

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

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In the Matter of

**ORANGE COUNTY DISTRICT ATTORNEY'S  
CRIMINAL INVESTIGATORS ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-6283**

**COUNTY OF ORANGE,**

Employer,

-and-

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

Incumbent.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS CERTIFIED that the Orange County District Attorney's Criminal Investigators Association has been designated and selected by a majority of the

employees of the above-named public employer, in the unit and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.


Included: Chief Criminal Investigator, Senior Criminal Investigator, Career Criminal Unit Coordinator and Criminal Investigator.


Excluded: All other County employees.

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

DATED: June 5, 2015  
Albany, New York

  
Seth H. Agata, Chairperson

  
Jerome Lefkowitz, Member

  
Sheila S. Cole, Member

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-6293**

**COUNTY OF GREENE,**

Employer,

-and-

**NEW YORK STATE NURSES ASSOCIATION,**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of

grievances.


Included: Full and part-time per diem registered professional nurse, nurse practitioner and public health nurse.

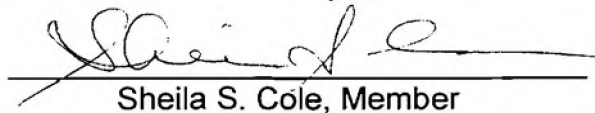
Excluded: All other County employees.

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

DATED: June 5, 2015  
Albany, New York

  
Seth H. Agata, Chairperson

  
Jerome Lefkowitz, Member

  
Sheila S. Cole, Member

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

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In the Matter of

**WHITEHALL ADMINISTRATORS ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-6294**

**WHITEHALL CENTRAL SCHOOL DISTRICT,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

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


Included: Jr/Sr High School Principal, Elementary Principal and CSE Chairperson.

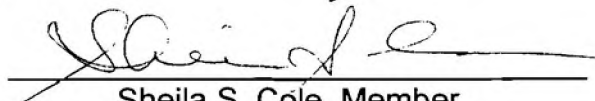
Excluded: All other employees.

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

DATED: June 5, 2015  
Albany, New York

  
Seth H. Agata, Chairperson

  
Jerome Lefkowitz, Member

  
Sheila S. Cole, Member

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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-6301**

**FAYETTEVILLE-MANLIUS CENTRAL SCHOOL  
DISTRICT,**

Employer,

-and-

**SEIU LOCAL 200UNITED,**

Incumbent.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their

exclusive representative for the purpose of collective negotiations and the settlement of grievances.


Included: School Bus Driver, Substitute School Bus Driver, Bus Attendant, Substitute Bus Attendant, School Bus Dispatcher, Laborer and Driver-Laborer.

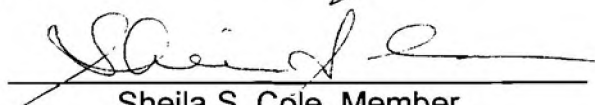
Excluded: All other employees.

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

DATED: June 5, 2015  
Albany, New York

  
Seth H. Agata, Chairperson

  
Jerome Lefkowitz, Member

  
Sheila S. Cole, Member



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

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In the Matter of

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

Petitioner,

-and-

**CASE NO. C-6302**

**BROCKPORT CENTRAL SCHOOL DISTRICT,**

Employer,

-and-

**SEIU LOCAL 200UNITED,**

Intervenor.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that the United Public Service Employees Union has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of

grievances.

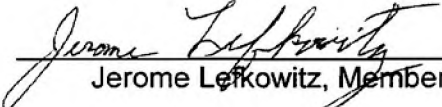
Included: All non-teaching employees.


Excluded: (a) exempt supervisors as identified in the terms and conditions of employment for exempt supervisors; (b) exempt non-supervisors as identified in the terms and conditions of employment for exempt non-supervisors; (c) administrative staff members, including all BAA members and Central Office administrators; (d) all substitutes; (e) all temporary non-teaching employees; and (f) all part-time employees.

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

DATED: June 5, 2015  
Albany, New York

  
Seth H. Agata, Chairperson

  
Jerome Lefkowitz, Member

  
Sheila S. Cole, Member

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

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In the Matter of

**SEIU LOCAL 200UNITED,**

Petitioner,

-and-

**CASE NO. C-6308**

**CITY OF ALBANY,**

Employer.

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**CERTIFICATION OF REPRESENTATIVE AND ORDER TO NEGOTIATE**

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

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

IT IS HEREBY CERTIFIED that SEIU Local 200United has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.


Included: All employees in the title of School Crossing Officer.

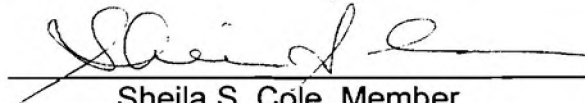
Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with SEIU Local 200United. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: June 5, 2015  
Albany, New York

  
Seth H. Agata, Chairperson

  
Jerome Lefkowitz, Member

  
Sheila S. Cole, Member

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

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In the Matter of

**EAST MEADOW TEACHERS ASSOCIATION,  
NYSUT, AFT, NEA, AFL-CIO,**

Charging Party,

**CASE NOS. U-27398,  
U-27735, U-27741 & U-27783**

- and -

**EAST MEADOW UNION FREE SCHOOL  
DISTRICT,**

Respondent.

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**BARBARA JACCOMA, for Charging Party**

**LITTLER MENDELSON, P. C. (CRAIG R. BENSON, GEORGE B.  
PAUTA and ADAM MALIK of counsel), for Respondent**

**BOARD DECISION AND ORDER**

These consolidated cases come to us on exceptions filed by the East Meadow Union Free School District (District), and contemporaneously filed exceptions by the East Meadow Teachers Association, NYSUT, AFT, NEA, AFL-CIO (Association) to a decision of an Administrative Law Judge (ALJ) resolving four consolidated improper practice charges.<sup>1</sup> In his decision, the ALJ dismissed the Association's claims that disciplinary charges against the Association's building president predicated on alleged misconduct in the context of informational picketing, and that his subsequent transfer

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<sup>1</sup> 43 PERB ¶ 4530 (2010). Following issuance of the ALJ's decision, multiple extensions were granted by the Board for the filing of exceptions and responses, as well as supplemental briefing, due to, *inter alia*, the pendency of related litigation, leading to delays in issuance of this decision.

constituted retaliation for protected activity, in Case Nos. U-27735 and U-27741 respectively. The ALJ further found that disciplinary charges against other tenured teachers arising out of discrete instances of informational picketing (Case No. U-27783) and of leafleting and refusing an order to cease distributing leafleting (Case No. U-27398) were brought in retaliation for protected activity.

### EXCEPTIONS

The District excepts to the ALJ's finding that it violated § 209-a.1(a) of the Public Employees' Fair Employment Act (Act) when it commenced Education Law § 3020-a disciplinary charges against Association unit members Ryan Malone (Case No. 27398), and in also bringing charges against Frank Fortney (Fortney) and Neil Golden (Golden) for engaging in protected activities under the Act (Case No. 27783). The Association excepted to the ALJ's dismissal of its claims that the District violated § 209-a.1(a) of the Act by initiating Education Law (EL) § 3020-a disciplinary charges against Association unit member Richard Santer (Case No. U-27735), and when it involuntarily transferred Santer (Case No. U-27741).

### PROCEDURAL BACKGROUND

During the processing of the charges, the ALJ granted the District's motion to dismiss, in part, Case No. U-27735 to the extent it alleged that the District violated § 209-a.1(a) of the Act when it initiated EL § 3020-a disciplinary charges against Association unit members Roberta Herman, Barbara Lucia and Gina Trupiano.<sup>2</sup> Thereafter, the four charges were consolidated for hearing, and the ALJ conducted six days of hearing.

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<sup>2</sup> ALJ Exhibits 20 and 23.

After the record was closed, the District moved to have the record in Case Nos. U-27735 and U-27741 reopened to admit into evidence arbitration awards by Hearing Officers appointed to hear disciplinary charges issued against Trupiano and Santer pursuant to EL § 3020-a.<sup>3</sup> In the awards, Trupiano and Santer were found guilty of misconduct for participating in an Association-initiated concerted action on March 2, 2007 involving Association members parking their personal vehicles on a public street in front of a District middle school, creating a health and safety risk for students being dropped off for school. Trupiano received a counseling memorandum, while Santer was ordered to pay a fine. Over the Association's objections, the ALJ granted the District's motion to reopen the record, and granted deference to the arbitral findings.<sup>4</sup>

Following issuance of the ALJ's decision, the District filed a motion seeking the reopening of the record in Case No. U-27398 to admit an EL § 3020-a arbitration award concerning disciplinary charges issued against Malone and seeking reconsideration of the ALJ's decision concerning Malone based upon the arbitration award.<sup>5</sup> Both motions were denied by the ALJ.<sup>6</sup>

Trupiano, Malone and Santer commenced separate special proceedings pursuant to EL § 3020-a (5) and Civil Procedure Law and Rules (CPLR) § 7511 seeking to vacate the respective disciplinary arbitration awards and penalties, on grounds

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<sup>3</sup> *East Meadown Union Free Sch Dist v Trupiano*, SED #7737 (2009), Respondent Exhibit 26; *East Meadown Union Free Sch Dist v Santer*, SED #7735 (2010), Respondent Exhibit 27.

<sup>4</sup> *Supra* note 1, at 4648-49.

<sup>5</sup> ALJ Exhibits 38, 40.

<sup>6</sup> ALJ Exhibit 43.

including that the imposition of discipline under the circumstances violated the teachers' rights to free speech under the State and Federal Constitutions.<sup>7</sup> In *Santer v Bd of Education of East Meadow Union Free School District*, the Court of Appeals balanced the parties' interests as implicated by the March 2, 2007 informational picketing.<sup>8</sup> After weighing the employees' speech rights against the employer's interest in protecting students and maintaining orderly administration, the Court found that disciplining the participants did not violate their constitutional right to free speech. The majority found that the teachers' "interest in engaging in constitutionally protected speech in the particular manner that was employed that day were outweighed by the District's interests in safeguarding students and maintaining effective operations at Woodland [Middle School]."<sup>9</sup> Two judges dissented, finding that the speech should have been deemed protected.

### FACTS

Prior to the expiration of the September 1, 1999-August 31, 2004 collectively negotiated agreement between the District and the Association, the parties commenced negotiations for a successor agreement. Following four negotiating sessions, the

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<sup>7</sup> See *Trupiano v Bd of Educ of East Meadow Union Free Sch Dist*, 2010 WL 3384696, (Sup Ct Nassau Co Aug 10, 2010), *affd as modified*, 89 AD3d 1030 (2d Dept 2011), *lv denied*, 18 NY3d 810 (2012); *Malone v Bd of Educ of the East Meadow Union Free Sch Dist*, 2010 WL 9049338 (Sup Ct Nassau Co December 1, 2010), *affd*, 93 AD3d 849 (2d Dept 2012) *lv denied*, 19 N.Y.3d 807 (2012); *Santer v Bd of Educ of East Meadow Union Free Sch Dist*, Index No. 1997/2010 (Sup Ct Nassau Co October 7, 2010), *revd*, 101 AD3d 1026, 45 PERB ¶ 7511 (2d Dept 2012), *revd*, 23 NY3d 251, 47 PERB ¶ 7502 (2014).

<sup>8</sup> 23 NY3d 251, 47 PERB ¶ 7502 (2014). Judge Smith concurred, contending that the speech in question did not fall within the ambit of the First Amendment.

<sup>9</sup> *Id.*, at 269.



District filed a declaration of impasse. During the conciliation process, the parties participated in multiple mediation sessions, fact-finding and superconciliation resulting in a memorandum of agreement dated July 24, 2007.

**Case Nos. U-27735 & 27741 (Santer)**

These cases involve the March 2, 2007 informational picketing in front of Woodland Middle School. The picketing on that day took place in inclement weather, and involved the participants, prior to the start of the workday, displaying signs while sitting in their parked cars, on both sides of the street, in spaces legally available at that time to members of the general public.<sup>10</sup> The cars were parked in such a manner as to not block the curb cuts, and to leave a gap to allow access to a walkway leading to the lobby of the school.

Principal James Lethbridge testified that on a normal school day, students are dropped off on the north side of the street, and wait to cross when the traffic is clear, either at the curb or between any parked cars. Lethbridge further testified that even on normal days, when cars are proceeding in both directions, the student drop-off area constituted a health and safety hazard, but that he had not taken action regarding the problem in the approximately 20 months he had been principal.

As a result of participating in the March 2, 2007 informational picketing, Richard Santer, a tenured science teacher and Association building president, was charged with misconduct under EL § 3020-a, in that he “intentionally created a health and safety hazard by purposely situating his vehicle along [the street] causing children to be

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<sup>10</sup> Picketing took place on Fridays from 7:30 a.m. to approximately 7:50 a.m.; signs on the section of the street the teachers parked on March 2, 2007 delineate it as a “no stopping” zone from 8:00 a.m. to 4:00 p.m. on school days.

dropped off in the middle of the street.”<sup>11</sup> Three other teachers, Roberta Herman, Barbara Lucia, and Gina Trupiano, were similarly charged.

On May 30, 2007, Santer won reelection as building president, and informed Lethbridge that same day. Santer subsequently received a letter dated June 7, 2007, informing him that he was being involuntarily transferred to Bowling Green Elementary School. Santer spoke to Lethbridge, who was non-committal about retaining him at the middle school. Santer then met with the superintendent for human resources, Louis DeAngelo. DeAngelo testified that he did not know that Santer had been re-elected as building president by the time of the transfer. DeAngelo advised him that the District wanted to start a science research program at the elementary school and also mentioned two specific science programs: the Jason project, a research-based science program geared toward elementary school, and the Publica School based model.<sup>12</sup> DeAngelo testified that it is rare to find a teacher who is certified to teach at the fifth grade level and has a strong science background.<sup>13</sup>

Santer also spoke with Maria Ciaremetaro, the principal at Bowling Green School, who advised him that they needed help in the science department. Ciaremetaro testified that she spoke with DeAngelo concerning the need to replace a retiring fifth grade teacher and her preference for someone with a strong background in science.<sup>14</sup> She told Santer that someone was needed to assume a leadership role in

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<sup>11</sup> Charging Party Exhibit 25; Respondent Exhibit 6.

<sup>12</sup> Transcript at pp. 190-94.

<sup>13</sup> Transcript at pp. 680-82.

<sup>14</sup> Transcript at pp. 817-818.

the reemerging Jason Project.<sup>15</sup> Ciaremetaro testified that Santer has been a very positive addition, and has in fact enhanced the science program at the school.<sup>16</sup> The Jason Project was not implemented in 2007-2008, but Santer (along with a third grade teacher) instituted a similar program called Immersion Presents.<sup>17</sup> By the time of the hearing before the ALJ, Santer was the leader of the Jason Project at Bowling Green.<sup>18</sup> Ciaremetaro testified that he is looked to as a resource in the department by other teachers.

### **Case No. U-27783 (Fortney and Golden)**

On March 26, 2007, Lethbridge placed traffic cones to create a driving lane for parents to use in dropping off students, putting up a sign reading "Student Drop Off Area." On March 26 and March 30, despite the presence of the cones, cars were parked alongside the curb. On March 30, only two cars were parked in that lane, belonging to teachers Frank Fortney (Association building president at Bowling Green for 2006-2007) and Neil Golden, who had been a teacher at McVey Elementary School, where he had been building president for 20 to 25 years, and who retired in 2007. As a result, any parent who parked behind them could not proceed alongside the curb. Golden testified that he refused an instruction to move delivered by a man he thought was a custodian. In refusing to move, Golden stated that he was parked legally. Golden reiterated this position when Lethbridge approached and asked him to move the

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<sup>15</sup> Transcript at pp. 800-801.

<sup>16</sup> Transcript at pp. 812-16.

<sup>17</sup> Transcript at pp. 806-807.

<sup>18</sup> Transcript at pp. 812-813.

car. When Golden refused, Lethbridge stated that the car's location endangered students. Fortney was likewise asked to move and refused. Both were later charged with misconduct and insubordination pursuant to EL § 3020-a.

**Case No. U-27398 (Malone)**

Tenured teacher and Association building president Ryan Malone was disciplined for handing out leaflets to parents concerning the ongoing labor dispute. Malone's actions took place on his own time, and on public property – on the exit road from the school property, at the corner of the street upon which the East Meadow High School is situated. Malone would make eye contact with the driver, and, if the driver pulled over and lowered the window, give the driver a leaflet. Depending on whether the driver was exiting left or right, Malone took one or two steps to hand the leaflet to the driver, or walked halfway across the exit road. Principal Mark Scher approached Malone shortly before the start of the workday and ordered him to stop leafleting. Malone replied that he was not doing anything wrong, and, noticing the time, reported to work, subsequently telling Scher that he was “anti-teacher and anti-union.”<sup>19</sup> Scher replied that the leafleting, in his opinion, created a safety hazard for students and staff, and it was his opinion that mattered.

Scher subsequently gave Malone a memorandum dated October 19, 2006 summarizing the incident and instructed him to acknowledge that his behavior was insubordinate. The memorandum stated that not providing such an acknowledgement “would cause this matter to be referred further.”<sup>20</sup> On October 25, 2006, Scher provided

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<sup>19</sup> Transcript at p. 101.

<sup>20</sup> Transcript at p. 104.

a second memorandum stating that no written response had been received from Malone to Scher's October 19 memorandum, and that if none were received by the next day, the matter would be referred to the District. Malone testified that he provided such a response but did not retain a copy. Scher denied that he or anybody in his office had received a response from Malone. Subsequently, Malone was charged pursuant to EL § 3020-a with misconduct for obstructing vehicles from exiting the high school and creating a hazardous situation, and with insubordination for refusing to comply with Scher's directive to desist.

### **Further Proceedings and Related Litigation**

The Hearing Officer rendered a decision in the EL § 3020-a proceedings against Malone on March 24, 2010, finding Malone culpable of the charges and fining him one day's pay. In so holding, the Hearing Officer found that "as autos approached [Malone] raised his hand which contained leaflets in an attempt to make eye contact. If contact [was] made he walked off the sidewalk into the road and handed the driver a leaflet."<sup>21</sup> The Hearing officer specifically found that "Malone had to obstruct traffic, even for a brief moment or two, each time he handed out a leaflet," and that "the egress onto Carman Avenue was somewhat slower than on regular school days."<sup>22</sup> The Hearing Officer also found "a nexus between what [Malone] did and the operation of the school," implicating the District's "right to ensure the safety of parents and others who are dropping students off at school," and its concomitant "obligation to see that traffic

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<sup>21</sup> ALJ Exhibit 40, Attachment "A," Exhibit at p. 10.

<sup>22</sup> *Id.* at 11-12.

progresses smoothly and without interference as vehicles leave the school property.”<sup>23</sup>

That decision was mailed by the State Education Department to the District and its counsel on March 30, 2010, and bears a “received” stamp from counsel’s office reflecting receipt on April 8, 2010. On April 20, 2010, counsel for the District sent via facsimile and first-class mail a letter motion to re-open the record and to admit into evidence the March 24, 2010 EL § 3020-a decision.<sup>24</sup> The ALJ’s decision, dated April 20, 2010, was received by counsel for the District on April 26, 2010. The District submitted a letter motion reiterating its request that the ALJ reopen the record and further requesting him to reconsider his decision in light of the March 24, 2010 EL § 3020-a decision. The Association opposed the motion. On June 10, 2010, the ALJ denied the motion to reopen and reconsider his decision, other than allowing the correspondence and the March 24, 2010 EL § 3020-a decision to be received into the record for identification only.<sup>25</sup> The EL § 3020-a award was confirmed by the Supreme Court, Nassau County, on December 1, 2010, in a decision subsequently affirmed by the Appellate Division, Second Department.<sup>26</sup>

The March 2, 2007 informational picketing was the subject of parallel proceedings that resulted in the decision of the Court of Appeals. In statutory arbitration

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<sup>23</sup> *Id.* at 12.

<sup>24</sup> The District acknowledges that, prior to the issuance of the ALJ’s decision, two similar motions were made by it and granted by the ALJ in consolidated cases. As was the case with its two successful motions, the letter motion did not annex a copy of the EL § 3020-a decision at issue, but offered to provide one if required to by the ALJ.

<sup>25</sup> ALJ Exhibit 43.

<sup>26</sup> *Malone v Bd of Educ of the East Meadow Union Free Sch Dist*, *supra* note 7.

under the EL, the respective Hearing Officers found that Santer and Lucia had committed misconduct by creating a health and safety risk by parking their cars in such a manner that students had to be dropped off in the middle of the street instead of at curbside. They were each fined in the amounts of \$500 (Santer) and \$1,000 (Lucia). Santer and Lucia each challenged the discipline imposed upon them pursuant to Article 75 of the CPLR. The petitions asserted that the informational picketing was entitled to protection under the First Amendment, mandating annulment of the disciplinary awards.<sup>27</sup>

In an order dated October 7, 2010, Supreme Court, Nassau County denied Santer's petition, and upheld the disciplinary sanctions; the Appellate Division, Second Department reversed.<sup>28</sup>

On May 3, 2013, we provided the parties with an opportunity to brief the effect, if any, of the Second Department decision in *Santer* on the issues pending before us. On May 20, 2013, counsel for the District informed us that the Court of Appeals had completed its jurisdictional inquiry and that it had set forth the briefing schedule for the appeal to the Court of Appeals. Accordingly, the matter was again placed on hold pending issuance of a decision by the Court of Appeals.

On May 6, 2014, the Court of Appeals reversed the Second Department's

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<sup>27</sup> See *Pickering v Bd of Educ of Township High Sch Dist 205, Will County, Ill.*, 391 US 563 (1968); *Melzer v Bd of Educ of City Sch Dist of City of NY*, 336 F3d 185, 197 (2d Cir 2003).

<sup>28</sup> *Santer v East Meadow Union Free Sch. Dist.*, 101 AD3d 1026, 1028 (2d Dept 2012). The Second Department reached the same conclusion as to Lucia. *Lucia v Board of Educ of East Meadow Union Free Sch Dist*, 109 AD3d 545, 547 (2d Dept 2013).

decision.<sup>29</sup> The majority opinion found that the speech of Santer and Lucia related to a matter of public concern, and was therefore entitled to First Amendment protection. The Court found that the District's interests were legitimate: "ensuring the safety of its students and maintaining orderly operations at Woodland."<sup>30</sup> The Court of Appeals further found that the District had adduced sufficient evidence to justify its discipline of Santer and Lucia, by "show[ing] that the parking demonstration created dangerous traffic conditions in front of the school that could have injured a student and that caused actual disruption to the school's operations."<sup>31</sup> The Court of Appeals relied heavily on the State's "public policy in favor of protecting children," and the District's *in loco parentis* role as to students in public schools.<sup>32</sup> In justifying its conclusion, the Court relied on: (1) Santer's own testimony describing his opposition to the parking activity on safety grounds; (2) Lethbridge's testimony regarding danger; (3) the Hearing Officer's finding that the teachers had intended to cause a disruption, and (4) the Court's own finding that a disruption had in fact resulted, as evidenced by the lateness of 16 teachers, with a resultant need to cover their homeroom assignments.<sup>33</sup>

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<sup>29</sup> *Santer, supra* note 8.

<sup>30</sup> *Id.* at 265.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Santer, supra* note 8, at 266-268. The Court found that although the parking was "entirely legal... weighs in petitioner's favor, it does not outbalance the evidence of disruption." *Id.* at 268. It explained that the circumstances, not the abstract legality, controlled, and that "the District, as a public employer, may impose restraints on the First Amendment activities of its employees even when such restraints would be unconstitutional if applied to the public at large." *Id.* at n. 11 (quotation and editing marks and citation omitted).



The Board provided the parties with an opportunity to re-brief the effect, if any, on the instant cases of the Court of Appeals' decision in *Santer*. After two requests for extensions, briefs were filed on December 22, 2014.

### DISCUSSION

Because of the multiple charges involving the same or similar incidents, as well as several parallel litigations relating to these consolidated cases, we address the individual claims *seriatim*.

#### **U-27735 & 27741 (Santer)**

The Association, in its supplemental brief, seeks to withdraw its exceptions in U-27735, which arise from the same facts as at issue in the Court of Appeals's decision in *Santer*. Pursuant to § 204.1 (d) of our Rules, that request is granted, and the exceptions are withdrawn.

Case No. U-27741 arises out of Santer's transfer from Woodland Middle School to Bowling Green Elementary School, shortly after his re-election as Association building president. We find that the Association has not provided a sufficient basis to warrant our reversing the ALJ's credibility determination that the transfer was not motivated by retaliation for Santer's protected activity.

When an improper practice charge alleges unlawfully motivated retaliation in violation of §§ 209-a.1 (a) and (c) of the Act, the charging party has the burden of demonstrating three elements by a preponderance of the evidence: a) that the affected individual engaged in protected activity under the Act; b) such activity was known to the person or persons taking the employment action; and c) the employment action would

not have been taken “but for” the protected activity.<sup>34</sup>

Where a charging party establishes a *prima facie* case of unlawful motivation through circumstantial evidence, the burden of persuasion shifts to the respondent to rebut the inference by presenting evidence demonstrating that the employment action or conduct was motivated by a legitimate non-discriminatory business reason. If the respondent establishes a legitimate non-discriminatory reason, then the burden shifts back to the charging party to establish that the articulated non-discriminatory reason is pretextual. At all times, however, “the burden of proof rests with the charging party to establish the requisite causation under the Act by a preponderance of evidence.”<sup>35</sup>

Credibility determinations by an ALJ “are generally entitled to great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.”<sup>36</sup> In the instant case, no objective evidence demonstrating that the ALJ’s credibility determinations are manifestly incorrect has been adduced, and we therefore decline to reverse them.

The Association, contending that the reasons given by the District’s witnesses are pretextual, points to the temporal proximity between Santer’s known protected

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<sup>34</sup> *UFT, Local 2, AFT-CIO (Jenkins)*, 41 PERB ¶ 3007(2008), *confirmed sub nom Jenkins v New York State Pub Empl Relations Bd*, 41 PERB ¶ 7007 (Sup Ct, New York County 2008), *affd*, 67 AD3d 567, 42 PERB ¶ 7008 (1st Dept 2009); *State of New York (State University of New York at Buffalo)*, 46 PERB ¶ 3021 (2013); *see also Dutchess Cmty College*, 47 PERB ¶ 3018, at 3056 (2014).

<sup>35</sup> *Id.*

<sup>36</sup> *Village of Endicott*, 47 PERB ¶ 3017, at 3051 (2014) (quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019 (2008)) (quotation marks omitted); *County of Tioga*, 44 PERB ¶ 3016, at 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *see also City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain’s Endowment Assn*, 10 PERB ¶ 3034 (1977).

activity, *i.e.*, his re-election, and the adverse employment action:

That anti-union animus was the real motivation can be inferred from other uncontroverted evidence: Santer and Lethbridge had an acrimonious relationship; Santer was re-elected to Building President at the end of May 2007; and Santer was transferred within the first week of June 2007.<sup>37</sup>

While this evidence might, on the record here, support an ALJ's credibility determination finding that retaliation had occurred, it does not constitute the objective evidence that the ALJ's contrary finding was "manifestly incorrect" that is required to justify reversal of a contrary finding in such cases.

The ALJ's finding that the District had established a legitimate business reason for the transfer rests partly on undisputed facts and partly on the ALJ's credibility determinations. The undisputed facts relied on by the ALJ include the District's right to transfer teachers, and its obligation to inform a teacher who is to be transferred by June 10. Santer was one of 18 teachers transferred at this time, and Ciaremetaro requested a new science teacher for Bowling Green to fill a vacancy precipitated by a retirement. Nor are Santer's qualifications for the newly vacant position and the difficulty of finding teachers certified to teach at the fifth grade level with a strong science background in dispute. Against this backdrop, the ALJ found the testimony offered by the District concerning its reasons for the transfer to be credible, and to constitute legitimate business reasons. This finding is not rendered manifestly incorrect by the fact that Santer was not designated a science mentor and the Jason Project was not immediately commenced upon his transfer. In fact, in that first year, Santer instituted a similar program, and was subsequently instrumental in the revival of the Jason Project.

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<sup>37</sup> Charging Party's Brief in Support of Exceptions at 10.

Between the ALJ's credibility determinations and the undisputed evidence supporting the ALJ's finding of a legitimate business reason for the transfer, we cannot find those determinations to be manifestly incorrect. Accordingly, we affirm the ALJ's decision and dismiss the exceptions in Case No. U-27741.

### **U-27783 (Fortney and Golden)**

Similarly, the Association contends that Case No. U-27783, involving the disciplinary charges proffered against Fortney and Golden, has been rendered moot by their retirements and by the withdrawal of charges by the District as to Golden, and the lack of any decision as to Fortney.

We have long held that where "the issues raised by [improper practice] charges are academic, we do not consider that the policies of the Act would be served by our consideration of [the] charges."<sup>38</sup> In so holding, we explained that:

[W]e decline to follow so much of any prior decisions which hold or suggest that traditional mootness concepts may not be applied in any of our improper practice proceedings. Our decision in this respect is limited to the facts and circumstances of this case. We recognize that the application of a mootness concept is controlled by the particular facts of the case and applied only to the extent consistent with the policies of the Act.<sup>39</sup>

The Association's request that we treat the matter as moot, in view of our inability to fashion any remedy to the benefit of either Golden and Fortney, is not without logic or precedent. We have previously granted a school district's exceptions to our issuance of a remedial order based on a finding of discriminatory discipline when the affected

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<sup>38</sup> *City of Peekskill*, 26 PERB ¶ 3062, at 3109 (1993).

<sup>39</sup> *Id.*

employee “had ceased to be an employee of the [d]istrict even before the hearing officer's decision was issued.”<sup>40</sup> In that case, the finding of improper motivation was not in question; here, the District’s exceptions challenge that finding, and the District objects to this finding’s evading review through a declaration that the matter is moot. We find that the charge is moot, but that under these circumstances, the policies of the Act will not be served by merely dismissing the exceptions on those grounds, rendering the ALJ’s finding unreviewable, albeit neither final nor binding in view of the filing of exceptions.<sup>41</sup> Rather, in Case No. U-27783, we find that we must, as have the courts in similar circumstances, “vacate the underlying order in order to prevent it from spawning any legal consequences or precedent.”<sup>42</sup> Accordingly, we find the charge to be moot, and vacate the ALJ’s order with respect to the charge.

#### **U-27398 (Malone)**

With respect to Case No. U-27398, we reverse the ALJ’s decision. As a threshold matter, we find the District’s claim that the Court of Appeals’ decision in *Santer* establishes error as a matter of law on the part of the ALJ to be unpersuasive. The District’s contention both misstates the Court of Appeals’ reasoning in *Santer* and the applicability of that decision to the facts here.

It is well established that state law “can offer broader protections for its citizens than is afforded by the Federal Constitution, which sets the floor rather than

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<sup>40</sup> See, e.g., *Bd of Educ of Limestone Union Free Sch Dist*, 12 PERB ¶ 3006 (1979).

<sup>41</sup> Rules § 213.6 (b).

<sup>42</sup> *Civ Serv Tech Guild v City of New York*, 58 AD3d 581 (1<sup>st</sup> Dept 2009) (quoting *Hearst Corp v Clyne*, 50 NY2d 707, 718 (1980) (editing marks omitted)).

the ceiling for an individual's rights."<sup>43</sup> Consonant with this principle, we have long held that the scope of expressive activity protected under the Act is broader than that protected under the First Amendment. Thus, in *Sachem Central School District Board of Education*, we rejected the employer's claim that because the First Amendment did not proscribe the employer's prohibiting a non-certified union's access to employer-provided teacher mailboxes, the limitation did not violate the Act.<sup>44</sup> As we explained:

The right to organize granted to public employees by § 202 of the Taylor Law exceeds those rights that are protected by the First Amendment of the Constitution so long as this statutory right or its exercise does not infringe upon constitutional guarantees.<sup>45</sup>

Thus, even were the decision of the Court of Appeals dispositive as to Malone's rights under the First Amendment, it would not of its own weight resolve the improper practice charge under the Act.

Moreover, the District's argument misstates the Court's holding in *Santer*. In arguing that the ALJ erred in finding Malone's activity protected under the Act, the District contends that, under the Court's analysis of the First Amendment claim before it,

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<sup>43</sup> *People v Sanad*, 2015 WL 479770 (Crim Ct Bronx Co Jan 28, 2015) (citing cases); see *Davenport v Wash Educ Assn*, 551 US 177, 185 (2007) (upholding state statutory regulation on ground that "the constitutional floor for unions' collection and spending of agency fees is not also a constitutional ceiling for state-imposed restriction").

<sup>44</sup> 11 PERB ¶ 3027 (1978).

<sup>45</sup> *Id.* at 3048. That First Amendment rights and rights under the Act are not coterminous is further exemplified by *State of New York (State University of New York at Stony Brook)*, 33 PERB ¶ 3045, at 3122-3123, n. 1 (2000); *Arlington Cent Sch Dist*, 25 PERB ¶ 3001, at 3007, n. 9 (1992); and *Eastchester Cent Sch Dist*, 29 PERB ¶ 3041 (1996).

“the fact that Malone’s activity was lawful is immaterial.”<sup>46</sup> This is, however, inaccurate. In *Santer*, the Court expressly found “that petitioners’ parking was entirely legal, but while that weighs in petitioners’ favor, it does not outweigh the evidence of disruption” caused by that parking-picketing activity, which, the Court found, hindered the dropping off of children on a rainy morning.<sup>47</sup> The Court found that the evidence established both “actual disruption” of school operations, and “a potential risk to student safety” that “outweighed the First Amendment value of petitioners’ speech about collective bargaining.”<sup>48</sup> This context-specific balancing of interests based upon evidentiary facts as to the parking-picketing does not predetermine the outcome of the First Amendment balancing test to the different factual context presented by Malone’s solitary leafleting, let alone the outcome under the Act.

In the instant case, it is undisputed that Malone’s leafleting was known to the employer; it, and his refusal to desist when ordered to do so, were the basis of the charges under EL § 3020-a.<sup>49</sup> Nor did Malone deny being ordered to desist. Rather, the ALJ found that Malone’s activity was protected, and that the insubordination charge was part and parcel of improperly motivated disciplinary action for which no legitimate non-discriminatory reason was adduced. We need not and do not find that the ALJ erred on the record before him. In so finding, however, we nonetheless cannot agree

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<sup>46</sup> District’s Supplemental Brief at 7-8, citing *Santer*, 23 NY3d at 268; see also *id.* at 5 (“the fact that the parking activity [of *Santer*] was lawful is of no consequence”; citing *Santer, id.*).

<sup>47</sup> *Santer*, 23 NY3d at 268.

<sup>48</sup> *Id.* at 267.

<sup>49</sup> Respondent’s Exhibit 5.

with his conclusion.

In the highly unusual procedural circumstances in which this case comes to us, in which notification to the ALJ of the Hearing Officer's findings under EL § 3020-a and an ALJ's decision quite literally crossed in the mail, the often-invoked risk of inconsistent adjudication in fact eventuated. The Hearing Officer's decision under § 3020-a has long been final. By contrast, under § 213.6 (b) of our Rules, the timely filing of exceptions or cross-exceptions deprives an ALJ's decision of finality.<sup>50</sup> Thus, we are confronted with the question of whether we should defer to an arbitral finding that has not only been the *status quo* between the parties for nearly five years, governing their now-settled expectations, but has been confirmed not once, but twice, by the courts. These factors militate in favor of deferral to the Hearing Officer's factual findings.

We have repeatedly stated that:

in order for us in an improper practice proceeding to defer to an arbitration award it must be satisfied that the issues raised by the improper practice charge were fully litigated in the arbitration proceeding, that arbitral proceedings were not tainted by unfairness or serious procedural irregularities[,] and that the determination of the arbitrator was not clearly repugnant to the purposes and policies of the Act.<sup>51</sup>

Neither unfairness nor procedural irregularity has been shown. While the

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<sup>50</sup> See, e.g., *UFT (Thomas)* 15 PERB ¶ 3030, at 3049 (1982); *Allen v NYS Pub Empl Relations Bd*, 33 PERB ¶ 7001, at 7003 (Sup Ct, Broome Co 2000). EL §3020-a(5)(b), by means of comparison, expressly provides that "[i]n no case shall the filing or the pendency of an appeal delay the implementation of the decision of the hearing officer."

<sup>51</sup> *Matter of New York City Tr Auth (Bordansky)*, 4 PERB ¶ 3031, at 3670(1971); *State of New York (Ben Aaman)*, 11 PERB ¶ 3084 (1978) (citing *Bordansky*); see also, *City of Canandagua*, 47 PERB ¶ 3025, at 3072 (2014); *State of New York (Dept of Mental Hygiene)*, 11 PERB ¶ 3084 (1978); *Matter of Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 21 NY3d 255, 46 PERB ¶ 7008 (2012) (approving our application of *Bordansky* factors to decline to defer to arbitrator's findings).



ultimate issues involved in the arbitration proceedings are different from those at issue here, the transaction at issue in both proceedings is the same, and the questions of fact are likewise identical. Moreover, deferring to the Hearing Officer's factual findings with respect to Malone's behavior and its effect on traffic is not repugnant to the Act. Indeed, such deference is consistent with the ALJ's prior rulings in the consolidated cases, in which he admitted and deferred to the factual findings of the Hearing Officers in awards brought to his attention prior to the issuance of his decision. Accordingly, we adopt the Hearing Officer's finding that Malone obstructed traffic leaving the school in a manner implicating the school's operations.

This factual finding does not, of course, end our inquiry. We must determine whether the presumptively protected activity of leafleting in support of concerted union activity lost its protected status here, as the District alleges. On the facts before us, we find that it does. It is well settled that "otherwise protected activity may be found to be unprotected under the Act when, under the totality of the circumstances, the conduct is found to be impulsive, overzealous, confrontational, or disruptive."<sup>52</sup>

Here, as Malone admitted and the Hearing Officer found, Malone sought to distract drivers on their way out of the school grounds, and his behavior had the effect of obstructing traffic, thus interfering with the efficient drop off of students at the beginning of the school day. Notably, this effect was not adventitious but was inherent in the method Malone chose to disseminate his message—for Malone to distribute a

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<sup>52</sup> *State of New York (Division of Parole)*, 41 PERB ¶ 3033, at 3146 (2008) (citing *State of New York (ben Aaman, supra note 50)*; *Kings Park Cent Sch Dist*, 24 PERB ¶ 3026 (1991); *Erie County Water Auth*, 24 PERB ¶ 3046 (1991); *Greenburgh No. 11 Union Free Sch Dist*, 30 PERB ¶ 3052 (1997), *confd as modified sub nom, Greenburgh No. 11 Union Free Sch Dist v Kinsella*, 253 AD2d 46, 32 PERB ¶ 7004 (3d Dept 1999) *lv denied*, 93 NY2d 810, 32 PERB ¶ 7014 (1999).


leaflet, the driver would have to stop, with the result that drivers of following cars would have to stop as well. On these factual findings, particularly that of the EL § 3020-a Hearing Officer that actual obstruction of traffic resulted from Malone's behavior, we find that his leafleting was done in such a manner as to lose the protection of the Act.

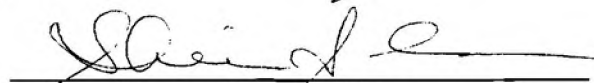
Conclusion

Accordingly, we approve, pursuant to Rule 204(1) (d) of our Rules, the withdrawal of the exceptions in Case No. U-27735. We affirm the ALJ's decision in Case No. U-27741 and the charge is dismissed. Further, we find Case No. U-27783 moot, and, for the reasons stated above, vacate the decision as to that case. Finally, for the reasons stated above, we defer to the Hearing Officer's factual findings, and reverse the ALJ's decision in Case No. U-27398, and dismiss the charge in that matter.

DATED: June 5, 2015  
Albany, New York

  
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Seth H. Agata, Chairperson

  
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Jerome Lefkowitz, Member

  
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Sheila S. Cole, Member

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

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In the Matter of

**SERVICE EMPLOYEES INTERNATIONAL  
UNION, LOCAL 200UNITED,**

Charging Party,

-and-

**CASE NO. U-31068**

**UTICA CITY SCHOOL DISTRICT,**

Respondent.

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**DREW BLANTON, ESQ., for Charging Party  
GEORGE E. MEAD, III, ESQ., for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by the Utica City School District (District) to a decision of an Administrative Law Judge (ALJ) granting an improper practice charge filed by the Service Employees International Union, Local 200United (SEIU).<sup>1</sup> The ALJ found that the District violated §§ 209-a.1 (a) and (d) of the Public Employees' Fair Employment Act (Act) by refusing to provide to SEIU the updated names, addresses and telephone numbers of the members of the bargaining unit employed by the District. The ALJ ordered the District to provide information requested by SEIU for purposes of contract administration.

**EXCEPTIONS**

The District excepts to the ALJ's decision on several bases. First, the District contends that the ALJ's decision is "tainted by the clear bias of the" ALJ "as evidenced by her apparent predetermination" of the issue, an allegation based on her referring the

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<sup>1</sup> 47 PERB 4572 (2014).

parties to the Board's case law after a conference.<sup>2</sup> The District also asserts that SEIU failed to explain the need for and relevance of the information to the employer in its request, thereby negating the obligation of the employer to respond to the request. The District asserts that the ALJ did not balance the interests of the parties appropriately, and that the burden to the employer of providing the information is substantial and real. The District further claims that the ALJ improperly considered allegations in the Amended Charge relating to a separate improper practice charge which was deemed abandoned. Finally, the District argues that the statutory right to privacy of the individual employees prohibits the District from disclosing the requested addresses and telephone numbers to SEIU.

### FACTS

The parties stipulated as to the following facts:

The District and SEIU are parties to a collectively negotiated agreement, the most current of which runs from July 1, 2008 through June 30, 2012. This agreement provides for and incorporates a form entitled "Application for Membership" which is completed by all new unit members and conveyed by the District to SEIU. Among other things, this form asks that the employee's home address and telephone number be provided.

In the Spring of 2011, SEIU executive vice president Liz Golembeski made at least one request to the District for an updated seniority list, including addresses and telephone numbers.

In February 2011, Richard Ambruso, then the District's Human Resources Director, wrote Golembeski that an updated seniority list would be provided, but that

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<sup>2</sup> Exceptions ¶ 1(a).

SEIU's request for social security numbers of bargaining unit members was under review.

On April 18, 2011, Golembeski contacted Andrew Lalonde, a BOCES labor relations specialist assigned to work with the District, by e-mail, again requesting an updated seniority list, including addresses, telephone numbers and dates of hire. Golembeski acknowledged receipt of a list of unit members from the District that did not include addresses or telephone numbers. Golembeski stated that the omitted information was necessary for SEIU to administer the collective bargaining agreement.

On May 20, 2011, the instant improper practice charge was filed.

The amended charge adds that:

The requested information is needed because the Union's ability to communicate with its members is central to its representational responsibilities. A specific example of this is that the Union sends informational newsletters to the membership. It is necessary to ensure that the addresses are accurate and current. Also, Union representatives have needed to contact members directly by telephone, such as when the Union was barred by the District from having a membership meeting on District premises. The Union had very little notice, and a change of venue was planned. Union representatives attempted to contact members by telephone to alert them of the change, but realized that many of the numbers were no longer accurate.

The need for the requested information has been heightened by the District's interference with typical communication methods. The Union has an Improper Practice charge U-30821.<sup>3</sup> One of the issues in this case is the District's restriction of access to Union representatives.

Consequently, the Union must have its members' addresses and phone numbers so that they may be informed about the Union's representational activities.<sup>4</sup>

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<sup>3</sup> The charge in Case No. U-30821 was deemed withdrawn and administratively closed on June 28, 2012 when there was no response from SEIU to a status update request.

<sup>4</sup> Although not relevant to the exceptions, the parties stipulated that SEIU's local leadership objected to SEIU's gathering this information.

On September 19, 2011, the ALJ sent a letter to the representatives of the parties memorializing their conference held that day. In the letter, the ALJ stated, in pertinent part:

With respect to the merits of the charge, I strongly suggest that both of you review *County of Yates*, 27 PERB ¶ 3080 and *Town of Greenburgh*, 20 PERB ¶ 4606 before proceeding with the charge. If, after reviewing the cases, a second conference would be helpful, please contact me to schedule.

If the charge is to proceed, I see no reason why a hearing will be required as there do not appear to be any relevant facts in dispute.

### DISCUSSION

We begin with the District's claim of bias, predicated on the ALJ's September 19, 2011 letter, referring the parties to our decision in *County of Yates*<sup>5</sup> and an ALJ decision in *Town of Greenburgh*.<sup>6</sup> The District has not adduced any evidence of personal animosity or bias on the part of the ALJ against the District. Nor does the District dispute the relevance of the cases cited by the ALJ in her letter, though it seeks to distinguish them, and it did not except to the decision to decide the case without a hearing. Indeed, the District "does not contest the general relevancy of having the names and addresses of its members to the conduct of the Union's business," but rather "does contest the reasonableness of the Union's instant request for that information *again*."<sup>7</sup> Accordingly, we find that here, as was the case in *Board of Education of the City School District of the City of New York (Grassel)*, "[t]he pre-hearing efforts by the ALJ to clarify the charge, and to discuss other preliminary matters with the parties before going on the record, are consistent with [her] quasi-judicial

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<sup>5</sup> 27 PERB ¶ 3080 (1994).

<sup>6</sup> 20 PERB ¶ 4606 (1987).

<sup>7</sup> Brief in Support of Exceptions at pp. 4-5.

responsibilities and do not constitute a basis for recusal,” or, here, a finding of bias warranting reversal.<sup>8</sup> We therefore deny the District’s exception to the ALJ’s decision predicated on its claim that the ALJ’s September 19, 2011 letter constitutes evidence of bias. Similarly, nothing in the record or the ALJ’s decision suggests any reliance on SEIU’s allegations in the Amended Charge overlapping the prior abandoned charge, nor any reason why such facts could not properly be considered if relevant.

We have held that “[t]he general right to receive requested documents and information is subject to three primary limitations: reasonableness, which includes the burden on the responding party; relevancy; and necessity.”<sup>9</sup>

We are unpersuaded by the District’s argument that SEIU’s failure to specify the reason for the request absolved it of its duty to respond. We have long rejected such an “unduly narrow” reading of our decisions.<sup>10</sup> To the contrary, we have held that such failure to articulate the need for the information required is not fatal when “a finding of need and/or relevance can be inferred from the circumstances surrounding a request for information.”<sup>11</sup> We agree with the ALJ that such is the case here.

The ALJ relied upon another ALJ decision, *Town of Greenburgh*, which drew upon as persuasive a decision of the National Labor Relations Board (NLRB) for the

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<sup>8</sup> 41 PERB ¶¶ 3031, 3136 (2008); see also *United Fedn of Teachers (Gray)*, 47 PERB ¶ 3011 (2014).

<sup>9</sup> *Hampton Bays Union Free Sch Dist*, 41 PERB ¶¶ 3008, 3051 (2008), *confd sub nom Hampton Bays Union Free Sch Dist v Pub Empl Relations Bd*, 62 AD3d 1066 (3d Dept), *lv denied*, 13 NY3d 711 (2009); *Board of Ed, City Sch Dist of the City of Albany*, 6 PERB ¶ 3012 (1973); see also *State of New York (OMRDD)*, 38 PERB ¶ 3036 (2005), *confirmed sub nom CSEA v. New York State Pub Empl Rel Bd*, 14 Misc3d 199, 39 PERB ¶ 7009 (2006), *affd*, 46 AD3d 1037, 40 PERB ¶ 7009 (3d Dept 2007).

<sup>10</sup> *Salmon River Cent Sch Dist*, 21 PERB ¶ 3006, at 3009 (1988).

<sup>11</sup> *Id.*

proposition that “[n]ames and addresses of unit employees should be presumed relevant to the union’s role as bargaining representative.”<sup>12</sup> The NLRB’s formulation was even more to the point here; it stated that “[a] union has a statutory right to receive unit members’ names and addresses,” explaining that “[t]his information is presumptively relevant to the union’s role as bargaining agent and no showing of particularized need is necessary.”<sup>13</sup> Although we have not had occasion to expressly comment on that precept, it has been relied upon by ALJs since, and the NLRB still applies that presumption.<sup>14</sup> We find this rationale persuasive, and we adopt it. Moreover, we find the same rationale is equally applicable to members’ telephone numbers.

The District claims that the ALJ erred in rejecting its arguments that providing the requested information would be burdensome upon the District and that the District met its contractual obligation to provide information when it provided the membership application forms. To the extent that the District contends that satisfying the contractual provision extinguishes the statutory duty, we have held to the contrary. As we explained in *Hampton Bays Union Free School District*, “[a]n agreement that contains negotiated terms and conditions that reiterate, expand, modify or touch upon statutory rights or procedures, does not eliminate the obligation under the Act to provide

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<sup>12</sup> 20 PERB ¶ 4606, 4748 (1987), citing *Bozzutto’s, Inc.*, 275 NLRB 375, 119 LRRM 1111 (1985).

<sup>13</sup> *Bozzutto’s, Inc.*, *supra* note 10 (quoting *Georgetown Holiday Inn*, 235 NLRB 485, 486 (1978) (quotation marks and editing marks omitted)).

<sup>14</sup> See, e.g., *In re Xcel Energy, Inc.*, 2002 WL 31662291 (NLRB Div of Judges) (November 15, 2002).



requested information and documents bearing on those negotiated terms.”<sup>15</sup>

Nor are we persuaded by the District’s claim that producing the requested information is unduly burdensome under the circumstances. SEIU has argued, and the District does not dispute, that the addresses and telephone numbers of the unit members change over time, and that they are in the possession, custody and control of the District. The District did not proffer any evidence or assertions before the ALJ specifying what steps would be necessary to produce the information, nor has it provided an estimate of the time and resources necessary to take those steps.<sup>16</sup> Rather, it has simply contended that the District has provided the information at an earlier time, and that it should not be required to update SEIU’s files. On this basis, it has not demonstrated that the request to provide the information would impose an undue burden upon it.

Finally, the District’s argument that the privacy interests of the unit members justifies the refusal to provide the information to SEIU is unavailing. As we explained in *County of Yates*:

A bargaining agent is simply not similarly situated to the general public when it demands employment information from an employer about employees it is obligated to represent. New York’s FOIL is concerned basically with the

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<sup>15</sup> *Supra* note 9, at 3051.

<sup>16</sup> In its Brief in Support of its Exceptions, the District has alleged that it would have to consult the personnel records of the individual employees to provide this information. *Id.* at 5. However, no such allegation can be found within the District’s Answer, its brief before the ALJ, nor the parties’ stipulation of facts. Section 213.2 of our Rules of Procedure (Rules) “limits our review of the ALJ’s determination to the record before him or her.” *Civ Serv Empl Assn (Bienko)*, 47 PERB ¶¶ 3027, 3082 (2014), citing *Civ Serv Empl Assn (Paganini)*, 36 PERB ¶¶ 3006, at 3019 (2003), citing *Margolin v Newman*, 130 AD2d 312, 20 PERB ¶¶ 7018 (3d Dept 1987), *affd other grounds*, 73 NY2d 796, 21 PERB ¶¶ 7017 (1988); see also *Town of Blooming Grove*, 47 PERB ¶¶ 3010 (2014); *Rochester Teachers Assn (Hirsch)*, 46 PERB ¶¶ 3035, at 3078 (2013). Accordingly, we do not consider these newly raised factual contentions.

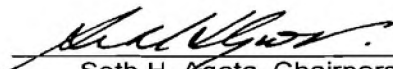
public's right to know about the operations of government as government. A public employee's social security number is largely irrelevant to the performance of the employee's duties. It is for that reason that disclosure of such information is deemed an unwarranted invasion of privacy and exempt as such from compulsory disclosure under FOIL. A bargaining agent demanding employment information of a government, however, is not seeking information about government as government, but government as employer. It is entitled to demand and receive relevant information from an employer under the Act because the information is needed to enable it to exercise its rights and carry out the responsibilities imposed upon it under the Act.<sup>17</sup>


Accordingly, for the reasons set forth above, the District's exceptions are denied and the ALJ's decision is affirmed.


IT IS, THEREFORE, ORDERED that the charge must be, and it hereby is, granted and that the ALJ's finding that the District is in violation of §§ 209-a.1 (a) and (d) of the Act for failing to provide SEIU with the names, addresses and telephone numbers of the members of its bargaining unit is hereby affirmed; and

IT IS THEREFORE ORDERED that the District forthwith provide SEIU with the names, addresses and telephone numbers of the members of the bargaining unit it represents, and sign and post the attached notice at all physical and electronic locations used to post communications for bargaining unit employees.

DATED: June 5, 2015  
Albany, New York

  
Seth H. Agata, Chairperson

  
Jerome LeFKowitz, Member

  
Sheila S. Cole, Member

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<sup>17</sup> 27 PERB ¶ 3080, at 3184 (1994).

# 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 Utica City School District in the unit represented by Service Employees International Union, Local 200United that the District will:

1. Provide to Service Employees International Union, Local 200United the names, addresses and telephone numbers of the members of the bargaining unit of District employees represented by Service Employees International Union, Local 200United.

Dated . . . . .

By . . . . .  
on behalf of the Utica City 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**

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In the Matter of

**LAWRENCE TEACHERS' ASSOCIATION, NYSUT, AFT,  
NEA, AFL-CIO,**

Charging Party,

**CASE NO. U-31703**

-and-

**LAWRENCE UNION FREE SCHOOL DISTRICT,**

Respondent.

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**CLAUDIA SCHACTER-DECHABERT, for Charging Party**

**MINERVA AND D'AGOSTINO, P.C. (CHRISTOPHER G. KIRBY of counsel),  
for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the Lawrence Teachers' Association, NYSUT, AFT, NEA, AFL-CIO (Association) to a decision of an Administrative Law Judge (ALJ) in an improper practice proceeding.<sup>1</sup> The ALJ dismissed the Association's charge alleging that the Lawrence Union Free School District (District) violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when, beginning in 2012, the District unilaterally transferred prekindergarten teaching responsibilities to another institution, St. Joseph's College. Relying on our construction of Education Law (EL) § 3602-e in *Springs Union Free School District*

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<sup>1</sup> 47 PERB ¶ 4556 (2014).

(*Springs*),<sup>2</sup> the ALJ held that the District had no obligation to bargain over its decision to transfer the work to St. Joseph's College, whether or not the work had been exclusively performed by Association unit members.<sup>3</sup>

### EXCEPTIONS

The Association asks us to overrule our holding in *Springs*, and alleges that the ALJ erred in not determining whether the at-issue work was exclusive bargaining unit work. In response, the District argues that we should not overrule *Springs*, and that the at-issue work was not exclusive bargaining unit work.

### FACTS

The Association does not dispute the factual findings of the ALJ, and we need not recite them here. Indeed, the only material facts for purposes of our decision are that the District has operated the at-issue prekindergarten program pursuant to EL § 3602-e since 2006, and that in the beginning of 2012 it unilaterally entered into a contract with St. Joseph's College to have the College operate and staff the prekindergarten classes on the District's behalf.

### DISCUSSION

In *Springs*, we provided an exhaustive analysis of EL § 3602-e and its effect on the duty to negotiate under the Taylor Law concerning a school district's decision to enter a contract with other entities to operate and staff a prekindergarten program cognizable under that statutory scheme. We shall not restate that analysis here, except

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<sup>2</sup> 46 PERB ¶ 3040 (2012).

<sup>3</sup> The District's impact bargaining obligations, if any, are not at issue in this matter.

as necessary to address the Association's particular argument.

Among the many elements of EL § 3602-e on which we relied in *Springs* is that EL § 3602-e.5 (d) provides: "Notwithstanding any other provision of law, the school districts shall be authorized to enter any contractual or other arrangements necessary to implement the district's prekindergarten plan." We held that the Legislature clearly intended to override the duty under the Act to negotiate concerning contracts with other entities to provide the services and staff necessary to implement the statutory prekindergarten plan.

The Association argues that the words "notwithstanding any other provision of law" in EL § 3602-e.5 (d) applies to the Education Law only. In support, it cites two decisions of the Commissioner of Education holding that public schools may not contract with independent contractors to provide instructional services on their behalf.<sup>4</sup> According to the Association, the "notwithstanding" language in EL § 3602-e.5 (d) was designed to overcome that restriction so as to permit schools to enter into such contracts, but no more. Thus, the Association contends that the "notwithstanding" language in EL § 3602-e.5 (d) does not extend to the statutory duty to negotiate under the Act concerning a decision to enter into such contracts.

We find the argument unpersuasive. If the Legislature had intended such a narrow application of the words "notwithstanding any other provision of law," it could

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<sup>4</sup> The Association relies on *Appeal of McKenna*, Ed Dept Rep 54 (2002) and *Matter of Friedman*, 19 Ed Dept Rep 522 (1980), where the Commissioner held that school districts could not provide certain instructional services with private contractors. That EL § 3602-e may override those decisions, as the Association argues, does not mean that the "notwithstanding" language in EL § 3602-e.5 (d) applies to those decisions only.

have easily stated the language as the Association would have us read it. Indeed, where the Legislature intended such a narrow reading of similar “notwithstanding” language, it said so. EL § 3602-e.5 (f) states: “Notwithstanding any other provision of *this section* to the contrary, two or more school districts may submit a joint application to operate a joint universal prekindergarten program” [emphasis added]. Therefore, the Association’s argument does not convince us that we should overrule *Springs*.

Therefore, we shall adhere to our holding in *Springs* that EL § 3602-e is a comprehensive statutory scheme that authorizes school districts to establish and operate state-subsidized prekindergarten programs and permits public schools to “enter any contractual or other arrangements necessary to implement the district’s prekindergarten plan,” notwithstanding any other provision of law, including the Act. Similar to *City of Schenectady*,<sup>5</sup> the duty to negotiate under the Act is inconsistent with, and must yield to, the Legislature’s plain and clear intent in EL § 3602-e that school districts are permitted to unilaterally contract for necessary services to implement a prekindergarten program cognizable under that statutory scheme.<sup>6</sup>

The Association’s reliance on *Board of Educ of City School Dist of City of the*

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<sup>5</sup> 25 PERB ¶¶ 3022 (1992), *annulled in part, confirmed in part, sub nom Schenectady Police Benev Assn v New York State Pub Empl Relations Bd*, 25 PERB ¶¶ 7009 (Sup Ct Albany Co 1992), *affd as modified* 196 AD2d 171, 27 PERB ¶¶ 7001 (3d Dept 1994), *affd* 85 NY2d 480, 28 PERB ¶¶ 7005 (1995).

<sup>6</sup> See also *Vestal Empls Assn, NEA/NY, NEA v New York State Pub Empl Relations Bd*, 93 NY2d 815 (1999), 33 PERB ¶¶ 7005 (1999); *Webster Cent Sch Dist v New York State Pub Empl Relations Bd*, 75 NY2d 619, 23 PERB ¶¶ 7013 (1990).

*New York v New York State Pub Empl Relations Bd*<sup>7</sup> is unavailing. There, the Court of Appeals found that a statutory grant of discretion to obtain certain confidential information from represented public employees did not overcome the duty to negotiate concerning the subject. However, the statutory provision at issue in *Board of Educ* did not contain comparable “notwithstanding any other provision of law” language. Accordingly, we balanced the school’s interests in obtaining the information under its statutory discretion against the impact that the disclosure obligation had on the employees’ negotiable interests under the Act, finding that the latter outweighed the former. The Court agreed with our application of that balancing test. No balancing test is triggered here in view of the plain and clear legislative intent underlying EL § 3602-e, including the express “notwithstanding” language contained therein.

Because the District’s decision to contract with St. Joseph’s College to provide instructional services for the District’s EL § 3602-e prekindergarten program is not mandatorily negotiable, we find it unnecessary to determine whether the work was exclusive bargaining unit work. Exclusivity is a factor in determining whether an employer has failed to satisfy its bargaining obligations under the Act.<sup>8</sup> Here, there are no such bargaining obligations.

Accordingly, we affirm the decision of the ALJ and hereby dismiss the

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<sup>7</sup> 75 NY2d 660, 23 PERB ¶ 7012 (1990).


<sup>8</sup> See, e.g., *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005 (2008), *confirmed and mod in part sub nom Manhasset Union Free Sch Dist v New York State Pub Empl Relations Bd*, 61 AD3d 123, 42 PERB ¶ 7004 (3d Dept 2009), *on remittur*, 42 PERB ¶ 3016 (2009).

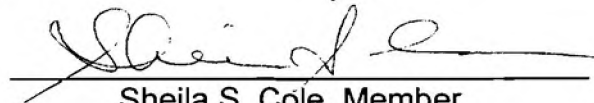


Association's improper practice charge.

DATED: June 5, 2015  
Albany, New York

  
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Seth H. Agata, Chairperson

  
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Jerome Lefkowitz, Member

  
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Sheila S. Cole, Member