STATE OF NEW YORK
PUBLIC EMPLOYMENT RELATIONS BOARD

In the Matter of

ALBANY POLICE OFFICERS UNION, LOCAL 2841, LAW ENFORCEMENT OFFICERS UNION, DISTRICT COUNCIL 82, AFSCME, AFL-CIO,

Charging Party, **CASE NO. U-29881**

- and -

CITY OF ALBANY,

Respondent.

SCHEUERMANN & SCHEUERMANN, LLP (ARTHUR SCHEUERMAN of counsel, and JENNIFER L. CARLSON of counsel) for Charging Party.

ROEMER WALLENS GOLD & MINEAUX, LLP (MARY M. ROACH of counsel), for Respondent.

BOARD DECISION AND ORDER

This case comes to us on remand from the Appellate Division, Third Department. Our previous decision in this matter,[1] affirming the decision of the Administrative Law Judge (ALJ) for reasons other than those given in her decision, was annulled on the ground that substantial evidence did not support our conclusion that "a past practice of reimbursements did not exist based on the documentary evidence."[2] On remand, we

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[1] *City of Albany*, 48 PERB ¶ 3026 (2015), *annulled, Albany Police Officers Union, L. 2841, AFSCME, AFL-CIO v. NYS Pub Empl Relations Bd*, 149 AD3d 1236 (3d Dept 2017) (*APOU I*).

[2] *APOU I*, 149 AD3d, at 1239-1240. Subsequently, APOU filed a mandamus action based on the premise that "by finding in *APOU I* that substantial evidence did not support PERB's determination that there was no improper practice, [the *APOU I* Court implicitly found] the inverse must be true – *i.e.*, that substantial evidence supported a finding that there was an improper practice." *See Albany Police Officers Union, L. 2841, AFSCME, AFL-CIO v. NYS Pub Empl Relations Bd*, 170 AD3d 1312, 1314 (3d Dept), *lv denied*, 33 NY3d 911 (2019) (*APOU II*). In denying the application for mandamus, the *APOU II* Court, expressly stating that the *APOU I* Court "did not find that the City violated Civil Service Law § 209–a (1) (d)," and remanded the matter to us to resolve "the underlying issue–whether the City engaged in an improper practice." *Id*.

consider *ab initio* the exceptions filed by the Albany Police Officers Union, Local 2841, Law Enforcement Officers Union, District Council 82, AFSCME, AFL-CIO (APOU) to the ALJ's finding that the City of Albany (City) did not violate § 209-a.1 (d) of the Public Employees' Fair Employment Act (Act) when it unilaterally changed the health insurance coverage and Medicare Part B reimbursement for members of the patrol, communications, and civilian units when such members retire.[3] Because of the length of time that had elapsed since our initial decision in view of two rounds of judicial proceedings, we invited the parties to submit supplemental briefs, which have been considered along with the original exceptions, response to exceptions, and memoranda of law in support of and in response to the exceptions.

EXCEPTIONS

APOU filed four exceptions to the ALJ's decision. First, it excepts to the ALJ's dismissal of the improper practice charge on the basis that "the City never directly notified current employees of its intention to reduce the value of their compensation package,"[4] despite her correctly finding that the benefits at issue were mandatorily negotiable and that a past practice had been established as to each of them. Second, APOU contends that the ALJ erred in dismissing the charge on the basis that APOU was required to demand to negotiate the already implemented unilateral changes. Third, APOU asserts that allowing a "silent unilateral modification of compensation package of current employees" to nonetheless impose a requirement that a formal

[3] 47 PERB ¶ 4593 (2014).
[4] Exceptions, at ¶ 1.

demand for bargaining be made violates the Act's public policy.[5] Finally, APOU takes exception to the conclusion reached by the ALJ that the City did not violate the Act. In its supplemental brief, the APOU reasserts these exceptions, noting that APOU was not itself informed of the unilateral changes.[6]

The City filed papers supporting the ALJ's decision, and it also filed a post-remand brief.

Upon review of the record and the all of the parties' submissions, consistent with the Court's determination in *APOU I* and *APOU II*, we affirm the ALJ's decision for the reasons stated therein and discussed below.

FACTS

The facts in this matter are more fully set out in the ALJ's decision and in our prior decision in this matter.[7] The core of APOU's charge is that, on January 1, 2010, the City discontinued a past practice of providing a future benefit to current employees upon their retirement of reimbursing such individuals for the cost of Medicare Part B payments and continuing coverage upon retirement by the City's primary insurance plans received while employed (formerly, Blue Cross/Blue Shield Indemnity Extended Benefits or Wraparound plans).[8]

APOU represents three separate bargaining units (patrol, communications, and civilians) in the City's police department, each with its own collectively negotiated

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[5] Exceptions, at ¶ 3.
[6] APOU Brief on Remand, at 6.
[7] Respectively, *City of Albany*, 47 PERB ¶ 4593, 4857-4864 (2014) and *City of Albany*, 48 PERB ¶ 3026, at 3099-3104.
[8] APOU's Improper Practice Charge and post-hearing "Memorandum of Law", at p. 1.

agreement. The agreements' durations are January 1, 2002 through December 31, 2005, and all were extended by MOAs through 2009. Each agreement covers health insurance for current employees but is silent on the issues of health insurance benefits for retirees and reimbursement of Medicare Part B costs incurred by employees and retirees.[9] APOU presented evidence that no contract proposals had been negotiated regarding either Medicare Part B reimbursement or the continuation of the extended healthcare benefits into retirement when those agreements were implemented.[10] Likewise, APOU provided testimony that APOU unsuccessfully attempted to add language codifying the members' retirement healthcare benefits into the contract during negotiations.[11] APOU further presented testimony that the City had never negotiated with APOU concerning either the change to Medicare reimbursement or the health insurance plans.[12]

There is no dispute that the City, which became self-insured in 1985, provided full reimbursement of a retiree's Medicare Part B premiums from 1985 until, on or about October 30, 2009, it sent a notice to all "Retirees and Participants Who Have City of Albany Health Insurance (non-active employees)," regarding the "Open Enrollment Period for Health Insurance." The notice stated the following, in relevant part:

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[9] Joint Ex 8 (article 19.1 for patrol unit), 9 and 10 (article 19 for communications unit which specifically provides in relevant part that "[i]f the EMPLOYER wishes to change the existing health insurance plan the EMPLOYER shall present proposals to the UNION for discussion and possible agreement on the proposal . . . [and if] no proposal is agreed upon, then an expedited arbitration will commence . . ."), and 11 and 12 (article 24 for civilians unit).
[10] Tr, at p. 36.
[11] Tr, at pp. 50-51.
[12] Tr, at p. 69.

> Medicare Refund for Part B Coverage
> ***As of December 31, 2009, the City will no longer reimburse individuals for the Medicare Part B premium whose effective date for Part B is January 1, 2010 and later.*** Individuals currently receiving a Medicare refund will continue to do so. Please note, regardless of your eligibility for Part B premium refund, it is mandatory that you elect Medicare Part B coverage when you become Medicare eligible.[13]

Additionally, the notice set forth specific changes to the indemnity health insurance coverage in retirement, revoking previously available plans and requiring retirees from the bargaining unit represented by APOU to enroll in different specified PPO or HMO insurance plans.[14] APOU characterizes, absent contradiction, these plans as "inferior."

APOU proffered a number of witnesses who testified, without contradiction, that over time, the City had made representations that healthcare coverage received by an employee while employed would continue through retirement.[15] Even Personnel Director Elizabeth Lyons confirmed that when she was first hired by the City, it informed her that when she retired, she "would have health insurance free of charge for the rest of [her] life."[16] The City argued below to the ALJ that if there were a past practice, it would have been the provision of health coverage, in general, and not any specific

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[13] Joint Ex 1, at 2 [emphasis added].
[14] *Id* at 1.
[15] *See* testimony of: Charles Barthe who testified that he first learned of this in 1996 when hired (Tr, at p. 27); James Teller who began working for the City in 1975 and retired in 2007 (Tr, at p. 42); Christian Mesley, a former president of APOU (Tr, at p.64); Thomas McGraw whom the City hired in 1990 and was on disability retirement at the time of the hearing but was still considered employed (Tr, at p.85) ; Richard Nowosielski who came on the police force in 1973 (Tr, at pp. 98, 104); Donna Whalen who at the time had been working for the City for 23 years (Tr, at pp. 113, 114, 119); and Rosalind Weatherholtz who had been employed by the city since 1986 (Tr, at pp. 136-138).
[16] Tr, at p. 179.

coverage to retirees. Through a number of witnesses, it was also presented that this included reimbursement for Medicare Part B coverage and coverage in the Blue Cross/Blue Shield Extended Benefits Plan.[17] Significantly, with minor variations in testimony, they confirmed that, while not mentioned when hired, they all had learned during their employ (during the late 1980's and early 1990's) that the City would reimburse them for Medicare Part B payments in retirement. It was also not disputed that the City's withdrawal of this benefit was not negotiated with APOU.[18]

Lyons testified that the City did not advise its active employees of the changes to Blue Shield Medicare PPO or CDPHP Medicare choices that would be implemented for retirees because it considered retiree health insurance to be "completely separate from the active employee health insurance."[19] She further explained:

> So active employees receive one memo with all of the changes that would affect their health insurance or their options, and then we do a separate mail-out to the retirees, and those individuals, this says retirees and participants. It could be COBRA individuals or people that are out of work paying contributor. They're on a different policy than these individuals.[20]

Lyons testified that, as of the second day of hearings, there were approximately 400 active employees who were members of APOU. Lyons agreed that the changes at issue were not negotiated with APOU, testifying, "But it changed prior retiree policy. We had a change to the retiree, the Medicare, the way we were handling it."[21]

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[17] *See* note 13, *supra*.
[18] Tr, at pp. 236-237.
[19] Tr, at pp. 193-194.
[20] Tr, at p. 236.
[21] Tr, at p. 237.

Lyons also testified, during cross-examination, that the City continues to offer both the extended benefits and wrap-around health insurance plans for active, unionized employees, and that retirees had the same options until the January 1, 2010 change. Finally, Lyons agreed that the plans offered to retirees after January 1, 2010 contained different benefits with increased costs.[22]

The ALJ correctly found that APOU did not dispute the lack of communication to it by the City of these changes to retiree benefits.[23] In fact, in its post-hearing brief, APOU straightforwardly stated that "[t]he notice sent to active employees failed to mention the discontinuation of the indemnity plans in retirement."[24] Likewise, in its brief on remand, APOU acknowledged that, with regard to the elimination of Medicare Part B reimbursement, it "only learned of this deviation from the well-established past practice of over twenty-five years from retirees who were notified by the City of the change to the benefit."[25] APOU likewise acknowledges that "[a]s with the Part B reimbursement change, the City never notified the APOU about this unilateral change in the past practice relating to health insurance coverage."[26] Finally, APOU affirmatively states that the 2008 Notice "was not sent to the APOU or its active members. Rather, it was sent only to retirees."[27]

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[22] Tr, at pp. 80, 237.
[23] 47 PERB ¶ 4593, at 4865.
[24] APOU Post Hearing Brief, at 15.
[25] APOU Brief on Remand, at 4.
[26] *Id*; citing Jt Exs 2 & 4.
[27] *Id*, at 15; APOU Post Hearing Brief at 4, 15.

DISCUSSION

As a preliminary matter, we agree with APOU that the presentation of a demand to negotiate is in no way a prerequisite to the filing of a charge alleging a refusal to negotiate in good faith that is grounded on a unilateral change.[28] As we recently reaffirmed in *City of Yonkers*[29] and in *Cayuga Community College*, we have long held that "[w]hile a demand is a necessary precondition to an obligation under the Act to negotiate the impact of an employer's decision, the duty to negotiate a change to a mandatory subject of negotiations does not require a demand as a precondition to the filing of a charge."[30] Indeed, in *City of Yonkers*, we expressly reaffirmed that "a charge premised on a refusal to negotiate on demand is distinct from a charge premised on a unilateral change in terms and conditions of employment, and therefore, a demand to negotiate is not a condition precedent to the violation found in the latter case."[31]

However, the ALJ did not impose such a requirement on APOU. Rather, her decision mentions, at the end of her thorough analysis of the claims actually presented, that had APOU demanded to negotiate the issue, and the City refused, such refusal would have established an improper practice wholly independent of that alleged in the

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[28] Exceptions 2, 3.
[29] 52 PERB ¶ 3015, 3066 (2019).
[30] *Id*, quoting *Cayuga Comm Coll*, 50 PERB ¶ 3003, 3011-3012 (2017) (editing marks and footnotes omitted); *see also City of Niagara Falls*, 44 PERB ¶ 3015, 3055 (2011), *confd*, *City of Niagara Falls v NYS Pub Empl Relations Bd*, 45 PERB ¶ 7004 (Sup Ct Albany Co 2012) (Ceresia, J.); *see Bd of Educ, City Sch Dist City of New York*, 40 PERB ¶ 3002 (2007); *City of Niagara Falls*, 31 PERB ¶ 3085, 3190-3191 (1998); *Great Neck Water Pollution Control Dist*, 28 PERB ¶ 3030 (1995).
[31] *Id,* at 3066, quoting *City of Niagara Falls*, 31 PERB ¶ 3085, at 3190, citing *Roma v Ruffo*, 92 NY2d 489, 495 (1998).

charge. The remark is, in context, clearly illustrative of conduct that would have violated the Act, and not a finding of a deficiency on the part of the charge APOU did in fact file. Accordingly, this exception is denied, and we proceed to the merits of the charge.

We begin by affirming the ALJ's finding that the record evidence establishes that

> [T]he City has been reimbursing retirees for their Medicare Part B premiums and offering indemnity insurance plans in retirement for quite some time[;] and that unit employees were aware of these benefits, thus giving rise to a reasonable expectation by current employees that these benefits would continue in their retirement.[32]

As we have long held, and the courts have affirmed, "[i]n order to establish an enforceable past practice, the charging party must demonstrate that the practice was unequivocal and continued uninterrupted for a period of time sufficient under the circumstances to give rise to a reasonable expectation among the affected unit members that the practice would continue."[33] By any reasonable assessment, the 25-year long uninterrupted practice demonstrated here meets the standard, making the reimbursement of Medicare Part B and continuation of insurance benefits mandatory subjects as to members of the bargaining unit represented here.

An employer is obligated to negotiate on demand proposals on mandatory subjects, including post-retirement monetary benefits, put forth by the bargaining agent

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[32] 47 PERB ¶ 4593, at 4864.

[33] *Cent NY Reg Trans Auth*, 52 PERB ¶ 3008, 3037 (2019); *State of NY v NYS Pub Empl Relations Bd*, 176 AD3d 1460, 1461, 52 PERB ¶ 7010 (3d Dept 2019), citing *State of NY (Off of Parks, Rec & Hist Pres)*, 50 PERB ¶ 3024, 3094 (2017); *see generally, Manhasset Union Free Sch Dist*, 41 PERB ¶ 3005, 3024 (2008), *confirmed and mod, in part, Manhasset Union Free Sch Dist v NYS Pub Empl Relations Bd*, 61 AD3d 1231, 42 PERB ¶ 7004 (3d Dept 2009), *on remittitur*, 42 PERB ¶ 3016 (2009).

on behalf of current employees who may retire during the life of the CBA.[34] However, as we held in *Chenango Forks Central School District*, among other cases, this continuing obligation to negotiate does not prohibit the employer from acting unilaterally as to individual retired employees because they are no longer employees and thus no longer in the bargaining unit.[35]

In the instant case, it is acknowledged by APOU that "[a]s with the Part B reimbursement change, the City never notified the APOU about this unilateral change in the past practice relating to health insurance coverage."[36] APOU affirmatively states that the 2008 Notice "was not sent to the APOU or its active members. Rather, it was sent only to retirees."[37]

Since the City took no action against current employees, the instant case essentially mirrors the facts in *Aeneas McDonald Police Benevolent Assn v City of Geneva.*[38] Where, as here, retirees base a claim to post-retirement benefits on a past

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[34] *City of Yonkers*, 52 PERB ¶ 3015, at 3066, citing *Inc Vill of Lynbrook*, 10 PERB ¶ 3065, at 3115-3116; *Myers v City of Schenectady*, 244 AD2d 845, 846-847 (3d Dept 1997), *lv denied,* 91 NY2d 812 (1998).

[35] 40 PERB ¶ 3012 (2007) ("[t]here is no duty under the Act to bargain for those who are not in the bargaining unit, including retirees"), *remanded* 42 PERB ¶ 4527 (2009), *affd,* 43 PERB ¶ 3017 (2010), *confirmed sub nom Chenango Forks Cent Sch Dist v NYS Pub Empl Relations Bd*, 92 AD3d 1479, 45 PERB ¶ 7006 (3d Dept 2012), *affd,* 21 NY3d 255, 46 PERB ¶ 7008 (2013). *See also Troy Uniformed Firefighters Assn, Local 2304, IAFF,* 10 PERB ¶ 3015, 3034 (1977); *Inc Village of Lynbrook*, 10 PERB ¶ 3067, 3121 (1977), *revd in part sub nom Inc Village of Lynbrook v NYS Pub Empl Relations Bd*, 64 AD2d 902, 11 PERB ¶ 7012 (2d Dept 1978), *reinstated*, 48 NY2d 398, 12 PERB ¶ 7021 (1979); *City of Yonkers*, 52 PERB ¶ 3015, at 3066.

[36] APOU Brief on Remand, at 4, citing Jt Exs 2, 4.

[37] *Id* at 15; APOU Post Hearing Brief, at 4, 15.

[38] 92 NY2d 326, 330-331 (1998).

practice, absent an explicit contractual right to receive such a benefit,[39] the Court of Appeals in *Aeneas McDonald PBA* has squarely ruled in terms that are dispositive:

> At issue is whether retired municipal employees, who are no longer members of any collective bargaining unit, may enforce a past practice in civil litigation with their former municipal employer. Where, as here, the past practice concededly is unrelated to any entitlement expressly conferred upon the retirees in a collective bargaining agreement, we hold that there is no legal impediment to the municipality's unilateral alteration of the past practice.[40]

As we have already noted in *City of Yonkers*, "[w]e are bound by this holding."[41] Here, as was the case in *Aeneas McDonald PBA* and *City of Yonkers*, the position that "a past practice concerning retirement [] benefits that was in place when an individual retired, in and of itself, prevents the City from unilaterally reducing those benefits for such person after cessation of public service" cannot be upheld.[42] As we explained in *City of Yonkers*, quoting and following *Aeneas McDonald PBA,* "[s]uch a conclusion

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[39] Where collective bargaining agreements expressly provide for post-retirement benefits for current employees, evidence of past practice is properly used to address ambiguities in the collective bargaining agreements, including as to subjects such as duration of the benefit. *Myers v City of Schenectady*, 244 AD2d 845, at 847-848.

[40] 52 PERB ¶ 3015, at 3066-3067; *quoting* 92 NY2d 326, at 330-331; *Kolbe v Tibbetts*, 22 NY3d 344, n 1 (2013); *see also Rocco v City of Schenectady*, 252 AD2d 82, 84 (3d Dept 1998) ("[O]nce employees retire, they are no longer represented by the union and would not possess collective bargaining rights on their own."). Where a collective bargaining agreement provides an explicit right to receive a post-retirement benefit, the enforcement of that contractual right is outside the scope of our jurisdiction as limited by § 205.5 (d) of the Act. *Myers v City of Schenectady*, 244 AD2d 845, 847 (3d Dept 1997) ("[A]t the expiration of [the collective bargaining agreements under which the retirees obtained the disputed health benefits, the union] no longer represents the retirees, has no bargaining rights or obligations on their behalf and, indeed, may not even have the right to bargain voluntarily on their behalf").

[41] 52 PERB ¶ 3015, at 3066 ("mailing of the December 9, 2015 letters solely to 43 retired former bargaining unit members and former employees substantiates that no action was taken towards current employees").

[42] *Id,* at 3067, *quoting Aeneas McDonald PBA*, 92 NY2d at 332.

misconstrues and unjustifiably extends the role of past practice in the field of public employment relations."[43]

Accordingly, the charge was properly dismissed.

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

DATED: April 28, 2020
Albany, New York

John F. Wirenius, Chairperson

Anthony Zumbolo, Member

Monte A. Klein, Member

[43] *Id*.