

In the Matter of

**CAYUGA COMMUNITY COLLEGE PART-TIME  
FACULTY ASSOCIATION,**

Petitioner,

**CASE NO. C-6254**

- and -

**CAYUGA COMMUNITY COLLEGE and COUNTY  
OF CAYUGA,**

Employer,

-and-

**CAYUGA COMMUNITY COLLEGE FACULTY  
ASSOCIATION,**

Intervenor.

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**TRUDY RUDNICK, LABOR RELATIONS SPECIALIST AND ORGANIZER, for  
Petitioner**

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

**SUSAN M. DECARLO, LABOR RELATIONS SPECIALIST, for Intervenor**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions by Cayuga Community College and the County of Cayuga (collectively, the College) to a decision of an Administrative Law Judge (ALJ) defining an appropriate bargaining unit and ordering the College to produce a list of the employees within the bargaining unit as defined.<sup>1</sup> The ALJ found, over the College's objection, that adjunct faculty at the College were most appropriately placed in a separate appropriate bargaining unit from the full-time faculty.

**EXCEPTIONS**

The College excepts to the ALJ's decision on multiple grounds. First, the College

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<sup>1</sup> 48 PERB ¶ 4003 (2015).

excepts to the ALJ's finding that the full-time faculty and the adjunct faculty do not share a strong community of interests, and to not weighing facts supporting the existence of a community of interests, such as the same core duties, educational qualifications, supervision, and advancement on the pay scale.<sup>2</sup> Second, the College contends that the ALJ erroneously found "significant conflicts" existed between full-time faculty and adjunct faculty, and in relying on the predicates supporting that finding.<sup>3</sup> Third, the College excepts to the ALJ's failure to accord significant weight to its claim of administrative convenience.<sup>4</sup>

In addition to these primary exceptions, the College raises several of a subsidiary nature. The College excepts to the ALJ's reliance on a specified decision, and her not considering others in which the Board found that part-time and full-time employees are appropriately placed in a single unit.<sup>5</sup> Likewise, the College contends that the ALJ should have addressed the fact that many other colleges have both full-time and adjunct faculty in a combined unit.<sup>6</sup> The College asserts that the ALJ should have found that if a conflict does exist the New York State United Teachers (NYSUT) should not represent both groups.<sup>7</sup> Finally, the ALJ erred, the College argues, by not finding the petition subject to the contract bar rule.<sup>8</sup>

### FACTS

The currently represented employees at the College fall into four units: (1) the

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<sup>2</sup> Exception Nos. 1, 10, 11,12, 13, 14, 15, 16, 17.

<sup>3</sup> Exception Nos. 3, 5, 6, 7, 8, 9.

<sup>4</sup> Exception No. 2.

<sup>5</sup> Exception Nos. 4 and 19.

<sup>6</sup> Exception No. 18.

<sup>7</sup> Exception No. 20.

<sup>8</sup> Exception No. 21.

full-time faculty represented by the Cayuga Community College Faculty Association (“Faculty Association”); (2) administrative professional staff; (3) clerical staff; and (4) maintenance and custodial staff.<sup>9</sup>

The current contract between the Board of Trustees of the College and the Faculty Association (Contract) includes, among its definitions, the “Negotiating Unit,” defined as:

The negotiating unit shall consist of faculty members (instructional and non-instructional) who are full-time professional staff employees holding academic rank and shall exclude administrators excepting those serving as division chairs as provided under Section 13 below.<sup>10</sup>

Section 13 defines a “Division Chair” as “a teaching faculty member temporarily assigned to administrative duties” under the Contract.<sup>11</sup>

The Faculty Association has approximately 66 members, including division chairs.<sup>12</sup> By contrast, the unit petitioned for by the Cayuga Community College Part-Time Faculty Association consists of approximately 193 adjunct faculty members (each of whom can teach up to 12 credits per semester), nine coaches and nine members of

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<sup>9</sup> Stipulation of Facts, Joint Ex 1 at ¶ 5.

<sup>10</sup> 2011-2016 Contract, Joint Ex 3, Art I, § 11. The 2004-2011 Contract contains an identical definition of the negotiating unit. Joint Ex 2, Art. I, § 11. The 1970-1972 Contract between Auburn Community College (the College’s original name) and the Auburn Community College Faculty Association, provides that the terms “Faculty Member, or Instructional Staff or Academic Staff shall mean a member of the negotiating unit, which consists of all full time professional staff employees who hold faculty rank.” Joint Ex 4, Art. I, §1.6 (emphasis in original).

<sup>11</sup> *Id.*, § 13. The 2004-2011 Contract contains an identical definition of Division Chair. Joint Ex 2, Art. I, § 13. The definition of “Department Chairman” similarly limits the position to full-time staff, requiring as the sole qualification “the rank of Associate Professor or above.” Joint Ex 4, Art. IX, § 6.2.

<sup>12</sup> Joint Ex 1, ¶ 14.

the administrative professional staff.<sup>13</sup>

For the 2013-2014 academic year, the minimum full-time faculty starting salaries were \$54,0241 for an Instructor; \$60,874 for an Assistant Professor; \$67,351 for an Associate Professor; and \$80,016 for a Professor.<sup>14</sup> For these salaries, a member of the full-time faculty is required to carry a full teaching load of no more than 17 credit hours per semester or 30 per year, and no less than 80% of that load.<sup>15</sup>

In addition to their salaries, full-time faculty members may teach additional courses, known as “overload” courses, and be compensated at a per credit hour rate ranging, in academic year 2013-2014, between \$ 966 per credit hour (for an Instructor) to \$1,301 (for a full professor) set forth in the Contract.<sup>16</sup> Adjunct faculty are offered courses on a take-it-or-leave-it basis only after the full-time faculty have selected the “overload” courses they want to teach.<sup>17</sup>

Full-time faculty members receive, and are eligible to receive, among other benefits: paid sick and personal leave time, paid sabbatical leave after six years of service with the College, longevity increases, faculty development funds, special service work, and promotional stipends. In addition, they are eligible to receive the Faculty Award for Excellence, an enhancement of their base pay. Full-time faculty also receive health and dental insurance, and have the option of an early retirement incentive. Full-time faculty may participate in the Employee Retirement System, the Teacher

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<sup>13</sup> *Id.*; see also Tr, vol. 2, at p. 15.

<sup>14</sup> Joint Ex 1, ¶ 17. The rates for 2015-2016 academic year are, respectively, \$56,538; \$63,988; \$70,032; and \$83,068. Joint Ex 3, Art. XV, § 1.

<sup>15</sup> Joint Ex 3, Art. XIV §§ 1.1. 2.2.

<sup>16</sup> Joint Ex 1, ¶ 6; Joint Ex 3, Art. XV, § 4. In 2015-2016, overload rates range between \$995-1339.

<sup>17</sup> Tr, vol 1 at 96-97.

Retirement System, or a TIAA-CREF retirement option.<sup>18</sup>

Adjunct faculty are compensated on a per credit hour basis, at a rate equivalent to the rate paid to full-time faculty for teaching an “overload” course. Adjunct faculty receive no other paid benefits or leave time. They are not eligible for health or dental insurance coverage.<sup>19</sup> Adjuncts are not required to be available to students for office hours, as are full-time faculty, nor are they required to attend division meetings.<sup>20</sup> Adjunct faculty may teach at other schools, or have other full-time employment elsewhere or at the College.<sup>21</sup>

According to Steven Keeler, Division Chair of the English, Humanities and Telecommunications Division, “we don’t consider adjuncts to be members of the division in terms of attending division meetings, and they have no vote at the division meetings” if they do attend.<sup>22</sup> Keeler further testified that full-time faculty participate in curriculum and course development, but that adjunct faculty have no role in governing the college.<sup>23</sup> Keeler explained that, since the 1990s, the Faculty Association had rejected the notion of representing the adjunct faculty, due to a perceived conflict of interest between them; he explained that “the objection always centered around the idea that the adjuncts would take away the full-time faculty courses.”<sup>24</sup>

All college staff, including adjunct faculty, receive a tuition waiver for family

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<sup>18</sup> Joint Ex 1, ¶¶ 18, 11; Joint Ex 3, Art. XVI.

<sup>19</sup> Joint Ex 1, ¶ 12.

<sup>20</sup> Joint Ex 1, ¶ 13; Tr, vol 1, at pp. 31-32 (Sevik); 97-98 (Keeler).

<sup>21</sup> See, e.g., Tr, vol 1, at p. 20 (Adjunct lecturer Gregory Sevik also teaches at LeMoyne College); Joint Ex 1, ¶ 11 (“Certain adjuncts participate in TIAA CREF based on being a member through employment at another institution”); Tr, vol 1, at p. 101 (College administrator taught a telecommunications course as an adjunct).

<sup>22</sup> Tr, vol 1, at pp. 97-98 (Keeler).

<sup>23</sup> Tr, vol 1 p. at 98.

<sup>24</sup> Tr, vol 1, p. at 77.

members attending the College. Adjuncts may participate in the State and Local Employees' Retirement System or the Teachers' Retirement System. Adjuncts who are former full-time faculty or administrators, or who are currently employed as full time administrative professionals, may participate in the TIAA-CREF retirement option.

The four division chairs of the College assign courses to both full-time faculty members and to adjunct faculty. Division chairs are also responsible for hiring and firing adjunct faculty, either directly or through a designee. Full-time faculty members may avail themselves of just cause disciplinary process that culminates in binding arbitration; adjunct faculty members have no such protection.<sup>25</sup> Full-time faculty members must be hired pursuant to a contractually agreed process that includes a recommendation by a search committee to the appropriate vice president and then to the College president, and finally ends with the approval of the Board of Trustees.<sup>26</sup>

### DISCUSSION

The unit placement petition here "presents an initial uniting situation because it seeks representation rights for unrepresented employees."<sup>27</sup> In such cases, the Board must determine the most appropriate unit because "[t]he statutory grant of authority to this Board to resolve disputes concerning representation status mandates this Board to define appropriate units and does not restrict its power simply to the approval or disapproval of units sought by the party or parties to the proceeding."<sup>28</sup> In making such a determination, the Board has long applied "the community of interest and administrative convenience standards set forth in § 207.1 of the Act, with the community

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<sup>25</sup> Joint Ex 3, Art. VI; Tr, at pp. 108-109.

<sup>26</sup> Joint Ex 3, Art. X.

<sup>27</sup> *Clinton Comm College*, 31 PERB ¶ 3070, 3155 (1998).

<sup>28</sup> *Id.*, quoting *State of New York*, 1 PERB ¶ 399.85, 3231 (1969).

of interest given predominant consideration.”<sup>29</sup>

As we have recently reaffirmed:

Under this standard, the Board has consistently held that, among the factors to be considered in determining whether a community of interest exists are similarities in terms and conditions of employment, shared duties and responsibilities, qualifications, common work location, common supervision, and an actual or potential conflict of interest between the members of the proposed unit.<sup>30</sup>

Additionally, the Board has, where proposed placement in a pre-existing unit is at issue, looked to the parties’ contractual recognition clause in determining whether the unrepresented employees were properly encompassed in the proposed unit.<sup>31</sup> Finally, where relevant, the Board has looked to the bargaining history of the parties and to the extent of supervisory authority of the unrepresented employees over the represented employees in determining the existence of a conflict of interest.<sup>32</sup>

The instant case bears several indicia of conflict of interest. First, as correctly found by the ALJ, we find that the fundamentally different institutional roles played by

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<sup>29</sup> *St. Paul Boulevard Fire Dist*, 42 PERB ¶ 3009, 3027 (2009), *citing Board of Educ of the City Sch Dist of the City of Buffalo*, 14 PERB ¶ 3051 (1981); *City of Rye*, 33 PERB ¶ 3035 (2000); *NYCTA*, 36 PERB ¶ 3038 (2003); *see also Niagara Frontier Transp Auth*, 45 PERB ¶ 3020, 3050 (2012).

<sup>30</sup> *County of Franklin*, 48 PERB ¶ 3025, \_\_\_\_ (2015) (quotation and editing marks omitted), quoting *Niagara Frontier Transportation Auth*, 45 PERB ¶ 3020, at 3050 (2012); citing *Sachem Cent Sch Dist*, 42 PERB ¶ 3030 (2009); *St. Paul Boulevard Professional Firefighters Assn*, 42 PERB ¶ 3009; *Monroe #1 BOCES*, 39 PERB ¶ 3024 (2006); *Somers Cent Sch Dist*, 12 PERB ¶ 3068 (1979); *East Ramapo Cent Sch Dist*, 11 PERB ¶ 3075 (1978); *Somers Cent Sch Dist*, 12 PERB ¶ 3068 (1979).

<sup>31</sup> *County of Monroe*, 47 PERB ¶ 3001, 3003 (2014).

<sup>32</sup> *Sachem Cent Sch Dist*, 42 PERB ¶ 3030, at 3112 (bargaining history showed unrepresented employees who had at one time been placed within unit had functioned harmoniously in bargaining with rest of unit); *County of Monroe*, 47 PERB ¶ 3001, at 3003 (nurse managers, though entitled to representation, not properly placed in a unit with their subordinates when they have a supervisory role in hiring, discharge, promotion or grievance administration enabling them to significantly affect the terms and conditions of employment of those whom they supervise).

the full-time faculty and the adjunct faculty are sufficient to create a conflict of interest precluding placing the adjunct faculty in the same bargaining unit as the full-time faculty.

In *Board of Higher Education of the City of New York*, the Board found that adjunct faculty and permanent faculty (that is, tenured faculty and tenure-track faculty) should be in different bargaining units.<sup>33</sup> The Board found it to be “significant” in that matter that “the non-tenured faculty almost matches the faculty-rank-status personnel in numbers.”<sup>34</sup> The Board explained the diverging interests of the two groups:

[A]s the nontenured instructional staff comprises a large number of persons who hold other positions from which they receive substantial fringe benefits and to which they owe their primary professional loyalty, their interests and ambitions relative to the City University are different from those of faculty-rank-status personnel.

The faculty-rank-status personnel are the heart of the university. It might be compromising to their independence and to the very stability of the university for nontenured instructional personnel, in numbers almost equal to that of faculty-rank-status personnel, to be included in the unit of faculty-rank-status personnel.

We believe that the differences between faculty-rank-status employees and nonannual lecturers-whether they teach more or less than six hours a week-are of sufficient magnitude to preclude their being placed in the same negotiating unit. Faculty-rank-status personnel are all permanent staff in that they are tenured or hold positions leading to tenure. Nonannual lecturers, on the other hand, are appointed and reappointed for only one semester at a time. Faculty-rank-status employees receive many and various fringe benefits, the cost and value of which are considerable. Nonannual lecturers, on the other hand, do not receive these fringe benefits.

Faculty-rank-status personnel exercise important responsibilities regarding the operation of the university by

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<sup>33</sup> 2 PERB ¶ 3056 (1969).

<sup>34</sup> *Id.* at 3469.



their service on departmental committees. Nonannual lecturers, on the other hand, rarely serve on departmental committees. Faculty-rank-status personnel have their primary personal commitment to the City University; nonannual lecturers, on the other hand, are likely to be full-time high school teachers working at the university at night, or businessmen, accountants, lawyers, or graduate students whose primary professional commitments are elsewhere.<sup>35</sup>

The decision in *Board of Higher Education* closely matches the facts here. Indeed, the conflict is starker and sharper in this case, as adding the adjunct faculty to the full-time faculty's bargaining unit would effectively drown out the voice of the full-time faculty, who would, at a stroke, be outnumbered by a more than three-to-one ratio. We note also that the approximately 200 adjunct faculty members petitioned for are sufficient to create a viable and coherent unit of employees with a genuine community of interest and absent conflict.

The College asserts that *Board of Higher Education* "was wrongly decided and has not stood the test of time,"<sup>36</sup> relying on *Warren County*<sup>37</sup> and *County of Genesee*.<sup>38</sup> As a threshold matter, these decisions were rendered not by the Board, but by the then-Acting Director of Representation and Employee Practices, and therefore are "not binding on the Board and ha[ve] no precedential value."<sup>39</sup>

Moreover, far from being inconsistent with *Board of Higher Education*, the cases relied upon by the College are applications of its fact-specific analysis to differing factual scenarios. Thus, in *Warren County*, the Director had found that academic and non-academic staff had a "community of interest" as they "serve[d] together on faculty

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<sup>35</sup> *Id.* at 3469-3470.

<sup>36</sup> Brief in Support of Exceptions, at 16.

<sup>37</sup> 7 PERB ¶ 4032 (1974).

<sup>38</sup> 7 PERB ¶ 4044 (1974).

<sup>39</sup> *County of Nassau*, 48 PERB ¶ 3023, n. 89 (2015).

governance committees,” worked closely and in consultation together with overlapping duties, and desired to be part of the same unit.<sup>40</sup> Under the specific factual circumstances of that case, the Director found that the employer’s claim of potential conflict did not suffice to warrant separating the titles into two units. Likewise, *County of Genesee* also involved a different constellation of facts than that involved here, in that the administrators at issue had faculty status, participated in college governance, and enjoyed similar benefits and work conditions to the academic faculty as well as having overlapping job functions. In both cases, the Director found the factual distinctions between the case before him and *Board of Higher Education* made all the difference. Without reviewing those director’s decisions on the merits, we reject the College’s claim that, as a matter of precedent, *Board of Higher Education* “is out of step with modern PERB policy and should be disregarded.”<sup>41</sup>

Moreover, the bargaining history of the parties supports separate representation of adjunct faculty. The fact that neither group wishes to be jointly represented with the other, while not dispositive, is salient, as is the fact that the Faculty Association has since the 1990s rejected the opportunity to organize and represent adjunct faculty because of a felt conflict between the two groups. Likewise, the fact that the College and the Faculty Association have stipulated in their collectively bargained Contract that the unit to be represented by the Faculty Association is limited to full-time academic staff is germane and supports our conclusion that adjuncts, while entitled to representation, are not properly placed in the Faculty Association.

This is particularly the case since the College deploys against the fundamental

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<sup>40</sup> 7 PERB ¶ 4032, at 4044-4045.

<sup>41</sup> Brief in Support of Exceptions, at 17.

alteration of the bargaining unit, the conflict delineated in our most directly applicable precedent, and the expressed wishes of both the full-time and the adjunct faculty only a conclusory, non-specific claim of administrative convenience. That claim is undermined by the fact that the College has, in a series of collectively bargained agreements, the latest of which remains in effect through August 31, 2016, expressly agreed upon a definition of the “negotiating unit” represented by the Faculty Association. While the parties’ agreements are not binding on us, the addition of the adjunct faculty members to the Faculty Association would either require an abrogation of this provision of the parties’ collectively bargained agreement or would require separate negotiations by the Faculty Association on behalf of adjunct faculty, thereby eliminating the very administrative convenience upon which the College relies.

Because we affirm the ALJ’s finding as to the appropriate bargaining unit and, more specifically, her finding that conflict between the interests of full-time faculty and adjunct faculty warrant a separate unit, we need not address the College’s exception based on the contract bar rule. Nor do we find persuasive the College’s contention that the Part-Time Faculty Association should be deemed an inappropriate placement because it is affiliated with NYSUT. The College asserts that the “the reality is that this is a single, NYSUT organization, with both the Faculty Association and the Part-Time Faculty Association ‘represented’ out of the same office.”<sup>42</sup> We have long rejected the notion that placement of two units within locals affiliated with the same parent union, without anything more, perpetuates the conflict between the two units.<sup>43</sup> As the only specific allegation is that the two locals are represented herein by advocates in the

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<sup>42</sup> Brief in Support of Exceptions, at 19.

<sup>43</sup> See *City of Binghamton*, 9 PERB ¶ 3022 (1976).

same office building, we decline to find any conflict in having two locals affiliated with NYSUT represent separate bargaining units employed by the College.

Accordingly, we affirm the ALJ's decision and find that a separate unit, defined to include all adjunct faculty, and to exclude all other employees, is most appropriate.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Petitioner,

-and-

**CASE NO. C-6332**

**AMITYVILLE UNION FREE SCHOOL DISTRICT,**

Employer,

-and-

**UNITED PUBLIC SERVICE EMPLOYEES UNION,**

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 Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO 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: Non-teaching personnel consisting of: chief custodians, head custodians, senior custodians, custodial workers, school maintenance foreman, maintenance men, head groundsman, groundsman, district groundsman/mechanic, district driver-messenger, district stock clerk, cooks, food service workers, central store clerk, and central store warehouseman.

Excluded: Office and secretarial employees and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Petitioner,

-and-

**CASE NO. C-6336**

**LONG BEACH HOUSING AUTHORITY,**

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 Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO has been designated and selected by a majority of the employees of the above-named public employer, in the unit agreed upon by the parties and described below, as their exclusive representative for the purpose of collective negotiations and the settlement of grievances.

Included: All full-time and part-time employees in the following titles: Tenant Relations Assistant, Tenant Relations Assistant (Spanish

Speaking), Tenant Relations Coordinator, Senior Account Clerk, Account Clerk; Resident Initiatives Liaison, Clerk, Senior Maintenance Mechanic, Maintenance Mechanic, Maintenance Worker, and Laborer.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member



STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Petitioner,

-and-

**CASE NO. C-6353**

**INCORPORATED VILLAGE OF BABYLON,**

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 Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO 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: Part-time Laborer.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

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

Petitioner,

-and-

**CASE NO. C-6354**

**MAMARONECK PUBLIC LIBRARY,**

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 Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO 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: Librarian I, Librarian II, Principal Library Clerk, Senior Library Clerk, Library, and Caretaker.

Excluded: All Pages, the Senior Library Clerk who serves in a confidential capacity to the Director and all other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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In the Matter of

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

Petitioner,

-and-

**CASE NO. C-6357**

**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 the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO 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.

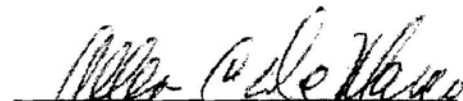
Included: Full-time Building Inspectors, Code Enforcement Inspectors, Plumbing Inspectors, Senior Building Inspectors, and Senior Electrical Inspectors.

Excluded: All other employees and department heads.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Civil Service Employees Association, Inc., Local 1000, AFSCME, AFL-CIO. The duty to negotiate collectively includes the mutual obligation to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written agreement incorporating any agreement reached if requested by either party. Such obligation does not compel either party to agree to a proposal or require the making of a concession.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

STATE OF NEW YORK  
PUBLIC EMPLOYMENT RELATIONS BOARD

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In the Matter of

**SUBWAY SURFACE SUPERVISORS ASSOCIATION,**

Petitioner,

-and-

**CASE NO. C-6358**

**STATEN ISLAND RAPID TRANSIT OPERATING  
AUTHORITY,**

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 Subway Surface Supervisors 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: Supervisor Maintenance, Supervisor Car Equipment (mechanical),  
Supervisor Electrical Maintenance, Supervisor Electronic

Maintenance, Supervisor Power/Signals, Supervisor Timekeeping,  
and Supervisor Operational Support.

Excluded: All other employees.

FURTHER, IT IS ORDERED that the above named public employer shall negotiate collectively with the Subway Surface Supervisors 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: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member



In the Matter of

**NASSAU COUNTY SHERIFF'S CORRECTION  
OFFICER'S BENEVOLENT ASSOCIATION, INC.,**

Charging Party,

**CASE NO. U-31793**

- and -

**COUNTY OF NASSAU,**

Respondent.

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**KOEHLER & ISAACS, LLP (LIAM L. CASTRO of counsel), for Charging  
Party**

**BEE READY FISHBEIN HATTER & DONOVAN, LLP (WILLIAM C. DE WITT of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the County of Nassau (County) to a decision and order of an Administrative Law Judge (ALJ) in which the ALJ held that the County violated § 209-a.1(d) of the Public Employees' Fair Employment Act (Act).<sup>1</sup> The ALJ found that the County violated the duty to bargain in good faith over a mandatory subject when it unilaterally discontinued providing a vacation preference to correction sergeants represented by the Nassau County Sheriff's Correction Officers

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<sup>1</sup> 46 PERB ¶ 4555 (2013).

Benevolent Association (COBA) assigned to the Behavioral Management Unit (BMU) within the County Sheriff's Department (Department).<sup>2</sup>

### EXCEPTIONS

The County excepts to various factual findings of the ALJ as to the origin and duration of the practice at issue.<sup>3</sup> The County also claims that the ALJ erred in finding that the discontinued preference did not affect staffing.<sup>4</sup> Additionally, the County contends that the ALJ incorrectly found that the County made a unilateral change to a mandatory subject of bargaining.<sup>5</sup> The County likewise asserts that the ALJ erred in finding that the Waiver-Zipper Clause and the Management Rights provisions of the parties' collective bargaining agreement (CBA) did not satisfy any duty to bargain the issue.<sup>6</sup> The County further maintains that the ALJ improperly construed the term "administrative needs" in the CBA to exclude economic needs.<sup>7</sup> Additionally, the County argues that the ALJ erred in balancing the interests of the parties, and finding that those of the County were outweighed by those of the employees.<sup>8</sup> Finally, the County excepts to the finding of a violation and to the remedy.<sup>9</sup>

### FACTS

COBA represents a unit within the Department that includes correction officers, corrections sergeants, correction corporals, correction lieutenants and correction

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<sup>2</sup> At the time of filing the improper practice charge, COBA was known as the Sheriff's Officers Association; it changed its name during the pendency of this matter.

<sup>3</sup> Exception Nos. 1, 2, and 3.

<sup>4</sup> Exception Nos. 4 and 6.

<sup>5</sup> Exception Nos. 5 and 7.

<sup>6</sup> Exception Nos. 9 and 11.

<sup>7</sup> Exception No. 10.

<sup>8</sup> Exception No. 12.

<sup>9</sup> Exception Nos. 13 and 14.

captains (collectively, officers) under the general supervision of the Sheriff of Nassau County, Michael Spozotto.

The BMU houses what are deemed to be the facility's most dangerous inmates. Correction lieutenant and tour commander Scott Michelsen, who testified on behalf of COBA, directly supervised the BMU from its establishment in 2003 until August 2004, and was directly responsible for vacation selections. In his role of tour commander, he has oversight responsibility for the BMU, but is not actively involved in day-to-day supervision.

Michelsen testified that the BMU has been viewed since its establishment and currently, as a position of higher stress due to the inmate population housed there. According to Michelsen, Deputy Undersheriff Rosato, decided to provide a vacation preference in the form of one vacation slot per day that could be used only by the three BMU sergeants. Rosato decided that this designated daily vacation slot limited to BMU sergeants was justified, Michelsen testified, as a means of recruiting sergeants to volunteer for the BMU assignment and to reduce their stress.<sup>10</sup>

Michelsen further testified that when the vacation preference was created in 2003 the BMU supervisors expected that it would continue and that it did continue until January 1, 2012.<sup>11</sup> By memo dated December 15, 2011 from Acting Commissioner James Ford, employees were notified that, effective January 1, 2012, "the Security Platoon leave entitlements for the Sergeants and Lieutenants will no longer include a

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<sup>10</sup> Vacation selections are submitted in December within each platoon. Officers can take up to four weeks of one week blocks and up to 30 single days of vacation. Conflicts between vacation requests are resolved on the basis of seniority.

<sup>11</sup> Significantly, at hearing during its opening statement, the County conceded the existence of the incentive as of 2003 and its removal by memorandum dated December 15, 2011.

separate time off spot for the BMU Sergeant.”<sup>12</sup>

Both before the change implemented in January 2012, and since, a total of three correction sergeants have been assigned to BMU. One sergeant works the morning shift, one works the afternoon shift, and one is off on any given day. The change did not increase the number of correction sergeants working any shift in the BMU, but did result in their competing against the other sergeants for vacation slots.

Ford, the County’s only witness, testified that he issued the December 15 memorandum at the direction of the sheriff, and that the reason for the change was to save money by reducing overtime.

In support of its affirmative defense of duty satisfaction, the County introduced the following provisions of its collectively negotiated agreement (Agreement) with the NCSCOBA.

Section 4. MANAGEMENT RIGHTS. Except as validly limited by this Agreement, the County reserves the right to determine the standards of service to be offered by its various agencies; to set the standards of selection for employment; to direct its employees; to regulate work schedules; to take disciplinary action; to relieve its employees from duty because of lack of work or for other legitimate reasons; to maintain the efficiency of governmental operations; to determine the methods, means and personnel by which governmental operations are to be conducted; to determine the content of job classifications; to take all necessary actions to carry out its mission in emergencies; and to exercise complete control and discretion over its organization and the technology of performing its work.

Section 5. WAIVER-ZIPPER. The County and the Union, for the life of this Agreement, each voluntarily and unconditionally agree that the other shall not be obligated to negotiate collectively with respect to any subject matter

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<sup>12</sup> Charging Party’s Exhibit 1.

referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement. This shall not be construed to apply to negotiations for future collectively negotiated agreements between the parties, or to re-negotiations of health or dental benefits in the event that another County negotiating unit improves its health or dental benefits, or re-negotiation of amendments to Section 2-5.2 of this Agreement.

Section 9. ADMINISTRATION OF AGREEMENT.

9-2.2 The Sheriff may promulgate departmental practices, procedures, rules and regulations. However, pursuant to Section 5 of the Agreement, said practices, procedures, rules and regulations shall not conflict with, exceed nor supersede this Agreement.

Section 38. LEAVE WITH PAY.

38-4 GRANTING OF, OR CHARGING TO, VACATION TIME.

(a) Vacation time may be granted in consecutive days, single days, or minimum units of one-quarter (1/4) days. However, vacation time shall be granted only in accordance with the administrative needs of the department.<sup>13</sup>

DISCUSSION

We need not treat with each of the County's exceptions to resolve this matter, because we find the County's contractual defenses sounding in waiver and duty satisfaction to be dispositive, as was the case for a similar charge on behalf of the same unit and the same defense arising under the same CBA in our recent decision in *County*

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<sup>13</sup>Joint Exhibit 1.

of *Nassau*.<sup>14</sup> Here, unlike that case, COBA claims that waiver was not raised by the County as an affirmative defense and that the defense has therefore been waived.

In *Dutchess County Community College*, the Board strictly construed § 204.3 (c) (2) of our Rules of Procedure (Rules) to find that a duty satisfaction defense was not sufficiently pleaded because the respondent “did not plead it as an affirmative defense,” but rather characterized the defense as sounding in “waiver.”<sup>15</sup> The function of § 204.3 (c) (2), however, is not to lay traps for the unwary litigant, but rather, as the Board noted in the same decision, to ensure “that a charging party is not taken by surprise by an issue not appearing on the face of the responsive pleading.”<sup>16</sup>

By contrast, in *Wayne-Finger Lakes Board of Cooperative Educational Services*, the Board held the defense of waiver to be sufficiently pleaded even though an employer “did not denominate any of its affirmative defenses as ‘waiver,’” where the nature of the defense is clear from the answer.<sup>17</sup> In that case, “[t]he relevant contract section was specifically quoted in the [employer’s] answers” and “satisfied the pleading requirements of § 204.3 (c) (2) of the Rules and gave the Association sufficiently clear

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<sup>14</sup> 48 PERB ¶ 3014 (2015).

<sup>15</sup> 46 PERB ¶ 3009, 3016 (2013).

<sup>16</sup> *Id.*, citing *New York City Transit Auth*, 27 PERB ¶ 3037 (1987).

<sup>17</sup> 27 PERB ¶ 3014, 3033 (1994). The Board in *Wayne-Finger Lakes BOCES* compared the facts before it to *Clarkstown Central School District*, 24 PERB ¶ 3046, 3096-3097 (1991), in which the respondent contended that a defense that the Board lacked jurisdiction over what was in essence a contractual dispute sufficed to plead waiver. The Board noted that lack of jurisdiction “relates to our power to hear and decide a case,” while waiver “affects only the disposition on the merits of the particular improper practice charge or an issue thereunder,” and found the pleading insufficient. *Id.*

notice that the contract was being raised in defense to the Association's allegations in other than a strictly jurisdictional sense.”<sup>18</sup>

In this case, as in *Wayne-Finger Lakes BOCES*, the relevant contract provisions were cited and litigated as providing a defense, COBA was on notice as to the nature of that defense, and the issue was litigated fully before the ALJ. Only the characterization of the defense as sounding in “duty satisfaction” and not “waiver” forms the basis of the argument for its rejection; no lack of notice, prejudice or willfulness is claimed. This is especially salient where, as is the case here, the pleadings were filed at a time when, as the Board has noted, the affirmative defenses of waiver and duty satisfaction “are sometimes confused with one another,” and before its most recent effort to clarify the distinction between the two.<sup>19</sup>

As we have recently held in an analogous context, disallowing an affirmative defense because the respondent “failed to invoke the magic words” in characterizing the legal conclusion supported by the facts pleaded and the arguments made “would elevate form over substance” by requiring “such an obvious state of facts be affirmatively mentioned when they are so clearly established by the record.”<sup>20</sup> We reaffirm that analysis here, and in another decision we issue today, *County of Suffolk*. In sum, we find that § 204.3 (c) (2) of the Rules requires a pleading of the specific factual basis of an asserted affirmative defense sufficient to put the charging party on

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<sup>18</sup> *Id.*

<sup>19</sup> *Orchard Park Central School District*, 47 PERB ¶ 3029, 3089 (2014).

<sup>20</sup> *State of New York (Division of State Police)*, 48 PERB ¶ 3012, 3042 (2015) (rejecting “the argument that a respondent in a transfer of unit work case must affirmatively plead and prove a change in job qualifications—especially when there has been a change as a matter of uncontested fact” and all parties are on notice as to the facts and their legal import), citing *Town of Stony Point*, 45 PERB ¶ 3045, 3115 (2012).

notice of the nature of the defense and to respond, but does not impose a heightened pleading standard such that the use of an incorrect characterization of the legal theory supporting the affirmative defense waives it. The policies of the Act and requirements of due process are best served by a non-technical notice pleading of affirmative defenses, and our Rules do not require more. Accordingly, we find that, to the extent that *Dutchess County Community College* imposed a heightened standard of pleading the affirmative defenses of waiver and duty satisfaction, it is hereby overruled, and we will treat the defense on the merits.

In our recent *County of Nassau* decision, we had before us what was effectively the same affirmative defense, one we found properly sounded in waiver, arising from the same clauses of the collective bargaining agreement at issue here. In that decision, we found “that the provisions relied upon establish a knowing and intentional relinquishment of the right to negotiate over a specified set of otherwise mandatory subjects for the duration of the Agreement, including specifically the right to negotiate those subjects not covered by the Agreement.”<sup>21</sup> In particular, we noted the language of the parties’ collective bargaining agreement providing that “the other shall not be obligated to negotiate collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement.”<sup>22</sup>

COBA argues, as it did before us in our most recent prior decision, that the specific subject of vacations is covered elsewhere in the collective bargaining

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<sup>21</sup> 48 PERB ¶ 3014, at 3051.

<sup>22</sup> *Id.*



agreement, and thus the vacation preference slot is not encompassed in the provisions relied upon by the County. As we addressed the similar claim in *County of Nassau*:

However, we have previously found just such a reservation of right in the specific management rights provision at issue here, which “reserves the right to . . . regulate work schedules,” which read in conjunction with the waiver-zipper clause at issue, “allows [the County] to set schedules and to determine how many employees are to be on duty and how many can use leave of any kind at any time.” Consistent with our prior holdings as to this language, we find the parties’ agreement sufficed to waive the statutory duty to bargain over such changes.<sup>23</sup>

The same rationale applies here.

We reiterate our statement in *County of Nassau* that our conclusion here is guided by the doctrine that “*stare decisis* should be most stringently applied in cases involving contract rights,” because “parties who engage in transactions based on prevailing law must be able to rely on the stability of such precedents.”<sup>24</sup> In view of our multiple decisions construing this exact language involving these parties or their predecessors-in-interest, including cases involving the very unit at issue here over a period spanning decades, we are loathe to disrupt the settled expectations of the parties. Even so we emphasize that

our conclusion in the present case is predicated upon our interpretation of the negotiated terms in the County-Association agreement. Prior Board decisions interpreting other contract language are generally not probative to determining a duty satisfaction, contract reversion or waiver defense in a subsequent case involving different parties and contracts.<sup>25</sup>

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<sup>23</sup> 48 PERB ¶ 3014, at 3051.

<sup>24</sup> *Id.*, quoting *Eastern Consol Props v Adelaide Realty Corp*, 95 NY2d 785, 788 (2000) (Kaye, CJ, concurring); *Holy Props v Cole Prods*, 87 NY2d 130, 134 (1995) (editing marks omitted).

<sup>25</sup> *Id.*, quoting *County of Nassau*, 46 PERB ¶ 3014, 3030 n. 2.

We note, as we did not in *County of Nassau, Orchard Park, and Sachem*, that this reasoning does not govern general management rights provisions and zipper clauses as “the language in this case, unlike those, evidences an intention to waive the statutory right to bargain mid-contract term.”<sup>26</sup>

Accordingly, we reverse the ALJ’s decision and dismiss the charge.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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<sup>26</sup> *Orchard Park*, 47 PERB ¶ 3029, at 3090, quoting *Sachem Central Sch Dist*, 21 PERB ¶ 3021,3042 (1988); citing *Profl Staff Congress-City University of New York v NYS Pub Empl Relations Bd*, 7 NY3d 458, 466, 39 PERB ¶ 7010, 7021-7022 (2006) (*affg*, 37 PERB ¶ 3006 (2004)) (citing *Sachem* with approval).

In the Matter of

**SUFFOLK COUNTY DEPUTY SHERIFFS POLICE  
BENEVOLENT ASSOCIATION,**

Charging Party,

-and-

**CASE NO. U-32331**

**COUNTY OF SUFFOLK AND SHERIFF OF  
SUFFOLK COUNTY,**

Respondent,

-and-

**SUFFOLK COUNTY POLICE BENEVOLENT  
ASSOCIATION, INC.,**

Intervenor,

-and-

**SUFFOLK COUNTY POLICE SUPERIOR OFFICERS  
ASSOCIATION,**

Intervenor.

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**GREENBERG BURZICHELLI GREENBERG, P.C. (SETH H. GREENBERG and  
GENEVIEVE E. PEEPLES, of counsel), for Charging Party**

**LAMB & BARNOSKY, LLP (ALYSON MATHEWS of counsel), for  
Respondent County of Suffolk**

**CERTILMAN BALIN ADLER & HYMAN, LLP (PAUL S. LINZER & JENNIFER  
A. BENTLEY of counsel), for Intervenor Suffolk County Police Superior  
Officers Association**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by the Suffolk County Deputy Sheriffs Police Benevolent Association (DSPBA) to a decision of an Administrative Law Judge (ALJ) dated June 3, 2014 conditionally dismissing the DSPBA's improper

practice charge which alleged that the County of Suffolk (County)<sup>1</sup> violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) by unilaterally transferring to members of the Suffolk County Police Superior Officers Association, Inc. (SOA) and the Suffolk County Police Benevolent Association (PBA) certain exclusive unit work.<sup>2</sup> In addition to asking the Board to affirm the ALJ's determination, the County filed a cross-exception to the ALJ's finding that the County (rather than the Sheriff) had removed DSPBA members from performing the work at issue.

#### EXCEPTIONS

The DSPBA filed three exceptions. It alleges that the ALJ erred in: (1) rejecting the DSPBA's argument that the charge could not be deferred because the County had repudiated the agreement at issue; (2) finding that if the agreement at issue was the source of the right to engage in work, then she would have been required to dismiss the charge with prejudice; and (3) conditionally dismissing the charge. The County and SOA ask the Board to deny the exceptions in full. The County cross-expected to the ALJ's finding that the County "assigned members of the [DSPBA] to perform highway patrol and enforcement functions that have been exclusively performed by DSPBA unit members since September 15, 2008." Rather, the County alleges that there is an unresolved factual issue as to whether the County or the Sheriff removed DSPBA members from performing the at-issue work.

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<sup>1</sup> The Sheriff of Suffolk County (Sheriff) is also a party and is listed as an employer on the charge. The issue of joint employer status was not addressed by the parties.

<sup>2</sup> 47 PERB ¶ 4553 (2015).

### FACTS

On November 12, 2012, the DSPBA filed an improper practice charge alleging that the County and the Sheriff violated § 209-a.1 (d) of the Act by unilaterally transferring to members of the SOA and the PBA the exclusive unit work of highway patrol and enforcement functions on the Long Island Expressway and Sunrise Highway. The County denied the material allegations and raised the defenses of failure to name and serve necessary parties, duty satisfaction and deferral. The Sheriff filed an answer admitting the material allegations of the charge, and alleged that the County, and not the Sheriff, unilaterally assigned the work and seeking indemnification from the County for its conduct. The ALJ granted motions by SOA and PBA to intervene and each filed an answer denying the material allegations of the charge and moving for deferral of the charge. The ALJ held a hearing on December 5, 2014, at which time the parties were given an opportunity to present evidence regarding the issue of deferral. The parties subsequently filed briefs addressing that issue.

Specifically, the charge alleged that since September 15, 2008, DSPBA unit employees exclusively performed patrol and enforcement functions on the Long Island Expressway and Sunrise Highway within the area known as the "Suffolk County Police District." On September 20, 2011, the County and DSPBA signed a Memorandum of Agreement (MOA) pursuant to which, among other things, unit employees agreed to defer "one half of monies due, or to be due them as a result of the Compulsory Interest Arbitration covering the period of January 1, 2008 through and including December 31,

2010.”<sup>3</sup> Pursuant to the DSPBA agreement, DSPBA deferred approximately four million dollars of retroactive payments due until December 31, 2015.<sup>4</sup> In consideration for agreeing to defer salary, the County agreed that, upon “the complete execution” of the MOA through December 31, 2017, the County would not assign certain duties performed by DSPBA unit employees to any other County employees who are also sworn peace or police officers.<sup>5</sup> The MOA further provides that:

[t]o the extent these official command duties and responsibilities were performed by other county employees who are sworn peace or police officers on May 18, 2009, the scope of their work shall not be expanded to displace official command duties and responsibilities performed by DSPBA members.<sup>6</sup>

The County further agreed that, upon the MOA’s “complete ratification and approval,” and through December 31, 2017, it would not eliminate any of the duties at issue performed by DSPBA “if that work is subsequently performed by any non-DSPBA unit member who is a sworn peace or police officer (except for New York State Troopers).”<sup>7</sup>

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<sup>3</sup> ALJ Exs 12 and 13.

<sup>4</sup> ALJ Ex 13.

<sup>5</sup> The duties in question are defined as any official command duties and responsibilities performed by DSPBA unit members contained in the Operations Division, Police Division, and those listed as part of the Table of Organization of the Suffolk County Sheriff’s Office as set forth in the Suffolk County Sheriff’s Office Directive Manual (dated April 27, 2009 and effective May 18, 2009) which provides that “official command duties and responsibilities” in the Police Division include the duties of the Highway Enforcement Section which is responsible for “the patrol and police response on both the Long Island Expressway and Sunrise Highway in the County of Suffolk.” Sheriff’d Ex 1, Vol. 1.

<sup>6</sup> ALJ Ex 12.

<sup>7</sup>ALJ Ex 12.

The MOA expires the earlier of December 31, 2017, or the date that the base salary of a top step Deputy Sheriff I constitutes the highest base salary paid to a top step police officer employed by the County of Suffolk. The agreement further provides that it is “subject to and shall become effective upon DSPBA ratification.”

Finally, the MOA includes its own expedited dispute resolution mechanism, separate from that which otherwise might exist under the governing collective bargaining agreement:

In the event there is a dispute of any kind related to the interpretation and/or implementation of any provision of this Agreement, the DSPBA has the option to proceed directly to expedited binding arbitration. The parties will endeavor to agree upon an arbitrator to resolve the dispute. If the parties are unable to agree, an arbitrator shall be selected from a list provided by the New York State Public Employment Relations Board.<sup>8</sup>

Steve Levy, the County Executive, Vincent DeMarco, the Suffolk County Sheriff, and Matthew Mullins, then the DSPBA President signed the MOA on or about September 20, 2011. However, it was never submitted to the Suffolk County Legislature for approval.

On or about September 6, 2012, the PBA and the County entered into a separate memorandum of agreement setting the terms of a successor collective bargaining agreement for those parties for the period of January 1, 2011 through December 31, 2018 (PBA agreement).<sup>9</sup> The PBA agreement assigns the highway patrol and enforcement duties here in question to the PBA unit employees within five days of

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<sup>8</sup> *Id.*

<sup>9</sup> County's Ex 11.

ratification of that agreement. The County and PBA ratified the PBA agreement on respectively, October 9 and 16, 2012; the transfer of the highway patrol and enforcement functions were, according to that agreement, due to occur on or about October 21, 2012.<sup>10</sup>

On October 11, 2012, DSPBA filed a grievance pursuant to the expedited grievance procedure in the MOA to halt the transferring the work in issue to the PBA unit employees based on the MOA.<sup>11</sup>

On or about October 17, 2012, DSPBA filed a demand for arbitration. Subsequently, the DSPBA filed an "Order to Show Cause" in New York State Supreme Court, County of Suffolk, to enjoin the County from transferring the work in issue to the PBA and for a declaratory ruling that the MOA is valid. On November 7, 2012, the County cross-moved for a permanent stay of arbitration arguing, among other things, that the MOA was invalid because it was not approved by the County Legislature and that the question of MOA's validity was a threshold issue to be determined before the dispute could be arbitrated.<sup>12</sup>

On November 13, 2012, Justice Peter H. Mayer vacated the temporary restraining order that had been enjoining the County from implementing the PBA agreement. On November 20, 2012, the highway patrol and enforcement duties here in

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<sup>10</sup> *Id.*

<sup>11</sup> County's Ex 2.

<sup>12</sup> County's Exs 9 -12.



question were assigned to PBA and SOA unit employees from DSPBA unit employees.<sup>13</sup>

An arbitration hearing in DSPBA's grievance was scheduled to commence on or about June 25, 2013. But, on June 24, 2013, the court granted the County's motion to temporarily stay the arbitration of the grievance. By order dated October 9, 2013, the court continued the stay pending its determination of the validity of the DSPBA agreement.

Ultimately, by decision dated February 27, 2014, the court declared that the MOA "is a valid agreement," lifted the temporary stay of arbitration and directed the County and DSPBA to proceed to arbitration pursuant to the MOA. On March 19, 2014, the County filed a notice of appeal, thereby staying enforcement of its order. Nonetheless, the DSPBA sought to have the arbitrator schedule the arbitration which the County opposed. On April 3, 2014, the arbitrator notified the parties that he would not schedule a hearing until either a court vacated, limited, or modified the automatic stay to allow for a hearing or until a decision was rendered on the appeal that affirms the court's February 27, 2014 decision.

Before the court rendered its decision, the ALJ conferenced the matter on March 8, 2013 and received written submissions dated December 2, 2013 from the County and DSPBA that addressed, among other matters, the characterization and legal effect of the County's move to stay the underlying arbitration on the grounds that the DSPBA agreement is invalid and the pendency of that arbitration as forming a basis for deferring

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<sup>13</sup> County's Exs 1- 3.

jurisdiction consistent with Board precedent.<sup>14</sup> The DSPBA raised at that time a concomitant Board doctrine which, if circumstances and facts so warranted, the Board would not defer a matter to arbitration where an employer has repudiated an agreement. These issues were raised again by the parties before the ALJ at the hearing held December 5, 2013. Finally, the DSPBA and the County submitted post-hearing briefs and sur-replies that addressed the propriety of raising repudiation as both a substantive, independent improper practice and as a defense to deferring a matter to arbitration.

#### DISCUSSION

We find that the ALJ's ruling on deferral was premature, and reverse accordingly. The Board has long held that a charge, even if properly deferred, is properly reinstated where the respondent interposes a challenge to arbitrability.<sup>15</sup> Likewise, the Board has found that, where the respondent seeks deferral of an improper practice sounding in a unilateral change to arbitration, deferral is not properly granted where the respondent has repudiated the contract or the provision thereof alleged to give rise to the claim of right.<sup>16</sup>

In the instant case, the DSPBA's initial pleading raised only the claim that the County and the Sheriff violated § 209-a.1(d) of the Act by unilaterally transferring to

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<sup>14</sup> ALJ Exs 8 and 9.

<sup>15</sup> *County of Westchester*, 42 PERB ¶ 3027 (2009). See also *City of Buffalo*, 17 PERB ¶ 3090 (1984); *City of Saratoga Springs*, 18 PERB ¶ 3009 (1985); *Monticello Cent Sch Dist*, 22 PERB ¶ 3002 (1989); *Bd of Educ City Sch Dist City of Buffalo*, 39 PERB ¶ 3029 (2006).

<sup>16</sup> *Village of Monroe*, 40 PERB ¶ 3013, 3051 (2007).

members of the SOA and the PBA the exclusive unit work of highway patrol and enforcement functions on the Long Island Expressway and Sunrise Highway. The County in its answer raised deferral as a defense. Subsequent to the receipt of the answers, the DSPBA raised, both orally and in post-hearing submissions, the question of the County's effort to deprive the DSPBA of availing itself of the grievance process set forth in the MOA. In sum, the DSPBA contended that the County could not simultaneously contend before the ALJ that the DSPBA's only recourse was the MOA's grievance procedure, and before the courts that the MOA, and thus its grievance procedure, were a nullity.

The ALJ initially addressed what she characterized as the DSPBA's argument that the charge cannot be deferred because the County allegedly repudiated the MOA. She found that the charge at issue only raised a claim based upon the unilateral transfer of work, not repudiation, and that even if a claim of repudiation was raised, it would be untimely. Thus, she did not substantively address the issue of repudiation as it bears upon the County's ability to assert an affirmative defense of deferral.

We find that the decision below mischaracterizes a threshold issue. The Board's review of the record and proceedings makes it clear that the DSPBA did not raise an independent improper practice charge based on the County's alleged repudiation of the MOA; rather, DSPBA alleged that the alleged repudiation of the MOA was inconsistent with a prerequisite for deferral: that there be an arbitral forum for the grievance to be heard.

Indeed, the record is undisputed with respect to certain facts. First, in its charge, the DSPBA did not allege a violation of any agreement, much less the MOA. It based its charge on the failure of the County to continue the work assignments with respect to coverage on various highways as a unilateral alteration of a past practice. It did not raise repudiation as an independent claim. Second, the County raised as an affirmative defense the existence of a contractual right with a contractual remedy that warranted the dismissal or deferral of the action.

While so arguing, the County actively sought and continues to actively seek a judicial determination that the MOA is null and void. It did not simply object to the arbitrability of a particular grievance nor did it argue that the principal collective bargaining agreement between the parties was the more appropriate source of remedies.<sup>17</sup> Instead, it claims that the MOA is null and void—in fact and in law. Furthermore, it proceeded by a subsequent collectively negotiated agreement with the PBA to undermine completely the terms of the MOA.<sup>18</sup>

Whether characterized as a challenge to arbitrability preventing deferral, as a repudiation of the MOA in whole or in part, or as a failure to establish the prerequisites

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<sup>17</sup> The record is devoid of any evidence that the County has tendered to the DSPBA, with appropriate interest, the approximately four million dollars of retroactive payments due under the arbitration award deferred pursuant to the DSPBA agreement, which would be consistent with a good faith belief that the agreement was invalid. It is not necessary to decide whether these facts would also establish the basis for an independent improper practice charge based on repudiation.

<sup>18</sup> We note the County's exception regarding the ALJ's characterization of the reassignment of work as being accomplished by the County rather than the Sheriff. Given our decision in this matter, we need not address that issue but leave it to the parties and the ALJ to address that matter on remand to the extent it is relevant to any final determination.

of deferral, we find that the ALJ erred by declining to weigh these facts and to defer to the arbitral process the County was thwarting at the very time it relied upon it.

The County has continued to claim that the entire MOA is null through the appellate process, and it has shielded itself from proceeding to arbitration behind the automatic stay (which a court subsequently refused to modify) that accompanies the filing of a notice of appeal in this context. The County, in this instance, does not merely deny the existence of an entire agreement but is seeking to have it voided and is proceeding with carrying out its actions as though it does not exist.<sup>19</sup>

We are not holding that, as a matter of law, such facts warrant a finding that the County has either attempted to repudiate, or has repudiated, the DSPBA agreement. That is not the claim before the Board, nor was it before the ALJ. Rather, the facts as alleged and established in the record require the ALJ to make a finding as to whether the County has acted inconsistently with the prerequisites for deferral, or repudiated the DSPBA agreement and if so, whether the County's actions would render deferral a meaningless act. If the ALJ finds that to be the case, then a determination on the merits of the charge should follow.

For the purposes of these proceedings, the relevant agreement has been cited, the County raised the issue of the outside arbitration as an affirmative defense and both

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<sup>19</sup> This holding is consistent with the Board's decision in *City of Newburgh (Local 589, International Assn of Firefighters)*, 24 PERB ¶ 3022, 3042 (1991), in which the Board held that it is not repudiation or a refusal to negotiate *per se* for party to initiate or even support a challenge to the legality of a negotiated agreement *Id.*, citing to *Salmon River Cent Sch Dist*, 13 PERB ¶ 4591 (1980) (where the Director of Representation dismissed a charge based on employer's initiation of a court proceeding to stay arbitration).

parties have fully briefed and litigated this issue before the ALJ. Both parties had the issue squarely placed before them, as did the ALJ, as in *Wayne-Finger Lakes Board of Cooperative Education Services*.<sup>20</sup> The omission of any repudiation claim as an independent charge does not prevent the DSPBA from opposing the County's affirmative defense with these facts. The DSPBA needed to plead nothing further in response to the County's affirmative defense. Moreover, the DSPBA indicated that it was willing to amend its charge to address the affirmative defense if that was necessary to properly bring the matter before her. Under our Rules of Procedure, the ALJ had the authority to permit amendment of the charge,<sup>21</sup> or to conform the pleadings to the proof.<sup>22</sup> Thus, even if the ALJ believed that a formal response to the affirmative defense was necessary to allow the DSPBA to challenge the elements of the County's deferral claim, she had the means to permit such a response. More fundamentally, in view of the full airing and briefing of the County's challenge to arbitrability and its claim that the MOA was void, as relating to its deferral claim, we believe that no such formal supplemental pleading was required.

Thus, the ALJ's deferral of the matter is premature. There can be no deferral of a matter to another forum if that forum does not exist. Such a deferral, under the factual circumstances present in this case, could be illusory in addition to be wasteful. The

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<sup>20</sup> 27 PERB ¶ 3014, 3033 (1994).

<sup>21</sup> Rules, § 204.1(d).

<sup>22</sup> See, e.g., *UFT (Cruz)*, 48 PERB ¶ 3004, n. 24 (2015).

County is not merely saying that the matter is not arbitrable;<sup>23</sup> it is actively pursuing a course that fundamentally negates the existence of the entire arbitration mechanism while simultaneously asking for deferral to a forum and under an agreement that it alleges is a nullity.<sup>24</sup>

In reaching this conclusion, as in *Herkimer Board of Cooperative Education Services*, we found the “the absence of any reference to the grievance by the charging party in its improper practice charge was of no moment in evaluating the question of whether the contract grievance filed by the charging party constituted a bar to PERB's jurisdiction . . . [and] whether the existence of a contract grievance is revealed by the charge or *in some other manner* is immaterial to determining PERB's jurisdiction.”<sup>25</sup> In *Herkimer*, the Board made it clear it is not bound to look at only the precise wording of a charge or pleading to determine the matters before it and the ALJ.

Recently, in *State of New York (Division of State Police)*, we found that the failure “to invoke the magic words” characterizing the legal conclusion supported by the facts pleaded and the arguments made “would elevate form over substance” by requiring “such an obvious state of facts be affirmatively mentioned when they are so clearly established by the record.”<sup>26</sup> Today we are also issuing a decision in *County of*

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<sup>23</sup> This is an existential assault on the grievance process, as a whole, rather than a “claim specific” attack.

<sup>24</sup> Although not raised by the parties, the Board's decision could differ if the claim made by the DSPBA was one relating to a benefit under the main collective bargaining between the parties that was being processed through that agreement's arbitration mechanism.

<sup>25</sup> 20 PERB ¶ 3050, 3108 (1987) (emphasis added).

<sup>26</sup> 48 PERB ¶ 3012, 3042 (2015).

*Nassau* in which we hold that the policies of the Act and requirements of due process are best served by a non-technical notice pleading, and our Rules do not require more. This decision is consistent with that holding.

The Board is mindful of discouraging the “wasteful duplication of efforts on the parties.”<sup>27</sup> Jurisdictional deferral is a preferred means to achieve that end; indeed, deferral may be appropriate in this matter, but not yet. Here, administrative economy warrants the remand of this matter to the ALJ for consideration of the claim of repudiation by the DSPBA at such time as the ALJ can address that claim. By the ALJ’s retaining jurisdiction over the instant matter, the DSPBA would avoid having to move to reopen the charge on notice to the parties with all that would entail including the burden on the Director or his designee to determine that motion.

Accordingly, we reverse the ALJ’s decision and remand this matter to the ALJ for further proceedings.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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<sup>27</sup> *County of Sullivan and Sullivan Co Sheriff*, 41 PERB ¶ 3006, 3036 (2008).



In the Matter of

**LOCAL 2110, TECHNICAL, OFFICE AND  
PROFESSIONAL UNION, UNITED AUTO  
WORKERS, AFL-CIO,**

Charging Party,

**CASE NO. U-32377**

- and -

**NEW YORK STATE HOUSING FINANCE AGENCY and  
STATE OF NEW YORK MORTGAGE AGENCY and  
NEW YORK STATE AFFORDABLE HOUSING  
CORPORATION,**

Respondents.

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**LEVY RATNER, P.C. (SUSAN J. CAMERON of counsel), for Charging Party**

**MICHELLE L. WEINSTAT, VICE PRESIDENT & LABOR COUNSEL, for  
Respondent**

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions to a decision and order of an Administrative Law Judge (ALJ)<sup>1</sup> filed by the New York State Housing Finance Agency (HFA), the State of New York Mortgage Agency (SONYMA), and the New York State Affordable Housing Corporation (AHC) (together, the “Agencies”)<sup>2</sup> and by Local 2110, Technical, Office and Professional Union, United Auto Workers, AFL-CIO (Local 2110). The Agencies and Local 2110 also filed cross-exceptions to one another’s exceptions.

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<sup>1</sup> 47 PERB ¶ 4587 (2014).

<sup>2</sup> Each agency is an independently operated public benefit corporation, overseen by a board of directors consisting of various State and State-appointed individuals. They provide financial services to the NYS Division of Homes and Community Renewal, a State agency, but they receive no direct financial support from the State. Furthermore, the parties stipulated that none of the employees is employed by the State.

They also filed legal memoranda in support of each pleading, and both filed a response to one another's legal memoranda in support of their cross-exceptions.

The ALJ held that the Agencies violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when they unilaterally conditioned merit based wage increases and promotions for unit employees represented by Local 2110 on their completion of an extensive background check.

The background check requires the employees to be fingerprinted and to complete and sign various forms that ask them to disclose information about themselves and their families, including their current and former partners/spouses, and their unemancipated children and other dependents. The background check further requires the employees to execute waivers in order to enable the Agencies to access confidential information obtained by other investigating agencies. The required fingerprinting, solicitation of information, and waivers are hereinafter collectively referred to as the "background check."

Finding that the background check is mandatorily negotiable as a condition for merit based wage increases and promotions, the ALJ concluded that the Agencies violated § 209-a.1 (d) of the Act by unilaterally imposing it. However, the ALJ dismissed Local 2110's allegation that the Agencies' conduct violated § 209-a.1 (e) of the Act, finding no provisions in the applicable expired collective bargaining agreements that barred the imposition of the background check.

#### EXCEPTIONS

The Agencies allege that the ALJ erred in denying their request that the matter

be deferred to the parties' dispute resolution process. On the merits, the Agencies contend that the background check is not mandatorily negotiable as a condition for merit-based wage increases and promotions, and that the ALJ therefore erred in concluding that they violated § 209-a.1 (d) of the Act by unilaterally implementing it. The Agencies alternatively argue that Local 2110 either waived its bargaining rights concerning the required background check or that the Agencies satisfied their bargaining obligations concerning it. Finally, as a procedural matter, the Agencies allege that the ALJ erred in not accepting documents into evidence that they proffered after the close of the record.

Local 2110 supports the ALJ's decision regarding each of the issues raised in the Agencies' exceptions. However, Local 2110 argues that the Agencies' conduct also violated § 209-a.1 (e) of the Act because it violated specific terms of the parties' expired collective bargaining agreements.

For the reasons that follow, we remand to the ALJ for her to conduct the requisite deferral analysis. Accordingly, we do not address the substance of her rulings, other than to clarify that, in the event that she does not deem deferral to be warranted, further proceedings are necessary to clarify the legal and factual basis for the parties' positions as to the negotiability of the background check.

#### FACTS

Based on a stipulated record, the undisputed facts are set forth in the ALJ's decision. They are reiterated here only insofar as necessary to address the specific exceptions that the parties have presented to us.

Local 2110 represents three separate bargaining units of employees employed by the Agencies. Each bargaining unit's terms and condition of employment are covered by a separate collective bargaining agreement that had expired when the background check was imposed.

As accurately recounted by the ALJ in her decision, in September 2012, the Agencies implemented a new policy that conditioned all merit based wage increases and promotions on the candidate's completion of a background investigation. Pursuant to that policy, beginning in September 2012, employees nominated for a merit pay increase or a promotion were required to undergo a background check, including fingerprinting by the New York State Police, and the completion and execution of the following documents and forms: 1) Appointments Questionnaire (Long Form); 2) New York State Police Applicant Data Sheet; 3) New York State Police Application for Confidential Background Investigation-Data Sheet (Long Form); 4) New York State Police Notification and Authorization Form for Employment Credit Report; 5) New York State Police Authorization for Release of Information; 6) State of New York Governor's Questionnaire; 7) Office of the Governor of the State of New York Annual Statement of Financial Disclosure for Calendar Year 2010 and/or 2011; and 8) Tax Information Release Form. The forms require unit employees to provide varying degrees of personal information, and some of the forms are releases and/or include waivers to be used by the Agencies and/or their agents to obtain information from other investigating entities. The information and waivers solicited by each form are accurately and more particularly summarized by the ALJ. As the ALJ noted, the requested information and

waivers seek considerable detail about the non-work affairs of the employees at issue, and the lives of their families.

Beginning in September 2012, employees represented by Local 2110 who were working for one of the Agencies<sup>3</sup> received communications from the NYS Division of Housing and Community Renewal (DHCR),<sup>4</sup> advising them that they had been approved to receive wage increases and/or promotions<sup>5</sup> but that all such personnel actions now required a background investigation.<sup>6</sup> Although the record does not indicate the reason for, or amount of the approved merit wage increases, the promotions were to the positions of Senior Auditor, Associate Auditor and Auditor.<sup>7</sup>

Before implementing the new background check policy, neither promotions nor pay rate increases were conditioned upon completing a background investigation or submitting fingerprints to the New York State Police, and there is no evidence that any other aspects of the at-issue background check were ever imposed on unit employees. The Agencies did not provide Local 2110 with advance notice of its intent to implement the background check policy or a copy of the new policy.

#### DISCUSSION

As a threshold matter, we deny the Agencies' November 17, 2014 request that we disregard Point III of Local 2110's November 12, 2014 Reply Memorandum of Law

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<sup>3</sup> Since employees received notification from the Human Resources Department of the New York State Homes and Community Renewal, a State umbrella organization, the record is unclear regarding which of the Agencies the employees worked for.

<sup>4</sup> The DHCR is not the employees' employer.

<sup>5</sup> Charging Party's Exhibits 1-8.

<sup>6</sup> *Id.*

<sup>7</sup> The parties stipulated that the term "personnel action" refers to promotions and/or pay rate increases.

in Response to the [Agencies'] Cross-Exceptions on the ground that it improperly raises new issues that were not raised in Local 2110's exceptions. Point III of Local 2110's Memorandum argues that we should not make any decision regarding dicta in the ALJ's decision on which the Agencies allegedly rely in their cross-exceptions and memorandum in support. Thus, Local 2110's argument responds to the Agencies' arguments; it does not raise new issues. Moreover, even if we were to decline to consider Point III of Local 2110's response, it would not affect our decision.

Likewise, we deny Local 2110's December 10, 2014 request that we disregard the Agencies' December 8, 2014 response to Local 2110's cross-exceptions. Although the Agencies' response was filed one day late, the Agencies explained that the one-day delay was occasioned by the Agencies' closure on November 29, 2014, the day following Thanksgiving, and, although late, it requested a retroactive one day extension to file the response. We hereby grant the Agencies' request under these circumstances and we accept the Agencies' December 8 response. Here again, even if we were to reject the submission, it would not impact our decision. The response offers arguments that the Agencies already placed before us in their exceptions, cross-exceptions, and their memoranda in support.

We now turn to the ALJ's determination that she would not accept into the record the Agencies' post-hearing evidentiary submission. The proposed submission was a press release concerning the conviction of a DHCR employee for embezzling \$944,000.00. In its memorandum of law in support of this exception, the Agencies

argue that the ALJ should have taken “judicial notice” of the “indisputable fact.”<sup>8</sup>

Whether or not the ALJ could have taken judicial notice of this press release, we find that she properly declined to accept the document into evidence after the close of the hearing for the reasons stated in her decision. The Agencies have not demonstrated any relevance of the proffered document to the instant matter; an act or acts of embezzlement at an employer other than those at issue does not bear upon the scope of the Agencies’ bargaining obligations with Local 2110. Therefore, while we note the Agencies’ post hearing submission, we find that it was properly excluded as evidence.

We further affirm the ALJ’s ruling that the at-issue dispute is not properly subject to a “jurisdictional deferral” under *Herkimer County BOCES*.<sup>9</sup> Irrespective of whether the alleged improper practice derives from a noncontractual practice or the express terms in the parties’ expired collective bargaining agreements, PERB has jurisdiction over the matter under §§ 209-a.1 (d) and (e) of the Act.<sup>10</sup> Thus, the ALJ correctly held that there was no reason to defer the dispute for a jurisdictional determination.<sup>11</sup>

However, the ALJ’s analysis on the merits deferral did not complete the requisite analysis. We note that Local 2110 alleged that the Agencies’ conduct violated § 209-a.1 (e) of the Act and the Agencies’ answer expressly requested a merits deferral, the

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<sup>8</sup> Agencies’ November 12, 2014 memorandum of law in support of its exceptions at p. 8.

<sup>9</sup> 20 PERB ¶ 3050 (1987).

<sup>10</sup> See, e.g., *Board of Trustees of Maplewood-Colonie Common Sch Dist v Maplewood Teachers’ Assn*, 57 NY2d 1025, 15 PERB ¶ 7538 (1982); *Triborough Bridge and Tunnel Auth*, 5 PERB ¶ 3064 (1972).

<sup>11</sup> See *State of New York (SUNY Health Science Center of Syracuse)*, 30 PERB ¶ 3019, 3041-3042 (1997) (Where charge alleged breach of an expired agreement, Board observed: “The ALJ appears to have deferred this charge pursuant to our jurisdictional deferral policy as established in *Herkimer County BOCES*, *supra*. If so, that was incorrect because no aspect of this charge raises any jurisdictional issue”).

denial of which has been excepted to. Likewise, Local 2110's exceptions reiterate to us its position that the Agencies' conduct breached specific terms in the parties' expired agreements.

The Act expressly provides that its policies are "best effectuated" by, among other means, encouraging parties to a bargaining relationship to "agree upon procedures for resolving disputes."<sup>12</sup> Moreover, just as the substantive rights under an expired agreement survive the expiration of the agreement under §§ 209-a.1 (d) and (e) of the Act, so too do the negotiated procedures to enforce those rights. Our merits deferral policy effectuates the policies of the Act by requiring the parties to use the negotiated dispute resolution procedures that the Act encourages them to enter into in the first place.

Therefore, as a general rule, any charge alleging that the employer has refused to abide by the terms of the parties' expired agreement in violation of §§ 209-a.1 (d) or (e) of the Act would place the ALJ on, at least, inquiry notice that the dispute is one that might be addressed under the parties' contractual grievance procedure, if any. If such a procedure exists, the ALJ's inquiry should turn to whether the contractual grievance procedure ends with binding arbitration. If it does, the next question is whether the respondent will lodge procedural objections to a grievance, such as its timeliness under the negotiated procedure. If it will not, then a merits deferral is generally appropriate,<sup>13</sup>

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<sup>12</sup> See Act, §§ 200 and 200 (c).

<sup>13</sup> See, e.g., *County of Westchester*, 30 PERB ¶ 3073 (1997), *on remand* 31 PERB ¶ 4623 (1998), *confd sub nom Westchester County Police Officers' Benevolent Assn v NYS Pub Empl Relations Bd*, 301 AD2d 850, 36 PERB ¶ 7001 (3d Dept 2003) (procedural history omitted).



particularly where the respondent requests it.<sup>14</sup>

Here, the ALJ denied the Agencies' request for a merits deferral on the sole ground that no grievance had been filed and that any such grievance would be untimely. However, that a grievance had not been filed or that any such grievance would be untimely under the parties' contractual procedure does not bar a merits deferral.<sup>15</sup> Indeed, the third of the aforementioned inquiries regarding a merits deferral—whether the respondent would object to an untimely grievance—contemplates deferral to a potentially untimely grievance that is yet to be filed. Here, while the ALJ observed that any such grievance would be untimely, the record does not establish whether the Agencies would waive timeliness objections to a grievance. Thus, the record before us does not permit us to determine whether the requirements for a merits deferral would have been appropriate in the first instance.

In *County of Sullivan*, the Board noted that “cases raising merits deferral of §§ 209-a.1 (d) and (e) allegations will be reviewed on a case by case basis to determine whether we should exercise our discretion” and defer to arbitration.<sup>16</sup> The Board went on to find that where “the parties have fully pursued the contract interpretation issues before the ALJ . . . , [d]eferral would . . . impose wasteful duplication of efforts on the parties.”<sup>17</sup> We adhere to that decision today, while noting that this case simply does not

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<sup>14</sup> See, e.g., *County of Sullivan*, 41 PERB ¶ 3006 (2008).

<sup>15</sup> *Id.* See also *County of Westchester*, 44 PERB ¶ 3020 (2011), *confd sub nom Westchester County Police Officers' Benevolent Assn v NYS Pub Empl Relations Bd*, 45 PERB ¶ 7003 (Sup Ct Albany County 2012), *affd*, 99 AD3d 1155 (3d Dept); *County of Westchester*, 42 PERB ¶ 3027 (2009).

<sup>16</sup> 41 PERB ¶ 3006, at 3035.

<sup>17</sup> 41 PERB ¶ 3006, at 3036.

fall within its ambit. The record before us is insufficient for us to resolve the issues before us, both statutory and contractual, and would, in any event necessitate a remand for further proceedings.

In its argument on the merits of the claim, Local 2110 correctly argues to us that the ALJ did not address provisions in the HFA and AHC agreements regarding maintaining noncontractual practices. Articles 5 and 6 of the HFA and AHC contracts, respectively, provide that each agency “agrees to maintain all existing employee benefits and conditions of employment unless modified by the terms of the Agreement.”<sup>18</sup> They also state: “it is the intent of the Agency and the Union to preserve all the benefits applicable to employees as of the effective date of the Agreement and to change them only on the basis of mutual agreement.”<sup>19</sup> The import and application of these provisions were not resolved by the ALJ’s decision, and we decline to address them here, as they warrant deferral to arbitration.

Articles 8 and 9 of the SONYMA agreement, entitled “Alteration of Agreement” and “Complete Agreement,” respectively, were treated with by the ALJ in her decision. Article 8 provides in relevant part: “It is agreed and understood that this agreement constitutes the complete understanding by the parties.”<sup>20</sup> Article 9 of the SONYMA contract provides:

This agreement represents the complete collective bargaining agreement and full agreement by the parties in respect to rates of pay, wages, hours of employment and other conditions of employment not reserved to the Agency

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<sup>18</sup> Stipulated Facts, Ex A (ii), at 6-8; Ex A(iii), at 7-8.

<sup>19</sup> *Id.*

<sup>20</sup> Stipulated Facts, Ex A (i), at 8.

pursuant to Article 10 (Management Rights) hereof, or pursuant to applicable law. *The Agency agrees, to the full extent required by law, to maintain all rates of pay, wages, hours of employment or other conditions of employment set forth in this Agreement and/or described in the SONYMA Personnel Manual as of the date of this Agreement unless modified by this Agreement; and/or any written agreement by and between the Agency and the Union which by its terms has not expired.*<sup>21</sup>

We note that the ALJ did address these provisions in her decision. Indeed, were this case a self-standing charge against SONYMA alone, we might find *County of Sullivan* to be applicable. However, in view of the fact that Local 2110 brought one charge against all three Agencies, with a common nucleus of facts and legal claims, we decline to consider SONYMA separately from the other Agencies, and remand for a further determination as to deferral by the ALJ as to each of the three Agencies.

Our conclusion is especially informed by the fact that the disposition of the matters will in any event require further proceedings involving all three Agencies, as the record does not permit us to resolve all the pending claims against any one of them. Thus, the record is not sufficiently clear for us to determine whether the background check may be a *prohibited* subject insofar as it requires employees to file a financial disclosure statement with the Joint Commission of Public Ethics (JCOPE) under Public Officers Law § 73-a.<sup>22</sup>

As the financial disclosure form that the Agencies require the employees to complete is facially comparable, if not identical to, that required under Public Officers

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<sup>21</sup> Stipulated Facts, Ex. A (i), at 8-9 (emphasis in original).

<sup>22</sup> Because PERB has no jurisdiction to administer the Public Officers Law, it may be necessary for the parties to obtain an opinion from JCOPE.

Law § 73-a, we cannot determine from the record before us whether the at-issue employees are required to file a Public Officers Law financial disclosure statement with JCOPE. To the extent such is the case, the Agencies may not be violating the Act as the filing obligation is mandated by law, not the Agencies.

Accordingly, we remand to the ALJ for reconsideration of the request for merits deferral. Should the matter not be deferred, the ALJ should determine the negotiability of conditioning the receipt of a merit increase on the financial disclosure obligation.<sup>23</sup>

Nor does the record before us permit us to assess the respective interests of the parties as applicable to the background check. While the Board has consistently held that the qualifications for promotion are not mandatorily negotiable,<sup>24</sup> the Court of Appeals has affirmed that where such qualifications are in fact not genuinely tethered to a promotional determination, it may be mandatory, or that the Board can find “after a weighing of the competing interests, that a questionnaire was so intrusive that

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<sup>23</sup> Because PERB has no jurisdiction to administer the Public Officers Law, it may be necessary for the parties to obtain an opinion from the Joint Commission on Public Ethics.

<sup>24</sup> *State of New York-Unified Court System*, 25 PERB ¶ 3065 (1992) (definition of promotion units nonmandatory as inextricably intertwined with the determination of employment qualifications); *Schenectady Patrolmen's Benevolent Assn*, 21 PERB ¶ 3022 (1988) (determination of qualifications for filling positions and job assignments nonmandatory); *Rensselaer City Sch. Dist.*, 13 PERB ¶ 3051 (1980), *confd sub nom. Rensselaer City School Dist. Unit of Rensselaer County Educ Local of Civ Serv Empls Assn, Local 1000, AFSCME, AFL-CIO v Newman*, 87 AD2d 718, 15 PERB ¶ 7003 (3d Dept 1982) (criteria for promotion); *Fairview Professional Firefighters Assn, Inc., Local 1586*, 12 PERB ¶ 3083 (1979) (psychological qualifications for promotion held nonmandatory); *Incorporated Village of Hempstead*, 11 PERB ¶ 3072 (1978) (qualifications for appointment); *Onondaga Community College*, 11 PERB ¶ 3045 (1978) (qualifications for appointment); *Somers Faculty Assn*, 9 PERB ¶ 3014 (1976) (management prerogative for an employer to offer employment to whomever it wishes subject to requirements of law).

bargaining was required.”<sup>25</sup>

We do not hold that either is the case here, nor do we claim any right to pass upon the business judgment of the Agencies. Rather, we note that the record before us is devoid of a basis from which we can determine whether the breadth of the background checks at issue goes beyond what constitutes a “qualification” under our case law and becomes a mandatory subject in accord with the decisions in *Levitt* and *Board of Education* as interpreted by the Court in *Levitt*. Accordingly, should deferral not be found to be appropriate, or should an arbitration award not resolve all the issues presented, the ALJ should further develop the record, including allowing the Agencies to submit any evidence supporting the basis upon which they determined such background information to be germane and the parties’ positions on the negotiability of a background check.

Therefore, the policy undergirding *County of Sullivan*—that the Board will not impose a technically proper but belated merits deferral when the record before us permits of a final disposition on the issues within our jurisdiction—does not apply here.

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<sup>25</sup> *Levitt v Board of Collective Bargaining of City of NY*, 79 NY2d 120, 922-923, 25 PERB ¶ 7514 (1992) (citing and characterizing *Matter of Board of Educ v NYS Pub Empl Relations Bd.*, 75 N.Y.2d 660, 670–671 (1992). Cf. *City of Buffalo (Police Dept)*, 29 PERB ¶ 3023 (1996) (quoting *Cassidy v Municipal Civil Service Commission*, 37 NY2d 526 1975)), (Board observed that “personality, character or disposition which may impair the performance of one’s duties in a civil service position” affect nonmandatory qualifications for promotion).

Accordingly, the ALJ's decision is reversed, and the matter remanded for further proceedings not inconsistent with this decision.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

In the Matter of

**SAG HARBOR POLICE BENEVOLENT  
ASSOCIATION,**

Charging Party,

-and-

**CASE NO. U-32762**

**VILLAGE OF SAG HARBOR,**

Respondent.

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**DAVIS & FERBER, LLP (CHRISTOPHER S. ROTHEMICH and HOPE SENZER  
GABOR, of counsel), for Charging Party**

**LAW OFFICE OF VINCENT TOOMEY (JAIMEE L. POCCHAIRI, of counsel),  
for Respondent**

**BOARD DECISION AND ORDER**

This matter comes to the Board on exceptions filed by the Village of Sag Harbor (Village) to a decision of an Administrative Law Judge (ALJ) finding that the Village violated § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it discontinued the practice of assigning a vehicle to the only detective in the Village's police department, a member of the unit represented by the Sag Harbor Police Benevolent Association (PBA).<sup>1</sup>

**EXCEPTIONS**

The Village filed nine exceptions to the ALJ's decision, collectively characterized as follows: (1) the ALJ erred in exercising jurisdiction because the source of the right at issue is the parties' collective bargaining agreement, and further erred in failing to find

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<sup>1</sup> 48 PERB ¶ 4511 (2015).

that an individual needs permission to use a vehicle under established policies;<sup>2</sup> (2) the ALJ erred in finding that the management rights clause in the contract did not satisfy the Village's duty to bargain or establish a waiver by the PBA of any right to negotiate over the matter at issue;<sup>3</sup> and (3) the ALJ erred in finding the existence of a past practice based on, among other things, the "singular nature of the instance,"<sup>4</sup> the association of the practice with a single title, the commencement of the practice in 2009 rather than 2010, and a generally inadequate factual record.<sup>5</sup> The PBA responded to, each of these exceptions, defending the ALJ's decision.

### FACTS

The PBA represents all law enforcement officers employed by the Village's Police Department, except for the Chief of Police. The practice at issue involves the Village's assignment of a vehicle on a 24 hour a day, seven days per week basis to the sole employee in the title Detective, to enable the detective to respond to emergencies and make "out of jurisdiction" trips more quickly. At the time of the proceeding before the ALJ, Jeffrey Proctor, who had been promoted to the position in 2008, was the only person in that title.<sup>6</sup>

Before Proctor was promoted to Detective, Paul Fabiano served in that position. While serving as a Detective, the Village assigned him a vehicle that he could use only during the work day to perform his work duties and without commuting privileges.<sup>7</sup>

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<sup>2</sup> Exceptions Nos. 1 and 7.

<sup>3</sup> Exceptions Nos. 2 and 3.

<sup>4</sup> Exceptions No. 4.

<sup>5</sup> Exceptions Nos. 5, 6, 8, and 9.

<sup>6</sup> Tr, at p. 38-9.

<sup>7</sup> Tr, at p. 39.



Thomas Fabiano, currently the Chief of the Department (Chief Fabiano), worked as a Detective before Paul Fabiano. Proctor testified that when Chief Fabiano served as a Detective, he was assigned a vehicle that he was permitted to use to commute between his home and work.<sup>8</sup> Currently, as Chief, Chief Fabiano is assigned a vehicle on a 24-hour basis that he can use to commute to work.

When Proctor was promoted to Detective, he was assigned a Village vehicle for use only during his work hours. Several months after his promotion, in December 2008, Proctor asked Chief Fabiano to assign him a vehicle that he could drive to and from his home. Chief Fabiano spoke to the Mayor about the matter and, thereafter, told Proctor that the Department would assign him an unmarked car that he would be able to use on a 24-hour basis and could use to commute to work, but that the vehicle would be assigned on that basis only from Memorial Day to Labor Day. For the rest of the year, Proctor was required to leave the car at the Department at the end of his workday. Proctor explained that the Department limited the assignment of a 24 hour vehicle, at that time, to the summer months because tourism increased during those months, with a correspondingly higher number of emergency calls. Proctor testified that as a condition of the assignment of the vehicle to him on a 24-hour basis, he was required to respond to emergency calls during his off-duty time whenever a Detective was needed.<sup>9</sup>

In April 2010, Chief Fabiano gave Proctor permission to take the car home throughout the year. According to Proctor, this occurred because there were as many or more emergency calls requiring a Detective during the non-summer months as the

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<sup>8</sup> Tr, at pp. 39-40.

<sup>9</sup> Tr, at pp. 20, 34.

summer. Proctor testified that when he was assigned the vehicle on a year round basis, he was on call 24 hours a day, seven days a week, except during his vacations.<sup>10</sup>

Regarding his use of the vehicle, Proctor explained that if he is not assigned a Village vehicle on a 24-hour basis, when he is called to an emergency during his off-duty time, he must first drive his own vehicle to the Department to pick up his assigned vehicle which contains his Detective equipment including a fingerprint kit, a blood kit, and a rape kit. The need to pick up his Department vehicle increases his response time and, at times, may increase his travel time, since some locations, such as certain hospitals, are closer to his home. His off-duty response time is further increased because he is unable to use the lights and siren that his Department vehicle is equipped with to navigate through traffic. Some of the emergency calls he responds to during his off-duty time require him to drive to the crime lab and to different hospitals where rape and assault victims are taken.<sup>11</sup> Proctor continuously used the assigned vehicle on a 24-hour basis until May 2013 at which point Chief Fabiano told Proctor that, upon the Mayor's direction, he was no longer authorized to use the Department vehicle to commute to and from work.<sup>12</sup>

Although Proctor is no longer assigned a Department vehicle on a 24-hour basis, he continues to respond to emergency calls during his free time. Since then, however, when he receives emergency calls during his off-duty hours, he first drives to the Department in his own vehicle to pick up that vehicle.

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<sup>10</sup> Tr, at pp. 20, 37.

<sup>11</sup> Tr, at pp. 21, 25-6, 81-2.

<sup>12</sup> Tr, at pp. 37, 83.

Patrick Milazzo, a Police Officer since May 1997 and the PBA President since 2005, testified that Proctor was assigned a Village vehicle with take home privileges commencing in 2009. Milazzo testified that he observed Proctor use the Village owned vehicle continually and openly between 2009 and 2013. He testified that the Detective may drive outside the Village to pick up evidence or drop off blood or other samples at the laboratory. Milazzo agreed during his testimony that, when he is on duty, he may perform at least one of the same duties as Proctor, *i.e.*, dropping off or picking up evidence at the crime lab.<sup>13</sup>

The Village Board of Trustees on February 10, 2009 adopted a vehicle use policy that provided that “[a]ll vehicles and related equipment of the Village of Sag Harbor are owned and maintained for the purpose of conducting official business of the Village.”

The policy further provides, in relevant part:

Use of Village vehicles for personal use<sup>14</sup> is strictly prohibited with the exception of authorized personnel who are required to be on-call for emergency purposes. A list of authorized personnel and respective vehicles should be maintained by Department Heads and submitted to the Village Administrator on a timely basis.

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In the event a Village vehicle must travel outside of the Village or the protection districts for Fire and Ambulance, the employee must receive prior approval from the department head or liaison either on a case by case basis or as a comprehensive approval for specified purposes. (Ex – training, conferences, mutual aid, transports).<sup>15</sup>

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<sup>13</sup> Tr, at p. 61.

<sup>14</sup> The Village is not claiming that it terminated Detective Proctor’s use of the vehicle based on improper personal use of it.

<sup>15</sup> Joint Ex 2, Ex B attached thereto. The Board of Trustees amended the policy on April 12, 2011 but the above cited provisions remained unchanged by the 2011 amendments.

Brian Gilbride, the Village's Mayor and the Department's Police Commissioner since 2009, testified that the vehicle use policy applied to all Village personnel. He testified regarding his 2009 conversation with Chief Fabiano about Proctor's request for a 24 hour vehicle that he responded "yes" when asked whether "the Chief [would] call you for approval to use a car on a 24/7 basis?"<sup>16</sup>

In 2009, Mayor Gilbride was told by Chief Fabiano that Detective Proctor was working on a matter and that it would be helpful if he could use the car. The Mayor testified that he said, "Well listen, if that's what has to happen, let it happen. I didn't want to know the particulars, but you know, if this is your recommendation let it happen and I'll see what happens. But I did not ask what that issue was."<sup>17</sup>

The Mayor also testified that Chief Fabiano did not, in 2009, go into specifics regarding the need for the vehicle and that he only told him there was "something they were working on" or "something that required, you know, him maybe responding quickly and that was it."<sup>18</sup> He testified that he thought that there had been something going on where drugs were being sold, and that he knew that an arrest was thereafter made, but he admitted that he never asked and never learned whether that was the reason why the car assignment was requested.<sup>19</sup>

Mayor Gilbride testified that Chief Fabiano did not specifically state that the car would be used 24 hours a day, seven days a week but also testified that "quite honestly, I didn't give it any thought."<sup>20</sup> He testified that ultimately, he had empowered Chief

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<sup>16</sup> Tr, at p. 66.

<sup>17</sup> Tr, at p. 67.

<sup>18</sup> Tr, at pp. 90-1.

<sup>19</sup> *Id.*

<sup>20</sup> Tr, at p. 98.

Fabiano to assign the vehicle to Proctor on that basis.<sup>21</sup> He noted that from 2009 to 2013, he periodically observed Proctor using the vehicle but, nonetheless, did not inquire further of Chief Fabiano regarding the continued need for or use of the vehicle.<sup>22</sup>

The Mayor advised Chief Fabiano in May 2013 that he was revoking Proctor's permission to use a vehicle on a 24-hour basis. Chief Fabiano responded by asking him to reconsider his decision, but the Mayor told the Chief that he would not do so at that time, but might reconsider the matter in the future.<sup>23</sup> Since that date, Chief Fabiano has not again asked him to reassign a vehicle to Proctor on a 24-hour basis.<sup>24</sup>

The state of the Village's finances was proffered for the revocation.<sup>25</sup> Gilbride also testified that there was a complaint that Proctor was using the Village vehicle for his personal business. When Gilbride asked Chief Fabiano about the matter, the Chief told him he would look into it and thereafter told him that he had spoken to Proctor and that the matter complained of "never happened." Gilbride testified that he "was satisfied with the chief's explanation." According to Gilbride, he receives complaints on a daily basis about "everybody and about everything."<sup>26</sup>

The last collectively negotiated agreement between the parties includes the following management rights clause:

Subject to the provisions of this agreement, the Employer retains the exclusive right to plan, determine, direct and control or change the nature and extent of all its operations and personnel policies, consistent with the terms and conditions of employment as set forth herein, and to make

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<sup>21</sup> Tr, at p. 80.

<sup>22</sup> Tr, at pp. 90-1.

<sup>23</sup> Tr, at p. 99.

<sup>24</sup> Tr, at p. 77.

<sup>25</sup> Tr, at p. 101.

<sup>26</sup> Tr, at p. 86.

decisions which are properly or have been a part of management or a prerogative of the Police Commissioner.<sup>27</sup> The agreement also includes a mileage reimbursement clause that provides that [a]ny employee required to utilize the employee's personal vehicle for police department business shall be compensated at the rate of \$00.28 per mile."<sup>28</sup>

### DISCUSSION

As a preliminary matter, we note that the Village does contest the established jurisprudence that vehicle use policies may be a mandatory subject of collective bargaining. As the Court of Appeals has affirmed, "employee use of an employer-owned vehicle for transportation to and from work is an economic benefit and a mandatorily negotiable term and condition of employment; therefore, a public employer may not unilaterally discontinue a past practice of providing its employees with this benefit."<sup>29</sup>

Thus, we first address the Village's exceptions to the ALJ's finding with respect to the affirmative defenses of waiver and duty satisfaction and the Board's alleged lack of jurisdiction over this matter. In distinguishing the defenses of "waiver" and "duty satisfaction," we held in *Orchard Park Central School District* that:

Waiver concepts suggest that a charging party has surrendered something. Although waiver may accurately describe a loss of right, such as one relinquished by silence, inaction, or certain other types of conduct, the defense as described is not one under which a respondent is claiming that the charging party has suffered or should be made to suffer a loss of right. Under this particular defense, a respondent is claiming affirmatively that it and the charging party have already negotiated the subject(s) at issue and

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<sup>27</sup> Joint Ex 2, Ex A, at pp. 13-16 attached thereto.

<sup>28</sup> *Id.*

<sup>29</sup> *Town of Islip v NYS Pub Empl Relations Bd*, 23 NY3d 482, 491 (2014) See also, *County of Onondaga*, 12 PERB ¶ 3035 (1979), *affd*, 77 AD2d 783, 13 PERB ¶ 7011 (4th Dept 1980) and *County of Nassau*, 36 PERB ¶ 3036 (2002).

have reached an agreement as to how the subject(s) is to be treated, at least for the duration of the parties' agreement.<sup>30</sup>

We also held in *Orchard Park* that:

in order to successfully plead the “distinct affirmative defense of duty satisfaction, the burden rests with the respondent to plead and prove through negotiated terms that are reasonably clear that it satisfied its duty to negotiate a particular. 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.”<sup>31</sup>

Duty satisfaction occurs when a specific subject has been negotiated to fruition, and it may be established by contractual terms that either expressly or implicitly demonstrate that the parties had reached accord on that specific subject.

In this case, there is not a scintilla of evidence that: (1) that the parties purposely and intentionally negotiated the practice of the Village providing an automobile to its detective; or (2) the PBA expressly and unmistakably relinquished its right to collectively negotiate such subject. The ALJ correctly decided, based on the record, that the PBA had not waived its right to negotiate this subject. We do not disturb that finding.

As we recently restated in *County of Nassau*, “in a collectively bargained management rights clause, where the ‘language is too broad to be considered to be a

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<sup>30</sup> 47 PERB ¶ 3029, 3089 n. 3 (2014) citing *Dutchess Cmty College*, 46 PERB ¶ 3009, 3016 (2013) (quoting *County of Nassau*, 31 PERB ¶ 3064, 3142 (1998)).

<sup>31</sup> *Id.* See also *City of Cohoes*, 31 PERB ¶ 3020, 3043-3044 (1998), *confirmed sub nom Uniformed Firefighters of Cohoes v Cuevas*, 32 PERB ¶ 7026 (Sup Ct Albany County 1999), *affd*, 276 AD2d 184, 33 PERB ¶ 7019 (3d Dept 2000), *leave to appeal denied* 96 NY2d 711, 34 PERB ¶ 7018 (2001).

clear, unmistakable and unambiguous waiver, no such waiver will be found.”<sup>32</sup> The management rights clause in question is not of the kind that would otherwise constitute such a waiver nor otherwise evince the intention of the PBA to relinquish the right to negotiate a midterm unilateral change to a past practice regarding this issue.<sup>33</sup>

With respect to the affirmative defense of “duty satisfaction,” again, no evidence with respect to the management rights clause at issue and the other policies with respect to vehicle usage supports the claim that the Village satisfied its duty to negotiate. The ALJ correctly rejected this affirmative defense.

We also find without basis the general assertion by the Village that this matter does not belong before the Board because the collectively negotiated agreement addresses vehicle usage in general. The record establishes beyond cavil that the PBA’s past practice claim is not based on a right explicitly or even implicitly arising out of the agreement. The evidence of past practice is used to establish a breach of the Act, not as parol evidence to interpret any purportedly ambiguous evidence in the parties’ agreement.<sup>34</sup>

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<sup>32</sup> 48 PERB ¶ 3014 (2015) quoting *City of Yonkers*, 40 PERB ¶ 3001 (quoting *Civil Service Employees Assn, Inc., v Newman*, 88 AD2d 685, 15 PERB ¶ 7011 (3d Dept 1982), *appeal dismissed*, 57 NY2d 775, 15 PERB ¶ 7020 (1982).

<sup>33</sup> In *Sachem Central Sch Dist*, 21 PERB ¶ 3021, 3041 (1988), for example, the Board held that a management rights clause constituted such a waiver where it provided that “[a]ll terms and conditions of employment not covered by this agreement shall continue to be subject to the Board’s control and discretion and shall not be the subject of negotiations until the commencement of the negotiations for a successor contract to this agreement.” The parties here did not negotiate a comparable clause.

<sup>34</sup> See, e.g., *Detectives’ Endowment Assn v City of NY*, 125 AD3d 475 (1<sup>st</sup> Dept 2015) (past practice evidence not a basis for contractual claim where “[t]here is no claim that the alleged past practice would have been relevant to any contractual issue, such as the interpretation of an ambiguous provision”).



We also find that the ALJ correctly held that the practice at issue, that is, the Village's assignment of a vehicle on a 24 hour a day, seven days per week basis to the sole employee in the title Detective in order to facilitate quicker emergency response and out-of-jurisdiction trips, had all the indicia and characteristics of an enforceable past practice.

In *Chenango Forks Central School District*, we reaffirmed what we described as:

our most authoritative statement regarding the applicable test for the establishment of a binding past practice: the practice was unequivocal and was continued uninterrupted for a period of time sufficient under the circumstances to create a reasonable expectation among the affected unit employees that the practice would continue.<sup>35</sup>

This *prima facie* showing may be defeated by a “showing of lack of actual or constructive knowledge and, therefore, a lack of a bilateral acceptance of or acquiescence in the practice.”<sup>36</sup> However, “constructive knowledge exists when the past practice is reasonably subject to the employer's managerial and/or supervisory responsibilities and obligations.”<sup>37</sup> In this case, the use of the vehicle was open, notorious, and uncontested for three years in the Village. In addition, the testimony

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<sup>35</sup> 40 PERB ¶ 3012, 3046-3047 (2007), *on remand*, 42 PERB ¶ 4527 (2009), *affd*, 43 PERB ¶ 3017 (2010), *confd sub nom. Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 95 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *confd*, 21 NY3d 255, 46 PERB ¶ 7008 (2013). Most recently, we reaffirmed this standard *New York (SUNY Brockport)*, 48 PERB ¶ 3013 (2015) and in *State of NY*, 48 PERB ¶ 3009 (2015).

<sup>36</sup> *State of New York (OSC)*, 48 PERB ¶ 3009, at 3029, citing favorably *Manhasset Union Free Sch Dist*, 44 PERB ¶ 3005, at 3024-25 (2008), *confd sub nom and mod on other grounds, Manhasset Union Free Sch Dist v PERB*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009); *Town of Islip v NYS Pub Empl Relations Bd*, 23 NY3d 482, 491-492 (2014) (citing cases); *Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 21 NY3d 255, 363 (2013) (quoting *County of Nassau*, 24 PERB ¶ 3029 at 3058 (1991)).

<sup>37</sup> *State of NY (OSC)*, 48 PERB ¶ 3009, *Manhasset* 44 PERB ¶ 3005, at 3025.

evinced an understanding that Chief Fabiano was empowered by the Mayor to grant such a privilege to Detective Proctor.

Regardless of whether the right to possess a Village vehicle 24 hours a day first accrued in 2009 or in 2010,<sup>38</sup> it had all the earmarks of a past practice implicating a mandatory subject of collective negotiations. In contrast to what the Village has asserted, the unequivocal nature of the practice is manifest. It is not a singular incident; the Village continually provided the vehicle to Detective Proctor 24 hours a day, seven days a week for three years. To characterize it as an “isolated conferral of a temporary benefit” misstates the record.<sup>39</sup>

Although there was only one member of the bargaining unit who was the subject of the past practice, that does not take away from it being a practice. Indeed, there was only one detective and the sole person in that title received the benefit. To accept the Village’s argument that there can be no past practice if only one individual benefits, would undermine the entire concept of a past practice.<sup>40</sup> To accept the Village’s

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<sup>38</sup> We note, although it does not change our determination, that the right to such vehicle did accrue in 2010 rather than 2009, in contrast to what the ALJ determined.

<sup>39</sup> Memorandum in Support of Exceptions at p. 10.

<sup>40</sup> *Canastota Cent Sch Dist*, 32 PERB ¶ 3003, 3005 (1999) does not stand for the proposition that because a single unit member is the only beneficiary of a past practice, there can be no enforceable practice. Rather, in that case, the Board found no past practice existed when over a period of:

several years nonunit employees have filled certain coaching positions in the [School] District, to which, upon application, they are appointed year after year. It appears from the record that, except for the year in question, there were no applications made by unit employees for coaching positions historically held by another coach, whether a unit employee or a nonunit employee. There has only been one instance in the last several years in which a unit employee was appointed to a coaching position previously held by a nonunit employee who had also applied for the position.

argument would be to assert that one could never establish a past practice with respect to a single individual – even where, as here, that individual was the only person in the title at issue.

The Village incorrectly avers that the ALJ “sets a new standard for what can constitute a practice;”<sup>41</sup> rather, the ALJ restated well-established precedent. The Village’s contention that this benefit is a “permanent obligation”<sup>42</sup> is also inaccurate. Rather, the benefit in question is negotiable; the parties can negotiate its continuation, modification or outright elimination.

“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>43</sup> The Village has not adduced the kind of objective evidence to compel the conclusion that the ALJ's determination was manifestly incorrect. While the Village appears to contend alternatively that it did not have the requisite knowledge of the practice to establish a binding past practice, it is also argues that the benefit was conditionally granted. Both assertions are belied by the record. Moreover, based on the duration of the practice, there is a strong presumption that the

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In the case before us, there is one detective and over a period of several years that same detective was granted 24-hour use of a Village automobile. To rely solely on the fact that there is only one instance of one individual who received such a benefit, completely ignores the context in which that benefit was granted. We will not do that.

<sup>41</sup> *Id.*, at 2.

<sup>42</sup> *Id.*

<sup>43</sup> *County of Clinton*, 47 PERB ¶ 3026, at 3079 (2014) (quoting *Manhasset Union Free Sch Dist*, *supra* note 18, at 3019); citing *County of Tioga*, 44 PERB ¶ 3016, at 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977)).

Village had knew of the practice by virtue of its managerial and supervisory responsibilities and obligations.<sup>44</sup> The Village has not overcome that presumption here.

The practice at issue was unequivocal and continued uninterrupted for three years, under circumstances that were sufficient to create a reasonable expectation among the affected unit employee that the practice would continue. The use of the vehicle was open and notorious, known to the Mayor as well as to the Chief, who had the requisite authority to assign the vehicle to Proctor. Likewise, the record establishes Proctor's understanding of his concomittant obligation to be available at need, even when off duty. As such, it became a practice binding on both parties, the alteration of which would be the subject of further negotiations. This prior past practice is definite, discrete, and "reasonably clear on the specific subject at issue" and not susceptible of more than one interpretation.<sup>45</sup>

Accordingly, we affirm the ALJ's decision.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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<sup>44</sup> *Manhasset*, 44 PERB ¶ 3005 at 3025.

<sup>45</sup> *State of New York (SUNY Brockport)*, 48 PERB ¶ 3013, 3048 (2015).

In the Matter of

**CHERYL VOLPE,**

Charging Party,

**CASE NO. U-33256**

- and -

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

Respondent.

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

**BOARD DECISION AND ORDER**

This matter comes to us on exceptions filed by Cheryl Volpe to a decision of an Administrative Law Judge (ALJ) finding that the Board of Education of the City School District of the City of New York (District) did not violate §§ 209-a.1 (a) and (c) of the Public Employees' Fair Employment Act (Act) when it took various personnel actions with respect to Volpe.<sup>1</sup>

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<sup>1</sup> 48 PERB ¶ 4503 (2015). Volpe filed an amended charge dated July 15, 2014 (received July 24, 2014), after commencing the action and completing the first day of hearings. The ALJ denied and dismissed that amended charge for lack of specificity and its proximity to the hearing date which was noticed on March 10, 2014. *Id.*, at n. 1. Volpe takes no exception to that action, thus we have no need to address its propriety. As the Board held in *Bellmore-Merrick Cent HS Dist*, 48 PERB ¶ 3022, at n. 48 (2015), "We note that we do not exercise plenary review over ALJ decisions, but rather, that any objections not specifically raised to the ALJ's decision have been waived, and are not properly before us." Citing § 213.2 (b)(4) PERB Rules of Procedure; *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014), *citing City of Schenectady*, 46 PERB ¶ 3025, 3056, n. 8 (2013), *confd sub nom Matter of City of Schenectady v NYS Pub Empl Relations Bd*, Index No. 4090/2011 (Sup Ct Albany Co July 9, 2014); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009).

### EXCEPTIONS

Volpe raises two exceptions to the ALJ's decision: (1) the ALJ erred in not permitting her witness, Khiera Heggs, to testify in Volpe's rebuttal case; and (2) the ALJ erred in not giving credence to and preferring Volpe's testimony over that of the District's witness, Olivia Frances-Webber.

### FACTS

The District employed Volpe for more than 29 years. At the time of the hearing, she worked as a special education teacher at P.S. 114, whose building principal is Olivia Francis-Webber.<sup>2</sup> Under the supervision of Francis-Webber since 2005, Volpe consistently received satisfactory ratings.<sup>3</sup> Volpe alleges that retaliatory actions against her began in June 2008 when she filed a grievance in response to the principal's removal of her from a resource room assignment (Special Education Teacher Support Services or SETSS which refers to special supplemental instruction provided by special education teachers). Volpe won the grievance and her SETSS position was restored in September 2008, after which Francis-Webber allegedly attempted to eliminate the post. Volpe filed another grievance challenging the alleged reorganization, won that and, in November 2008, was returned to the resource room.<sup>4</sup>

Volpe testified that in June 2011, P.S. 114 posted for one bilingual and one monolingual SETSS position for the 2011-2012 school year. Francis-Webber hired only a bilingual SETSS teacher. Volpe acknowledged that she does not hold bilingual certification, but filed a grievance claiming retention rights to a monolingual position. She

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<sup>2</sup> ALJ Exhibit 1.

<sup>3</sup> Tr, at pp. 249, 365.

<sup>4</sup> Tr, at pp. 153-160.

also challenged the principal's claim that there was never a monolingual posting in June 2011 for the upcoming school year and produced a copy of it during the arbitration. In fact, she told a district representative for the United Federation of Teachers (UFT) that the principal's denial that she prepared and signed the posting was "a lie," which assertion was made known to the principal.<sup>5</sup>

In response to the controversy, Francis-Webber filed a report with the District's Office of Special Investigation (OSI) alleging that Volpe wrongfully created the monolingual posting and fraudulently signed the principal's name. Based on the charge, the District filed disciplinary charges against Volpe pursuant to Education Law § 3020-a on April 15, 2013.

Francis-Webber, on March 22, 2013, summarized a meeting held with Volpe, former UFT chapter leader Khiera Heggs, and the assistant principal. The summary included reference to a statement by Heggs that she had received the contested posting from Francis-Webber's secretary in 2011. Heggs and Volpe assert, however, that such information was not conveyed by Francis-Webber to OSI and did not deter the principal from pursuing a charge under Education Law § 3020-a.<sup>6</sup>

On July 22, 2013, the attorney prosecuting the Education law § 3020-a charges met with Heggs and was presented with both the monolingual and the bilingual postings. The charges were withdrawn that same month. Thereafter, in August 2013, Heggs was interviewed by OSI and the allegation before that investigatory body was found to be unsubstantiated. Heggs testified that when she was asked by the OSI investigator about

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<sup>5</sup> Tr, at pp. 43, 161-164, 166.

<sup>6</sup> Tr, at pp. 171-174, 179-180.

the history of conflict between Volpe and Francis-Webber, she accused the principal of falsely accusing Volpe and said that their conflict has been ongoing since Volpe began filing grievances.<sup>7</sup>

Volpe also testified to other incidents that she asserted constituted wrongful actions taken by the District against her. Specifically, she said she attended an Individual Education Program (or IEP which is a program for students receiving special education) meeting in October 2013 for one of her students and challenged the District psychologist's recommendation for the child's placement. Allegedly in response, the psychologist made complaints about Volpe to Francis-Webber, which resulted in a letter to Volpe's personnel file dated December 16, 2013.<sup>8</sup>

In addition, Volpe disagreed with the transfer of a student from her class and, on December 18, 2013, left her classroom to question the parent, who was at the school, as to why the transfer was being made. When Francis-Webber learned of this, she allegedly interrupted Volpe, screamed at her, and kept her in the main office for over three hours. Volpe claimed, contrary to the principal's assertion that she left her class unattended, that her class was covered by another teacher and a paraprofessional. Heggs testified that at a subsequent disciplinary conference, the principal presented copies of two parental complaints against Volpe.<sup>9</sup>

As the District's witness, Francis-Webber contested Volpe's claim that her first problems arose in 2008 after she filed a grievance. Instead, she cited incidents in 2005 and 2006, before any claimed union activity, when Volpe was the subject of disciplinary

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<sup>7</sup> Tr, at pp. 51, 57, 71-74, 182-190.

<sup>8</sup> Tr, at pp. 288-289; Charging Party's Exhibit 2.

<sup>9</sup> Tr, at pp. 83-85, 88-90, 326.



action. For example, she cited an incident in 2006 that involved Volpe leaving her class unattended, for which a letter was placed in her file.<sup>10</sup>

Regarding the SETSS controversy, Francis-Webber said that Volpe did not get a SETSS position because she was needed to temporarily cover a new special education class until a teacher could be hired for it. The principal claimed that Volpe was ultimately returned to the SETSS position where she remained until the 2011-2012 school year. At that time, the needs of the student population had changed and the SETSS program required a teacher who also spoke Spanish; Volpe did not, so the District assigned her to a self-contained special education class. Volpe grieved this action and lost at every step of the process, including arbitration.

According to Francis-Webber, Heggs' testimony in support of Volpe was not presented until the § 3020-a charges were pending. Although the OSI dropped the charges against Volpe, Francis-Webber testified that there was never any conclusion as to who prepared the posting and insisted that she did not. Francis-Webber noted that when she held the March 22, 2013 disciplinary conference with Volpe regarding the monolingual posting, OSI had not made any findings. The principal also testified that at the time of the meeting, she had been informed that she had the right to suspend Volpe, but decided not to because Volpe was doing a good job in the classroom.<sup>11</sup>

In October 2012, Volpe filed a Joint Committee special complaint against Francis-Webber, alleging a general pattern of harassment by Francis-Webber. The UFT and the

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<sup>10</sup> Tr, at pp. 312-320.

<sup>11</sup> Tr, at pp. 325, 336-337.

District investigated that charged and declared it to be unfounded.<sup>12</sup>

The principal also testified about a December 2013 incident between Volpe and a school psychologist. The psychologist made several complaints about Volpe's behavior at a meeting the psychologist was conducting. Specifically, the psychologist reported that Volpe invited several people to a confidential meeting over the psychologist's objections and was antagonistic and disrespectful, breached confidentiality, made inappropriate comments about a student, and contradicted the psychologist's professional recommendations. Francis-Webber met with Volpe, at which point Volpe admitted to breaching confidentiality and analogizing a student's situation to cancer. Thereafter, a letter was placed in Volpe's file.<sup>13</sup>

Francis-Webber also testified to a December 2013 complaint from a guidance counselor alleging that a student had reported corporal punishment by Volpe. The principal investigated the incident and allowed Volpe to respond, and determined on December 17, 2013 that the allegations against her were unfounded.<sup>14</sup> The next day, however, there occurred the incident described above where Volpe left her classroom. The principal said she found the teacher in an empty room speaking with a parent about her child being transferred out of Volpe's class. Finding Volpe's conduct to be inappropriate, Francis-Webber interrupted the meeting and told Volpe to report to her office while she investigated the matter. She noted that this was not the first time Volpe had abandoned her classroom.<sup>15</sup>

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<sup>12</sup> Tr, at pp. 111-113, 131, 332.

<sup>13</sup> Tr, at pp. 341-349, 439, 440-441.

<sup>14</sup> Tr, at pp. 349-356.

<sup>15</sup> Tr, at pp. 360-365, 403, 453.

### DISCUSSION

As a preliminary matter, the Board will address Volpe's claim that the ALJ erred in not permitting Heggs to testify in rebuttal. Volpe alleges that she "requested a short break in order to wait for Khiera Heggs, her witness, who was travelling from Queens, to testify in rebuttal to Principal Webber's testimony. The ALJ denied the request and prevented Ms. Heggs from testifying in rebuttal."<sup>16</sup> In the end, the ALJ also did not consider a supplemental affidavit signed by Heggs submitted by Volpe in a post-hearing brief.<sup>17</sup>

The record completely belies the basis for this exception. After Volpe testified in rebuttal, the following discourse ensued:

ALJ: . . . Anything further by way of rebuttal?

Counsel for Volpe: I just need to speak – she had Ms. Haggs [sic - reported as "Haggs" rather than "Heggs" throughout] coming back. True rebuttal with Ms. Haggs, Ms. Haggs was on her way. I don't know if she arrived or not.

ALJ: Is she here now?

Volpe: I believe, yes.

ALJ: What is your offer of proof of rebuttal that we haven't already heard testimony about. Because Ms. Haggs did testify.

I realize that a lot of what the principal said was in contradiction of what Ms. Haggs testified to, but that is as it is and I have to draw credibility determination.

Rebuttal is not another opportunity to come back and cover the same stuff.

Counsel for Volpe: It's not necessary.

ALJ: You then rest?

Counsel for Volpe: Yes.<sup>18</sup>

An ALJ is vested with the discretion to control proceedings before her. As we

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<sup>16</sup> Exceptions, pp. 1-2.

<sup>17</sup> 48 PERB ¶ 4503, n. 2.

<sup>18</sup> Tr, at pp. 474-475.

recently held in *County of Franklin*,<sup>19</sup> “[a] n ALJ has considerable discretion with respect to conducting a hearing under § 212.4 of the Rules, including discretion to control the order of proof to promote an orderly and expeditious hearing . . . .”<sup>20</sup> In this matter, the ALJ gave counsel for Volpe the opportunity to present Heggs as a rebuttal witness, declined that opportunity and instead, rested his case. During two days of hearings, the parties had ample opportunity to present their cases in full. Indeed, Volpe was given the opportunity of presenting a rebuttal witness which she did. The conduct of the hearing was manifestly fair to both parties. It would arguably have been unfair for the ALJ to consider the Heggs testimony in the form of an affidavit appended to a post-hearing brief where such testimony was being offered after the charging party had rested and without opportunity for the opposing party to cross-examine. Thus, we reject this part of Volpe’s exceptions in full.

The remaining exception<sup>21</sup> goes directly to the ALJ’s determination that Volpe’s charge failed because Francis-Webber’s testimony was more credible than that of Volpe and her witness. 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 by a preponderance of the evidence: a) that the affected

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<sup>19</sup> 48 PERB ¶ 3025 (2015).

<sup>20</sup> *Id.*, at n. 23, citing *County of Orleans*, 25 PERB ¶ 3010, 3292, n. 2 (1992); *City of Elmira (PBA)*, 41 PERB ¶ 3018, 3084 (2008), citing *Nanuet Union Free Sch Dist*, 17 PERB ¶ 3005 (1984); *Board of Ed of the City Sch Dist of the City of Buffalo and Buffalo Teachers Fed*, 26 PERB ¶ 3019 (1993); *New York State Security and Law Enforcement Employees, Council 82, AFSCME (Fronczak)*, 29 PERB ¶ 3015 (1996); *Amalgamated Transit Union, Division 580, AFL-CIO (Farella)*, 32 PERB ¶ 3053 (1999).

<sup>21</sup> We note that no exception is taken to the ALJ’s finding that given the charge’s filing date of January 11, 2014, any actions taken before September 11, 2013 or after January 11, 2014, could not form the basis for the charge. See note 1, above. In fact, the ALJ gave Volpe’s counsel considerable leeway to proffer otherwise time-barred evidence to place the current charge in context.

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>22</sup> In this case, there was no direct evidence of animus, but circumstantial evidence can be sufficient to raise the inference of unlawful motivation. Proof that the employer's stated reasons for its conduct are pretextual may constitute such circumstantial evidence.<sup>23</sup>

If a charging party establishes a *prima facie* case of unlawful motivation through circumstantial evidence, the burden of persuasion shifts to the respondent to rebut such 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>24</sup>

The ALJ found that Volpe had satisfied the first two elements for establishing a *prima facie* case. That is to say, she had proven that she had engaged in protected activity and that the District knew of such activity. Correctly, she also found that, Volpe must establish that “but for” her protected activity, she would not have been the subject of

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<sup>22</sup> *East Meadow Union Free School Dist*, 48 PERB ¶ 3006, 3017-3018, n. 34 (2015) citing *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, 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, 3056 (2014).

<sup>23</sup> *See City of Utica*, 24 PERB ¶ 3044 (1991); *Town of Henrietta*, 28 PERB ¶ 4605, *affd*, 28 PERB ¶ 3079 (1995).

<sup>24</sup> *Id.*

the disciplinary letter in December 2013 and the timing of the conduct, in and of itself, is not enough to establish an actionable nexus.<sup>25</sup>

Volpe avers in her Exceptions that “[b]ased on Principal Webber’s lack of credibility, there was more than sufficient basis to find Principal Webber retaliated against Ms. Volpe following her grievances above removal” from a position she held.<sup>26</sup> The ALJ found, notwithstanding Volpe’s contentions and the apparent animosity between Volpe and Frances-Webber, that:

[E]ven if I considered all of Volpe’s testimony to be true, there is nothing more than speculation to tie the adverse actions against her to motivation based on union animus. Her proof is insufficient to establish a prima facie case of retaliation. Volpe relies solely upon the fact that she filed grievances and thereafter suffered adverse actions by the principal.

\* \* \*

However, even if Volpe had established a prima facie case, the District effectively proved that it acted for legitimate business reasons. Francis-Webber very convincingly testified that any action she took against Volpe in December 2013 was in response to incidents she witnessed or which were brought to her attention. She also pointed out that even after Volpe’s grievance activity, she consistently rated her satisfactory, did not suspend her when the § 3020-a charges were pending, returned her to the [SETSS] position for two years when that accommodated the District’s needs, and concluded that corporal punishment allegations against her were unfounded.

\* \* \*

I find very credible the testimony of the principal substantiating her legitimate business concerns and responses in accordance therewith.<sup>27</sup>

As in *East Meadow Union Free School District*, while anti-union animus *could* be

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<sup>25</sup> See *State of New York (SUNY Buffalo)*, 33 PERB ¶ 3020 (2000).

<sup>26</sup> Exceptions, p. 3.

<sup>27</sup> 48 PERB ¶ 4503, at 4514-4515.

inferred from actions taken by Francis-Webber, such inferences do “not constitute the objective evidence that ALJ’s finding was ‘manifestly incorrect’ that is required to justify reversal of a contrary finding.”<sup>28</sup> Volpe’s argument supporting her Exception that the “situation that occurred with the School Psychologist in the Fall 2013 should not have been handled in the manner in which it was” merely suggests that there were alternative methods of resolving an issue between the parties that might have been less confrontational,<sup>29</sup> not that anti-union animus was the motivating factor in the District’s actions. Conjecture is neither proof nor evidence.

We have long held that such “[c]redibility determinations by an ALJ are generally entitled to ‘great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.’”<sup>30</sup> In the instant case, Volpe has not posited any such objective evidence demonstrating that the ALJ’s credibility determinations are manifestly incorrect, thus we will not disturb them.<sup>31</sup> Thus, we deny the exceptions to the ALJ’s determination that challenged her findings on credibility, as a result of which; we affirm the ALJ’s dismissal of the instant charge.

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<sup>28</sup> *East Meadow Union Free School Dist*, 48 PERB ¶ 3006, 3018 (2015).

<sup>29</sup> Exceptions, pp. 2-3 (Volpe also suggests that “a mediation type meeting should have been scheduled” in lieu of the manner in which the issue was resolved).

<sup>30</sup> *Id.*; *Elwood Teachers’ Alliance (Neithardt)*, 48 PERB ¶ 3020, n. 40 (2015) citing *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014) (quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, at 3019 (2008), citing *County of Tioga*, 44 PERB ¶ 3016, at 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain’s Endowment Assn*, 10 PERB ¶ 3034 (1977)).

<sup>31</sup> We also note that Volpe always received positive evaluations from Francis-Webber who spoke highly of her during the hearing and where charges have been commenced, they have ended positively in her favor.

IT IS, THEREFORE, ORDERED that the ALJ's findings are affirmed in full.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member



In the Matter of

**BRIAN MOORE,**

Charging Party,

**CASE NO. U-33509**

-and-

**PROFESSIONAL STAFF CONGRESS/  
CITY UNIVERSITY OF NEW YORK,**

Respondent,

-and-

**CITY UNIVERSITY OF NEW YORK,**

Employer.

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**BRIAN MOORE, *pro se***

**PETER ZWIEBACH, ESQ., for Respondent**

**FREDERICK P. SCHAFFER, GENERAL COUNSEL (HILARY B. KLEIN of  
counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Brian Moore to a decision of an administrative law judge dismissing his amended improper practice charge on the grounds that it was not timely filed, and that it failed to state a claim under the Public Employees' Fair Employment Act (Act).<sup>1</sup> In his charge, Moore contended that the Professional Staff Congress/City University of New York (PSC) violated § 209-a.2 (c) of the Act by refusing to represent him at a disciplinary arbitration. The ALJ found that Moore's own allegations and exhibits established that PSC had informed Moore of its

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<sup>1</sup> 47 PERB ¶ 4600 (2014).

decision not to represent him or pay for his arbitration costs more than four months prior to the filing of the charge, and that PSC had not failed to respond to his inquiries.

Accordingly, the ALJ dismissed the charge.

### EXCEPTIONS

In his exceptions, Moore contends that “the charging party assumed from Day 1 that [PSC] would not provide legal counsel at any stage in the process,” and that “a lawyer advised the charging party to investigate the legal counsel issue, so he did, but this had nothing to with the issue at hand, or the cause of action.”<sup>2</sup> Moore acknowledges that he knew on November 6, 2013 that “the American Arbitration Association (AAA) required him to file adequate security to pay the cost of arbitration.”<sup>3</sup> He alleges that he petitioned AAA for a hardship waiver on November 6, 2013, and in or about January 1, 2014, received an invoice from AAA for \$100, which he paid on or about March 12, 2014. Moore further states that he “assumed that the token charge of \$100 was meant to cover the security. He appreciated the gesture of good will from the AAA.”<sup>4</sup> However, he alleges that on or about March 19, 2014, AAA sent a letter to both Moore and the employer, asking each “to mail a certified check in the amount of \$2700.00 ... to cover your share of the estimated fee for the Arbitrator’s services.”<sup>5</sup>

Moore concludes:

The Charging Party filed his Improper Practice Charge only when he knew what he was complaining about, which was that two weeks before the arbitration was scheduled to begin—out of the blue—he got hit with a bill for \$2700.00 to

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<sup>2</sup> Exceptions, at 1.

<sup>3</sup> Exceptions, at 2, ¶ 1.

<sup>4</sup> Exceptions, at 3 ¶ 7.

<sup>5</sup> *Id.* at ¶ 8.

cover the estimated fee for the Arbitrator's services when he thought he had already done that.<sup>6</sup>

### DISCUSSION

The facts relevant to the instant decision are stated in the ALJ's decision, and need not be summarized here. In both his original and his amended charge, Moore clearly stated as his claim that "[i]t is my position that PSC/CUNY violated my rights by not providing me with legal counsel, and in so doing, PSC/CUNY is trying to avoid paying the arbitrator."<sup>7</sup> In neither document, nor at any time, did Moore assert either that PSC could be held derivatively liable for alleged misconduct by AAA, or that he was endeavoring to state a claim against AAA.

As we have recently reaffirmed, we do not exercise plenary review over ALJ decisions; rather, § 213.2 of our Rules "limits our review of the ALJ's determination to the record before him or her."<sup>8</sup> Thus, these new theories of the case, not advanced before the ALJ, are not properly before us. Moreover, even if we were to review such new claims on the merits, no basis for imputing to PSC any untoward behavior on the part of AAA—assuming any could be gleaned from the exceptions—has been alleged in

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<sup>6</sup> Exceptions, at 4.

<sup>7</sup> Addendum to June 3, 2014 Amended Charge, at 2; Addendum to April 28 Charge, at 2. Likewise, Moore's September 2, 2014 brief on the timeliness issue framed the issue by alleging that PSC "promis[ed] on its website—without any exclusions, caveats, or disclaimers—to provide as a matter of right of union membership, legal counsel for the final-step hearing with a professional arbitrator," and that "PSC/CUNY failed to fulfill this promise." *Id.*, ¶ 4. The letter from AAA requesting payment of \$2,700.0 is alleged in the brief to establish the date the claim accrued. *Id.*, ¶¶ 2-3.

<sup>8</sup> *UFT (Gibson)*, 48 PERB ¶ 3015, 3054 (2015), citing *CSEA (Bienko)*, 47 PERB ¶ 3027, 3082 (2014); *NYS Thruway Authority*, 47 PERB ¶¶ 3032, 3100, at n 25 (2014); *CSEA (Paganini)*, 36 PERB ¶¶ 3006, 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).

the exceptions, which expressly acknowledge that Moore was aware of PSC's decision to not represent him, and of his own obligation to pay his share of the costs of arbitration. As was the case in *UFT (Gibson)*, the only action adverse to the charging party was taken by a party other than PSC.<sup>9</sup> Moreover, improper practices within the ambit of the Act can only be brought against a "public employer" and an "employee organization," as defined by the Act.<sup>10</sup> AAA is neither, and, in any event, has not been named as a party at any point in these proceedings. Accordingly, the exceptions do not state any claim against either PSC or AAA.

Nor do the exceptions in any way undermine the rulings of the ALJ on the issues that were raised before her, and which she in fact decided. Based upon the foregoing, we deny Moore's exceptions, dismiss the charge and affirm the decision of the ALJ.

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

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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<sup>9</sup> *Id.*, 48 PERB ¶ 3015, at 3054.

<sup>10</sup> Act, § 209-a.

In the Matter of

**WADE WHITFIELD,**

Charging Party,

**CASE NO. U-33565**

- and -

**UNITED FEDERATION OF TEACHERS, LOCAL 2,**

Respondent,

- and -

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

Employer.

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**WADE WHITFIELD, *pro se***

**RICHARD E. CASAGRANDE, GENERAL COUNSEL (GREGORY M. AINSLEY  
of counsel), for Respondent**

**DAVID BRODSKY, DIRECTOR OF LABOR RELATIONS (JOHN WALLIN of  
counsel), for Employer**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions filed by Wade Whitfield to a decision of an Administrative Law Judge (ALJ) dismissing as untimely his amended improper practice charge, filed on May 31, 2014.<sup>1</sup> In his charge, Whitfield alleged that the United Federation of Teachers, Local 2 (UFT) violated § 209-a.2 (c) of the Public Employees'

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<sup>1</sup> 48 PERB ¶ 4560 (2015).

Fair Employment Act (Act) in representing him in a 2011 grievance hearing and by failing in 2014 to investigate his allegations of fraud stemming from his 2011 termination. For the reasons stated below, we affirm the ALJ's decision, and dismiss the charge.

### EXCEPTIONS

Whitfield excepts to the ALJ's decision on three grounds. First, Whitfield asserts because of his receipt of Worker's Compensation benefits, the ALJ was required to "conclude that there was *no connection* between the employee and his employer for the purpose of both work and pay" at the time of the purported termination.<sup>2</sup> Second, Whitfield contends that the ALJ erred in treating March 29, 2012 as the date of accrual of the improper practice charge, as he received the termination letter while he was "still separated from [the Board of Education of the City School District of the City of New York (District)], recovering from an extensive Line-of-Duty injury, and receiving compensation for his injuries."<sup>3</sup> Third, Whitfield claims that the asserted ground for the termination, his failure to submit an application for extended leave of absence, was not valid as he was not required by any rule, regulation, policy, practice, and/or procedure to submit such a form.

### FACTS

Whitfield was employed by the District as a paraprofessional, assigned to District

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<sup>2</sup> Exceptions, at 2.

<sup>3</sup> *Id.*

75, a non-geographically defined district with responsibility for special education.<sup>4</sup>

Paraprofessionals employed in District 75 work only with special education students, and the position is, therefore, physically demanding because of the unique needs of the students, who on occasion may need to be lifted or restrained by paraprofessionals.<sup>5</sup>

On March 23, 2011, Whitfield was assaulted by a student, sustaining injuries that resulted in his being absent and receiving Worker's Compensation benefits from that date through September 20, 2011.<sup>6</sup> According to the SDHR Decision, Whitfield's leave was initially scheduled to end in April, but was extended more than once at his request.<sup>7</sup>

On September 14, 2011, Whitfield's own doctor cleared him to return to work on September 20, 2011, "with the limitations of no pulling, pushing, or lifting greater than 15 pounds."<sup>8</sup> Whitfield reported to work on September 20, only to be sent by Principal Barbara Hanson for an evaluation of his fitness for duty by the District's Division of Human Resources, which, based upon the limitation set forth by Whitfield's doctor, found him to be "*Not Fit* for duty."<sup>9</sup> Both the SDHR Decision and Whitfield's brief in opposition to the motion to dismiss agree that Hanson encouraged Whitfield to submit another application to extend his leave of absence, and that Whitfield did not submit

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<sup>4</sup> The facts set forth here are based on the amended charge, or on the facts set forth in the UFT's motion to dismiss and, particularly, the July 19, 2013 decision of the New York State Division of Human Rights (SDHR Decision) dismissing Whitfield's claim of unlawful discriminatory practices under Article 15 of the Executive Law, annexed to the UFT's motion as Exhibit A. Whitfield stated in his response to the motion to dismiss (Whitfield Brief) that he "agrees totally with the facts presented to the [ALJ] by counsel to be true and accurate," while asserting that additional facts in the charge mandated a finding of a violation. *Id.* at 1.

<sup>5</sup> SDHR Decision, at 2-3.

<sup>6</sup> *Id.* at 3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> Amended Charge, at 1. The SDHR Decision found that Hanson determined that the limitations placed on Whitfield's activity by his doctor "did not clear him to return to work as a paraprofessional," because the limitations were inconsistent with performance of his job duties. *Id.* at 2-3.

such an application.<sup>10</sup> On October 13, 2011, a meeting between Whitfield, the UFT, and Hanson took place in response to a grievance filed by the UFT on Whitfield's behalf, asserting that he should have been allowed to return to work with the limitations in place.<sup>11</sup> On or about October 25, 2011, Hanson sent Whitfield a letter stating that the District deemed him to be on unauthorized leave until November 22, 2011, advising him of his right to request an extension of his leave of absence, providing him forms with which to do so, and warning that failure to respond by October 31, 2011 "would result in the termination of his employment" based on abandonment of his position.<sup>12</sup>

On March 1, 2012, Hanson met with Whitfield and his UFT representative to discuss his "current employee status and to have him apply for an extension of his leave of absence in order to protect his job."<sup>13</sup> Whitfield affirmatively alleges that the UFT "engaged the Charging Party's employer, the [District], concerning [his] employment status."<sup>14</sup> Characterizing the union representative's behavior at this conference as "fraud," Whitfield requested that an inference be drawn accordingly that "the UFT knew that there were no leave policies applicable [to] paraprofessionals other than Worker's Compensation."<sup>15</sup> Whitfield refused to apply for an extension, and on March 29, 2012, the District terminated his employment.<sup>16</sup> A Step 1 decision upholding the decision issued on April 25, 2012, and a Step 2 grievance was filed on April 3, 2014. A conference was held on the Step 2 grievance on April 25, 2014, and a decision denying the grievance as untimely issued on June 16, 2014.

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<sup>10</sup> Whitfield Brief, at 2; SDHR Decision, at 4-5.

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

<sup>12</sup> Whitfield Brief, at 2; SDHR Decision, at 5-6.

<sup>13</sup> Whitfield Brief, at 3, quoting SDHR Decision, at 6.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> SDHR Decision, at 6.



### DISCUSSION

Whitfield asserts that his charge should be deemed timely because he last received Worker's Compensation benefits within four months of his filing the charge.<sup>17</sup> Under § 204.1 (a) of our Rules of Procedure, "the four-month time period for filing a charge commences when a charging party has actual or constructive knowledge of the act or acts that form the basis for the charge or the date that such conduct could have reasonably been discovered."<sup>18</sup> By Whitfield's own allegations, the District issued a letter terminating him on March 29, 2012, and that the UFT in some unspecified manner condoned the District's position in a meeting held on March 1, 2012. Thus, any timely charge arising out of the allegations in the amended charge or raised in the exceptions had to be filed by, at latest, within four months of Whitfield's termination, that is, by July 30, 2012. The original charge, filed by mail on May 31, 2014, is therefore clearly

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<sup>17</sup> Whitfield does not except to the ALJ's ruling that any allegations concerning the 2014 Step 2 grievance hearing and subsequent decision upholding his termination were not the subject of a proper amendment and were in any event untimely when brought to the ALJ's attention in a letter. Nor does Whitfield except to the ALJ's finding that his claim that the UFT failed to investigate his claim of fraud against the District in 2014 was barred by his lack of standing as a result of the severance of his employment relationship; indeed, he affirmatively alleges that there was "no connection" between him and the District. As we noted in *Bellmore-Merrick Cent HS Dist*, 48 PERB ¶ 3022, n. 48 (2015), "we do not exercise plenary review over ALJ decisions, but rather, that any objections not specifically raised to the ALJ's decision have been waived, and are not properly before us." *Id.*; see § 213.2 (b)(4) PERB Rules of Procedure; *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014), citing *City of Schenectady*, 46 PERB ¶ 3025, 3056, n. 8 (2013), *confd sub nom Matter of City of Schenectady v New York State Pub Empl Relations Bd*, Index No. 4090/2011 (Sup Ct Albany Co July 9, 2014); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confd sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007); *Town of Walkill*, 42 PERB ¶ 3006 (2009).

<sup>18</sup> *UFT (Cruz)*, 48 PERB ¶ 3004, 3010 (2015) (quoting *Local 456, IBT (Rojas)*, 45 PERB ¶ 3031, 3072 (2012)); see also *Solvay Union Free Sch Dist*, 45 PERB ¶ 3023 (2012); *Nanuet Union Free Sch Dist*, 45 PERB ¶ 3007 (2012); *New York State Thruway Auth*, 40 PERB ¶ 3014 (2007); *City of Binghamton*, 31 PERB ¶ 3088 (1998); *City of Oswego*, 23 PERB ¶ 3007 (1990); *State of New York (GOER)*, 22 PERB ¶ 3009 (1989); *Board of Educ of the City Sch Dist of the City of New York (Chamberlin)*, 15 PERB ¶ 3050 (1982).

untimely as to the acts alleged, and thus the ALJ properly dismissed it both as to the UFT and the District.<sup>19</sup>

In view of Whitfield's *pro se* status, we have examined the exceptions and the record, and "we are unable to discern an arguably meritorious basis for [his] challenge to the ALJ's decision."<sup>20</sup>

We do not address the ALJ's holding that the severance of the employment relationship effectively extinguished the UFT's duty of fair representation toward Whitfield. The UFT's unsuccessful representation contesting the termination led to a decision adverse to Whitfield within four months of the filing of the charge, which raises a factual question as to whether representation was ongoing, so that the duty of fair representation continued to apply. We need not resolve this question, however, as the record below establishes that no breach of the duty of fair representation can be gleaned from the facts presented.

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."<sup>21</sup> As we have recently had occasion to explain, 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

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<sup>19</sup> *Id.*; see also *UFT (Pinkard)*, 47 PERB ¶ 3020 (2014).

<sup>20</sup> *UFT (Pinkard)*, 47 PERB ¶ 3020, at 3066, quoting *Westchester County Correction Officers' Benevolent Assn, Inc.*, 30 PERB ¶ 3075, 3184 (1997).

<sup>21</sup> *CSEA (Arredondo)*, 48 PERB ¶ 3010, (2015), quoting *UFT (Munroe)*, 47 PERB ¶ 3031, 3095 (2014), *confd sub nom, Munroe v NYS Pub Empl Relations Bd*, 48 PERB ¶ 7002 (Sup Ct NY Co. May 27, 2015) (Huff, J.) (quoting *Bienko (CSEA)*, 47 PERB ¶ 3027, 3082-83 (2014); see *District Council 37, AFSCME, AFL-CIO (Farrey)*, 41 PERB ¶ 3027, 3119 (2008)).

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.<sup>22</sup>

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.”<sup>23</sup> In particular, “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.”<sup>24</sup>

Whitfield has not provided any basis upon which we could conclude that the representation was tainted by any “arbitrary, discriminatory or bad-faith conduct” sufficient to violate the duty of fair representation. Indeed, the SDHR Decision corroborates the District’s practice of requiring an employee on Worker’s Compensation leave of absence to apply for extension of such leave, and Whitfield’s earlier requests for such extensions.<sup>25</sup> Thus, the record does not unequivocally establish that the UFT failed to advance a viable claim on behalf of Whitfield, let alone that it did so in an arbitrary or invidious manner. Accordingly, for the reasons set forth above, we deny Whitfield’s exceptions and affirm the ALJ’s.

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

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<sup>22</sup> *Id.*

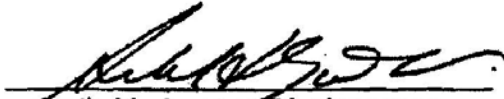
<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> SDHR Decision, at 3, 4.

dismissed.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

In the Matter of

**JONATHAN A. ZENZ,**

Charging Party,

**CASE NO. UP-31167**

-and-

**OUR LADY OF LOURDES HIGH SCHOOL and THE  
ARCHDIOCESE OF NEW YORK,**

Respondents.

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**FRUMKIN & HUNTER, LLP (WILLIAM D. FRUMKIN & ALEXANDRA MANREDI  
of counsel), for Charging Party**

**SHEPPARD, MULLIN, RICHTER & HAMPTON, LLP (JAMES R. HAYS of  
counsel), for Respondent**

**BOARD DECISION AND ORDER**

This case comes to us on exceptions from a decision by an Administrative Law Judge (ALJ) dismissing Jonathan Zenz's amended charge alleging that Our Lady of Lourdes High School (OLL) and the Archdiocese of New York (ANY) (collectively, "Respondents")<sup>1</sup> engaged in an unfair labor practice by terminating Zenz's employment in violation of §§ 704(5), (8) and (10) of the New York State Employment Relations Act (SERA).<sup>2</sup>

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<sup>1</sup> OLL is a private school operating under the auspices of the Archdiocese of the City of New York, but is governed by an independent board of trustees; OLL has sole responsibility for all employment decisions.

<sup>2</sup> 48 PERB ¶ 4401 (2015). Zenz did not except to the ALJ's dismissal of his claim that the Respondents violated § 205.5 (m) of the Public Employees' Fair Employment Act by terminating Zenz in retaliation for his participation in protected activity. Therefore, any claims regarding this finding have been waived, and are not before us. *City of Lockport*, 47 PERB ¶ 3030, 3093, n. 8 (2014), citing *Village of Endicott*, 47 PERB ¶ 3017, 3052, n. 5 (2014) (citing § 213.2(b)(4) PERB Rules of Procedure; see also *City of Schenectady*, 46 PERB ¶ 3025, 3056, n. 8 (2013), *confirmed sub nom Matter of City of Schenectady v NYS Pub Empl Relations Bd*, 47 PERB ¶ 7004 (Sup Ct Albany Co July 9, 2014); *Town of Orangetown*, 40 PERB ¶ 3008 (2007), *confirmed sub nom Matter of Town of Orangetown v NYS Pub Empl Relations Bd*, 40 PERB ¶ 7008 (Sup Ct Albany Co 2007).

### EXCEPTIONS

Zenz excepts to the ALJ's decision on the grounds that: (1) the ALJ stated, but did not apply, the SERA principle that an adverse employment action even partially motivated by anti-union animus is unlawful;<sup>3</sup> (2) the ALJ erred in finding that Zenz could not have been retaliated against for protected activity on the basis that the charging party was not recognized by the employer as the leader of a labor organization;<sup>4</sup> (3) the evidence used to establish a *prima facie* case should have been deemed conclusive as to the finding of animus;<sup>5</sup> (4) the ALJ erred in failing to credit Zenz's evidence of pretext;<sup>6</sup> and (5) the ALJ erred in determining that anti-union animus played no part in Zenz's termination.

### FACTS

The Catholic High School Association (CHSA) employed the lay faculty at ten Catholic High Schools, including OLL. The CHSA disbanded on September 1, 2009, divesting its functions to the individual schools, each with a separate and independent board of trustees. Both before and after the dissolution of CHSA, employees at OLL were represented by the Lay Faculty Association, Local 255, United Service Workers Union (USWU), International Union of Journeymen and Allied Trades IUJAT (LFA). The LFA remained the recognized collective bargaining representative of the OLL lay faculty until July 2012, when the OLL lay faculty voted to decertify the LFA as its representative. During this time, the LFA was organizing in an effort to affiliate with a different local of the USWU and the IUJAT, Local 74. Zenz actively supported the re-affiliation, and opposed decertification in favor of no representation altogether.

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<sup>3</sup> Exception Nos. 1 and 3.

<sup>4</sup> Exception No. 3.

<sup>5</sup> Exception Nos. 4-7.

<sup>6</sup> Exception Nos. 8 and 9.

Zenz began teaching Physics on a part-time basis at OLL in September 2004, subject to annual renewal. From that time through the termination of his employment, Zenz did not have a New York State certification to teach Physics, and none was required to teach at OLL. Rather, Zenz held a Bachelor of Science degree in Chemical Engineering. In the 2006-2007 school year, he began teaching AP Physics-B and continued in that course through the 2010-2011 school year. He also taught Physics of the Regents and Honors levels.

Zenz was one of five members of the LFA labor committee and, along with Ed Cigna, Sebastian Rutigliano, Tony Camaja and Fran O'Sullivan, comprised the Local 74 organizing committee at OLL. Cigna resigned for personal reasons from the LFA committee before Local 74 commenced its campaign. Communications of the group listed all four committee members, with no member identified as the leader. Zenz's name was not listed first.<sup>7</sup> Zenz also wrote two letters regarding union issues, neither of which expressly identified him as a union leader. Of the four committee members, only Zenz and O'Sullivan were not re-employed for the 2011-2012 school year.

At the beginning of the 2011-2012 school year, Andrew Scecina replaced Zenz. Scecina holds teaching certifications from New York State and New Jersey in Physics, Chemistry, General Science Grades 7 to 12, and Mathematics, a Bachelor of Science degree in Physics, a Master's degree in Secondary Education with a Physics major, and course work toward a Master's degree in Health Physics. He had more than 38 years of classroom teaching experience at the time he was hired, was approved to teach both AP Physics "A" as well as "B."

Zenz's last observation, from May 2011, rated him as proficient in five areas and

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<sup>7</sup> Charging Party's Ex 7, 9, 10,16.

expert in two, and commended him on the lesson, as well as his efforts on behalf of his students.<sup>8</sup>

Cigna was hired by OLL for the 2008-2009 school year as a Chemistry and Physics teacher. He holds New York State certifications in Biology, Chemistry, Physics, General Science, School Business Administration, and School Leadership, and had previous experience in AP Biology at the time of his hire. John Herles was also hired for the 2008-2009 school year to teach Biology. Herles had no prior teaching experience, and held no New York State certification. In spring 2010, when Cigna's employment was terminated, Herles continued as a Biology teacher. Cigna testified that he would have been qualified to teach Biology, but admitted that he had not done so while at OLL and had not been hired to teach that subject. Cigna testified that, prior to his involvement in union activity, he had a good working relationship with OLL Principal, Father John Lagiovane, but that it soured after he became involved with the union.

Cigna was told in April 2010 that he would not be rehired for the 2010-2011 school year due to decreased enrollment at OLL. Cigna surmised that Lagiovane made the change for retaliatory reasons since he was the only individual in the Science Department whose employment was affected.

Cigna also claimed that his employment was terminated by Lagiovane before the principal knew that he had withdrawn from union activity. He testified that once Lagiovane learned that Cigna had resigned from an active union role, he stated to Cigna, "I wish you had told me that." Cigna could not recall if this was before or after the part-time position was offered to him.<sup>9</sup>

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<sup>8</sup> Charging Party's Ex 18.

<sup>9</sup> Tr, at p. 97.



By November 2010, Herles and another teacher, John Meyers, had become active in a campaign urging teachers at OLL to decertify the LFA and opt for no union representation at the school. Meyers's wife was an administrator at OLL.

On or around May 31, 2011, Zenz wrote to the OLL board of trustees, with a copy to Lagiovane, alleging that Herles and Meyers were disseminating misleading information and intimidating the lay faculty.<sup>10</sup> Zenz also contended that the two teachers were being treated preferentially by Lagiovane. Three weeks later he received notice that he was not to be rehired for the 2011-2012 school year. In the letter, Zenz identified himself as a member of the labor negotiation committee, but signed it "Jon Zenz Science Dept." The letter also denied a rumor that he is "saying hateful things about Father [Lagiovane]" rhetorically asking, "If I was saying hateful or untrue things about Father, why am I still employed here ....?" Finally, the letter denied a rumor that he engaged in a heated discussion with another teacher.

Lagiovane testified that he decided to hire Scecina instead of retaining Zenz because Scecina's resume was the most impressive he had ever seen, and this presented a rare opportunity to upgrade OLL's science program.<sup>11</sup> Although he had received the resume initially in or about May 2010, he did not then hire the candidate; rather, Zenz was offered re-employment for the 2010-2011 school year by letter dated May 11, 2010.<sup>12</sup>

Lagiovane testified that he decided not to rehire O'Sullivan based on complaints from other teachers in her department and her insubordination toward him which included her refusal to participate in a mass and commissioning service held for faculty. He said

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<sup>10</sup> Charging Party's Ex 19.

<sup>11</sup> Tr, at pp. 396-397.

<sup>12</sup> Charging Party's Ex 8.

there had been prior incidents of misconduct which were addressed verbally or via e-mail, and he had no indication that she would change. While Lagiovane acknowledged that O'Sullivan had many years of experience at OLL, and was replaced with a teacher who was far less experienced, he said that that hiring was not an effort to "trade up," as was Zenz's, but rather was in response to an opening that had to be filled.

Lagiovane acknowledged that he knew Zenz was a LFA committee member and supporter of Local 74 from the correspondence that had been circulated and copied to him, but had no knowledge of any leadership role with respect to union activity. He testified that he had never attended a committee meeting for the LFA or Local 74 led by Zenz, never inquired as to who was the leader of either union, and expressly told Zenz during a conversation about mailbox use that the school had to remain neutral during Local 74's organizing drive. Zenz confirmed these facts in his own testimony.

Lagiovane denied harboring anti-union animus, noted that Zenz's wife remained employed at OLL and that the LFA had not filed any grievances or other kind of proceeding against him during his eight years as principal. Lagiovane pointed out that the LFA had been voluntarily recognized. He further testified that enrollment at OLL was low in 2010 and a number of teachers with no union involvement were also not re-employed for the 2010-2011 and 2011-2012 school years. The parties stipulated that among those teachers who were retained, some were not certified.

The LFA had always been allowed to hold meetings on OLL premises and use school mailboxes because, according to Lagiovane, it was the legal representative of the teachers. During the 2010-2011 school year, Lagiovane forbade all union-related meetings because he believed that the school administration needed to remain neutral

during the pendency of Local 74's organizing campaign. That notwithstanding, Zenz asserted that in April 2011, Herles and Meyers had permission to use faculty mailboxes to distribute a letter supporting the LFA's decertification and advocating no representation at the school. Lagiovane had no recollection of Herles and Meyers using the mailboxes and disputed that permission for such had been given.

### DISCUSSION

This matter presents the first discrimination, discriminatory discharge, or interference case to reach the Board since SERA was amended to repose jurisdiction over such claims arising under the statute in this Board.<sup>13</sup> To provide guidance, therefore, we begin with the applicable standard, although neither party has excepted to the ALJ's meticulous laying out the elements of the charge and the respective burdens of proof.

As the ALJ correctly began her analysis, § 704 of SERA provides that it shall be an unfair labor practice for an employer to:

(5) ...discourage membership in any labor organization, by discrimination in regard to hire or tenure or in any term or condition of employment....

(8) ...discharge or otherwise discriminate against an employee because he has signed or filed any affidavit, petition or complaint or given any information or testimony under this article....

(10) ...do any acts, other than those already enumerated in this section, which interfere with, restrain, or coerce employees in the exercise of the rights guaranteed by section seven hundred three.

In interpreting § 704, the Court of Appeals long ago explained that:

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<sup>13</sup> See L. 2010, ch. 56, Part O, which abolished the State Employment Relations Board (SERB). Although the Board was originally known as the State Labor Relations Board (SLRB) and only later known as SERB, we use the latter nomenclature for clarity and consistency. We note that ALJs have issued decisions not only in the instant matter, but in the context of a claimed breach of the duty to bargain in good faith. *Our Lady of Lourdes High School*, 45 PERB ¶ 4401 (2012), *adopted* 45 PERB ¶ 3402 (2012).

The policy of the statute is that employees shall be free to join a union of their choice or, if they prefer, to join no union. The statute confers upon the Board power to prevent discrimination by the employer which interferes with such freedom of his employees. The Board may not command an employer to retain in his employ a discharged employee who is a member of the union unless it appears that the discharge was influenced by the employee's membership in the union and was calculated to interfere with the freedom of choice guaranteed by the act to all employees.<sup>14</sup>

Under § 704 of SERA, as the ALJ correctly noted, a charging party must establish that the employer had knowledge of the employee's protected activity prior to the adverse action alleged to be discriminatory.<sup>15</sup> In *Celia Camhi (New Garden Theatre)*, SERB explained the other elements the charging party (at that time, SERB itself)<sup>16</sup> bore in establishing an alleged discriminatory or retaliatory discharge in violation of § 704:

The burden of proving a charge against an employer of unlawful discrimination or discharge rests upon the [charging party]. After a full hearing the Board considers and sifts all of the evidence, including that offered by an employer to establish that a discharge was for cause. While the evidence produced by the [charging party] standing alone, may be enough to establish a *prima facie* case, its effect in proving a causal relationship may be dissipated by the evidence produced by the respondents. At this stage, the Board's task is to determine the real reason for the employer's action. Having considered the evidence produced by the [charging party], in connection with, and in the light of, the evidence produced by the respondent, the Board then determines from the record as a whole whether the respondent's actions were motivated, *in whole or in part*, by reasons prohibited by [SERA]. If we decide that his actions were so motivated, we find that the employer has violated [SERA]. However, if the evidence, considered as a whole, reveals that the discharge was not motivated by

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<sup>14</sup> *Stork Restaurant, Inc. v Boland*, 282 NY 256, 270 (1940).

<sup>15</sup> *See, e.g., 1165 Fulton Avenue Tenants Corp*, 49 SLRB 174 (1994).

<sup>16</sup> As summarized by the drafters, L. 2013, ch.148 § 1, amended § 706(2) of SERA "by eliminating the responsibility of PERB to investigate unfair labor practice charges alleging violations of Labor Law §§ 704 and 704-a, and to issue and prosecute complaints with respect to those charges." Memo in Support, A07668.

union membership or activity, we will dismiss the complaint irrespective of the justice of the cause alleged for the discharge.<sup>17</sup>

The evidence presented may be of a direct or circumstantial nature, and close proximity in time of the adverse action to the protected activity may be used to establish the *prima facie* case.<sup>18</sup>

With two important caveats, this standard is essentially the same as that applied by this Board in interpreting similar provisions of the Public Employees' Fair Employment Act,<sup>19</sup> and to that applied by the National Labor Relations Board in applying the National Labor Relations Act,<sup>20</sup> as the ALJ correctly noted. The first caveat is that if the discharge is even in part motivated by prohibited reasons, including anti-union animus, the employer will be found to have violated SERA. The second is that, unlike the standard applied by this Board in public sector cases, close proximity in timing between the protected activity and the adverse action is enough to establish a *prima facie* case, and, if unrefuted, a violation.<sup>21</sup>

Zenz's contention that the ALJ erred by finding that Zenz was not the union leader and that his activity was therefore unprotected is without foundation in the ALJ's decision,

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<sup>17</sup> 13 SLRB 242, 243 (1950) (emphasis added). See also *Milton M. Hollander*, 43 SLRB 276, 287 (1980), quoting *Marlene Transp. Co., Inc.*, 17 SLRB 391, 393-394 (1954), enforced, *NYS Labor Relations Bd v. Marlene Transp Co., Inc.*, 1 AD2d 1002 (1<sup>st</sup> Dept 1956); *310 85<sup>th</sup> Street Corp*, 37 SLRB 568, 587 (1974).

<sup>18</sup> See *Milton M. Hollander*, 43 SLRB at 286; *Stork Restaurant*, 282 NY at 268.

<sup>19</sup> Civil Service Law, Art. 14. See, e.g., *UFT, Local 2, AFT-CIO (Jenkins)*, 41 PERB ¶ 3007(2008), confirmed sub nom *Jenkins v NYS 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).

<sup>20</sup> 29 USC §§ 151-169. See, e.g., *Fernbach ex rel NLRB v. Raz Dairy, Inc.*, 881 F Supp 2d 452, 464 (SDNY 2012).

<sup>21</sup> *Bernard Levine (Broadway Realty Associates)*, 46 SLRB 526, 533 (1985) (citing additional cases); *3554 Dekalb Realty Corp*, 48 SLRB 321, 329 (1990).

which expressly states that “it is clear that Zenz was involved in protected activity,” citing his membership of a union-affiliated labor committee and his role as a proponent of Local 74’s bid to displace the LFA and represent OLL faculty.<sup>22</sup> The ALJ also found that the evidence was “equally clear that Lagiovane, who ultimately made the decision to not rehire Zenz, was aware of Zenz’s union involvement prior to the time that the decision was made to terminate his employment.”<sup>23</sup> Thus, the ALJ properly credited these elements of Zenz’s *prima facie* case, and her determination turned on the question of improper motivation.

Zenz’s contention that the ALJ erred by, in effect, finding Zenz’s termination was motivated in part by anti-union animus and dismissing the charge based on OLL’s legitimate business reason fares no better. The ALJ stated that “where a discharge was motivated even in part by reasons prohibited by SERA, it is wholly unlawful. As such, OLL must have produced proof that its action was without any regard whatsoever for Zenz’s protected involvement.”<sup>24</sup> In applying that standard, the ALJ found that “[u]pon an evaluation of all of the credible evidence, I conclude that [OLL] was successful in this regard.”<sup>25</sup>

The true gravamen of Zenz’s exceptions boils down to his claim that the ALJ erred in finding Lagiovane credible. In particular, Zenz claims the ALJ failed to consider his evidence of pretext, including the allegedly improperly motivated terminations of Cigna and O’Sullivan, the timing of Zenz’s discharge, both in terms of its nearness in time to his protected activity and the year’s gap between OLL’s receipt of Scecina’s resume and his hiring.

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<sup>22</sup> 48 PERB ¶ 4401, at 4405.

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

<sup>24</sup> 48 PERB ¶ 4401, at 4406 (citing *Milton M. Hollander*, 43 SLRB 276).

<sup>25</sup> *Id.*

The ALJ based her finding on her assessment of Lagiovane's credibility, stating that "Lagiovane was a very credible witness based on his demeanor and forthright testimony. He was wholly convincing in his assertion that he did not renew Zenz's employment based solely on his assessment of the needs of his school's science program and independent of Zenz's union activity."<sup>26</sup>

We have long held that "[c]redibility determinations by an ALJ are generally entitled to 'great weight unless there is objective evidence in the record compelling a conclusion that the credibility finding is manifestly incorrect.'"<sup>27</sup> This is especially salient where, as here, the credibility determination rests in part on the witness's "demeanor."<sup>28</sup>

The ALJ found that the gap between the receipt of Scecina's resume and his hiring was explained by the very close proximity between the time that Scecina's resume was received on May 11, 2010 and the issuance of re-employment letters, as confirmed by Zenz's own testimony that such letters were normally issued in May. Likewise, the ALJ noted that, of the four active members of the committee, two (Zenz himself and O'Sullivan) were not rehired, but the other two were rehired, undermining Zenz's contention that union activity motivated the discharges. The ALJ's finding is buttressed by the facts that nothing in the record suggested that Zenz and O'Sullivan were particularly prominent when the

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<sup>26</sup> 49 PERB ¶ 4401, at 4406.

<sup>27</sup> *Village of Endicott*, 47 PERB ¶ 3017, 3051 (2014), quoting *Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3019 (2008); citing *County of Tioga*, 44 PERB ¶ 3016, 3062 (2011); *Mount Morris Cent Sch Dist*, 41 PERB ¶ 3020 (2008); *City of Rochester*, 23 PERB ¶ 3049 (1990); *Hempstead Housing Auth*, 12 PERB ¶ 3054 (1979); *Captain's Endowment Assn*, 10 PERB ¶ 3034 (1977).

<sup>28</sup> *State of New York (Office of State Comptroller)*, 48 PERB ¶ 3009, 3030 (2015), quoting *County of Clinton*, 47 PERB ¶ 3026, 3079 (2014), quoting *Manhasset Union Free Sch Dist*, 44 PERB ¶ 3005, 3024 (2008), *confd sub nom and mod on other grounds*, *Manhasset Union Free Sch Dist v NYS Pub Empl Rel Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009). See also *UFT (Cruz)*, 48 PERB ¶ 3004, 3010-3011 (2015); *County of Ulster*, 39 PERB ¶ 3013, at 3045-3046 (citing *Fashion Institute of Technology v Helsby*, 44 AD2d 550, 7 PERB ¶ 7005, 7009 (1st Dept 1974)).

labor committee acted in concert, and that Zenz's wife was retained in her position. Moreover, Lagiovane's testimony that O'Sullivan was terminated for cause was unrefuted. While the ALJ would have been acting within her discretion had she found the Cigna's testimony probative of anti-union animus, and supported an inference that Lagiovane acted against both Cigna and Zenz for unlawful reasons,<sup>29</sup> no objective evidence demonstrating that the ALJ's determinations as to the respective credibility of the witnesses are manifestly incorrect has been adduced, and we therefore decline to reverse them. Accordingly, we affirm the ALJ's decision and dismiss the charge.

DATED: January 25, 2016  
Albany, New York

  
Seth H. Agata, Chairperson

  
Allen C. DeMarco, Member

  
Robert S. Hite, Member

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<sup>29</sup> See, e.g., *Stork Restaurant v. Boland*, 282 NY at 274-275; *Marlene Transp Co, Inc*, 17 SLRB at 393-394.