24 PERB ¶ 3026 (1991).

[43] We also note that the ALJ did not find credible Fox-Alter's assertion that the District was motivated by a concern that the t-shirt activity was planned by the Association to draw public attention to collective bargaining and would unduly enmesh students in a labor relations issue, due to Fox-Alter's demeanor and vagueness. 50 PERB ¶ 4537, at 4600. Again, the District has not adduced any "objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect," especially necessary to overcome an ALJ's credibility finding "where, as here, the credibility determination rests in part on the witness' demeanor." *County of Westchester*, 50 PERB ¶ 3016, 3068-3069 (2017).

of the general public that the services that Association members provided could be "withheld [through, for example a "work to contract"] to the detriment of students and parents."[44] We find this reading to be not only strained, but implausible. The message, as found by the ALJ, is certainly one that emphasizes the positive value provided by teachers. It is not, however, a message that it any way relates to negotiations, to the impasse, or to any other labor dispute.

The District also cites *Kings Park Central School District*, in support of its argument that the planned t-shirt activity was unprotected.[45] In *Kings Park*, the Board found an employee's comment in a union newsletter to be unprotected. The Board found that the comment consisted of a public disparagement of an employer's program and that it lacked any connection to a labor dispute or to any other aspect of the employer-employee relationship. In the current case, however, there is no disparagement of the employer. The t-shirts at issue, as explained above, simply express a positive message about teachers, as well as employees' membership in and, inferentially, at least, support of the Association. The situation here is categorically different from that in *Kings Park*.

We also do not find the absence of discipline to be a reason to reverse the ALJ's finding. Although no employees suffered discipline in the current case, that is only because they elected not to engage in protected activity after being threatened with adverse consequences by the District. Fox-Alter's email clearly contained an implied

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[44] District's Brief in Support of Exceptions, at 14.
[45] 27 PERB ¶ 3022 (1994).

threat of discipline if employees did not comply with her directive not to wear the Association t-shirts.

We, therefore, affirm the ALJ's finding that the District violated § 209-a.1 (a) of the Act by directing employees not to wear the at issue t-shirts. Employees had a protected right to wear the t-shirts while on duty and the District has not demonstrated any "special circumstances" which outweigh the employees' statutory rights.

We also affirm the ALJ's finding that the District's prohibition violated § 209-a.1 (c) of the Act. As the ALJ found, the District allowed employees to wear other t-shirts while on duty and explicitly banned these t-shirts because they related to the Association. Such disparate treatment of activity solely because it relates to activity associated with an employee organization is the very definition of a violation of § 209-a.1 (c) of the Act. We agree with the ALJ that this conduct satisfies the standard for establishing a *per se* violation[46] and, as discussed above, we find that the District has not shown a legitimate explanation justifying its actions.

We find merit, however, to the District's exceptions to the ALJ's finding that the District's conduct also independently violated § 209-a.1 (b) of the Act. Section 209-a.1 (b) of the Act declares it improper for a "public employer or its agents deliberately to dominate or interfere with the formation or administration of any employee organization

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[46] *UFT (Jenkins)*, 41 PERB ¶ 3007, 3043 (2008), *confd sub nom Jenkins v NYS Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct NY Co 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *Greenburgh Union Free Sch Dist,* 33 PERB ¶ 3018, 3049 (2000).

for the purpose of depriving [public employees] of [their rights guaranteed in § 202]."[47] We have long held that the term "interference" in subsection (b) is "designed to prevent a public employer from meddling in the internal affairs of the organization or trying to control it."[48] Moreover, we have also recently reaffirmed that "the prohibition in [that subsection] is directed to conduct by a public employer which would compromise the independence of an employee organization that represents or seeks to represent its employees."[49] The conduct complained of here is not of that character.

Although Fox-Alter issued a directive to Kearney and Lamar to communicate with the Association's members, this directive appears to have been a method for the District to communicate directly with the Association's members in order to thwart the Association's lawful activities. While the directive improperly interfered with protected activity, we do not find it was an attempt to compromise the independence of the union or meddle with its internal administration. As a result, we reverse the ALJ's finding that the District's directive not to wear the Association t-shirts violated § 209-a.1 (b) of the Act.

We next turn to the letter dated November 30, 2015, sent by Fox-Alter to unit members. The ALJ found that this letter violated § 209-a.1 (a) of the Act. The ALJ also found a § 209-a.1 (d) direct dealing violation. Contrary to the ALJ, we do not find that

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[47] *State of New York (Dept of Corrections and Community Supervision)*, 50 PERB ¶ 3037, 3157 (2017), quoting *Monroe BOCES No. 1*, 28 PERB ¶ 3068, 3157 (1995).
[48] Id, quoting *County of Rockland (Rockland County Community College)*, 13 PERB ¶ 3089, 3143 (1980).
[49] Id, quoting *County of Onondaga*, 14 PERB ¶ 3029, 3051 (1981) (editing marks and internal quotation marks omitted).

the District violated the Act through any statements made in the letter.

With respect to § 209-a.1 (a) of the Act, an employer may communicate directly with unit employees about employment issues so long as the communication does not contain threats of reprisal for their exercise of protected rights and does not promise them benefits for refraining from exercising those rights.[50] The test is a purely objective one, and we examine only whether a reasonable employee would view the statements as threatening or coercive in the context in which the statements are delivered.[51] An employer's representatives "are entitled to express opinions regarding the merits" of the subject at issue "so long as they do not do so in a coercive manner nor subvert the authority of the [Union's] negotiators."[52] We do not find any threatening, coercive, or otherwise unlawful statements in the letter. The letter may be implicitly critical of the Association, and it may encourage employees to pressure the Association to resolve the impasse, but it makes no promises nor threatens any reprisals. Overall, we find that the letter is a lawful exercise of the District's right to communicate directly with unit employees.

Direct dealing occurs when an employer impermissibly bypasses the employee organization for the purpose of negotiating or attempting to negotiate with an employee or a group of employees aimed at reaching an agreement on the subject under

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[50] *Buffalo City Sch Dist*, 49 PERB ¶ 3028, 3087 (2016); *Town of Greenburgh*, 32 PERB ¶ 3025 (1999); *City of Albany,* 17 PERB ¶ 3068, 3107 (1984).
[51] *Id*.
[52] *Buffalo City Sch Dist*, 49 PERB ¶ 3028, at 3088, quoting *City of Albany,* 17 PERB ¶ 3068, at 3106 and *Town of Huntington*, 26 PERB ¶ 3073, 3140 (1993).

discussion.[53] Contrary to the ALJ, we do not find a direct dealing violation here. Although the letter states proposals that the District is "open" to and, again, may have been intended to encourage employees to pressure the Association to accept the District's proposals, we do not find that the District, through the letter, was seeking to negotiate or reach an agreement with employees separate from negotiations with the Association.

Therefore, we affirm the ALJ's finding that the District violated §§ 209-a.1 (a) and (c) of the Act by prohibiting Association members from wearing Association t-shirts. In all other respects, the charge is dismissed.

Having affirmed the ALJ's findings in part, reversed them in part, and modified them, IT IS HEREBY ORDERED that the District forthwith:

1. Rescind its November 24, 2015 directive that Association members not engage in the protected activity of concertedly wearing the Association-provided t-shirts at issue therein;
2. Cease and desist discriminating against unit members for engaging in the protected activity of wearing the Association-provided t-shirts prohibited by the November 24, 2015 directive; and

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[53] *Dutchess Community College*, 41 PERB ¶ 3029 (2008); *CUNY*, 38 PERB ¶ 3011 (2005); *City of Schenectady*, 26 PERB ¶ 3047 (1993); *Town of Huntington*, 26 PERB ¶ 3034 (1993).

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

DATED: September 5, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE DECISION AND ORDER OF THE

NEW YORK STATE
PUBLIC EMPLOYMENT RELATIONS BOARD

and in order to effectuate the policies of the

NEW YORK STATE
PUBLIC EMPLOYEES' FAIR EMPLOYMENT ACT

we hereby notify all employees of the Pleasantville Union Free School District (District) in the bargaining unit represented by the Teachers Association of Pleasantville, NYSUT Local 15140, AFT, AFL-CIO, that the District will forthwith:

1. Rescind its November 24, 2015 directive that Association members not engage in the protected activity of concertedly wearing the Association-provided t-shirts at issue therein; and

2. Not discriminate against unit members for engaging in the protected activity of wearing the Association-provided t-shirts prohibited by the November 24, 2015 directive.

Dated . . . . . By . . . .
On behalf of the Pleasantville Union Free School District

This Notice must remain posted for 30 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

CITY OF ITHACA,

Charging Party,

-and-

CASE NO. U-35450

ITHACA POLICE BENEVOLENT ASSOCIATION, INC.,

Respondent.

In the Matter of

ITHACA POLICE BENEVOLENT ASSOCIATION, INC.,

Charging Party,

-and-

CASE NO. U-35494

CITY OF ITHACA,

Respondent.

ROEMER WALLENS GOLD & MINEAUX LLP (EARL T. REDDING of counsel), for City of Ithaca

JOHN M. CROTTY, ESQ., for Ithaca Police Benevolent Association, Inc.

BOARD DECISION AND ORDER

These cases come to us on exceptions filed by the Ithaca Police Benevolent Association, Inc. (PBA) to a decision of the Assistant Director of Employment Practices and Representation (Assistant Director) finding that the PBA violated § 209-a.2 (b) of the Public Employees' Fair Employment Act (Act) by submitting proposals to interest arbitration as to which the City of Ithaca (City) had already satisfied its duty to

negotiate.[1] The ALJ further found that the City had not violated § 209-a.1 (d) of the Act by submitting a demand concerning pension benefits.

EXCEPTIONS

The PBA filed five exceptions to the Assistant Director's decision. First, the PBA contends that the Assistant Director erroneously found that she lacked jurisdiction to decide the City's allegation that the PBA violated the Act by filing a petition for interest arbitration. In its second and third exceptions, the PBA claims that the Assistant Director further erred "by holding that the PBA's demands in its petition for interest arbitration constituted a refusal to bargain in violation of the Act," and in ordering the PBA to withdraw all of the proposals in that petition from interest arbitration.[2]

The PBA asserts in its fourth exception that the Assistant Director improperly found that the City's demand pertaining to retirement pensions was properly submitted to interest arbitration, and thus did not violate the Act. Finally, the PBA argues in its fifth exception that the Assistant Director committed reversible error by not ordering the dismissal in its entirety of the City's response to the PBA's petition as a remedy for the City's violation of the Act.

The City filed a response supporting the Assistant Director's decision. For the reasons that follow, we affirm the ALJ's decision in part, and modify it in part.

FACTS

Much of the relevant factual background has been summarized in our prior

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[1] 51 PERB ¶ 4503 (2018). The ALJ further found that the City had likewise violated § 209-a.1 (d) of the Act by submitting a nonmandatory management rights proposal, a conclusion as to which the City did not cross-except, and which is therefore not before us pursuant to § 213.2 of our Rules of Procedure. *See, eg, Lawrence Union Free Sch Dist*, 50 PERB ¶ 3034, 3140 (2017); *NYCTA (Burke)*, 49 PERB ¶ 3021, 3072, n. 4 (2016) and cases cited therein; *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014).

[2] Exceptions at 2, ¶¶ 2, 3.

decisions *City of Ithaca*[3] (*Ithaca I*) and in *City of Ithaca*[4] (*Ithaca II*), as well as in the Assistant Director's decision below. The facts are therefore given here only to the extent necessary to inform the resolution of the issues pending before us.

In March 2012, the PBA and the City began negotiations for a successor agreement to their collective bargaining agreement that had expired on December 31, 2011. The PBA filed a declaration of impasse on or about July 10, 2013, and, on or about May 8, 2014, after conciliation efforts, the City filed a petition for interest arbitration pursuant to § 209.4 of the Act and § 205 of PERB's Rules of Procedure (Rules).[5] On or about May 13, 2014, the PBA acknowledged receipt of the petition, but refused to submit to interest arbitration, asserting its right to maintain the status quo under § 209-a.1 (e) of the Act, and requesting the Director of Conciliation (Director) not process the City's petition for interest arbitration. Via letter dated May 30, 2014, the Director granted that request, and no public arbitration panel was designated.

In a letter dated December 23, 2014, the City attempted to commence a new round of negotiations for a successor agreement with a starting date of January 1, 2014. The PBA responded by a letter dated December 30, 2014 requesting negotiations for a successor agreement covering 2012 and 2013—the same two-year period denominated in the City's May 12, 2014 petition for interest arbitration, in which the PBA declined to participate.

In the wake of the PBA's demand, the City filed the improper practice charge giving rise to our decision in *Ithaca I*, claiming that the PBA violated § 209-a.2 (b) of the Act by refusing to negotiate with the City for a successor agreement with a starting date

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[3] 49 PERB ¶ 3030 (2016).
[4] 50 PERB ¶ 3006 (2017).
[5] The Assistant Director in her decision correctly notes that the petition was received on Tuesday, May 13, 2014.

of January 1, 2014, on the ground that the PBA's refusal to participate in interest arbitration for the 2012-2013 period had waived its right to negotiate for those years.

In our decision in *Ithaca I*, we rejected the City's waiver argument, but found that the City's "duty to negotiate in good faith over the status quo period, here 2012 and 2013, had been satisfied."[6] We dismissed the City's improper practice charge on the grounds that, as it had been neither pleaded nor proven that the PBA's demand constituted a condition on bargaining, "the fact the demand was made well prior to any declaration of impasse means that no improper practice has taken place."[7]

On December 2, 2016, the PBA filed the instant petition for interest arbitration, seeking an award to cover the period January 1, 2012 through December 31, 2013 — the same period at issue in *Ithaca I*. The City objected to the PBA's petition. The Director, based upon our finding that the City had satisfied its duty to negotiate for the 2012-2013 period at issue in *Ithaca I*, declined to process the petition on the basis that the PBA was not eligible for interest arbitration for that time period. The PBA filed exceptions to the Director's ruling, on the basis that the question was one of arbitrability, required to be decided through an improper practice charge, and not one of eligibility. In our decision in *Ithaca II*, we clarified that under § 205.6 of our Rules:

> In sum, 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. Arbitrability goes to the character of the substance of the dispute, while eligibility goes to the character of the parties.[8]

We found that the City's objection to the petition for interest arbitration was one

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[6] *Ithaca I,* 49 PERB ¶ 3030, at 3097; *see also Ithaca II*, 50 PERB ¶ 3006, at 3028.
[7] *Ithaca I,* 49 PERB ¶ 3030, at 3098.
[8] *Ithaca II*, 50 PERB ¶ 3006, at 3030.

of substance—that is, of arbitrability—and not of the parties' right to invoke interest arbitration, and thus must proceed through an improper practice or declaratory ruling proceeding. We declined to address the merits of the City's challenge to arbitrability, specifically noting that "[t]he question of the arbitrability of the PBA's demands is before the ALJ in the pending improper practice proceeding."[9]

On December 19, 2016—that is, during the pendency of *Ithaca II*—the City filed one of the improper practice charges at issue here (Case No. U-35450) alleging that, because the City had satisfied its duty to negotiate concerning calendar years 2012 and 2013, it could not be compelled to participate in interest arbitration concerning proposals specifically limited to that time frame.

On January 3, 2017, the PBA filed the second improper practice charge at issue here (Case No. U-35494) challenging the arbitrability of the City's proposal for a new management rights clause as nonmandatory, and its proposal regarding retirement system enrollment and participation as prohibited. The cases were consolidated by the Assistant Director, giving rise to the decision as to which the PBA has excepted.

Because the issues raised in the parties' submissions before the Board involve what is in essence a question of first impression, the Board granted the PBA's request for oral argument, which was held on April 25, 2018. Subsequent to the oral argument, the Board requested supplemental briefing on the continuing viability of two of the cases relied upon by the PBA in its brief in support of its exceptions, *City of Kingston*[10] (*Kingston*) and *City of Yonkers* (*Yonkers*).[11] Both the PBA and the City filed supplemental briefs.

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[9] *Ithaca II*, 50 PERB ¶ 3006, at 3030.
[10] 18 PERB ¶ 3036 (1985).
[11] 46 PERB ¶ 3027 (2013).

DISCUSSION

This matter has now given rise to three decisions seeking to clarify the application of interest arbitration pursuant to § 209.4 of the Act when an employee organization has previously stood on its right to maintain the status quo under § 209-a.1 (e) of the Act, more commonly known as the Triborough Amendment.[12] The Triborough Amendment gains its name from the Board's 1972 decision in *Triborough Bridge and Tunnel Authority*,[13] in which the Board, as the Court of Appeals approvingly summarized, "required that employers continue the 'terms and conditions' of employment after expiration of a C[ollective] B[argaining] A[greement], thereby maintaining the 'status quo' during collective bargaining of a new agreement."[14] However, the legislative Triborough Amendment differs somewhat in scope from the Board's original enunciation of the doctrine, in that it defines as an improper practice an employer's "refus[ing] to continue all the terms of an expired agreement until a new agreement is negotiated."[15] As the Board explained in *State of New York (Office of Parks and Recreation)*, "Section 209-a.1 (e) extended the employer's obligation by requiring the continuation of all contract terms, whether or not they are mandatorily negotiable, unless the union was responsible for an unlawful strike."[16]

Notably, interest arbitration is not, for purposes of the Act, considered

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[12] Added by L. 1982, ch. 868.
[13] 5 PERB ¶ 3037 (1972).
[14] *Profl Staff Congress-CUNY v NYS Pub Empl Relations Bd*, 7 NY3d 458, 466, 39 PERB ¶ 7010, 7022 (2006) (summarizing *Triborough Bridge & Tunnel Auth*, 5 PERB ¶ 3037 (1972)).
[15] Act, § 209-a.1 (e); *Profl Staff Congress CUNY v NYS Pub Empl Relations Bd*, 7 NY3d 458, 466, 39 PERB ¶ 7010, at 7022.
[16] 27 PERB ¶ 3001, 3002 (1994). Although not germane here, we note that a unilateral change to a mandatory subject not contained in the expired agreement has been found to state a claim under § 209-a.1 (d) of the Act pursuant to the original *Triborough* Doctrine, which has never been overruled. *County of Sullivan*, 41 PERB ¶ 3006, 3035 & 3039, n. 22 (2008).

negotiations, and an interest arbitration "award is not an agreement for purposes of the Act."[17] Indeed, for just this reason, the Board has found that the "assertion that § 209-a.1 (e) confers a right to the incorporation of the terms of an interest arbitration award into a collective bargaining agreement has no basis in fact or legislative history."[18] However, the interest arbitration award "defines the terms and conditions of employment between the parties unless and until the terms are varied by a subsequent collective bargaining agreement or interest arbitration award."[19] Or, as the Court of Appeals phrased it, "PERB's longstanding precedent supports its decision to define the status quo to include the expired interest arbitration award to the extent its provision[s] superseded the parties' collective bargaining agreement."[20] That is, an interest arbitration award effectively substitutes for an agreement for its term for purposes of § 209-a.1 (e) of the Act.

In the instant case, after the City filed a petition for interest arbitration to cover the years 2012-2013, the PBA in May 2014 asserted its right to stand on the status quo, and declined to participate in the interest arbitration proceedings. Over two years later, in December 2016, the PBA filed a petition for interest arbitration to cover the exact same time period.

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[17] *Town of Orchard Park*, 29 PERB ¶ 3080, 3189 (1996), citing *City of Niagara Falls*, 23 PERB ¶ 3039 (1990); *see generally Police Benev Assn of NYS Troopers v Governor's Office of Lab Rel*, 17 AD3d 972, 974-975, 38 PERB ¶ 7506, 7519 (3d Dept 2005); *Anastacio, et al, v County of Putnam*, 41 PERB ¶ 7519, 7560 (Sup Ct Putnam Co 2008) ("Compulsory arbitration award is not a collective bargaining agreement"; rather, "[i]t is an award made by a three-person panel because the Employer and the union were unable to reach an agreement").

[18] *Town of Orchard Park*, 29 PERB ¶ 3080, at 3190.

[19] *Town of Southampton*, 34 PERB ¶ 3007, 3011 (2001); *confd*, *Town of Southampton v NYS Public Empl Relations Bd*, 307 AD2d 428, 36 PERB ¶ 7013 (3d Dept 2003), *affd*, 2 NY3d 513, 37 PERB ¶ 7001 (2004).

[20] *Town of Southampton v NYS Pub Empl Relations Bd*, 2 NY3d at 523, 37 PERB ¶ 7001, at 7006 (editing marks omitted).

As we noted in *Ithaca I*, neither party in that matter acted in a culpable or unlawful manner: "the stipulated facts do not make out a claim that the PBA waived its right to negotiate for an agreement covering 2012 and 2013, but they do establish that the City fully satisfied its duty to negotiate in good faith for that period."[21] Moreover, the City's improper practice charge was dismissed on the ground that, "[s]ince the negotiations had just commenced, and the City has neither pleaded nor proven that the PBA's demand constituted a condition on bargaining, the fact the demand was made well prior to any declaration of impasse means that no improper practice has taken place."[22] However, the PBA has subsequently demanded interest arbitration for the same period as to which it stood on the status quo, and the City's charge asserts that this demand improperly seeks to submit a nonmandatory subject—one as to which the City has already been deemed to have satisfied its duty to negotiate—to interest arbitration.

In resolving the issues posed by this matter, we note that we have not previously had before us a case in which an employee organization, having declined to participate in interest arbitration to resolve terms and conditions of employment for a specified time period (here, the years 2012-2013), then itself subsequently sought interest arbitration for that exact same time period. While we acknowledge that the PBA's declining to participate in interest arbitration was in accord with the Board's holdings in *Kingston* and *Yonkers,* this matter underscores the tension between the holdings in those decisions and the statutory mandate providing for the final resolution of bargaining impasses through interest arbitration.

In its post-oral argument submission, the PBA aptly points out that § 209.4 (c)

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[21] *Ithaca I*, 49 PERB ¶ 3030, at 3097.
[22] *Ithaca I*, 49 PERB ¶ 3030, at 3098.

(i) of the Act expressly provides that "upon petition of either party, the board shall refer the dispute to a public arbitration panel as hereinafter provided." As is well established, in construing statutes, "[t]he use of the verb 'shall' indicates the mandatory nature of the obligations" imposed by the statute's language.[23] While of course this rule does not compel a construction of a statute that derogates from the statute's overall functionality, is absurd, or otherwise defeats or undermines the legislative intent underlying the enactment, no such showing has been made here.[24] To the contrary, the Board has long held, "[t]he availability of arbitration assures the parties of either a new agreement, or of an arbitration award, within a reasonable time after the expiration of a predecessor agreement."[25] Here the Board's refusal to process the interest arbitration petition pursuant to *Kingston* had the effect of denying finality to either employer or employee organization, and does so in contravention of the statutory language.

Indeed, the tension between *Kingston* (and thus also *Yonkers*), with this statutory mandate is noted in the very text of *Kingston* itself, which expressly states that "[t]he purpose of arbitration under § 209.4 of the Taylor Law is to provide a final disposition of a negotiation deadlock," but then goes on to find that such arbitration would be "futile."[26] The Board based its finding that arbitration would be "futile" on the ground that it was "unlikely that the arbitration panel would be able to perform its work effectively,"[27] because any participation by the union could be deemed a waiver of the right to stand on its status quo rights. The *Kingston* Board further reasoned that the employer would

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[23] *Kanaly v DeMartino*, 162 AD3d 142, 150 (3d Dept 2018), citing *Thomas v Alleyne*, 302 AD2d 36, 40 (2d Dept 2002); *Ibrahim v Nablus Sweets Corp*, 161 AD3d 961 (2d Dept 2018); *see generally Kolbe v Tibbetts*, 22 NY3d 344, 363 (2013).
[24] *See, eg, City of New York v Novello*, 65 AD3d 112, 116-118 (1st Dept 2009).
[25] *Inc Village of Lynbrook*, 10 PERB ¶ 3067, 3122 (1977).
[26] 18 PERB ¶ 3036, at 3076.
[27] Id.

be at a disadvantage if the union could await the issuance of an award and decide whether to abide by it only after its issuance—that is, waive its *Triborough* rights only when it became aware that the terms and conditions in the award were an improvement over the status quo.[28]

While we find persuasive the reading of the legislative history in *Kingston* and much of its substantive analysis, the facts of this case establish that the paradigm established by the *Kingston* Board did not recognize that processing an interest arbitration petition under circumstances such as those presented here could substantially advance the policies of the Act. This is so, even if the result would inevitably be an award confirming the status quo. An interest arbitration award would at a minimum serve to punctuate the end of negotiations of an immediate successor agreement to the expired contract, and would establish the status quo for the duration of the award, as determined by the interest arbitration panel within the statutory time frame, based upon the parties' bargaining history and other appropriate factors. This avoids the sort of delay that has left the parties here caught up in procedural brinkmanship more than five years after the declaration of impasse.

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[28] The Board's decision in *Yonkers* does not add much to the analysis in *Kingston*; it notes that the Court of Appeals in *Town of Southampton v NYS Pub Empl Relations Bd*, 2 NY3d 513, 37 PERB ¶ 7001 (2004), had cited *Kingston* in reaching its conclusion that the Board's precedent supported the Board's "defin[ing] the status quo to include the expired interest arbitration award" where it superseded the expired contract. *Yonkers*, 46 PERB ¶ 3027, at 3060. The Board also asserted that the 2013 amendments to the Act did not legislatively overrule *Kingston*, and in fact "mirrored" it by requiring a "joint request" by the parties to invoke the alternate impasse resolution procedure of § 209.4-a of the Act available to fiscally eligible municipalities is consistent with *Kingston*. *Id*, citing L. 2013, ch. 67. The former argument does nothing more than establish that *Kingston's* effort to avoid inadvertent waiver of status quo rights has been endorsed by the Court of Appeals, as we have recently reaffirmed in *Ithaca I.* The latter argument is less illuminating still, as the essence of *Kingston* is that it allows one party to unilaterally thwart the procedure to resolve an impasse, while the 2013 amendment requires the agreement of both parties to jointly request the alternative procedure available to fiscally eligible municipalities.

Moreover, the parallel with legislative imposition demonstrates that finality can be achieved without curtailing the union's right to stand on its status quo rights. In 1984, the Appellate Division, Fourth Department held that in a legislative imposition pursuant to § 209.3 (e) of the Act, the "legislative body is precluded by the Triborough Amendment from imposing a settlement which diminishes employee rights under an expired collective bargaining agreement."[29] Two years later, the Board clarified that, absent an employee organization's consent, it is impermissible for a "legislative determination, imposed pursuant to § 209 (3) (e) of the [Act], [to] change the terms and conditions of an expired collective bargaining agreement, whether or not to the benefit of the bargaining unit employees."[30]

The scope of the Triborough Amendment's interdict of changes to the status quo in interest arbitration is no less than that applicable to legislative imposition. As the Board explained in *City of Johnstown*, "neither a legislative body *nor an interest arbitration panel* may make any changes in the terms of an employee organization's expired contract without the union's consent."[31] In other words, just as the scope and enforceability of a legislative imposition rendered without the employee organization's consent are limited to the status quo, the same limitation applies to an interest arbitration award rendered under similar circumstances.[32]

Likewise, the reasonable concerns regarding waiver find their solution in the

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[29] *Niagara County v Newman*, 104 AD2d 1, 4 (4th Dept 1984).
[30] *City of Buffalo*, 19 PERB ¶ 3023, 3055, 3056, n. 7 (1986).
[31] 25 PERB ¶ 3085, 3174 (1992) (emphasis added), citing *Niagara County Legislature and County of Niagara*, 16 PERB ¶ 3071 (1983), *confd*, *Niagara County v Newman*, 104 AD2d 1, 17 PERB ¶ 7021 (4th Dept 1971); *Kingston*, 18 PERB ¶ 3036, at 3075-3076.
[32] *See, eg, City of Batavia*, 17 PERB ¶ 3007, 3014 (1984) ("The problem for the employer would arise, if at all, only when the employer actually altered the terms of an expired agreement pursuant to such an arbitration award").

parallel procedures applicable to legislative imposition.[33] Just as "a union must make its position known at the commencement of the legislative hearing process," and "may not participate in the process on the merits and then await the results of the process before deciding whether and to what extent to be bound by it," the same logic applies to interest arbitration.[34] So too, as we have long held, "[t]he union must make its position known at the commencement of the process" if it chooses to stand on its Triborough rights.[35] Only if the employee organization elects to participate in the merits of the interest arbitration—that is, if it takes action beyond informing the Director of Conciliation, and through the Director, the interest arbitration panel, of its decision to stand on its rights and its designated panel member, does the employee organization waive its Triborough rights.[36]

Accordingly, we overrule *Kingston* and *Yonkers* to the limited extent that the Board held in those decisions that, upon a union's invocation of its Triborough rights, an employer's interest arbitration petition would not be processed. Rather, we find that the invocation of an employee organization's Triborough rights limits the scope and the enforceability of any award that an interest arbitration panel may issue, but does not negate the statutory right of the petitioning employer to an interest arbitration award. Henceforth, the Director of Conciliation shall process petitions for interest arbitration filed by employers that comply with our Rules even when an employee organization object to their processing and assert their right to the status quo under § 209-a.1 (e) of

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[33] Obviously, the union's filing a petition for interest arbitration itself constitutes a waiver of the right to stand on its status quo, as we have long recognized. *Kingston*, 18 PERB ¶ 3036, at 3076.
[34] *City of Buffalo*, 19 PERB ¶ 3023, at 3057.
[35] Id.
[36] Id.; *see also Niagara County Legislature and County of Niagara*, 16 PERB ¶ 3071, at 3116.

the Act. As stated above, an employee organization that informs the Director of its decision to stand on its rights and its designated panel member but does not participate further in the interest arbitration does not waive its Triborough rights.

We emphasize the limited nature of this ruling to address the parties', but especially the City's, expressed concern that a simple overruling of *Kingston* and *Yonkers* could be read broadly as imperiling or undermining those cases in toto and thus the structure by which we have essentially held in equipoise the statutory imperatives of §§ 209.a (1) (e) and 209.4 of the Act. The sole issue as to which *Kingston* is overruled is the Board's declining to process the interest arbitration petition absent the employee organization's consent. As evident above, we expressly reaffirm that the Triborough Amendment's strictures govern the permissible scope of an interest arbitration award upon an employee organization's invocation of its status quo rights at the beginning of the process.

The PBA, while advocating this partial overruling,[37] has urged that equity requires that it not be penalized for its good faith reliance on *Kingston* and *Yonkers*. In the past, we have on occasion recognized such equities, where a practice did not comport with the Act, but "is so long-standing that it would be inappropriate to alter it retroactively." However, we need not determine whether the equities are so strong as to preclude retrospectively applying our partial overruling of *Kingston* and *Yonkers*, as such retrospective application does not affect the substantive outcome of this decision. Absent the *Kingston* right to not participate in interest arbitration, the PBA's invocation of the status quo, combined with its refusal to participate in interest arbitration, would result in an interest arbitration award limited to the status quo for the period at issue,

[37] Transcript of oral argument, at 25; PBA's Response to Board's Request for Briefing, at 2.

here (2012-2013). Likewise, under our analysis in *Ithaca I*, the same substantive outcome—albeit not in the form of an interest arbitration award—would govern: the parties' rights and obligations for those two years would be those encompassed within the status quo.

As we noted in *Ithaca II*, § 205.6 of our Rules expressly addresses objections to "the arbitrability of any matter set forth in the petition or response."[38] While the term "arbitrability" is not defined in the Rules, "the specification that such challenges are properly addressed to any 'matter' frames the scope of any challenge," denoting that a challenge to arbitrability involves a claim that the "subject" or "substance" of the dispute is not properly subject to arbitration.[39]

Moreover, the Rules provide an expressly non-exclusive list of objections to arbitrability in § 205.6. As § 205.6 (a) of the Rules provides:

> Objections as to arbitrability may include, *but not be limited to*, the following circumstances:
>
> (1) a matter proposed is not a mandatory subject of negotiations;
>
> (2) a matter proposed was not the subject of negotiations prior to the petition;
>
> (3) a matter proposed had been resolved by agreement during the course of negotiations.[40]

In *Ithaca II*, we found the Rule provided guidance in determining the circumstances in which the Board had found matters not properly within the scope of interest arbitration, either inherently (as nonmandatory or prohibited) or procedurally (as either not having been previously raised, or as having been negotiated to completion). We reasoned that "[w]hile the list is not exclusive, under the rule of construction known

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[38] 50 PERB ¶ 3006, at 3029, quoting Rules § 205.6 (emphasis omitted).
[39] *Ithaca II*, 50 PERB ¶ 3006, at 3029-3030.
[40] Id; emphasis added.

as ejusdem generis, "a series of specific words describing things or concepts of a particular sort are used to explain the meaning of a general one in the same series."[41] Thus, while in no way limiting what challenges to arbitrability may be raised in specific circumstances, the Rule does provide hallmarks of what constitute objections likely to be deemed meritorious. This is particularly true in terms of the procedural objections—matters not inherently inappropriate for interest arbitration, but which, under the circumstances of a specific case, would disserve the policies of the Act underlying interest arbitration.

In *Ithaca I*, we found that "the duty to negotiate in good faith over the status quo period, here 2012 and 2013, has been satisfied."[42] The satisfaction of that duty necessarily implies that both the City and the PBA exhausted all means of conciliation, and that the PBA's good faith decision to not participate in interest arbitration, effectively set, albeit unilaterally, the terms governing the terms and conditions for the applicable duration of an interest arbitration award, which we found in *Ithaca I* "to be the presumptive default period of two years from the expiration of the previous agreement, that is, calendar years 2012 and 2013."[43] The PBA's exercise of its *Kingston* right to refuse interest arbitration, coupled with the City's satisfaction of its duty to negotiate, serves to exhaust the negotiation for those years, and effectively substitutes for an agreement, just as would an arbitration award.[44]

Moreover, we reaffirm our finding in *Ithaca I* that "[t]he policies underlying § 209.4

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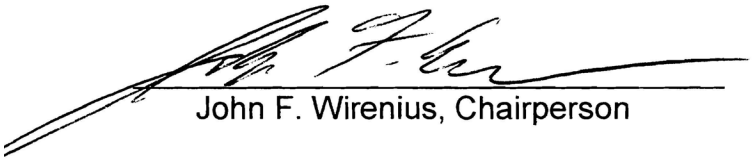
[41] 50 PERB ¶ 3006, at 3030, citing *Matter of Riefberg*, 58 NY2d 134, 141 (1983); *Lend Lease (U.S.) Const. LMB Inc v Zurich American Ins Co*, 136 AD3d 52, 57 (1st Dept 2015); Statutes, § 239.
[42] 49 PERB ¶ 3030, at 3097.
[43] 49 PERB ¶ 3030, at 3098.
[44] *See Town of Southampton v NYS Pub Empl Relations Bd*, 2 NY3d at 523, 37 PERB ¶ 7001, at 7006.

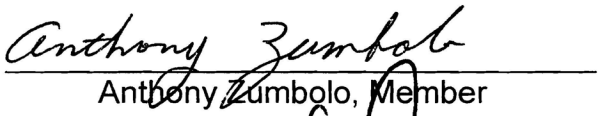
of the Act are best served by treating the status quo right as a shield, and not allowing it to be deployed as a sword to reopen the negotiations for which interest arbitration and its resultant finality was avoided."[45] In sum, the parties, having exhausted all available options to achieve finality for calendar years 2012-2013, are no longer required to negotiate for that time period, and no matters are subject to arbitration for the period of the status quo.

Accordingly, we affirm the ALJ's finding that the PBA violated § 209-a.1 (b) of the Act, and order that the PBA withdraw from arbitration all of the proposals submitted with its 2016 demand for arbitration and that the City withdraw its proposals as, under the circumstances here, we find that the PBA's petition for interest arbitration must be and hereby is dismissed.

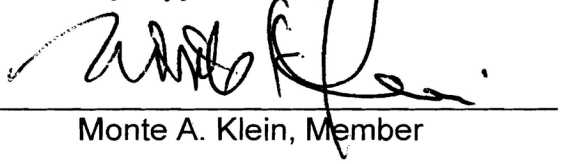
DATED: September 5, 2018
Albany, New York



John F. Wirenius, Chairperson



Anthony Zumbolo, Member



Monte A. Klein, Member

[45] 49 PERB ¶ 3030, at 3098.

In the Matter of

NUBIA MARTINEZ,

Charging Party, **CASE NO. U-35544**

- and -

UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondent,

- and -

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

Employer.

NUBIA MARTINEZ, *pro se*

ROBERT T. REILLY, GENERAL COUNSEL (PAMELA PATTON FYNES of counsel), for Respondent

KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS (BERNADETTE LUMAS CODRINGTON of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Nubia Martinez to a decision of the Regional Director (RD) dismissing her improper practice charge.[1] In her charge, Martinez alleged that the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) by failing to properly handle an appeal of her termination from employment as a probationary teacher for the Board of Education of the City School District of the City of New York (District). The RD dismissed Martinez's charge as

[1] 51 PERB ¶ 4520 (2018).

untimely. Even assuming that the charge was timely, the RD found that there was no basis to find that the UFT breached its duty of fair representation.

EXCEPTIONS

Martinez filed exceptions in which she argues that her charge is timely, that her termination violated both the collective bargaining agreement and the New York State Education Law (EL), and that she has not received the full process she was due. Specifically, Martinez argues that she should have received a hearing and decision pursuant to EL § 3020-a to which a tenured teacher is entitled, but that she was instead treated as a probationary employee, receiving the truncated process afforded probationary teachers. As a result, Martinez argues that the UFT's actions are arbitrary and in bad faith.

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

We deny Martinez's exceptions because they were not timely served. Even if they were timely served, we would affirm the RD's decision.

FACTS

The facts are set forth in Martinez's offer of proof submitted to the RD in lieu of a hearing. On November 10, 2010, the District appointed Martinez as a probationary teacher. Martinez attached to her offer of proof two "Extension of Probation Agreements" signed by her, in which she agreed to certain terms to extend her probationary period.[2] On December 17, 2015, the District denied Martinez's "Certification of Completion of Probation" and terminated her appointment effective

[2] Charging Party's Offer of Proof, Exs J & K.

January 19, 2016.[3]

Pursuant to EL § 3012-C (5-a) and/or the Bylaws of the New York City Board of Education, the UFT and Martinez filed an appeal of the District's denial of her completion of probation.[4] Martinez argued that the District violated the terms of the probation extension agreements or otherwise invalidated them.[5] Therefore, according to Martinez, she achieved tenure in November of 2013.[6]

On April 13, 2016, a hearing on Martinez's appeal was held at the District's Office of Appeals and Reviews, at which Martinez was represented by counsel provided by the UFT.[7] Martinez contends that this representation was ineffective.[8]

In her offer of proof, Martinez alleged that on July 12, 2016, she received a letter decision from Superintendent Timothy Lisante (Lisante), in which Lisante stated that he was upholding the termination of Martinez's probationary service and termination of her license.[9] In pertinent part, the letter stated:

> I have received the report from the Chancellor's officially designated Committee of the meeting(s) held on April 13, 2016, pursuant to the provisions of Article 4, in connection with the Recommendation Discontinuance of Probationary Service and License Termination as Teacher of Spanish . . . appointed on November 10, 2010. I am hereby informing you that I have reaffirmed the previous action which resulted in Discontinuance of Probationary Service and License Termination effective close of business January 19, 2016.[10]

Martinez contends that the UFT did not properly inform her of the results of her April 13, 2016 hearing, and that she has not received any proper resolution of the

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[3] Id, Preliminary Statement ¶ 2; Ex B.
[4] Id, Ex C.
[5] Id, ¶¶ 5-A & 5-B.
[6] Id, ¶ 1-F.
[7] Id, Ex D.
[8] Id, ¶ 5-F.
[9] Id, Preliminary Statement ¶ 4.
[10] Id, Ex E.

disciplinary charges. She asserts that in November 2016, she asked the UFT whether she could receive a decision regarding the reason for her termination, and that on November 29, 2016, a UFT representative advised her that the UFT did not have a copy of the decision.[11] She further reports that, on December 1, 2016, this same UFT representative sent her an email to which was attached a copy of Lisante's July 2016 letter.[12] However, Martinez contends that because she is a tenured employee, she was entitled to receive a different type of decision on her termination than the one contained in Lisante's July 2016 letter (that is, Martinez believes she was entitled to receive a full EL § 3020-a decision applicable to tenured teachers).[13]

DISCUSSION

Pursuant to § 213.2 (a) of PERB's Rules of Procedure (Rules), within 15 working days after receipt of a decision, a party may file exceptions with the Board. The Rule requires the party filing exceptions to submit proof of service to the Board demonstrating that the exceptions were also served on all other parties within the same 15 working day period.[14] The RD issued her decision on April 16, 2018, and Martinez received it on April 23, 2018. Martinez's exceptions were received in PERB's Albany office on May 7, 2018, within 15 working days after her receipt of the RD's decision. However, no proof of service of the exceptions on the other parties was provided. A letter was sent to Martinez by PERB's Deputy Chair on May 24, 2018, pointing out this omission and giving Martinez an opportunity to provide the requisite proof of service.[15]

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[11] Id, ¶ 5-H.
[12] Id, ¶ 5-I.
[13] Id, ¶ 3-B, 4-A, 4-C, Exceptions, at 5-6.
[14] Rule § 213.2 (a) requires that a copy of the exceptions and brief be "simultaneously" served on all other parties.
[15] Both the UFT and the District were sent copies of the Deputy Chair's letter to Martinez.

On June 6, 2018, Martinez submitted documentation to the Board demonstrating that on May 31, 2018 she served her exceptions and brief to the UFT and the District.

Consistent with the Rules, the Board has held that "[t]imely service of exceptions upon all other parties is a necessary component for the filing of exceptions under the Rules, and this timeliness requirement is strictly applied."[16] In the present case, Martinez failed to serve her exceptions on the UFT and the District within 15 working days of her receipt of the RD's decision. Thus, on the record before us, Martinez's exceptions were not timely served and, therefore, must be denied.[17]

Even if the exceptions had been timely filed and served, we would affirm the RD's decision.

Section 204.1 (a) of our Rules requires an improper practice charge to 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.[18] Here, Martinez's fundamental allegation is that the UFT provided ineffective representation at the hearing on April 13, 2016. To be timely, a charge challenging this representation would need to

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[16] *TWU (Ayala)*, 50 PERB ¶ 3017, 3073 (2017);*Transport Workers Union of Greater New York, Local 100, AFL-CIO (Waters)*, 49 PERB ¶ 3026, 3083 (2016); *United Federation of Teachers (Hunt)*, 48 PERB ¶ 3005, 3012 (2015); *State of New York (Commission of Correction)*, 47 PERB ¶ 3019, 3058 (2014); *UFT (Elgalad),* 43 PERB ¶ 3028, 3105 (2010); *See generally Honeoye Falls-Lima Educ Assn, NYSUT (Malcolm),* 41 PERB ¶ 3015 (2008); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶ 3037 (2002*); Yonkers Fedn of Teachers (Jackson)*, 36 PERB ¶ 3050 (2003).

[17] *District Council 37 (Fonseca)*, 50 PERB ¶ 3038, 3160 (2017); *TWU (Ayala)*, 50 PERB ¶ 3017, at 3073; *TWU (Waters)*, 49 PERB ¶ 3026, at 3083; *UFT (Hunt)*, 48 PERB ¶ 3005, at 3012; *UFT (Pinkard)*, 44 PERB ¶ 3011, at 3042; *Honeoye Falls-Lima Educ Assn, NYSUT (Malcolm)*, 41 PERB ¶ 3015, at 3079.

[18] *See, eg, 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).

be filed by August 13, 2016.[19] Because Martinez did not file her charge until February 6, 2017, her charge was untimely.

The issuance of a decision adverse to Martinez's interests does not provide an independent basis on which to challenge the UFT's representation, as the UFT did not issue that decision, and does not control its issuance or content. Moreover, as the RD found, the mere fact that the UFT sent Martinez a copy of Lisante's decision does not extend Martinez's time to challenge the UFT's representation of her at the hearing in April. Even if we measured Martinez's time for filing her charge from her receipt of Lisante's letter decision, her charge is still untimely, as she admitted in her offer of proof that she received Lisante's decision on July 12, 2016.[20]

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

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

DATED: September 5, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[19] *See Local 280, International Assn of Firefighters and City of Syracuse (Knighton)*, 30 PERB ¶ 4649 (1997), citing *NYCTA and TWU, Local 100*, 30 PERB ¶ 3032 (1997); *Board of Educ of the City Sch Dist of the City of New York and UFT*, 30 PERB ¶ 3038 (1997).

[20] Charging Party's Offer of Proof, Preliminary Statement, ¶ 4.

In the Matter of

YVONNE SPAULDING,

Charging Party, **CASE NO. U-35783**

- and -

UNITED FEDERATION OF TEACHERS, LOCAL 2, AMERICAN FEDERATION OF TEACHERS, AFL-CIO,

Respondent,

- and -

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

Employer.

YVONNE SPAULDING, *pro se*

ROBERT T. REILLY, GENERAL COUNSEL (GREGORY M. AINSLEY of counsel), for Respondent

KAREN SOLIMANDO, EXECUTIVE DIRECTOR OF LABOR RELATIONS (DON NGUYEN of counsel), for Employer

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by Yvonne Spaulding to a decision of an Administrative Law Judge (ALJ) dismissing her amended improper practice charge.[1] In it, Spaulding alleged that the United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO (UFT) violated § 209-a.2 (c) of the Public Employees' Fair Employment Act (Act) when it refused to pursue a grievance on her behalf regarding material in her personnel file related to the cessation of her employment with the Board of Education of the City School District of the City of New York (District).

[1] 51 PERB ¶ 4509 (2018).

EXCEPTIONS

Spaulding filed exceptions in which she "questions the procedural process used" by the UFT and asserts that the UFT should submit a grievance on her behalf "for the removal of the problem code DQC as well as the accompanying explanation letter from my employment record."[2]

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

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

FACTS

Spaulding was formerly employed by the District as a teacher. She resigned her position "effective immediately," on May 3, 2011.

Spaulding claims in her charge that in June 2016, she obtained copies of her employment record and became aware of a problem code in her file. The code, DQC, indicates that Spaulding "resigned pending charges."[3] Spaulding's file also contained a 2011 letter advising that she was about to be charged under Education Law § 3020-a with incompetence and that her resignation was to be deemed "irrevocable."[4] Spaulding asserts in her charge that the problem code makes her ineligible for future employment with the District and its vendors. She takes issue with the code and the reference to disciplinary charges since no discipline was actually pursued against her.

Spaulding visited the UFT on June 21, 2016 and requested that it file a grievance on her behalf. On September 7, 2016, the UFT advised her that the grievance would

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[2] CP Exceptions, at 1 and 4.
[3] Charge, Exhibit A.
[4] Id.

not be pursued since the UFT grievance committee believed that her case could not be won.[5] The UFT reiterated that position on October 24, 2016.[6] Spaulding was given the option to appeal that decision, which she did, and the UFT's position was reviewed through its internal procedures. These procedures included a meeting between Spaulding and the UFT's appellate committee, Ad Com, on December 5, 2016.

By letter dated February 2, 2017, from UFT Director of Staff, LeRoy Barr, Ad Com confirmed the decision not to proceed with the grievance.[7] Ad Com advised Spaulding that she would not be able to withdraw her resignation because she had failed to give the District 30 days' notice prior to her departure in May 2011.[8] Chancellor's Regulation C-205 precludes reinstatement to service for pedagogical employees who fail to provide at least 30 days' written notice prior to the effective date of a resignation.[9]

DISCUSSION

Pursuant to § 213.2 (a) of PERB's Rules of Procedure (Rules), a party may file exceptions with the Board within 15 working days after receipt of a decision. The Rule requires the party filing exceptions to submit proof of service to the Board demonstrating that the exceptions were also served on all other parties within the same 15 working day period.[10] The ALJ issued her decision on February 22, 2018, and Spaulding received the decision on March 15, 2018. Spaulding's exceptions were hand delivered to PERB's Brooklyn office on April 3, 2018, and were received in PERB's Albany office on

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[5] Charge, Exhibit D.
[6] Charge, Exhibit E.
[7] Charge, Exhibit F.
[8] Id.
[9] Charge, Exhibit H.
[10] Rule 213.2 (a) requires that a copy of the exceptions and brief be "simultaneously" served on all other parties.

April 4, 2018, within 15 working days after receipt of the ALJ's decision by Spaulding. However, no proof of service upon the other parties was filed. A letter from PERB's Deputy Chair was sent to Spaulding on April 4, 2018, pointing out this omission and giving Spaulding an opportunity to provide the requisite proof of service.[11]

On April 11, 2018, Spaulding submitted documentation to the Board demonstrating that on that day she made a mailing to the UFT and the District by certified mail. Spaulding's proof of service does not indicate what she mailed to the UFT and the District. For purposes of this decision, we will assume that she mailed to the other parties copies of her exceptions.

Consistent with the Rules, the Board has held that "[t]imely service of exceptions upon all other parties is a necessary component for the filing of exceptions under the Rules, and this timeliness requirement is strictly applied."[12] In the present case, Spaulding failed to serve her exceptions on the UFT and the District within 15 working days of her receipt of the ALJ's decision. Thus, on the record before us, Spaulding's exceptions were not timely served and, therefore, must be denied.[13]

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[11] Both the UFT and the District were sent copies of the Deputy Chair's letter to Spaulding.

[12] *TWU (Ayala)*, 50 PERB ¶ 3017, 3073 (2017);*Transport Workers Union of Greater New York, Local 100, AFL-CIO (Waters)*, 49 PERB ¶ 3026, 3083 (2016); *United Federation of Teachers (Hunt)*, 48 PERB ¶ 3005, 3012 (2015); *State of New York (Commission of Correction)*, 47 PERB ¶ 3019, 3058 (2014); *UFT (Elgalad),* 43 PERB ¶ 3028, 3105 (2010); *see generally Honeoye Falls-Lima Educ Assn, NYSUT (Malcolm),* 41 PERB ¶ 3015 (2008); *Town/City of Poughkeepsie Water Treatment Facility*, 35 PERB ¶ 3037 (2002*); Yonkers Fedn of Teachers (Jackson)*, 36 PERB ¶ 3050 (2003).

[13] *DC 37 (Fonseca)*, 50 PERB ¶ 3038, 3160 (2017); *TWU (Ayala)*, 50 PERB ¶ 3017, at 3073; *TWU (Waters)*, 49 PERB ¶ 3026, at 3083; *UFT (Hunt)*, 48 PERB ¶ 3005, at 3012; *UFT (Pinkard)*, 44 PERB ¶ 3011, at 3042; *Honeoye Falls-Lima Educ Assn, NYSUT (Malcolm)*, 41 PERB ¶ 3015, at 3079.

Even if the exceptions had been timely served and filed, we would affirm the ALJ's decision.

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."[14] 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.[15]

Moreover, it is "well-settled that an employee organization is entitled to a wide range of reasonable discretion in the processing of grievances under the Act."[16] We will not substitute our judgment concerning the merits of a grievance for an employee organization's reasonable interpretation of its negotiated agreement with the

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[14] *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 (2015), *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).

[15] *Id.,* citing *District Council 37 (Calendario)*, 49 PERB ¶ 3038, at 3161 (2016); *see also Cairo-Durham Teachers Assn (DeOliveira)*, 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)), *confirmed sub nom DeOliveira v NYS Pub Empl Relations Bd*, 133 AD3d 1010, 48 PERB ¶ 7006 (3d Dept 2015).

[16] *District Council 37 (Calendario)*, 49 PERB ¶ 3038, at 3161; *UFT (Gibson)*, 48 PERB ¶3015, 3054 (2015); *CSEA* (*Munroe*), 47 PERB ¶ 3031, at 3095; *Amalg Transit Union, Local 1056 (Lefevre)*, 43 PERB ¶ 3027, 3104 (2010).

employer.[17] Further, an employee organization is not obligated to pursue a claim that it believes, in good faith, to lack merit.[18] Finally, "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."[19]

In deciding this motion to dismiss, we "assume the truth of all of the charging party's evidence and give the charging party the benefit of all reasonable inferences that could be drawn from those assumed facts."[20] Nevertheless, we find that the record is devoid of any facts or evidence that the UFT breached its duty of fair representation.[21]

Spaulding claims that the UFT breached its duty of fair representation to her by declining to file a grievance on her behalf to remove a problem code and accompanying letter from her employment record. The allegations in Spaulding's charge and offer of proof, however, do not support a finding that the UFT's decision not to file a grievance breached the UFT's duty of fair representation. The UFT evaluated Spaulding' s grievance and found that Spaulding did not comply with Chancellor's Regulation C-205 and that this failure would prevent the grievance from being successful.

There is simply no evidence and no facts to indicate that this reasoned response,

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[17] *CSEA (Trowbridge)*, 48 PERB ¶ 3024, 3093 (2015), citing *UFT (Morrell)*, 44 PERB ¶ 3030, 3107 (2011).
[18] *CSEA (Trowbridge)*, 48 PERB ¶ 3024, at 3093; *Law Enforcement Officers Union Council 82, AFSCME, AFL-CIO (Gardner)*, 31 PERB ¶ 3076, 3170-3171 (1998).
[19] *See, eg, District Council 37 (Fonseca)*, 50 PERB ¶ 3038, at 3161; *Cairo-Durham Teachers Assn (DeOliveira)*, 47 PERB ¶ 3008, 3026 (2014).
[20] *CSEA (Trowbridge)*, 48 PERB ¶ 3024, at 3093; *Town of Tuscarora*, 45 PERB ¶ 3044, 3112 (2012); *County of Livingston*, 43 PERB ¶ 3018, 3073 (2010); *County of Nassau (Unterweiser)*, 17 PERB ¶ 3013, 3030 (1984).
[21] In view of our findings on the merits of Spaulding's claims, we need not, and do not, decide whether the five-year gap between Spaulding's resignation and her request that the UFT file a grievance on her behalf has extinguished either Spaulding's standing to bring the charge or any duty of fair representation on the part of the UFT to her. *See Westchester County Officers' Benevolent Association, Inc.*, 30 PERB ¶ 3075 (1997).

whether ultimately correct on the merits or not, was a pretext for more invidious reasons. Even if the UFT erred in assessing the effect of Chancellor's Regulation C-205, there is no proof whatsoever that the UFT was acting arbitrarily, in bad faith, or discriminatorily. While Spaulding does not agree with the UFT's assessment of the viability of her grievance, a mere disagreement concerning the merits of a grievance is insufficient to establish that a union's reasoned decision not to pursue the grievance breaches its duty of fair representation.[22] At most, the UFT may have been in error as to the effect of Chancellor's Regulation C-205. Even were that demonstrated to be the case, Spaulding "would have at most asserted 'an honest mistake resulting from misunderstanding,' insufficient to constitute a breach of the duty of fair representation."[23]

In sum, we find that Spaulding has not established that the UFT's assessment was arbitrary, discriminatory, or reached in bad faith. Based upon the foregoing, we dismiss the charge in its entirety.

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

DATED: September 5, 2018
Albany, New York

[22] *See, e.g., District Council 37 (Fonseca)*, 50 PERB ¶ 3038, at 3161; *United Public Service Employees Union*, 32 PERB ¶ 3027, 3058 (1999).
[23] *UFT (Barnes)*, 48 PERB ¶ 3017, at 3059, quoting *CSEA (Munroe)*, 47 PERB ¶ 3031, 3096 (2014). *See also Cairo-Durham Teachers Assn (DeOliveira)*, 47 PERB ¶ 3008, at 3026.

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

In the Matter of

CITY OF NEW YORK,

Charging Party,

-and- **CASE NO. U-36306**

PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

Respondent.

PROSKAUER ROSE LLP (NEIL H. ABRAMSON, of counsel), for the City of New York

ARNOLD & PORTER KAYE SCHOELER, LLP (ARTHUR E. BROWN, SUSAN L. SHINN & ROBERT GRASS, of counsel), for the Patrolmen's Benevolent Association of the City of New York, Inc.

BOARD DECISION AND ORDER

This case comes to us on exceptions filed by the City of New York (City) and by the Patrolmen's Benevolent Association of the City of New York, Inc. (PBA) to a decision of the Director of Employment Practices and Representation (Director) dismissing the City's improper practice charge on the ground that this Board lacks jurisdiction over the dispute.[1] The City's charge alleged that the PBA violated § 209-a.2 (b) of the Public Employees' Fair Employment Act (Act) by refusing to negotiate in good faith, since April 2017, over the subject of health benefits. The City further alleged that the PBA's refusal to negotiate over health benefits "foreclosed any negotiations over

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[1] 51 PERB ¶ 4537 (2018).

changes in health benefits for this unit in an effort to send the parties prematurely to an arbitration in violation of § 209-a.2 (b)."[2]

On April 9, 2018, the Director issued a notice pursuant to § 204.2 of our Rules of Procedure (Rules), in which she advised the parties that the charge was deficient "because PERB lacks jurisdiction over the matter as the charge alleges a violation of § 209-a.2 (b) of the Act based on the PBA's refusal to negotiate in good faith with the City, rather than a 'scope of bargaining' issue."[3] The City did not seek to amend its charge, but on April 16, 2018, submitted further argumentation in support of its claim that the Board does have jurisdiction over such charges.

On May 14, 2018, the City advised the Director that it had filed an improper practice petition with the New York City Board of Collective Bargaining (BCB) regarding the same matters as raised in the instant charge. The City's May 14 letter further stated that the PBA, in its answer to the City's improper practice petition before the BCB asserted that the BCB lacked jurisdiction over the improper practice petition, and that these matters fall squarely within PERB's jurisdiction. Finally, the City's May 14 letter states that the "PBA has filed a Declaratory Ruling [petition] with PERB over the very same subject matter, asserting that it had no obligation to bargain over the City's health [benefits] demands because they are non-mandatory."[4] Based on these facts, the City raises the specter of inconsistent adjudications.

EXCEPTIONS

The City and the PBA each filed exceptions to the Director's decision. The City

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[2] 51 PERB ¶ 4537, quoting Charge, Attachment A, at 2, ¶ 9 (editing marks omitted).
[3] Id, at 2.
[4] Id. Before the Director, as exhibits to the City's May 14 letter, are copies of the City's petition before the BCB and the PBA's Answer thereto, including a copy of the PBA's petition for a declaratory ruling.

asserts that the Director erred in finding that "PERB does not have jurisdiction over post-impasse charges pursuant" to the decision of the Court of Appeals in *Patrolmen's Benevolent Association of the City of New York v City of New York* (*PBA v City*).[5] Thus, the City contends, the Director erred in finding that PERB lacked jurisdiction over the instant matter. The City further argues that the charge "puts at issue post-impasse conduct that relates directly to the putative impasse," and, thus, "is intertwined with the impasse itself."[6]

The PBA's exceptions make similar arguments. The PBA argues, first, that the Director's decision is inconsistent with the text and legislative history of Chapter 641 of the Laws of 1998, which conferred exclusive jurisdiction on PERB to declare and render assistance to the parties in resolving collective bargaining impasses. Second, the PBA contends that the decision in *PBA v City* in fact supports the exercise of jurisdiction by PERB. Finally, the PBA maintains that the Director's decision is inconsistent with a prior decision of the Board in which it found an improper practice charge was outside of its jurisdiction because "PERB has not declared an impasse to exist."[7]

For the reasons that follow as well as the reasons given by the Director in her decision, we affirm the Director's decision.

DISCUSSION

In view of the threshold nature of the inquiry before this Board, the determination of subject matter jurisdiction over the charge at issue, we do not address the factual assertions by either party. The facts alleged in the charge are summarized in the

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[5] 97 NY2d 378 (2001).
[6] City Brief in Support of Exceptions at 4.
[7] Exceptions at 2, quoting *City of New York (Law Enforcement Employees Benev Assn)*, 39 PERB ¶ 3030 (2006).

Director's decision, and we make no findings with regard to any such facts. Rather, the question before us is a purely legal one: whether jurisdiction over an improper practice charge alleging, in part, post-impasse refusal to negotiate in good faith reposes in this Board or the BCB.

The PBA argues that the legislative history of Chapter 641 of the Laws of 1998, as reflected in the Bill Jacket, provides support for the exercise of jurisdiction by us to effectuate the legislative purpose. The City argues that *PBA v City* only explicitly addresses scope of bargaining charges because the improper practice charge in that case was itself a scope charge. Moreover, the post-impasse improper practice charge here raises the question of whether the parties had complied with the duty to negotiate in good faith after impasse is declared,[8] and, thus, whether the matter was actually ripe for interest arbitration. These arguments provide a persuasive basis upon which to conclude that our exercise of jurisdiction over the improper practice charge would reasonably be deemed to be the most efficient and practical way to process the dispute.

However, we do not write on a blank slate; we are constrained by the decision of the Court of Appeals in *PBA v City.* In that decision, the Court of Appeals held that:

> We conclude that under the present statutory scheme, once a police or fire union pursues impasse resolution assistance from PERB and PERB declares an impasse, it has jurisdiction over scope of bargaining issues between [the] PBA and the City, to the extent necessary for PERB to exercise its exclusive jurisdiction to resolve impasses. Until such time, BCB retains jurisdiction to determine scope of bargaining outside of the impasse context.[9]

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[8] *See City of Ithaca*, 49 PERB ¶ 3030, (2016) ("[i]t is well-settled that the duty to negotiate in good faith under the Act extends to conduct following a declaration of impasse"), citing *Village of Wappingers Falls*, 40 PERB ¶ 3020, 3083 (2007); *City of Mount Vernon*, 11 PERB ¶ 3095, 3156 (1978); *Poughkeepsie Public School Teachers Assn*, 27 PERB ¶ 3079, 3182 (1994); *County of Rockland*, 29 PERB ¶ 3009 (1996).
[9] 97 NY2d at 389-390.

Although the Court clearly finds that post-impasse "scope of bargaining issues" are within our jurisdiction, the Court does not distinguish between such issues raised by petitions for declaratory rulings or as improper practice charges. Rather, the subject matter, not the procedural vehicle by which it is brought, controls. Accordingly, this passage does not resolve whether jurisdiction over post-impasse bad faith bargaining charges, or other improper practice charges that do not involve "scope of bargaining issues," properly lies with this Board or the BCB.

However, in discussing the effect of the 1998 amendments to the Act providing "that all collective bargaining impasses reached between local governments and their police and fire unions are resolved by PERB,"[10] the Court of Appeals gave some guidance as to the jurisdictional boundaries between this Board and BCB.

The Court went on to explain that "Chapter 641 and the Taylor Law generally plainly evince the intention to equip PERB with all the powers it needs to resolve impasses but not to otherwise disturb BCB's improper practice jurisdiction."[11] This broad statement is supported by an excerpt from a Memorandum of Michael R. Cuevas, then-Chair of PERB, included in the Bill Jacket, stating that "PERB understood that the bill would not disturb BCB's general jurisdiction 'including all proceedings ancillary to the mediation/arbitration, e.g., improper practice proceedings.'"[12]

Clearly, the Court's reliance on and adoption of the statement in the Cuevas Memorandum should not be read to undercut its express ruling regarding our jurisdiction, post-impasse, over scope of bargaining issues, whether brought through the procedural vehicle of a petition for a declaratory ruling or that of an improper practice

[10] 97 NY2d at 387, summarizing effect of L. 1998, ch 641.
[11] 97 NY2d at 391.
[12] Id, quoting Bill Jacket, L 1998, ch 641.

charge.[13] Rather, we believe, the specific enumeration of "improper practices" as an example is intended by the Court to distinguish between what falls within our jurisdiction and what falls within that of the BCB, and makes clear that, at a minimum, claims of *conduct* violative of the provisions of § 209-a of the Act, unlike scope of bargaining cases, fall within the jurisdiction of the BCB, even when "ancillary to the mediation/arbitration."[14] The charge here clearly is "ancillary" to the arbitration, in that it is "subsidiary," "related," or "supplemental" to the arbitration.[15] Therefore, we find that the bad-faith bargaining charge here, as a charge alleging conduct that violates § 209-a.1 (b) of the Act, falls within the jurisdiction of BCB.

Finally, we note that the parties' similar arguments that this Board should exercise jurisdiction do not create any kind of agreement to submit to jurisdiction or waiver of jurisdiction that would empower us to accept the case regardless of *PBA v City*. Rather, lack of subject matter jurisdiction cannot be waived, and therefore may be raised at any time, which would render any contrary decision susceptible to annulment at any time in the subsequent proceedings, thereby encouraging procedural gamesmanship.[16] As the Court of Appeals acknowledged in *PBA v City*, "[t]o the extent that this construction may result in venue shopping and concomitant delays, such consequences can only be rectified by the Legislature."[17]

Accordingly, we affirm the Director's decision dismissing the charge for lack of subject matter jurisdiction, and find that the charge herein must be, and hereby is,

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[13] *See, eg, City of Ithaca*, 50 PERB ¶ 3006, 3029 (2017).
[14] 97 NY2d at 391, quoting Bill Jacket, L 1998, ch 641.
[15] WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 80 (G. & C. Meriam Co 1966) see, eg, *Patrolmen's Benev Assn v NYS Pub Empl Relations Bd*, 13 AD3d 879, 881, 37 PERB ¶ 7012 (3d Dept 2004), *affd*, 6 NY3d 563, 39 PERB ¶ 7006 (2006).
[16] *See, eg, Rothschild v Braselmann*, 157 AD3d 1027, n. 1 (3d Dept 2018).
[17] 97 NY2d at 391.

dismissed. This determination shall not be construed to limit the rights, if any, of the parties to pursue their claims and defenses before any other forum.

DATED: September 5, 2018
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member